

**McDevitt & Miller LLP**

**Lawyers**

RECEIVED

(208) 343-7500  
(208) 336-6912 (Fax)

420 W. Bannock Street  
P.O. Box 2564-83701  
Boise, Idaho 83702

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Chas. F. McDevitt  
Dean J. (Joe) Miller

IDAHO PUBLIC  
UTILITIES COMMISSION

August 19, 2011

*Via Hand Delivery*

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

**Re: TFW-T-09-01**

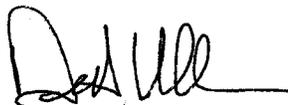
Dear Ms. Jewell:

Enclosed for filing in the above matter, please find an original and seven (7) copies of Tracfone Wireless, Inc.'s Petition for Reconsideration.

Kindly return a file stamped copy to me.

Very Truly Yours,

McDevitt & Miller LLP



Dean J. Miller

DJM/hh  
Encl.

Dean J. Miller (ISB No. 1968)  
McDEVITT & MILLER LLP  
420 West Bannock Street  
P.O. BOX 2564-83701  
Boise, Idaho 83702  
Tel: 208-343-7500  
Fax: 208-336-6912  
joe@mcdevitt-miller.com

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UTILITIES COMMISSION

Mitchell F. Brecher (*admitted pro hac vice*-DCB No. 210781)  
Debra McGuire Mercer  
GREENBERG TRAUIG, LLP  
2101 L Street, NW  
Suite 1000  
Washington, DC 20037  
Tel: 202-331-3100  
Fax: 202-331-3101  
brecherm@gtlaw.com  
mercerdm@gtlaw.com

*Attorneys for TracFone Wireless, Inc.*

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

IN THE MATTER OF THE AMENDED )  
APPLICATION OF TRACFONE ) CASE NO. TFW-T-09-01  
WIRELESS, INC. FOR DESIGNATION AS )  
AN ELIGIBLE TELECOMMUNICATIONS ) PETITION FOR RECONSIDERATION OF  
CARRIER ) APPLICANT TRACFONE WIRELESS,  
) INC.

TracFone Wireless, Inc. ("TracFone"), pursuant to Idaho Code, § 61-626 and IDAPA 31.01.01.331, files this Petition for Reconsideration in which it respectfully asks the Idaho Public Utilities Commission ("Commission") to reconsider Order No. 32301 dated July 29, 2011 ("Order"). As will be explained in this reconsideration petition, reconsideration of the Order is compelled because the Order misapplies applicable law; is not supported by the record; and because the result therein would not serve the public interest.

## INTRODUCTION

TracFone has applied to the Commission for designation as an Eligible Telecommunications Carrier (“ETC”). The Commission has been empowered by Congress to designate ETCs pursuant to Section 214(e)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996.<sup>1</sup> In the Order, the Commission denied the Application of TracFone for designation as an ETC. The Commission concludes in the Order that TracFone has failed to meet the requirements for ETC designation codified at 47 U.S.C. § 214(e)(1) and that TracFone’s failure to remit certain fees conflicts with the public interest and provides cause to deny TracFone’s ETC Application. The Commission also states that it will not grant ETC status to TracFone until TracFone assents to “voluntarily” pay the fees at issue.<sup>2</sup> As explained in this petition, the Commission’s legal conclusion that Idaho law requires TracFone to pay certain fees is based upon a misapplication of the relevant statutes. Also, the Commission has provided no factual basis for its wholly unsupported conclusion that TracFone has not met all requirements for ETC designation codified at 47 U.S.C. § 214(e)(1). Furthermore, the Commission’s reliance on an unsupported and conclusory statement by another state government agency and on unrelated judicial proceedings from other states involving other states’ laws is misplaced. Accordingly, TracFone asks the Commission to grant reconsideration and to issue an order designating TracFone as an ETC for the limited purpose of providing Lifeline service to low-income Idaho households. TracFone requests reconsideration by written briefs, and if desired by the Commission, oral argument.

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<sup>1</sup> 47 U.S.C. § 214(e)(2).

<sup>2</sup> Order, at 9.

On October 29, 2009, TracFone applied to the Commission for designation as an ETC solely for the purpose of providing Lifeline service to eligible low-income consumers in Idaho. As stated in its Application, TracFone will only seek funds from the low-income portion of the federal Universal Service Fund (“USF”). TracFone will not seek any funds from the high cost portion of the federal USF. Nor will TracFone seek funds from any state fund, including the Idaho Telecommunications Service Assistance Program (“ITSAP”) fund.<sup>3</sup>

On February 5, 2010, the Commission issued an Order denying TracFone’s initially-filed ETC Application without prejudice. TracFone filed an Amended ETC Application on March 1, 2010. CTC Telecom Inc. dba Snake River PCS (“CTC”) -- itself an ETC -- and the Idaho Telecom Alliance (“ITA”) on behalf of its ETC members, each filed very untimely motions to intervene in this proceeding nearly eleven weeks after the filing of TracFone’s amended Application. Notwithstanding the untimeliness of those intervention motions and the absence of any good cause showing as to why either intervenor was unable to move to intervene in a timely manner, the Commission granted both intervention motions.

