

Cynthia A. Melillo, ISB # 5819
GIVENS PURSLEY LLP
601 W. Bannock Street
P.O. Box 2720
Boise, ID 83701
Telephone: (208) 388-1200
Facsimile: (208) 388-1300
Email: cam@givenspursley.com

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IDAHO PUBLIC
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Attorneys for Idaho Telecom Alliance

Molly O'Leary (ISB No. 4996)
Richardson & O'Leary PLLC
515 North 27th Street
P.O. Box 7218
Boise, ID 83707
Telephone: (208) 938-7900
Facsimile: (208) 938-7904
E-Mail: molly@richardsonandoleary.com

Attorneys for CTC Telecom, Inc.

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION) CASE NO. TFW-T-09-01
OF TRACFONE WIRELESS, INC., FOR)
DESIGNATION AS AN ELIGIBLE TELE-) INTERVENORS' POST-HEARING
COMMUNICATIONS CARRIER) BRIEF ON THE APPLICABILITY OF
) THE IDAHO EMERGENCY
) COMMUNICATIONS ACT AND THE
) IDAHO TELECOMMUNICATIONS
) SERVICE ASSISTANCE PROGRAM TO
) TRACFONE WIRELESS, INC.

The Idaho Telecom Alliance ("ITA"), by and through its attorney of record, Givens Pursley LLP, and CTC Telecom, Inc., dba CTC Wireless, by and through its attorney of record, Richardson & O'Leary, PLLC (collectively, "Intervenors"), in accordance with Order No. 32231 of the Idaho Public Utilities Commission ("Commission"), hereby jointly

file this post-hearing briefing in the above-captioned matter. The Commission limited the scope of post-hearing briefing to the single issue of “whether TracFone is legally obligated to remit certain fees pursuant to the Idaho Emergency Communications Act (IECA) or the Idaho Telecommunications Service Assistance Program (ITSAP).” Order No. 32231 at 2 (April 21, 2011).

I. INTRODUCTION.

Post-hearing briefing was ordered to provide the Commission with additional analysis of whether TracFone Wireless, Inc. (“TracFone”) is required to submit fees pursuant to the IECA and the ITSAP. Although TracFone has requested that this issue be briefed to the Commission, TracFone has also indicated that it does not consider the Commission to be the ultimate authority on the applicability of the IECA or the ITSAP to TracFone. *Hearing Transcript* at 357. If the Commission were to decide that the IECA and/or the ITSAP apply to TracFone, TracFone has indicated that it would not consider the decision to be a “final determination” and would continue to litigate the issue or seek other remedies as it has done in other jurisdictions. *Hearing Transcript* at 335. See also *Rebuttal Testimony of Jose Fuentes* at 3 (describing legislative and regulatory strategies employed in other states).

TracFone asserts that the ITSAP and the IECA are not clearly applicable to TracFone and its practice is, “Where the law has been vaguely defined or does not include prepaid as within the law, we do not pay.” *Hearing Transcript* at 109. Indeed, “TracFone has contested the applicability of certain 911 tax laws in a number of jurisdictions.” *Hearing Transcript* at 110. TracFone believes that, because “[t]here has not been an official determination yet that states you must pay 911 fees” in Idaho, the

Commission should allow TracFone to benefit from the market for wireless telecommunications services without sharing the burden of providing for universal access and developing and operating the 911 emergency system. *Hearing Transcript* at 166.

TracFone is wrong. The plain and unambiguous language of the IECA and the ITSAP require all telecommunications carriers – including wireless carriers and not excluding prepaid wireless carriers – to pay the fees established under those frameworks. In addition to the clear language of the statutes, the legislative histories of the IECA and the ITSAP demonstrate the legislature’s intent to keep up with evolving telecommunications technology and ensure that all telecommunications providers and customers contribute to universal access and emergency services. In spite of the clear legislative mandates, TracFone argues that its chosen business model makes it “different” and thus TracFone is outside the scope of the IECA and the ITSAP. Essentially, TracFone wants to be exempt from the law because compliance with the applicable laws does not conveniently fit its chosen business model.

