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TracFone Wireless, Inc. v. State Respondent's Brief Dckt. 41868

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IN THE SUPREME COURT OF THE STATE OF IDAHO

TRACFONE WIRELESS, INC.)	
)	Supreme Court No. 41868-2014
Plaintiff/Counterdefendant/Appellant/Cross)	
Respondent)	Ada County Case No. CVOC 12-10005
)	
v.)	
)	
THE STATE OF IDAHO and IDAHO)	
EMERGENCY COMMUNICATIONS)	
COMMISSION,)	
)	
Defendants/Counterclaimants/Respondents,)	
)	
And)	
)	
ADA COUNTY and the ADA COUNTY BOARD)	
OF COMMISSIONERS, and IDAHO)	
ASSOCIATION OF COUNTIES, INC.,)	
)	
Intervenors/Respondents/Cross-Appellants.)	

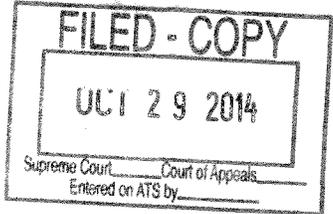
RESPONDENTS' ANSWERING BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho
in and for the County of Ada
District Case No. CV OC 12-10005

The Honorable Michael Wetherell, District Judge, presiding

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STEVEN L. OLSEN, ISB #3586
SHASTA KILMINSTER-HADLEY, ISB #7889
Deputy Attorneys General
Statehouse, Room 210
P.O. Box 83720
Boise, ID 83720-0010
*Attorneys for Respondents State of Idaho
and IECC*

DEAN J. MILLER
CHAS. F. MCDEVITT
McDevitt & Miller, LLP
420 West Bannock Street
P.O. Box 2564-83701
Boise, ID 83702
Attorneys for Appellant/Cross-Respondent



MICHAEL J. KANE
Michael Kane & Associates, PLLC
1087 W. River Street, Suite 100
P.O. Box 2865
Boise, ID 83701-2865
*Attorney for Intervenor/Counter-claimant
Idaho Association of Counties, Inc.*

GREG H. BOWER
SHERRY A. MORGAN
JAMES K. DICKINSON
Ada County Prosecutor's Office, Civil Division
200 W. Front Street, Room 3191
Boise, ID 83702
*Attorneys for Respondent/Cross-Appellant
Ada County*

RICHARD H. GREENER
Greener Burke Shoemaker, P.A.
950 W. Bannock Street, Suite 950
Boise, ID 83702

MITCHELL F. BRECHER
DEBRA MCGUIRE MERCER
Greenberg Traurig, LLP
2101 L Street, NW, Suite 1000
Washington, DC 20037
Attorneys for Appellant/Cross Respondent

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I. STATEMENT OF THE CASE

A. Nature of the Case

This appeal arises from a declaratory judgment action requesting a judicial determination as to whether, prior to January 1, 2014, the Idaho Emergency Communications Act, Idaho Code §§ 31-4801, et seq., obligated TracFone Wireless to collect the Idaho Emergency Communications Fee (“911 Fee”) from purchasers of its prepaid wireless services. Idaho Code § 31-4804 authorizes the assessment of the 911 Fee, which is used to fund the provision of 911 services in the various counties and cities of the state. The statute requires that telecommunications providers collect the fee from their customers, and then remit it to the correct county or public safety answering point (“PSAP”).

TracFone has consistently denied its obligation to collect the fee, both here and in other jurisdictions, usually citing its lack of monthly billing as the reason it should be exempt. The current litigation mirrors prior lawsuits between TracFone and other states with similar statutes; TracFone has been litigating this issue for over a decade, from one end of the nation to the other.

The Idaho statute provides that:

The fee shall be imposed 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.

Idaho Code § 31-4804(2). Initially, before the Idaho Public Utilities Commission (“IPUC”) TracFone argued, as it has in other states, that it was exempt from the statute’s mandate because of its prepaid billing model. Later, before the district court, TracFone asserted that it was not obligated to collect the fee because it is not even a telecommunications provider (surprisingly, given that TracFone had explicitly conceded that it *is* a telecommunications provider in briefing before the IPUC).