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<sup>3</sup> TracFone acknowledges that the Commission speaks through its orders, not through news releases announcing those orders. However, the Commission’s August 1, 2011 news release announcing its decision in this proceeding (“Commission Denies ETC Designation to Pre-paid Wireless Service”) contains no fewer than four material factual misstatements. First, it states that ETC designation “would have qualified TracFone to receive money from federal and state low-income assistance programs.” In fact, TracFone has not sought and would not accept a single dime from any state low-income program. Its Lifeline program is funded only through the federal USF. Second, the news release states that the ETC denial is “due primarily to TracFone’s refusal to contribute to a combined federal and state program called Lifeline . . .” Contrary to that statement, TracFone has never contested the applicability to it of the obligation to contribute to the federal USF and has complied fully with its obligation to contribute to that fund. Third, the news release says falsely that TracFone Lifeline customers would receive “up to 67 minutes of free time.” The record in this proceeding reflects the fact that TracFone Lifeline customers would receive 250 free minutes of monthly airtime -- minutes which can be used to call from anywhere to anywhere in the United States. Fourth, the news release states that for use beyond 67 minutes (actually 250 minutes), “customers would purchase a pre-paid card at 20 cents per minute.” That too is incorrect. As explained during the proceeding, additional airtime minutes would be available to Lifeline customers at a rate not to exceed ten cents per minute.

On March 31, 2011, the Commission convened a technical hearing regarding TracFone's ETC Application. After the hearing, the Commission directed the parties to submit legal briefs on whether TracFone is legally obligated to remit two fees: (1) the 911 fee pursuant to the Idaho Emergency Communications Act ("IECA") and (2) an ITSAP surcharge.

The Commission holds in the Order that the ITSAP surcharge, which is mandated by statute to be stated on end user billings, is applicable to TracFone, notwithstanding the incontrovertible and undisputed fact that TracFone does not have end user billings. The Commission also holds that the 911 fee, which is required by statute to be collected on a monthly basis from customers, is applicable to TracFone, despite the equally incontrovertible and undisputed fact that TracFone does not provide its service on a monthly basis.<sup>4</sup> The Commission's legal conclusion regarding the applicability of the 911 fee is based solely on a letter from the Idaho Emergency Communications Commission ("IECC") which sets forth without citation to any authority or any legal analysis the view of the IECC that TracFone is required to remit the 911 fee.<sup>5</sup> In addition, the Commission relies on TracFone's proceedings in other states to justify its denial of TracFone's ETC Application. The Commission concludes that TracFone's refusal to remit the 911 fee and ITSAP surcharge "conflict[s] with the public interest and provides sufficient cause to deny TracFone's Application."<sup>6</sup> The Commission further states that that it "will not grant ETC status to TracFone until the Company, at a minimum, assents to the payment of IECA and ITSAP fees."<sup>7</sup> TracFone respectfully disagrees with these conclusions, believes them to be wrong as a matter of law, and does not believe that they justify

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<sup>4</sup> Order, at 6.

<sup>5</sup> Id. at 6-7.

<sup>6</sup> Id. at 9.

<sup>7</sup> Id.

denial of TracFone's ETC Application and the resulting unavailability of TracFone's wireless Lifeline service to thousands of low-income Lifeline-eligible Idaho households -- most of whom are not currently receiving Lifeline-supported service.

## ARGUMENT

### **I. There Is No Basis for the Commission's Unexplained Conclusion That TracFone Does Not Meet the ETC Designation Requirements of 47 U.S.C. § 214(e)(1).**

At page 4 of the Order, the Commission states that it finds that TracFone "has failed to meet the minimum requirements for ETC designation outlined in 47 U.S.C. § 214(e)(1) . . . ." Absent from the Order is any identification of what minimum requirements for ETC designation outlined in 47 U.S.C. § 214(e)(1) TracFone has failed to meet. Neither does the Order offer any explanation as to why TracFone does not meet any Section 214(e)(1) ETC designation requirement. Nor does the Order cite to any record evidence which it relies upon in support of its finding that TracFone does not meet the minimum requirements for ETC designation contained in 47 U.S.C. § 214(e)(1).

Section 214(e)(1) of the Communications Act (47 U.S.C. § 214(e)(1)) states as follows:

#### (e) PROVISION OF UNIVERSAL SERVICE

(1) ELIGIBLE TELECOMMUNICATIONS CARRIERS. A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3) or (6) shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received --

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier; and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

Pursuant to 47 U.S.C. § 214(e)(1), minimum requirements to be an ETC are only: i) be eligible to receive universal service support in accordance with Section 254 of the Communications Act; ii) provide service supported by the USF using a carrier's own facilities or a combination of its own facilities and resale of other carriers' services; and iii) advertise the availability of such services using media of general distribution. Nowhere does the Order identify which of these three Section 214(e)(1) minimum requirements TracFone has failed to meet. Moreover, the factual record demonstrates unequivocally that TracFone does indeed meet the requirements of 47 U.S.C. § 214(e)(1). The statutory requirement of Section 214(e)(1)(A) that an ETC provide service at least in part using its own facilities was satisfied by the Federal Communications Commission's 2005 order exercising its statutory obligation to forbear from application or enforcement of that requirement with respect to TracFone.<sup>8</sup> Pursuant to 47 U.S.C. § 160(e), "[a] State commission may not apply or enforce any provision of this Act that the [Federal Communications] Commission has determined to forbear from enforcing under subsection (a)." The statutory requirement of 47 U.S.C. § 214(e)(1)(B) was satisfied by TracFone's ample showing that it aggressively and creatively advertises the availability of its Lifeline service -- a fact that was not questioned by Staff or by either intervenor.