TracFone also suggests that the Commission should confer Eligible Telecommunications Carrier (“ETC”) designation before a “final determination” is reached as to TracFone’s duty to comply with the IECA and the ITSAP. *Rebuttal Testimony of Jose Fuentes* at 2-3. In essence, TracFone argues that the resolution of the IECA and the ITSAP issues are not critical to an ETC designation and thus those issues can be segmented and decided at a later date in a different forum. TracFone’s request should be denied because compliance with the ITSAP and the IECA are critical factors in determining whether TracFone should be designated an ETC in Idaho. First,

failure to comply with all E911 requirements applicable to wireless resellers in those states where TracFone seeks ETC designation is a failure to meet all the conditions of TracFone's grant of forbearance from the facilities-based requirements of Section 214(e) of the Telecommunications Act. *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 F.C.C. Rcd 15095 (2005). Second, it is not in the public interest to grant ETC status in Idaho to any telecommunications provider that is not in compliance with fundamental Idaho Laws regarding the offering of telecommunications services in the state.

II. THE PLAIN LANGUAGE OF THE IECA AND THE ISTAP DOES NOT EXCLUDE PREPAID WIRELESS COMPANIES LIKE TRACFONE FROM THE STATUTORY SCHEMES.

The issue is a matter of statutory interpretation. The Idaho Supreme Court has established the legal framework for interpreting a statute:

The object in interpreting a statute is to derive the intent of the legislative body that adopted the act. Such analysis begins with the literal language of the enactment. If the statutory 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 (Idaho 2002) (internal quotation marks and citations omitted). All "[w]ords must be given their plain, usual and ordinary meaning, and the statute must be construed as a whole." *Hoskins v. Howard*, 132 Idaho 311, 315, 971 P.2d 1135, 1139 (Idaho 1999) (internal quotation marks and citations omitted).

Here, the IECA and the ITSAP establish requirements that unambiguously apply to prepaid wireless services like TracFone's.

- A. The ITSAP requires telecommunications carriers to remit the assistance surcharge and allows such telecommunications carriers to be reimbursed by collecting the surcharge from end users. No exceptions are established.**

The ITSAP exists to “provide eligible recipients with a reduction in costs of telecommunications services to promote universal service” and seeks to “maximize federal ‘lifeline’ and ‘link-up’ contributions to Idaho’s low income customers.” Idaho Code § 56-901(1). To effectuate this program, the Commission is authorized to impose an “assistance surcharge” on each end user’s service; telecommunications carriers are required to remit the surcharge to the fund administrator; and such carriers are entitled to reimbursement by collecting the surcharge from the end user. *Id.* § 56-904. As explained by Commission Staff,

Idaho Code § 56-904(1) states that all wireline and wireless companies are obligated to collect the ITSAP surcharge from its customers and remit these funds to the program Administrator. The only customers who are not assessed this surcharge are those customers who are eligible to receive the ITSAP discount. Not assessing ITSAP-eligible customers, however, does not excuse TracFone from paying into the ITSAP fund.

Direct Testimony of G. Seaman at 8.

- 1. The definition of “telecommunications carrier” is inclusive and does not exclude prepaid wireless carriers.**

Prepaid wireless companies like TracFone are not excluded from the plain language of the ITSAP’s inclusive definition of “telecommunications carriers.” For the purposes of the ITSAP’s assistance surcharge, a “telecommunications carrier” is “a telephone corporation providing telecommunications services for compensation within this state, and shall include . . . telecommunication corporations providing wireless . . . services for compensation.” Idaho Code § 56-901(2). The statute makes no distinction

between wireless providers that provide prepaid services and those who provide post-paid services. The question is whether the wireless service provider provides wireless services for compensation, which TracFone clearly does. Thus, TracFone is a telecommunications carrier within the scope of the ITSAP, regardless of TracFone's chosen means of collecting such compensation.

2. The ITSAP establishes a monthly remittance and distribution scheme but does not allow telecommunications providers to avoid remittance by choosing not to bill its customers on the same monthly schedule.