After reviewing extensive briefing on the matter, the district court held that the statute in question did, in fact, apply to TracFone’s business in Idaho. The court’s decision was largely

based on its determination that TracFone was unambiguously a “telecommunications provider” as that term is defined in the Act, and that it provides “access lines” to its customers in Idaho. TracFone subsequently petitioned the court to reconsider its decision and was denied reconsideration.

This appeal represents TracFone’s (presumably) final attempt to persuade an Idaho court that the plain language of the IECA either 1) explicitly exempted TracFone from the collection duty in Idaho Code § 31-4804(2), or 2) was too ambiguous to apply, whether because TracFone has been able to imagine a possible second meaning of the statutory language, however implausible, or because the awkward syntax makes it impossible to understand. Despite TracFone’s efforts, however, neither of these arguments can prevail against the clear, unambiguous meaning of the statute’s plain language.

B. Course of Proceedings Below and Statement of the Facts

The Idaho Emergency Communications Act (“IECA” or the “Act”) was originally enacted in 1988. Idaho Code § 31-4801. The Idaho State Legislature, recognizing that consolidated emergency communications systems are vital to public health and safety, enacted the IECA to finance the “initiation, maintenance, operation, enhancement and governance of consolidated emergency services” in Idaho. Idaho Code § 31-4801. Idaho Code § 31-4804 provides a mechanism for fulfilling that goal, authorizing the imposition of the emergency communications fee (“911 Fee”) on purchasers of access lines or interconnected VoIP service lines within each county or 911 service area.

The Fee pays for equipment, hardware and software, training of dispatchers, salaries and management of basic and enhanced consolidated emergency systems. *See* Idaho Code §§ 31-4801, 31-4804. It is also used to reimburse telecommunications providers for their costs in maintaining the system. *Id.* Although the IECA originally contemplated collection from users of wireline, or landline systems, the statute was amended to include services provided by wireless carriers in 2003. In 2007, recognizing the increasing number of choices in telecommunications technology available to the public, and determining that the financing of emergency systems

should reflect the ways in which the systems are utilized, *see* Idaho Code § 31-4801, the Legislature amended the statute again. The Amendment added VoIP service providers and “any person providing any other communications service” that connects its customers in Idaho to 911 to its definition of telecommunications providers. Idaho Code § 31-4802(13).

TracFone has been providing wireless telecommunications service in Idaho since 1997. (R. at 000433). TracFone is a non-facilities-based commercial mobile radio service (“CMRS”) provider. (R. at 000340). TracFone resells wireless telecommunications services on a prepaid basis. (R. at 000340). It is a common carrier as that term is defined in the Federal Communications Act of 1934 (“FCA”), 47 U.S.C. §§ 151 *et seq.* (R. at 000398).

Despite being authorized as a common carrier by the Federal Communications Commission (“FCC”), (R. at 000398), TracFone holds no licenses from the FCC. (R. at 000416). TracFone offers its services by purchasing airtime and/or capacity from other CMRS licensees. (R. at 000416). “Because TracFone does not own or lease any wireless telecommunications equipment, TracFone contracts with other telecommunications providers that are cellular licensees in the state of Idaho to provide service to TracFone’s customers using other carrier’s equipment (e.g., bandwidth on cellular towers operated by AT&T, Verizon and others).” (R. at 000268).

Idaho consumers purchase TracFone’s services on a prepaid basis from retail stores or from TracFone directly through its website. (R. at 000417). Since it began operating in Idaho, TracFone has failed to collect the 911 fee. (R. at 000496, R. at 000503).