The Commission is required to "explain the reasoning employed to reach its conclusions in order to ensure that the [Commission] has applied relevant criteria prescribed by statute or its own regulations and thus has not acted arbitrarily or capriciously."<sup>9</sup> The Commission fails to provide any explanation to support its finding that TracFone does not meet the minimum

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<sup>8</sup> 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).

<sup>9</sup> Rosebud Enterprises, Inc. v. Idaho Pub. Util. Comm'n, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996) (citing Washington Water Power v. Idaho Pub. Util. Comm'n, 101 Idaho 567, 575, 617 P.2d 1242, 1250 (1980)).

requirements for ETC designation outlined in 47 U.S.C. § 214(e)(1).<sup>10</sup> Accordingly, its unexplained conclusion that TracFone has failed to meet any of the requirements of 47 U.S.C. § 214(e)(1) is legally erroneous and warrants reconsideration of the Order.

## II. TracFone Is Not Required to Collect and Remit the ITSAP Surcharge.

The Commission purports to rely on the “plain and unambiguous” language of Idaho Code § 56-904 for its conclusion that TracFone is required to remit the ITSAP surcharge.<sup>11</sup> However, a review of all of the language in Section 56-904 leads inexorably to the conclusion that TracFone is not obligated to remit the ITSAP surcharge. The Commission must “give effect to every word, clause and sentence of a statute.”<sup>12</sup> Moreover, the Commission may not construe a statute in a manner that deprives a provision of a statute of its meaning.<sup>13</sup>

Section 56-904(1) establishes a “uniform statewide monthly surcharge on each end user’s business, residential and wireless access service.” Thus, end users, not providers of telecommunications services, are responsible to paying the ITSAP surcharge. Section 56-904(1) further mandates that the “surcharge shall be explicitly stated on end user billings.” Section 56-904(3), which sets forth the carrier’s responsibilities, states: “All carriers of telecommunications services shall remit the assistance **surcharge revenues** to the fund administrator designated by the commission on a monthly basis, unless less frequent remittances are authorized by order of the public utilities commission.” (emphasis added) As stated by the statute, carriers are only

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<sup>10</sup> The Commission’s unexplained conclusion that TracFone does not meet the requirements of 47 U.S.C. § 214(e)(1) is especially remarkable in light of the fact that the ETC designating authorities of 38 other states have concluded that TracFone does meet the requirements of 47 U.S.C. § 214(e)(1).

<sup>11</sup> Order, at 6.

<sup>12</sup> George W. Watkins Family v. Messenger, 118 Idaho 537, 540, 797 P.2d 1385, 1388 (1990) (citing University of Utah Hosp. Medical Center v. Bethke, 101 Idaho 245, 611 P.2d 1030 (1980)).

<sup>13</sup> Id. (citing Belt v. Belt, 106 Idaho 426, 679 P.2d 1144 (Ct. App. 1984)).

required to remit surcharge revenues, which are revenues received from end users **through the billing process**. TracFone, because it does not offer post-paid or billed services, has no billing process as contemplated by Section 56-904(1), and therefore, has no means to impose upon or collect from its end users the ITSAP surcharge. As such, TracFone is not obligated by Section 56-904 to remit funds that it has not collected, and that it, in fact, has no billing mechanism to collect, as expressly contemplated by the statute.

The Commission's assertion that TracFone may not escape a duty to remit the ITSAP surcharge because it chooses not to bill customers is not supported by the statute. Section 56-904 only requires a carrier to remit the surcharges it has collected; it does not require a carrier to alter its business model or its charging mechanism to develop a means to bill and collect the surcharges. It is possible that the Legislature may not have contemplated that some carriers do not issue bills to their customers. Indeed, the Commission, when implementing Section 56-904, recognized that "it may require some time for billing changes to be made" so that companies can comply with the requirement that the ITSAP surcharge "be explicitly stated on end user billings."<sup>14</sup> The Commission directed companies to "keep Staff informed of the time required to change billing statements to explicitly state the ITSAP surcharge."<sup>15</sup> While the Legislature and the Commission may have assumed that all telecommunications carriers issue billing statements, the fact that this assumption was not correct does not change the explicit and unambiguous language of the statute. The Commission must apply the law as enacted by the Legislature, not as it might prefer the law to have been enacted. The law as enacted contains no requirement that telecommunications carriers collect ITSAP surcharges through any mechanism other than

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<sup>14</sup> In the Matter of Implementing Amendments to the Idaho Telecommunications Service Assistance Program, Case No. GNR-T-98-6, Order No. 27608 (June 30, 1998).