The ITSAP requires all telecommunications service carriers to remit the assistance surcharge revenues to the fund administrator on a monthly basis, although a less frequent remittance schedule may be authorized by the Commission. *Id.* § 56-904(3). The ITSAP then requires the fund administrator to distribute the revenues to eligible telecommunications carriers monthly. *Id.* Given this monthly schedule of remittance and distribution, it would make sense for a telecommunications provider to bill its customers monthly as well; however, the ITSAP does not mandate a monthly customer billing. The ITSAP's scheme simply establishes the surcharge on each end user's access line; sets the surcharge at a price that will "reimburse each carrier"; authorizes each carrier to state the surcharge on customer billings; and instructs the carriers to remit the surcharge to the fund administrator. The ITSAP neither states explicitly nor indicates implicitly that a telecommunications carrier can avoid the ITSAP's system merely by choosing to bill its customers other than monthly or because its "end users" choose to pre-pay for wireless services.

Also note that Section 56-904(3) allows the Commission to authorize "less frequent remittances" than monthly remittances. Thus, if TracFone is concerned that its

lack of a monthly billing cycle puts it at risk for noncompliance with the ITSAP, TracFone could request from the Commission an annual remittance or some other remittance schedule that would accommodate its prepaid business model. It is disingenuous for TracFone to argue that the ITSAP is inapplicable to prepaid wireless models.

3. The ITSAP created only one special rule for wireless carriers – to limit collection to customers with a place of primary use in Idaho.

As applied to wireless carriers, the ITSAP only applies the surcharge to wireless access lines for customers with a “place of primary use in Idaho.” *Id.* § 56-904(4). If the legislature had intended to create another special rule for mobile wireless carriers – particularly a special rule so extreme as a complete exception for prepaid wireless – it would have made such a special rule clear. But, no other special rules exist. All wireless service providers are subject to the ITSAP requirements, and it is only wireless customers with a place of primary use outside of Idaho that are exempt from the surcharge.

B. The IECA does not exempt users or providers of prepaid wireless services from the emergency communications fee requirements.

The IECA was enacted to provide a “consolidated emergency communications system” and to provide a means “to finance the initiation, maintenance, operation, enhancement and governance of consolidated emergency communications systems.” Idaho Code § 31-4801. The findings of the legislature recognize the insufficiency of collecting fees only from wireline customers and express the need for the system to ensure that the emergency communications system is properly financed by all types of users of all types of telecommunications technologies. *Id.* §§ 31-4801(1)(b), (d), (e). The IECA’s corresponding intent and purpose clauses express the intent to require

each type of user of each type of telecommunications service to contribute to the emergency communications system and to reimburse telecommunications providers for their role in implementing such system. *Id.* §§ 31-4801(2)(a), (c).

- 1. Once approved by the voters, the IECA emergency communications fee is to be collected from the customers and remitted by the telecommunications providers.**

The IECA authorizes counties and 911 service areas to seek voter approval to implement a consolidated emergency communications system financed by the emergency communications fee. *Id.* § 31-4803. Once approved, the collection and use of the emergency communications fee is governed by Section 31-4804. Like the ITSAP access surcharge, the IECA emergency communications fee is imposed upon the users, collected by telecommunications providers, and remitted to the county or 911 service area. *Id.* § 31-4804.

- 2. Users and providers of prepaid wireless services like TracFone's are not excluded from the imposition of the emergency communications fee on each user of a telecommunications access line.**

The emergency communications fee is imposed upon and collected from purchasers of access lines. *Id.* §§ 31-4804(1)-(2). An "access line" is "any telephone line, trunk line, network access register, dedicated radio signal, or equivalent that provides switched telecommunications access to a consolidated emergency communications system from either a service address or a place of primary use within this state." *Id.* § 31-4802(1). "In the case of wireless technology, each active dedicated telephone number shall be considered a single access line." *Id.* Therefore, prepaid wireless services like TracFone's are subject to the emergency communication fee

requirements because the customers of such prepaid wireless services are provided with a dedicated telephone number and thus use an “access line.”

In addition, providers of prepaid wireless services like TracFone are “telecommunications providers” that are required to remit the emergency communications fee. *Id.* § 31-4804(3). The definition of “telecommunications provider” includes “[a]ny wireless carrier providing telecommunications service to any customer having a place of primary use within this state” and “[a] provider of any other communications service that connects an individual having either a service address or a place of primary use within this state to an established public safety answering point by dialing 911.” *Id.* §§ 31-4801(12)(b), (d). Prepaid wireless providers like TracFone fall within both of these categories.

