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IDAHO PUBLIC
UTILITIES COMMISSION

July 24, 2012

Idaho Public Utilities Commission
472 W. Washington Street
P.O. Box 83720
Boise, ID 83720-0074

Via Facsimile & Hand Delivery
208/334-3762

Re: *TracFone Wireless v. State of Idaho and Idaho Emergency Communications*
Ada County District Court Case No. CV OC 1210005
GBS File No. 19360-001

Gentlemen:

The law firms of McDevitt & Miller, LLP and Greener Burke Shoemaker P.A. have been retained by TracFone Wireless, Inc. to represent its interests in a declaratory judgment claim that is presently pending in the Fourth Judicial District Court of the State of Idaho for Ada County against the State of Idaho and the Idaho Emergency Communications Commission. Said action seeks relief from the Idaho District Court from Order No. 32358 issued September 19, 2011 by the Idaho Public Utilities Commission ("IPUC") in Case No. TFW-T-09-01 relating to the Amended Application of TracFone Wireless, Inc. for Designation as an Eligible Telecommunications Carrier. A copy of the Complaint on file in the Ada County District Court is enclosed for your reference.

As you may or may not already know, all parties to litigation and their counsel have a strict legal obligation under court rules to retain and preserve any and all documents that may relate, in any way, to such litigation. In order to ensure that we have fulfilled our obligation to ensure the preservation and retention of any records that may become relevant to this case, we are requesting that the IPUC please place a hold on and preserve all records in its possession relating to the initial and/or Amended Application of TracFone Wireless, Inc. filed before the IPUC in connection with Case No. TFW-T-09-01. This documentation hold request seeks to preserve, but shall not be limited to, all filings contained in the record before the IPUC, as well as all correspondence and other forms of written communications (including without limitation letters, memoranda, notes (both typed and handwritten), opinions and emails), circulated both internally within the IPUC and between and among the IPUC, the parties and their counsel, as well as any interested third parties, and shall include all writings and/or documents in both hard copy and electronic format. Privileged communications between the IPUC and its counsel should be preserved for identification purposes, although the same may ultimately be withheld from production in accordance with court rules.

Please ensure that any relevant records that you may have, both in hard copy and electronic format, are preserved.

Should you have any questions regarding the above, please feel free to contact us, or have your legal counsel contact us, at your convenience.

July 24, 2012
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Thank you for your anticipated cooperation in this matter.

Very truly yours,

GREENER BURKE SHOEMAKER P.A.



Richard H. Greener

McDEVITT & MILLER, LLP



Dean J. Miller

RHG/cmb
Enclosure
(474904)

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CHRISTOPHER D. RICH, Clerk
By **JERI HEATON**
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Attorneys for TracFone Wireless, Inc.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACFONE WIRELESS, INC,

Plaintiff,

vs.

THE STATE OF IDAHO AND THE IDAHO
EMERGENCY COMMUNICATIONS
COMMISSION,

Defendants.

CV OC 1210005

Case No.

**COMPLAINT FOR DECLARATORY
JUDGMENT**

COMES NOW TracFone Wireless, Inc., (TracFone) and for a cause of action, upon
which relief can be granted, complains and alleges as follows:

COMPLAINT FOR DECLARATORY JUDGMENT- 1

I.

Parties

1. TracFone is a Delaware Corporation authorized to conduct business in the State of Idaho. TracFone is a telecommunications carrier engaged in the business of reselling on a prepaid basis commercial mobile radio service as that term is defined at 47 U.S.C. § 332 (CMRS) in the State of Idaho.
2. The State of Idaho is the sovereign body responsible to implement and enforce the laws of the State of Idaho.
3. The Idaho Emergency Communications Commission (IECC) is a governmental body created by the Idaho Emergency Communications Act, Idaho Code §31-4801 *et seq.* The duties and responsibilities of the IECC are described in Idaho Code §31-4816.

II.

Jurisdiction and Venue

4. The Court has jurisdiction pursuant to the Idaho Declaratory Judgment Act, Idaho Code §10-1201 *et seq.*
5. Venue is proper in Ada County, Idaho.

III.