<sup>15</sup> Id.

explicitly stated surcharges on end user billing statements. Pursuant to the statute as enacted, there is no ITSAP collection or payment obligation on non-billed services. The Legislature, not the Commission, has the authority to amend the law it has enacted if it wishes to subject non-billed services to ITSAP fees.

The Commission also notes that Section 56-904(3) provides the Commission with discretion to allow carriers of telecommunications services to remit ITSAP surcharge revenues on a basis that is less frequent than monthly, but that TracFone has not sought Commission authorization for less frequent remittance.<sup>16</sup> In accordance with Section 56-904(3), the Commission has made a determination that quarterly remittances would be allowed.<sup>17</sup> However, the timing of the remittances for those carriers who collect their charges through end user billings does not change the fact that TracFone, as a carrier that does not issue billing statements and has no end user billings, is not obligated to make any remittances of the ITSAP surcharge.

### **III. TracFone Is Not Required to Collect and Remit the 911 Fee.**

#### **A. Section 31-4804(2) of the Idaho Code Does Not Obligate TracFone to Collect and Remit the 911 Fee.**

The 911 fee remittance requirement, codified at Section 31-4804(2) of the Idaho Code, provides:

The fee shall be imposed on and collected from purchasers of access lines or interconnected VoIP service lines with a service address or place of primary use within the county or 911 service area **on a monthly basis** by all telecommunications providers of such services. The fee may be listed as a separate item on customers' monthly bills.

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<sup>16</sup> Order, at 6.

<sup>17</sup> In the Matter of Implementing Amendments to the Idaho Telecommunications Service Assistance Program, Case No. GNR-T-98-6, Order No. 27806 (June 1998) (“the ITSAP administrator may arrange for quarterly remittances with individual carriers.”).

(emphasis added) The Commission holds in the Order that because TracFone falls within the definition of “telecommunications provider” and does not fall within the statute’s exemption for prepaid calling cards in Section 31-4813, TracFone is obligated to remit the 911 fee. While TracFone does not dispute that it is a telecommunications provider, that fact alone does not establish a legal obligation for TracFone to remit the 911 fee. As explained above, the Commission must “give effect to every word, clause and sentence of a statute.”<sup>18</sup> Pursuant to Section 31-4804(2), 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; and 3) on a monthly basis, by all telecommunications providers of such services. Although TracFone’s service is provided to purchasers within a county or 911 service area in Idaho, TracFone does not provide its service to all customers on a monthly basis. Rather, TracFone’s customers purchase quantities of service on an as-needed basis, either by purchasing prepaid airtime cards at retail establishments or online through TracFone’s Internet website (www.tracfone.com). Some TracFone customers make multiple airtime purchases in a month; others may go several months or longer without making airtime purchases. Given that TracFone does not provide its service on a monthly basis and that it has no means to collect the 911 fee on a monthly basis, it is not obligated to impose or collect the 911 fee nor is it obligated to remit the fee from its own resources.

As noted above regarding the ITSAP surcharge, it is possible that the Legislature may not have contemplated that some telecommunications providers do not provide service on a monthly basis to their customers when it enacted the law establishing the 911 fee. However, the fact the Legislature may not have fully understood the business practices of telecommunications carriers

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<sup>18</sup> George W. Watkins Family, 118 Idaho at 540, 797 P.2d at 1388.

or that some carriers may have established or modified business practices subsequent to enactment of the legislation does not empower the Commission to usurp the Legislature's authority to alter the language in Section 31-4804. Any changes to Section 31-4804 must be accomplished through the Legislature, not by a Commission order. The Commission must apply the language in the statute, which undeniably provides that the 911 fee is only imposed on and collected from purchasers of service that is provided on a monthly basis.

**B. The Commission May Not Rely on a Letter from the IECC to Support Its Conclusion that TracFone Is Required to Remit the 911 Fee.**

The Commission relies on a letter from the IECC to support its finding that TracFone is required to make contributions to the 911 fund. The letter the Commission references is a May 21, 2010 letter from Garrett Nancolas, Chair, IECC, filed in this proceeding as a public comment. Notably, the IECC, although opposing TracFone's ETC application, did not intervene in the proceeding. Therefore, the IECC's only statement in the record of the proceeding is its unexplained assertion that TracFone's "failure to [collect the 911 fee] is in violation of the Idaho Emergency Communications Act, Idaho Code § 31-4801 *et seq.*"<sup>19</sup> The IECC provides no explanation for its conclusion other than that TracFone provides wireless service in Idaho. Since the IECC did not participate as an intervenor in this proceeding, there was no opportunity for TracFone to learn the basis for the IECC's position or to cross-examine the IECC during the

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<sup>19</sup> Letter from G. Nancolas, IECC, to Commission, filed May 24, 2010. Indeed, Mr. Nancolas' letter not only offers a legal conclusion without an explanation, it is internally inconsistent. In the same sentence of the same paragraph, Mr. Nancolas states that the IECC has not made a determination about whether TracFone is not responsible for collecting the 911 fee, and then reverses itself by stating that it is the IECC's belief that "TracFone should be paying the required fees under Idaho Code § 31-4804 as they provide wireless service in Idaho." Curiously, Mr. Nancolas also alleges that TracFone's failure to collect the 911 fees is an "unfair business practice." The IECC has cited to no provisions of Idaho law, nor is TracFone aware of any provisions of Idaho law, which authorize the IECC to enforce any state laws governing unfair business practices.

hearing. As such, the letter is hearsay and merely constitutes the unexplained and unsupported opinion of the IECC.