3. The lack of a monthly billing cycle for customers and providers of prepaid wireless systems does not eliminate the IECA’s duties.

TracFone argues that because it does not issue monthly bills, its services “don’t fit neatly into the statutory scheme” which purportedly “assumed that there will be a bill and a monthly remittance and monthly pass-back to government.” *Hearing Transcript* at 332. Presumably, TracFone bases its position on the few places in Section 31-4804 that use the term “month” or “monthly” when discussing the imposition, collection, remittance and reimbursement of the emergency communications fee. None of these sections operate to exclude any customer or provider simply because bills are not issued monthly. At most, the terms are used in recognition that historically the most common billing method is monthly. Granting TracFone’s request to create an artificial

loophole is contrary to the clear, express statutory language of the IECA and would create absurd results.

Section 31-4804(1) requires that the emergency communications fee “not exceed one dollar (\$1.00) per month per access or interconnected VoIP service line.” This section does not limit the applicability of the fee to those who pay monthly but instead establishes a cap on the amount of the fee – no more than \$1.00 per month per access line, or in other terms, no more than \$12.00 per year per access line. Section 31-4801 is silent on how many times per year such fee can or must be collected from the customers.

Section 31-4804(4) states, “Telecommunications providers will be *allowed* to list the surcharge as a separate item on the telephone subscriber’s bill.” *Id.* § 31 4804(4) (emphasis added). This section *allows* telecommunications providers to inform customers why the surcharge is being charged (*i.e.*, to shift the “blame” for the extra fee), but it does not operate as an exemption from the IECA for a telecommunications provider that chooses not to send bills to its customers.

Section 31-4804(2) appears to be the source of TracFone’s professed confusion, but on balance it cannot be fairly read to exclude users or providers of prepaid wireless services from the IECA’s requirements. This section states,

The fee shall be imposed upon 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.

Id. § 31-4804(2). Presumably, TracFone reads this section as an implicit exclusion for certain telecommunications providers that choose not to bill their customers monthly.

Such an implicit exclusion cannot be harmonized with the context of the IECA provided in the stated findings and broad purpose and intent clauses; the substantive breadth in the inclusive definitions of “access line” and “telecommunications provider”; and/or the lack of a direct exception for customers that are not billed monthly.

Furthermore, such an interpretation would lead to absurd results. If a telecommunications provider could eliminate the requirement to remit the fees simply by billing on any basis other than monthly, then all telecommunications carriers could choose to change their billing practices and cease paying into the IECA system. Surely the legislature did not intend to create such an easy way for customers and telecommunications carriers to avoid their statutory obligations. “Constructions of a statute that would lead to an absurd result are disfavored.” *State v. Harvey*, 142 Idaho 727, 730, 132 P.3d 1255, 1258 (Ct. App. Idaho 2006).

4. The legislature crafted one narrow exception to the IECA’s requirement for prepaid calling cards and explicitly excludes prepaid wireless from such exception.

“When a statute’s language is broad enough to include a particular subject matter, an intent to exclude it from a statute’s operation must be specifically expressed.” *State v. Michael*, 111 Idaho 930, 933, 729 P.2d 405, 407 (Idaho 1986). The legislature crafted one and only one exception to the IECA’s requirements. Section 31-4813 states, “The imposition of the emergency communications fee shall not apply to the prepaid calling cards for all forms of access fees. Prepaid wireline, wireless and VoIP phones with a service address or place of primary use within Idaho are not considered prepaid calling cards.” Idaho Code § 31-4813 (emphasis added). Thus, prepaid

wireless services like TracFone's are explicitly excluded from the one narrow exception to the IECA's requirements.

III. THE LEGISLATIVE HISTORY OF THE ITSAP AND THE IECA CONFIRMS THE LEGISLATURE'S INTENT TO INCLUDE PREPAID WIRELESS COMPANIES LIKE TRACFONE.