This appeal follows several years of administrative and judicial proceedings on whether TracFone was subject to the statute’s mandatory collection duty.¹ TracFone’s failure to collect the fee was one of the reasons cited by the Idaho Public Utilities Commission (“IPUC”) in its initial Order denying TracFone’s application for Eligible Telecommunications Carrier (“ETC”)

¹ Following commencement of this litigation, the legislature adopted a point-of-sale collection mechanism for collecting the 911 Fee from purchasers of prepaid wireless service. That legislation took effect on January 1, 2014. Thus, the issue before this court is limited to whether TracFone was obligated to collect the fee under the IECA prior to that date.

status in Idaho. (R. at 000503). ETC status allows a telecommunications provider to provide low cost and free communications service subsidized by the federal government to eligible low-income customers. Due to TracFone's failure to collect the 911 Fee and another statutorily required fee, the IPUC found that it was not in the public interest to grant TracFone's request for designation as an ETC in Idaho. (R. at 000503). The IPUC directed TracFone to either remit the 911 fees or seek an official ruling from the IECC or other tribunal with relevant jurisdiction as to whether the fees applied to prepaid wireless telecommunications companies. (R. 000503). Following TracFone's Petition for Reconsideration of the IPUC's July 29, 2011 Order, the IPUC issued an Order affirming its prior Order, which TracFone appealed to this Court. (*See* R. 000502).

Before the appeal was heard, TracFone and the IPUC entered into a Stipulation with the following relevant condition: that TracFone agree to file a declaratory judgment action in State district court requesting a determination as to whether TracFone should be required to pay the "emergency communications fee" pursuant to Idaho Code § 31-4804. (R. 000515). Based on that Stipulation, on June 4, 2012, TracFone filed its Complaint for Declaratory Judgment against the State of Idaho ("State") and the IECC, presenting the following issue for determination by the Court:

[W]hether 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.

(R. at 000018). On June 29, 2012, the State and IECC filed an Answer and Counterclaim ("Counterclaim") requesting that the court:

1. Declar[e] and determin[e] that TracFone is legally obligated under Idaho Code § 31-4801, et seq. to collect and remit the Emergency Communications Fee[; and]
2. Order[] TracFone to remit past due fees accrued over the past nine (9) years that the fee has been applicable to wireless telecommunications providers in Idaho, whatever the total amount is determined to be.

(R. at 000025).

On May 17, 2013, the State and the IECC filed a Motion for Partial Summary Judgment on the question of whether the statute applied to TracFone. (R. at 000525). Ada County and the Idaho Association of Counties joined in the motion on May 17, 2013, (R. at 000327), and May 23, 2013 (R. at 000546), respectively. Following extensive briefing by the parties, the court issued a Memorandum Decision and Order in which it held that TracFone is unambiguously a telecommunications provider as defined under Idaho Code § 31-4802(13)(d), though not under Idaho Code § 31-4802(13)(b), that TracFone's customers with a service address or place of primary use in Idaho are subject to the 911 Fee, and that TracFone's prepaid billing model does not exempt it from the statutory obligation to collect the 911 Fees. (R. at 001048).

Following the district court decision, TracFone filed a Petition for Reconsideration in which it argued that: 1) evidence of differing opinions as to whether the statute applied to prepaid wireless, particularly given the difficulty inherent in requiring prepaid wireless providers to collect monthly was adequate to show that the IECA is ambiguous; 2) a syntactical error in Idaho Code § 31-4802(13) renders the statute incomprehensible, and thus ambiguous for purposes of defeating the State's motion for partial summary judgment; and 3) the court erred in holding that TracFone provides an "other communications service, since its service is the same as that provided by "wireless carriers." (*See* R. at 001673).

The district court denied TracFone's petition, stating that although it can be said that the service provided by TracFone is the same as the service provided by wireless carriers as that term is defined in the IECA, the way the statute is written creates a distinction. (R. at 001847). The court noted that the statute created one category for telecommunications services provided by "wireless carriers," and a different category for those communications services that are not provided by "wireless carriers" (and are not considered VoIP or exchange services). (R. at 00187). The court concluded that wireless service provided by an unlicensed reseller "is not, as TracFone admits, a communications service covered under the first three definitions provided; thus, it is "other" than the services described in those definitions, even though the result might be deemed a legal fiction." (R. 001847).