Notwithstanding the hearsay nature of the IECC letter, the Commission appears to accord the IECC's position significant weight. In particular, the Commission states: "inasmuch as the IECC letter represents a clear statement from an agency that the Company agrees is vested with the authority by the Idaho Legislature to levy [a 911 fee] TracFone is required to make appropriate contributions, in accordance with statute to the Fund."<sup>20</sup> The letter states the IECC's position on whether TracFone should be collecting the 911 fee and whether the Commission should grant TracFone's ETC Application. The Commission's reliance on the IECC letter to support a legal conclusion as to the 911 fee's applicability is especially troubling since it appears that the letter was procured by the Commission staff. According minutes of the IECC's May 6, 2010 meeting (obtained by TracFone pursuant to a Public Records Act request), Grace Seaman, a Commission employee, attended that meeting and encouraged the filing of that letter.<sup>21</sup>

The letter does not, however, cite to any legal authority or provide any reasoning for the IECC's conclusion. Furthermore, the letter does not indicate that the IECC has made any attempt to enforce the statute against TracFone. Therefore, while the IECC can state its opinion

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<sup>20</sup> Order, at 7.

<sup>21</sup> Those meeting minutes state at page 6: "Ms Seaman commented that her purpose for addressing the ECC is to let the Commission know that it is too late to intervene in this case, but it is not too late for the Commission to submit comments, if they so wish, on this case. The comment deadline is May 24, but that could change." Ms. Seaman also testified in this proceeding on behalf of Commission staff. In her testimony, Ms. Seaman opposes designation of TracFone as an ETC, in part, on the basis that it does not collect and remit 911 fees. Her testimony regarding the applicability of the 911 fee law to TracFone references the IECC letter -- the very letter she solicited during the May 6, 2010 IECC meeting. Direct Testimony of Grace Seaman, at 11-12.

to the Commission that TracFone should collect and remit the 911 fee, the IECC has done nothing to directly notify TracFone that it must do so.<sup>22</sup>

Moreover, the IECC's position that TracFone is required to collect and remit the 911 fee is contradicted by its own previous statements regarding whether the 911 fee is applicable to prepaid wireless services such as those provided by TracFone. In 2008, the Florida Department of Management Services E911 Board issued a report which included the results of a survey of each state's E911 Coordinator, including Idaho's E911 Coordinator. In response to the question of whether an E911 fee was assessed on prepaid wireless, the IECC -- Idaho's E911 Coordinator -- responded that an E911 fee was not assessed on prepaid wireless services.<sup>23</sup> Similarly, a 2006 report by the Maine Public Utilities Commission ("PUC"), Emergency Services Communication Bureau, indicates that in Idaho, providers of prepaid wireless services are not required to collect 911 fees according to IECC.<sup>24</sup> That information also was provided by the IECC.

Finally, the IECC's position on the applicability of the 911 fee to prepaid wireless services, as expressed in its unsupported and conclusory May 21, 2010 public comment in this proceeding, contradicts the IECC's position, as discussed during a February 2010 meeting of the IECC. TracFone provided details of those minutes in its post-hearing brief, and attached a copy

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<sup>22</sup> According to the May 6, 2010 IECC meeting minutes, Commissioner Smith suggested that the IECC seek an opinion from the Attorney General's office as to the applicability of the 911 fee to prepaid wireless services. Apparently, seeking legal advice was deemed unnecessary as the IECC provided the Commission its own legal opinion, albeit one without any explanation, analysis or citation to any legal authority, and developed without advice from the Attorney General.

<sup>23</sup> E911 Prepaid Wireless Fee Collection and E911 Fee Exemptions: A Feasibility Analysis, Florida Department of Management Services E911 Board, E911 Prepaid and Fee Exemption Study, at 31 (December 31, 2008) (relevant excerpts attached as Exhibit 1).