A. Examination of the legislative history is not necessary to the analysis because the statutes are not ambiguous.

"If the language [of the statute] is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation." *Harvey*, 142 Idaho at 730, 132 P.3d at 1258. Here, the plain and unambiguous language of the ITSAP and the IECA create no exemptions for prepaid wireless services like TracFone's. TracFone's suggestion that it is exempt because its chosen business model is unique does not create an ambiguity in the ITSAP or the IECA. "A statute is ambiguous where the language is capable of more than one reasonable construction. Ambiguity is not established merely because different interpretations are presented to a court; otherwise, all statutes subject to litigation would be considered ambiguous." *Porter v. Board of Trustees, Preston School*, 141 Idaho 11, 14, 105 P.3d 671, 674 (Idaho 2004) (internal quotation marks and citations omitted).

Nevertheless, an examination of the legislative history confirms the legislature's intent for the IECA and the ITSAP to apply to all providers of wireless telecommunications. Thus, any alleged ambiguity should be resolved against TracFone.

B. The legislative history shows that prepaid wireless carriers like TracFone were not intended to be excluded.

The ITSAP and the IECA have been amended several times since their original enactments. As the statutes evolved, the scope of customers and telecommunications

carriers that were required to comply with the fee collection and remittance schemes was repeatedly clarified to be inclusive. While differences between wireless and wireline technologies were recognized and accommodated, at no time was an exemption created for prepaid wireless companies like TracFone.

In 1987, the Telecommunications Service Assistance Program was “established within the department of health and welfare to provide eligible recipients with a reduction in costs of telecommunications services.” 1987 Idaho Sess. Laws 686. The stated purpose of the legislation was to “provide a ‘lifeline’ credit of \$4.00 (four) per month on the telephone bill of Senior Citizens over age 60 who participate in the low income home energy assistance program.” Statement of Purpose, House Bill 298 (1987). The first version of Section 56-904(1) (“Recovery of Telecommunications Service Revenue Reductions”) imposed a “company specific” surcharge on business and residential access lines only.

The Idaho public utilities commission shall determine and impose a company specific uniform monthly surcharge on each business and residential access line in an amount sufficient to reimburse each provider of residential basic local exchange service for the total amount of telephone assistance discounts provided and the expense of administering the plan. Such surcharge shall be effective concurrent with the discounts given eligible subscribers. The surcharge shall not be imposed on eligible subscribers.

1987 Idaho Sess. Laws 687 (emphases added).

One year later, the Emergency Communications Act was enacted. 1988 Idaho Sess. Laws 1027. The original Section 31-4804 established that the “telephone line user fee” which was to “be collected from customers on a monthly basis by all

telecommunications entities which provide local telephone line service within the county, and may be listed as a separate item on customers' monthly bills." *Id.* at 1028.

Ten years later, amendments to both the ITSAP and the IECA clarified the applicability of the programs and incorporated wireless technologies. 1998 Idaho Sess. Laws 157. A definition of "telecommunications carrier" was added to the ITSAP: "a telecommunications carrier' means a telephone corporation providing telecommunication services for compensation within this state, and shall include municipal, cooperative, or mutual nonprofit telephone companies, and telecommunication corporations providing wireless, cellular, personal communications services and mobile radio services for compensation." *Id.* at 163. Amendments to the IECA's Section 56-904 changed the "company specific uniform monthly surcharge on each business and residential access line" to a "uniform statewide monthly surcharge on each end user's business, residential, and wireless access service." *Id.* at 164. A new sentence clarified the inclusive scope of the requirement: "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." *Id.* (emphasis added).

In 2002, Section 56-904(4) was added in response to federal legislation governing the taxation of wireless communications. Statement of Purpose, Senate Bill 1477 (2002). This new section clarified that the ITSAP surcharge, when "collected from customers of mobile wireless carriers," could only be collected from those "customers with a place of primary use in Idaho." 2002 Idaho Sess. Laws 885.