Factual Background

6. Idaho Code § 31-4804 authorizes the collection of an Emergency Communications Fee from purchasers of access lines by telecommunication providers for the purpose of financing the maintenance, operation, enhancement and governance of a consolidated

emergency communications (911 or E911) system. Section 31-4804(2) provides that the Emergency Communications Fee shall be imposed upon and collected from purchasers of access lines with a service address or place of primary use within the county or 911 service areas on a monthly basis by all telecommunications providers. Section 31-4804(2) further provides that the 911 fee may be listed as a separate item on customers' monthly bills. Section 31-4804(3) states that telecommunications providers shall remit the Emergency Communications Fee to the relevant county treasurer's office or administrator for the 911 service area based upon the area from which the fee was collected. The issue presented in this case is whether the statute, as currently enacted, obligates TracFone to remit the Emergency Communications Fee on services which are not provided on a monthly basis and which are not collected from consumers through charges on their monthly bills, *i.e.*, whether the Emergency Communications Fee is applicable to non-billed resold prepaid wireless services.

7. TracFone resells wireless telecommunications service throughout the nation, including Idaho. TracFone's services are provided on a prepaid basis only. Consumers purchase specified quantities of wireless airtime in advance on an as-needed basis. TracFone prepaid airtime cards are available for purchase through various third party retail outlets (*e.g.* Wal-Mart, Target, Best Buy, etc.). Consumers may also purchase prepaid airtime online through TracFone's internet website (www.tracfone.com). TracFone offers no post-paid or billed services and does not render monthly bills to consumers of its prepaid services.

8. On October 29, 2009, TracFone filed an Application with the Idaho Public Utilities Commission ("IPUC") for designation as an Eligible Telecommunications Carrier ("ETC") pursuant to Section 214(e)(2) of the Communications Act of 1934, as amended (47 U.S.C. § 214(e)(2)) for the limited purpose of providing Lifeline service to qualified low-income Idaho households. Designation as an ETC allows telecommunications carriers to offer discounted or, in TracFone's case, free telecommunications service to qualified low-income consumers and to receive reimbursement from the federal Universal Service Fund for the Lifeline benefits provided to those consumers. On March 1, 2010, TracFone filed an Amended Application for designation as an ETC with the IPUC, docketed as Case No. TFW-T-09-01 ("Idaho PUC Proceeding").¹
9. During the IPUC Proceeding, an issue arose as to whether TracFone is legally required to collect and remit the Emergency Communications Fee to the various counties in which it operates. TracFone asserted that, since its services are not provided on a monthly basis and since consumers pay in advance for those services, primarily at retail vendor locations, rather than through bills rendered to them, the statute, as enacted, does not impose 911 fee remittance obligations on TracFone. It further asserted that amendatory legislation would be necessary to extend coverage of Idaho's 911 fee law to non-monthly, non-billed prepaid services such as those provided by TracFone.

¹ The Application may be viewed at:
<http://www.puc.idaho.gov/internet/cases/tele/TFW/TFWT0901/20100301FIRST%20AMENDED%20APPLICATION.PDF>.

10. On May 21, 2011, the IECC, acting through its Chairman, submitted a letter to the IPUC contending that TracFone was responsible for remittance of the Emergency Communications Fee and urged the IPUC to deny TracFone's ETC Application. ("IECC Letter")² That letter contains no legal analysis, no explanation and no citation to any authority in support of the assertion that the Emergency Communications Fee remittance requirement of Section 31-4804 is applicable to TracFone's non-billed, non-monthly, prepaid services. Although TracFone had been in contact with IECC prior to that time, never before had the IECC or any representative of the IECC expressed the opinion that the 911 fee was applicable to prepaid, non-billed, non-monthly services like that provided by TracFone. Indeed, in documents generated by the IECC, it indicated that the 911 fee requirement is not applicable to prepaid services and that legislation would be necessary in order encompass prepaid services within the 911 fee requirement.