The court also pointed out that reading the IECA as a whole supports this conclusion, given the plain language of the statement of purpose codified in Idaho Code § 31-4801, and the language of Idaho Code § 31-4813 (as it existed prior to July 1, 2013, in which the legislature exempted prepaid calling cards from the 911 Fee requirements, but added that “[p]repaid 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; 2007 Idaho Laws Ch. 340 (H.B. 123). “Thus, in addition to the plain language of section 31-4802(13) that affirmatively includes unlicensed resellers of wireless service within the scope of the Act, the statute is also totally devoid of any language that would indicate a legislative intent to except these resellers from the Act, or which could at least create ambiguity on the subject.” (R. at 001849).

The court reiterated its opinion that TracFone had not offered a reasonable alternative construction of the statutory language, and that merely presenting a proposed alternative interpretation of a statute does not create ambiguity, particularly when the proffered interpretation is at odds with the statute as read as a whole. (R. at 001854-001855). Finally, the court found TracFone’s argument as to the problematic syntax of Idaho Code § 31-4802(13) to be unpersuasive; “the Court believes that these errors in no way impact the ability of section 31-4802(13) to unambiguously convey the legislature’s intent.” (R. at 001852).

Following the court’s order on reconsideration, TracFone moved for a 54(b) certification, (R. at 001860), and filed this appeal.

II. ISSUES PRESENTED

The issues presented, as framed by the Respondent, are as follows:

- A. Whether the District Court erred in determining that, TracFone is a “telecommunications provider” for purposes of the IECA.
- B. Whether the District Court erred in determining that, prior to January 1, 2014, Idaho Code § 31-4804 (2) applied to TracFone Wireless, Inc., obligating the company to collect the 911 Fee from its customers.
- C. Whether the District Court erred in striking evidence presented by TracFone in support of its memoranda.

D. Whether the State and the IECC should be awarded attorney's fees on appeal.

III. STANDARD OF REVIEW

When evaluating a lower court's decision as to the meaning of a statute, this Court exercises free review. *Doe v. Boy Scouts of America*, 148 Idaho 427, 430, 224 P.3d 494, 497 (2009). The principles governing how courts interpret statutes are well established in Idaho law. Statutory interpretation starts with the plain meaning of the statute. *State v. US*, 134 Idaho 940, 944, 12 P.3d 1284, 1288 (2000). The literal words of the statute are the clearest expression of what the legislature intended. Idaho Code § 73-113. "The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. . . . Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings." *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 310, 208 P.3d 289, 292 (2009) (citations omitted).

"If a statute is not ambiguous, the Court does not construe it, but simply follows the law as written." *Verska v. St. Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011) (quoting *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003)). "[W]here statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." *Id.* (citation omitted). "A statute is ambiguous where the language is capable of more than one reasonable construction." *Ada County Prosecuting Attorney v. 2007 Legendary Motorcycle*, 154 Idaho 351, 353, 298 P.3d 245, 247 (2013) (citation omitted). Ambiguity is not established merely because different interpretations are presented to a court. If this were the case then all statutes that are the subject of litigation could be considered ambiguous. *Id.*, 298 P.3d at 248. Indeed, even differing opinions from two courts would not necessarily make a statute ambiguous. *Id.* at 354, 298 P.3d at 248. "A statute is not ambiguous merely because an astute mind can devise more than one interpretation of it." *Id.*, 298 P.3d at 248. The rationale behind this precept is simple:

The plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover. Rule of construction to consider object and purpose has no place when words of act leave no doubt.

Lowe v. Idaho Transp. Dept., 878 F. Supp. 2d 1166, 1174 (D. Idaho 2012) (citation omitted).

While rules of sentence structure and grammar are legitimate considerations when interpreting a statute, “ultimately our task is to interpret the statute not as a professor of English grammar would parse it but as the legislature intended it.” *State v. Paciorek*, 137 Idaho 629, 632, 51 P.3d 443, 446 (Idaho Ct. App. 2002). “Neither rules of grammar, punctuation nor syntax are decisive of the construction of a statute, if their strict observance would render ineffective any portion of it.” *De Gorter v. Fed. Trade. Comm’n*, 244 F.2d 270, 278 (9th Cir. 1957) (footnote omitted). Courts should not apply rules of syntax to defeat evident legislative intent. *Id.* (footnote omitted). Indeed, a court does not have the discretion to avoid the plain language of a statute even when applying the statute as written would be “patently absurd, or would produce absurd results. . . .” *Verska*, 151 Idaho at 896, 265 P.3d at 509.