In 2003, the legislature took action to confirm that wireless providers should be subject to the same requirements as land line providers. The IECA was amended to “impose the same requirements currently imposed by state law on land line telephone companies to wireless providers.” Statement of Purposes, House Bill 363 (2003). In this amendment, the legislature explained that “[c]hanges in technology and the rapid growth of communications media have demonstrated that financing such systems solely by a line charge on subscribers to wire-line services does not reflect utilization of emergency communications systems by subscribers to wireless and other forms of communications systems.” 2003 Idaho Sess. Laws 785. The legislature also explained that “[u]tilization of cellular telephones to access emergency communications systems has substantially increased citizen access to emergency services while at the same time increasing demands upon the emergency response system.” *Id.*

The 2003 amendments added inclusive definitions for “telecommunications provider” and “wireless carriers” to the IECA. “Telecommunications provider” means any person providing exchange telephone service to a service address within this state or any wireless carrier providing telecommunications service to any customer having a place of primary use within this state.” *Id.* at 787. “Wireless carrier” means a cellular licensee, a personal communications service license, and certain specialized mobile radio providers designated as covered carriers by the federal communications commission in 47 CFR 20.18 and any successor to such rule.” *Id.*

The framework for reimbursing wireless carriers was established in 2003, as well. Section 31-4804 was amended to “provide for the reimbursement of wireless carriers for implementing enhanced consolidated emergency systems”, and Section 31-4804A was

added to “[p]rovide for an agreed-to level of reimbursement for telecommunications providers for the costs of wireless carriers resulting from their implementation and operation of enhanced emergency communications systems.” *Id.* at 788-90. Soon after these amendments were approved, the legislature made a technical correction and replaced “wireless carriers” in Section 31-4804 with “telecommunications providers.” 2003 Idaho Sess. Laws 854.

Perhaps the most enlightening part of the 2003 amendments was the addition of Section 31-4813, which creates an exemption from the imposition of the emergency communications fee for “prepaid calling cards.” 2003 Idaho Sess. Laws 791. The legislature obviously recognized that prepaid calling cards (which are not tied to a dedicated access line and can generally be purchased and used by anyone, on any phone, and in any state) did not belong within the IECA scheme. The legislature did not choose to exempt any other products or services, including prepaid wireless services like TracFone's.

The legislative intent to exclude only prepaid calling cards and no other products or services was confirmed in 2007. House Bill 123 made many changes that clarified the broad applicability of this fee requirement to all telecommunications providers. In an action specifically eliminating any suggestion that prepaid wireless services were exempt for the IECA requirements, Section 31-4813 (the section that exempts prepaid calling cards) was amended to add the following sentence: “Prepaid wireline, wireless and VoIP phones with a service address or place of primary use within Idaho are not considered prepaid calling cards.” 2007 Idaho Sess. Laws 999.

In addition, Section 31-4801(2)(a) was amended to specify that counties and 911 service areas could impose the emergency communications fee to all communications “services that connect an individual dialing 911 to an established public safety answering point.” *Id.* at 996. Section 31-4804(2) was also amended to clarify that the fee “collected from customers” was to be “imposed upon 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.” *Id.* at 998.

In sum, the legislative history demonstrates a concerted effort to adapt to changes in telecommunications technology and ensure universal access to emergency communications services. TracFone’s attempt to secure an exception for its chosen business model flies in the face of the legislature’s clear intent.

IV. OTHER JURISDICTIONS APPLYING SIMILAR PROVISIONS HAVE DETERMINED THAT PREPAID WIRELESS COMPANIES LIKE TRACFONE ARE NOT EXEMPT.

TracFone has argued that it is not required to pay into the IECA and the ITSAP type funds in other states. Intervenors agree with TracFone’s counsel that “analogies or experiences in other states are always a little bit dangerous because every state operates differently, every state’s law is a little bit different.” *Hearing Transcript* at 191. Nevertheless, a brief summary of how other states have handled similar arguments under similar statutory schemes is helpful in confirming the failures of TracFone’s arguments in Idaho.