11. Through various pleadings, briefs and written testimony in the IPUC Proceeding, TracFone asserted that it did not have a legal obligation to remit the Emergency Communications Fee because, among other things, TracFone does not provide service on a monthly basis, as expressly required by Idaho Code §31-4804 with respect to the 911 fee, and, as a reseller of prepaid services, it does not have a customer billing process through which to collect and remit 911 fees as expressly contemplated by the statute.

² The IECC letter may be viewed at:
[http://www.puc.idaho.gov/internet/cases/tele/TFW/TFWT0901/public%20comments/20100524COMMENT%20\(IECC\).PDF](http://www.puc.idaho.gov/internet/cases/tele/TFW/TFWT0901/public%20comments/20100524COMMENT%20(IECC).PDF).

12. On September 19, 2011, the Commission issued its final Reconsideration Order No. 32358, denying TracFone's Application.³ The IPUC's denial of TracFone's ETC Application was based, in part, on its conclusion that TracFone's refusal to remit the Emergency Communications Fee is contrary to the public interest.
13. In its final Reconsideration Order No. 32358, the IPUC placed heavy reliance on the IECC Letter, but stated: "If TracFone disputes the IECC's clear statement regarding the applicability of the IECA fee then it is free to challenge that finding before the IECC or other appropriate legal venue" (emphasis added). IPUC Order No. 32358, at 8.⁴ The IPUC further concluded: "Absent the Company's assent to remit the applicable fees, or seek an official ruling from the IECC, or another tribunal with relevant jurisdiction, as to whether the fees applied, the designation of TracFone as an ETC in Idaho would not be in the public interest." *Id.* at 11-12.
14. On February 8, 2012, TracFone and the Staff of the IPUC entered into a Settlement Stipulation. That Stipulation provides, *inter alia*, that TracFone would file with this Court a declaratory judgment action requesting a legal determination as to whether TracFone is required to pay the emergency communications fee pursuant to Idaho Code § 31-4804. On May 18, 2012, the IPUC issued Order No. 32550 wherein it

³ The Order may be viewed at:

http://www.puc.idaho.gov/internet/cases/tele/TFW/TFWT0901/ordnotc/20110919RECONSIDERATION_ORD_ER_NO_32358.PDF.

⁴ Here, the IPUC acknowledged that it is not a court with the judicial power to interpret or construe statutes that are not within the scope of its jurisdiction under the Public Utility Law, but that it would give deference to another state agency, in the absence of a judicial determination. Matters of statutory interpretation and application should be adjudicated by courts of competent jurisdiction.

approved the Stipulation and indicated that it would designate TracFone as an Eligible Telecommunications Carrier as conditioned in the Stipulation.

15. In accordance with IPUC Order No. 32550, TracFone files this Complaint for Declaratory Judgment in this Court, a tribunal with relevant jurisdiction, seeking a declaration regarding whether TracFone is required to remit the Emergency Communications Fee on its prepaid, non-billed services which are not provided on a monthly basis.

IV.

Issue for Determination

16. The issue for determination and upon which a declaration is sought is whether Idaho Code § 31-4804 as enacted, imposes the Emergency Communications Fee on purchasers of non-billed prepaid wireless services and legally obligates resellers of non-billed prepaid wireless services to collect and remit the Emergency Communications Fee.

Pursuant to Idaho Code §10-1202, TracFone is a person whose rights or legal relations are affected by a statute and is entitled to obtain a declaration of rights thereunder.

TracFone respectfully requests that the Court enter its declaration to the effect that it is not legally obligated to remit the Emergency Communications Fee.

V.

Justiciable Controversy

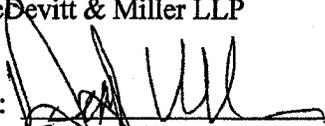
17. For the reasons set forth above, there is an actual and justiciable controversy between TracFone and the Defendants.

WHEREFORE, TracFone respectfully requests that the Court enters its Order:

1. Declaring and determining that TracFone is not legally obligated under Idaho Code § 31-4804 as enacted to remit the Emergency Communications Fee.
2. Granting such other and further relief is appropriate in the circumstances.

Dated this 14 day of June, 2012.

McDevitt & Miller LLP

By: 

Dean J. Miller

Attorneys for TracFone Wireless, Inc.,