IV. ARGUMENT

A. **The District Court correctly held that TracFone is a “telecommunications provider” as that term is used in the IECA.**

TracFone seeks to have this Court overturn the district court’s holding that it is a telecommunications provider as defined by the IECA. It offers several arguments why the Court should do so, explaining that the plain language of the Act’s definition of telecommunications provider should be construed as 1) explicitly excluding prepaid wireless, 2) ambiguous because there are other interpretations on whether it applies, or 3) so impossible to understand that it cannot be attributed any meaning at all. None of these arguments can stand in the face of the plain language of the statute which unambiguously defines TracFone as a telecommunications provider.

TracFone’s resolute denial of its status is belied by its own admission in a previous filing before the IPUC that it *is*, in fact, a telecommunications provider. In a Petition for

Reconsideration of an IPUC Order finding that, “TracFone clearly falls within the definition of “telecommunications provider” found in the IECA,” (R. at 000932) TracFone stated the following:

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.” 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.*²

(R. at 000488) (footnote omitted) (emphasis added).

It is surprising, then, for TracFone to argue now that it is not and never has been a telecommunications provider under the IECA. Nonetheless, despite the inconsistency of TracFone’s arguments, the statutory language of the IECA remains constant, and continues to provide a clear expression of the legislature’s intent to require every provider of access lines to customers in Idaho to collect the 911 Fee in fulfillment of the Act’s stated purpose: to fund the maintenance, operation, and enhancement, inter alia, of emergency systems in Idaho. *See Idaho Code § 31-4801.*

a. TracFone is a telecommunications provider as that term is clearly and unambiguously defined by Idaho Code § 31-4802(13).

The Idaho Emergency Communications Act defines “telecommunications provider” as any person providing:

² The argument that the statute exempts providers who do not bill on a monthly basis was the only legal theory espoused by TracFone before the IPUC. Indeed, TracFone’s Complaint relies only on that one issue, and contains no assertion that TracFone is not a telecommunications provider under the Act: “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.” (R. at 000014).

- (a) Exchange telephone service to a service address within this state; or
- (b) Any wireless carrier providing telecommunications service to any customer having a place of primary use within this state; or
- (c) Interconnected VoIP service to any customer having a place of primary use within the state; or
- (d) 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.

Idaho Code § 31-4802(13). Idaho Code § 31-4802(15) further defines wireless carrier as

a cellular licensee, a personal communications service licensee, 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.

TracFone argues that it is not a wireless carrier under this definition, because it is neither a licensee, nor a “Specialized Mobile Radio” provider. Though the latter term is not capitalized in the statute, TracFone contends that it is a technical term of art used to describe a particular kind of radio service not offered by TracFone. Under TracFone’s theory it is not a wireless carrier providing telecommunications service in Idaho, and therefore, is not a telecommunications provider under Idaho Code § 31-4802(13)(b).

The State and the IECC originally argued that TracFone was a wireless carrier under Idaho Code § 31-4802(15), reading the words “specialized mobile radio providers” with their everyday, common meaning. However, even if TracFone is correct in its reading of Idaho Code § 31-4802(15), it is still a telecommunications provider as defined by Idaho Code § 31-4802(13). Idaho Code § 31-4802(13) enumerates the most prominent categories of telecommunications providers at the time the statute was enacted: landline providers (exchange service), wireless carriers, and providers of Voice over Internet Protocol (“VoIP”). But the legislature did not stop there. The legislature included a fourth category of telecommunications providers: those providing any *other* communications service that can connect a customer with a 911 dispatch center. The reason for this fourth category is clearly stated in the Act’s statement of purpose, Idaho Code § 31-4801:

- (1) The legislature of the state of Idaho finds that:

(b) Changes in technology and the rapid growth of communications media have demonstrated that financing such systems solely by a line charge on subscribers to wireline services does not reflect utilization of emergency communications systems by subscribers to wireless and *other forms of communications systems*;

* * *

(e) In order to protect and promote the public health and safety, and to keep pace with advances in telecommunications technology and the various choices of telecommunications technology available to the public, there is a need to plan and develop a statewide coordinated policy and program to ensure that enhanced 911 services are available to all citizens of the state and in all areas of the state.