In Washington, the statute at issue “imposed a county and state E-911 tax on ‘all radio access lines whose place of primary use is located within the state.’” *TracFone Wireless, Inc. v. Washington Department of Revenue*, 170 Wash.2d 273, 280, 242 P.3d 810, 813 (Wash. 2010) (quoting RCW 82.14B.030(2), (4)). TracFone argued that the

tax could not be imposed on prepaid wireless cellular telephone services. *Id.* at 277, 242 P.3d at 812. The court characterized TracFone's contentions as essentially "seeking a decision that whether the tax is owed depends upon how a company decides to market and charge for its service or, to put it another way, whether the tax must be paid depends entirely upon the company's business model." *Id.* at 283, 242 P.2d at 815. The court rejected TracFone's argument. "Whether prepaid or not, cell phone service is what is involved in this case. The plain language of the controlling statutes requires payment of the state E-911 excise tax on TracFone's prepaid wireless service." *Id.* The court would not imply an exemption for TracFone's business model because "[t]he fact that TracFone does not send monthly billing statements is a consequence of the way in which it chooses to conduct its business. It does not relieve TracFone of its obligations under the taxing statutes nor does it convert a plainly taxable event into a nontaxable event." *Id.* at 290, 242 P.3d at 819. The court concluded its rejection of TracFone's arguments by stating,

[R]egardless of the particular plan a subscriber buys, the legislature intended that cell phone service must be taxed to help fund the enhanced 911 service. The subject of taxation remains the same, regardless of whether paid for through a monthly contract plan or through a prepaid plan like those that TracFone offers. The benefits of the E-911 service are equally available to those who prepay as it is to those who pay on a monthly basis.

Id. at 297-98, 242 P.3d at 822.

In Kentucky, the statute specified a method of collecting the 911 service fee in a way that the court acknowledged "does not comport with TracFone's chosen business model." *Commonwealth of Kentucky Commercial Mobile Radio Service Emergency*

Telecommunications Board v. TracFone Wireless, Inc., 735 F.Supp.2d 713, 722 (W.D.

Kentucky 2010). The statute in dispute stated,

Each CMRS provider . . . shall, as part of the provider's normal monthly billing process, collect the CMRS service charges levied upon CMRS connections under KRS 65.7629(3) from each CMRS connection to whom the billing provider provides CMRS. Each billing provider shall list the CMRS service charge as a separate entry on each bill which includes a CMRS service charge.

Id. (quoting KRS § 65.7635(1) (emphasis in original)). At issue was whether TracFone was required to collect and remit these fees for its prepaid wireless services. The federal district court noted that a Kentucky state court had previously characterized an identical argument from another wireless provider as “the equivalent of a request for an exemption from a generally applicable tax.” *Id.* That judge found that while the “statute’s specific guidance on how to collect the fees [was] admittedly in conflict with prepaid providers’ chosen business model, [it] did not clearly create an implicit exemption to the general duty to collect the service fee.” *Id.* Taking the state court’s “convincing, well-reasoned and most thorough” analysis into consideration, the district court rejected TracFone’s argument.

The clear intent and language of the statute requires “each CMRS provider,” which would include TracFone, to collect the service fees from each customer to whom they provide service. To interpret the statute to apply only to post-paid providers would, indeed, create an exemption from prepaid providers. Because such exemption is not clearly required by the statute’s plain language, the Court cannot grant one.

Id. at 723.

In Nebraska, the 911 surcharge explicitly applied to “all users of prepaid wireless services” and instructed the Nebraska Public Service Commission (“PSC”) to “develop

methods for collection and remittance of surcharges from wireless carriers offering prepaid wireless services.” *TracFone Wireless, Inc. v. Nebraska Public Service Commission*, 279 Neb. 426, 428, 778 N.W.2d 452, 455 (Neb. 2010). The PSC published an order providing three preapproved methods and allowing prepaid wireless carriers that wished to utilize a different method to seek individual approval. *Id.* at 428-29, 778 N.W.2d at 456. TracFone’s first and second suggested methods were rejected. *Id.* at 429-30, 778 N.W.2d at 456. In challenging the rejections, TracFone also challenged the applicability of the requirement itself because “it is impossible for it to collect surcharges directly from its customers” and “if it cannot collect a surcharge directly from its customers, it is not required to collect the surcharge.” *Id.* at 432, 778 N.W.2d at 458. The court rejected TracFone’s argument.

In sum, TracFone’s argument is that if a wireless carrier is unable to collect a surcharge directly from a customer, the Legislature intended for *neither* the carrier nor the customer to pay for it. This is contrary to the stated intent of the 911 Act, and to a commonsense reading of the statutory model. TracFone’s choice of business model does not give it license to throw up its hands and pay nothing.

Id. at 434-35, 778 N.W.2d at 459-60 (emphasis original).