<sup>24</sup> Report by the Maine Public Utilities Commission, Emergency Services Communication Bureau to the Utilities and Energy Committee on Collection of Fees on Prepaid Wireless Telephone Services, Attachment 4 (February 6, 2006) (relevant excerpts attached as Exhibit 2).

of those minutes to its brief. The February 2010 minutes reveal that the IECC believed that further legislation would be necessary to collect the 911 fee on prepaid wireless services.<sup>25</sup> The IECC acknowledges the existence of the February 2010 minutes in its May 21, 2010 public comment, but asserts that it has not made a determination that the 911 fee is not applicable to prepaid wireless services. As explained above, the IECC also did not provide any basis for its changed position that the 911 fee is applicable to prepaid wireless services.<sup>26</sup>

In short, in 2006, the IECC told the Maine PUC that the Idaho 911 fee was not applicable to prepaid wireless services. In 2008, the IECC notified the Florida Department of Management Services E911 Board that the Idaho 911 fee was not applicable to prepaid wireless services. The IECC's February 2010 meeting minutes indicate its belief that legislation would be needed to extend the Idaho 911 fee to prepaid wireless services. Then, suddenly and without explanation, in May 2010, the IECC reversed four years of contrary conclusions and told the Commission that it believed that the 911 fee was applicable to prepaid wireless services (and that failure to pay the fees -- irrespective of any ability to collect through a billing process -- constituted an "unfair business practice").

The IECC's sudden and abrupt change of opinion on the applicability/non-applicability of the 911 fee law to prepaid wireless services during the three month period between February 2010 and May 2010 is unexplained and unexplainable. The Commission improperly relies on the IECC's unsupported and unexplained change of opinion by the IECC in concluding that TracFone is in violation of the Idaho Code, as a basis for denying TracFone's ETC Application.

#### **IV. The Commission's Reliance on Proceedings in Other States as a Basis to Justify Denial of TracFone's ETC Application Is Misplaced.**

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<sup>25</sup> See TracFone Wireless, Inc.'s Post Hearing Brief, filed May 23, 2010, at 3-4.

<sup>26</sup> See *id.*

The Commission's Order refers to and relies upon decisions by courts in Washington, Kentucky, Indiana,<sup>27</sup> and Nebraska that have rejected TracFone's argument that it is not required to pay a 911 fee if the relevant statute requires collection of the 911 fee through billing customers. The Commission further asserts that TracFone's refusal to contribute to ITSAP and 911 funds is not due to an inability to assess how much it owes to the funds, but due to a "policy to vigorously contest the applicability and payment of these fees."<sup>28</sup> TracFone's decision to exercise its right to challenge the applicability of certain fees in other states provides no basis for denying TracFone's ETC Application in Idaho for several reasons. First, states' laws regarding the collection and remittance of fees differ from each other. The manner in which a state court interprets that state's laws is only relevant to this proceeding if the other state's laws contain the same legal requirements. The Commission does not assert that the laws of the listed states have the same requirements as the Idaho statutes governing the ITSAP surcharge and 911 fee. Therefore, there is no lawful basis for the Commission's reliance on other states' court decisions involving other states' laws as a basis for its conclusions regarding Idaho laws reached in this proceeding.<sup>29</sup>

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<sup>27</sup> No tribunal in Indiana ever has concluded that the state's 911 fee law is applicable to TracFone. Absent from the Order is any citation to any such holding by any Indiana tribunal.

<sup>28</sup> Order, at 7.

<sup>29</sup> The Commission's reliance on TracFone Wireless, Inc. v. Washington Department of Revenue, 242 P.3d 810 (Wash. 2010) is especially misplaced. In that case, the primary issue before the Washington Supreme Court was whether imposition of that state's 911 excise tax violated a statutory requirement of uniformity in taxation. No comparable issue was before the Commission in this proceeding. Significantly, that case reached the Washington Supreme Court following a collection proceeding conducted by the Washington Department of Revenue. The applicability of the state's 911 fee law was not adjudicated in the entirely unrelated ETC designation proceeding before the Washington Utilities and Transportation Commission. Once the applicability of the Washington statute was conclusively determined (by a 5-4 vote), TracFone is in compliance with that law, consistent with its policy to comply with all states' laws once their applicability has been determined.

Second, the Commission overlooks the highly significant fact that TracFone's disagreement with the relevant authorities in those other states about the applicability of a 911 fee or TracFone's exercise of its right to challenge a fee's applicability in a court of law has not caused any of those other state commissions to do what the Commission has done in the Order -- deny TracFone's application for designation as an ETC. TracFone has been designated as an ETC by the state commissions in Washington, Kentucky, and Indiana.<sup>30</sup> Each of those state commissions concluded that designation of TracFone as an ETC would serve the public interest and provide benefits to the state's low-income consumers despite the existence of disputes and litigation regarding the applicability of statutory fees. As a result, low-income households in Washington and Kentucky are enjoying the convenience and security of wireless Lifeline-supported service through enrollment in TracFone's SafeLink Wireless® Lifeline service, and low-income households in Indiana will soon have that service available to them. Similarly, this Commission should grant TracFone's ETC Application so that low-income consumers in Idaho can receive the benefits of TracFone's SafeLink Wireless® Lifeline service. The Commission could address its concerns regarding those fees by resolving its disagreement with TracFone about the applicability of the ITSAP surcharge in a separate proceeding and leaving to the IECC the responsibility to determine whether the law governing the 911 fee is applicable to TracFone and, if so, to take appropriate steps to enforce that law; and if not, then to seek enactment of legislation which would resolve the question of the fee's applicability to prepaid services.