In Michigan, TracFone was successful in obtaining a determination that it was not required to pay the 911 fee because the statute at issue “requires CMRS providers and retailer to collect a monthly fee from their customers for ‘each CMRS connection that has a billing address in this state.’” *TracFone Wireless, Inc. v. Department of Treasury*, 2008 WL 2468462, *1 (Mich. App. 2008) (unpublished). TracFone argued “that because it does not have billing addresses or monthly bills for its customers, the 9-1-1 fee does not apply, so it was not required to collect or remit the fees.” *Id.* Because the

court interpreted “billing address” to require actually sending bills (which TracFone did not do) as opposed to knowing where the customer lived (which TracFone knew or could have known), the court agreed that the 911 fee did not need to be collected from TracFone’s prepaid wireless customers. *Id.* at *4. Unlike Michigan’s statute, the IECA does not include a “billing address” requirement, so that portion of the analysis is not useful. The court’s rejection of TracFone’s “monthly billing cycle” argument, however, is instructive:

We find it irrelevant that plaintiff does not have a monthly billing cycle. The plain language of the statute requires the fees to be computed on a monthly basis, but not necessarily collected on a monthly basis. There is no inherent restriction on having only one bill, or having a billing cycle of either longer or shorter than one month. The plain language of the statute does not mandate at least one “bill,” but most importantly, it requires a “billing address.”

Id. at *3.

While case law from other jurisdictions may not serve as binding precedent regarding the interpretation of the IECA, the rationale of other adjudicators in rejecting TracFone’s argument that its prepaid billing model excuses it from compliance with similar laws is instructive. As the Washington Court noted, TracFone chose its business model and cannot invent implied exemptions to shield that model from otherwise applicable requirements.

V. CONCLUSION

Despite TracFone’s attempts to characterize the statutory schemes as inapplicable to TracFone’s business model, neither the IECA nor the ITSAP exclude prepaid wireless carriers from the statutory schemes. Accordingly, TracFone must remit the IECA and the ITSAP fees if TracFone is to provide prepaid wireless services in

Idaho. Contrary to TracFone's position, to the extent TracFone's obligation to remit the ITSAP and the IECA fees are unresolved legal questions, TracFone must fully resolve such questions, as well as all of the other deficiencies in its Application and proposed service offering before ETC designation may be conferred. Thus, Intervenor encourage the Commission to find that TracFone's failure to comply with the requirements of the IECA and the ITSAP is tantamount to a *per se* failure to meet the public interest requirement under Section 214(e) of the Telecommunications Act of 1996 and this Commission's ETC Requirements Order.

DATED this 23rd day of May 2011.

By: Cynthia A. Melillo
Cynthia A. Melillo
GIVENS PURSLEY LLP
Attorneys for Idaho Telecom Alliance

By: Cynthia A. Melillo for
Molly O'Leary
RICHARDSON & O'LEARY, PLLC
Attorneys for CTC Telecom, Inc.,
dba CTC Wireless

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jean Jewell
Idaho Public Utilities Commission
472 West Washington Street
Boise, ID 83702
jean.jewell@puc.idaho.gov

- U.S. Mail
- Overnight Mail
- Hand Delivery
- Fax
- Electronic Mail

Neil Price
Idaho Public Utilities Commission
472 West Washington Street
Boise, ID 83702
Neil.price@puc.idaho.gov

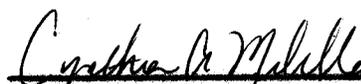
- U.S. Mail
- Overnight Mail
- Hand Delivery
- Fax
- Electronic Mail

Mitchell F. Brecher
Debra McGuire Mercer
GREENBERG TRAURIG, LLP
2101 L Street, NW, Suite 1000
Washington, DC 20037
brecherm@gtlaw.com
mercercdm@gtlaw.com

- U.S. Mail
- Overnight Mail
- Hand Delivery
- Fax
- Electronic Mail

Dean J. Miller
McDEVITT & MILLER LLP
420 West Bannock Street
Boise, ID 83702
joe@mcdevitt-miller.com

- U.S. Mail
- Overnight Mail
- Hand Delivery
- Fax
- Electronic Mail



Cynthia A. Melillo