Third, the Commission's assertion that TracFone's refusal to pay fees is based on a policy of contesting the applicability of fees, rather than an inability to calculate the amount of

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<sup>30</sup> TracFone does not have an ETC application pending before the Nebraska Public Service Commission. As noted in footnote 27, no Indiana court has determined that either the Indiana's 911 fee law is applicable to TracFone or that TracFone is in violation of that state's 911 fee law.

fees owed, misstates the issue in this proceeding. The Order appears to base its conclusions regarding the applicability of the fee statutes to TracFone on an asserted statement by TracFone that it is able to calculate fee amounts. As stated in the Order, “[t]o wit, TracFone witness Jose Fuentes conceded at the technical hearing that the Company has the ability to track the usage rate of its customers and calculate the amount of tax due without any problem with uniformity.”<sup>31</sup> In fact, contrary to that statement, Mr. Fuentes made no such concession. Mr. Fuentes, at the direction of Staff counsel, was merely reading into the record a quotation from Exhibit 103 -- a decision of the Supreme Court of Washington. Moreover, the fact that TracFone could calculate the amount of the ITSAP surcharge or 911 fee it would collect from its customers if it was a postpaid provider has no bearing on whether TracFone is legally obligated to collect and remit those fees pursuant to the applicable statute. If a telecommunications carrier is not required by law to collect and remit a fee, then it cannot be required to pay that fee from its own resources, irrespective of whether it can calculate the amount which would be owed if the fee were applicable. TracFone’s decision to exercise its constitutional right to challenge the applicability of fee laws in other states in the courts of those states is wholly irrelevant to the question before the Commission -- whether designation of TracFone as an ETC for the limited purpose of providing Lifeline service to low-income Idaho households will serve the public interest.

**V. The Commission’s Holding That It Will Not Grant ETC Status to TracFone until TracFone Assents to the Payment of the ITSAP Surcharge and 911 Fee Denies TracFone Its Legal Right to Receive a Legal Determination on the Applicability of the Fees.**

The Commission finds that “[a]n agreement to voluntarily contribute applicable fees to the aforementioned IECA and ITSAP Funds should be viewed as a minimum requirement for

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<sup>31</sup> Order at 7.

any telecommunications carrier seeking designation as an ETC in Idaho.”<sup>32</sup> The Commission then concludes that it will not grant ETC status to TracFone until it assents to payment of the ITSAP surcharge and 911 fee.<sup>33</sup> The Commission’s insistence that TracFone **voluntarily** make contributions to the ITSAP and 911 Funds, denies TracFone its legal right to receive a legal determination on the applicability of the fees.

TracFone has the right to challenge the applicability of any state fee in accordance with the relevant state’s legal procedures. State agencies charged with enforcing statutes imposing fees on telecommunications carriers may bring appropriate enforcement actions against any company that they believe is not complying with an applicable legal requirement to collect and remit such fees. In Idaho, the Commission is responsible for enforcing the ITSAP surcharge. However, the Commission has never attempted to enforce the ITSAP surcharge statute against TracFone. It has never conducted an investigation, convened an enforcement proceeding or ordered TracFone to pay the surcharge. Indeed, prior to issuance of the Order in this proceeding, TracFone had no basis to conclude that the Commission even believed the ITSAP fee to be applicable to it. Apparently, the Commission itself is not certain that the surcharge is applicable. The Commission states in the Order that TracFone must **voluntarily** agree to pay the ITSAP surcharge if it wants to receive ETC status. That such payments would be voluntary recognizes that there is no legal obligation to pay.

The IECC, the state agency responsible for enforcing the 911 fee, also has not challenged TracFone’s refusal to collect and remit the 911 fee and has never attempted to commence an enforcement action against TracFone. Thus, the Commission has no legal basis for requiring TracFone to voluntarily pay the 911 fee as a condition for receiving ETC status. At

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<sup>32</sup> Order, at 9.

<sup>33</sup> Id.

this time, there has been no determination by this Commission, the IECC, or a state court, that TracFone is legally required to commence collecting and remitting the ITSAP surcharge and 911 fee. Therefore, the Commission may not lawfully rely on TracFone's non-payment of those fees to deny the ETC Application.

**VI. The Commission's Refusal to Designate TracFone as an ETC for the Limited Purpose of Providing Lifeline Service to Low-Income Idaho Households Will Disserve the Public Interest.**

As noted in the preceding sections of this petition for reconsideration, the Commission's determinations that TracFone is required by applicable law to collect and remit ITSAP charges and 911 fees and that its refusal to do so warrants denial of its ETC application are legally erroneous. Those legal errors by themselves are sufficient to warrant reconsideration of the Order. However, there is a more important reason for the Commission to grant reconsideration and to designate TracFone as an ETC: designation of TracFone as a Lifeline-only ETC will serve the public interest.

To date, TracFone has been designated as an ETC in 38 states. It provides SafeLink Wireless<sup>®</sup> Lifeline service in most of those states. TracFone's Lifeline customers receive at no charge full-featured E911-compliant wireless handsets (paid for by TracFone, not by the USF), 250 minutes of free wireless airtime each month they remain enrolled in the program, nationwide calling, and such important vertical features as call waiting, caller ID, and voice mail. The record established in this proceeding is undisputed. No ETC currently offering Lifeline service

in Idaho offers anything comparable. No Idaho ETC offers nationwide calling, vertical features at no additional charge, free handsets and 250 minutes of free monthly usage.<sup>34</sup>

Based upon public information, most low-income Idaho households who qualify for Lifeline support are not receiving it. According to Federal Communications Commission data, in 2002, Idaho's Lifeline participation rate among low-income Lifeline-eligible households was only 22.1 percent.<sup>35</sup> Although that percentage is low, the situation has actually gotten worse. According to the Universal Service Administrative Company, in 2010, Idaho's Lifeline participation rate among eligible low-income households was less than 20 percent.<sup>36</sup> With about 3.8 million low-income households currently enrolled in its Lifeline program nationwide, TracFone has materially increased Lifeline participation in those states where its Lifeline service is available. There can be little question that the availability to low-income Idaho households (including the more than eighty percent of which are not receiving Lifeline benefits today) of a free wireless Lifeline program like TracFone's SafeLink Wireless<sup>®</sup> will increase enrollment of low-income Idahoans in the federal Lifeline program -- a program which is supported by all Idaho consumers through their contributions to the federal USF.

## CONCLUSION

As explained above, the asserted bases for denying TracFone's ETC Application are not supported by law or fact. TracFone has significantly raised the level of Lifeline participation in

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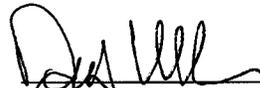
<sup>34</sup> Several of the intervenors in this proceeding are ETCs (CTC and members of the Idaho Telecom Alliance). Although those intervenors stridently opposed TracFone's ETC application, not one of them offers a wireless Lifeline plan which includes nationwide calling, free phones and vertical features. Thus, their opposition is an understandable response to a potential competitive threat to their limited Lifeline business, but that opposition is not very responsible.

<sup>35</sup> Lifeline and Link-Up (*Report and Order and Further Notice of Proposed Rulemaking*), 19 FCC Rcd 8302 (2004), at Appendix K - Section 1: Baseline Information Table 1.A. Baseline Lifeline Subscription Information (Year 2002).

<sup>36</sup> [http://www.universalservice.org/\\_res/documents/li/pdf/li-participation-rate-map-2010/pdf](http://www.universalservice.org/_res/documents/li/pdf/li-participation-rate-map-2010/pdf).

every state where the service is available. Most importantly, the entire benefit is funded by the federal USF and by TracFone and not by any state or any state's rate payers, tax payers or by any state's universal service fund. TracFone is anxious to bring this important federally-funded program to Idaho and to the State's low-income households -- more than eighty percent of whom are not currently receiving Lifeline assistance. For the foregoing reasons, TracFone respectfully requests the Commission to grant reconsideration of its Order, and promptly approve TracFone's amended ETC Application, and that it be designated as an ETC in Idaho.

Respectfully submitted,



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Dean J. Miller (ISB No. 1968)  
McDEVITT & MILLER LLP  
420 West Bannock Street  
P.O. Box 2564-83701  
Boise, Idaho 83702  
Tel: 208-343-7500  
Fax: 208-336-6912  
joe@mcdevitt-miller.com

Mitchell F. Brecher (*admitted pro hac vice*)  
Debra McGuire Mercer  
GREENBERG TRAUIG, LLP  
2101 L Street, NW, Suite 1000  
Washington, DC 20037  
Tel: 202-331-3100  
Fax: 202-331-3101  
brecherm@gtlaw.com  
mercerdm@gtlaw.com

*Attorneys for TracFone Wireless, Inc.*

August 19, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that on the 19<sup>th</sup> day of August, 2011, I caused to be served, via the method(s) indicated below, true and correct copies of the foregoing document, upon:

Jean Jewell, Secretary  
Idaho Public Utilities Commission  
472 West Washington Street  
P.O. Box 83720  
Boise, ID 83720-0074  
[jjewell@puc.state.id.us](mailto:jjewell@puc.state.id.us)

Hand Delivered   
U.S. Mail   
Fax   
Fed. Express   
Email

Neil Price, Esq.  
Idaho Public Utilities Commission  
472 West Washington Street  
P.O. Box 83720  
Boise, ID 83720-0074  
[Neil.Price@puc.idaho.gov](mailto:Neil.Price@puc.idaho.gov)

Hand Delivered   
U.S. Mail   
Fax   
Fed. Express   
Email

Molly O'Leary, Esq.  
Richardson & O'Leary, PLLC  
P.O. Box 7218  
Boise, ID 83707  
[molly@richardsonandoleary.com](mailto:molly@richardsonandoleary.com)

Hand Delivered   
U.S. Mail   
Fax   
Fed. Express   
Email

Cynthia A. Melillo, Esq.  
Givens Pursley LLP  
601 N. Bannock Street  
P.O. Box 2720  
Boise, ID 83701  
[cam@givenspursley.com](mailto:cam@givenspursley.com)

Hand Delivered   
U.S. Mail   
Fax   
Fed. Express   
Email

BY: Heather Houle  
MCDEVITT & MILLER LLP