(2) Therefore, it is hereby declared that the intent and purpose of the provisions of this act are to:

(a) Provide authority to counties and 911 service areas to impose an emergency communications fee on the use of telephone lines, wireless, VoIP or *other communications services* that connect an individual dialing 911 to an established public safety answering point; . . .

Idaho Code § 31-4801 (emphasis added). So, the legislature expanded the statute's application to include VoIP and wireless services, and, appreciating the difficulty of the maintaining pace through legislation with the rapid growth of new technologies, included a fourth category to capture anything else that could provide access to 911 services in the state.

In Idaho Code § 31-4802(13), the "other" means anything that falls out of the enumerated categories, that is to say other than those persons providing exchange or VoIP service, and other than wireless carriers providing telecommunications service. Thus, if a person or company does not fit into those categories, yet provides a communications service that connects its customers to 911, it is a telecommunications provider. So, if TracFone is not a wireless carrier as it claims (and all parties agree that it does not provide exchange or VoIP service) the question becomes simply whether it provides a communications service that allows its customers to connect to a public safety answering point in Idaho by dialing 911. TracFone has already admitted that it does,³ so it falls squarely within the definition provided in Idaho Code § 31-4802(13)(d).

³ In a pleading before the IPUC, TracFone stated, "TracFone does not dispute that its service meets the first two prongs of the statutory language [of Idaho Code § 31-9804]: 1) it provides services to purchasers of access lines and 2) those purchasers have service addresses within the county or 911 service area." (R. at 000467-000468). In another statement submitted to the IPUC, TracFone reiterated that, "TracFone's service is provided to purchasers within a county or 911 service area in Idaho." (R. at 000488). It is equally undisputed that the service provided by TracFone enables its customers to access public safety answering points by dialing 911; TracFone repeatedly touted

TracFone’s principal argument for why it is not a telecommunications provider under Idaho Code § 31-4802(13)(d) is that it provides wireless service, and wireless service is covered in subsection (b). TracFone even provides its own version of Idaho Code § 31-4802(13) to illustrate its point, asserting that “[i]t is therefore appropriate to read the Legislature’s intent to have covered in the definition of “telecommunications provider” those entities that *provide* the following types of *service*:

- (a) Exchange (wireline) **service**; or
- (b) Wireless telecommunications **service**; or
- (c) Voice over Internet Protocol (VoIP) **service**; or
- (d) Any other communications **service**.

Appellant’s Opening Brief at 27 (emphasis in original). The problem is, the statute simply does not use this language, and the language that is used must be attributed its plain, everyday meaning. Idaho Code § 31-4802(13) actually defines telecommunication provider as any person providing:

- (a) Exchange telephone service . . . ; or
- (b) Any wireless carrier providing telecommunications service . . . ; or
- (c) Interconnected VoIP service . . . ; or
- (d) A provider of any other communications service

Despite TracFone’s desire to equate the two, “any wireless carrier providing telecommunications service” does not mean the same thing as “wireless telecommunications service” or “wireless service.”⁴

Neither TracFone, nor the Court can change the statutory language adopted by the legislature. Rather, it must be given its plain effect and applied as written. This is why TracFone’s repeated declarations that it provides wireless service and therefore “falls squarely and unambiguously within the ambit of subsection (b)” (Appellant’s Opening Brief at 29), are

in multiple submissions to the IPUC that it provides 911 access to all of its customers and is compliant with the FCC’s 911 requirements. (R. at 000377).

⁴ In fact, using the section’s plain language, it is apparent that any kind of telecommunications service provided by a wireless carrier would come under the purview of subsection (b), which couches its definition on the *provider*, and not the service. If, for example, Verizon began selling satellite-based telecommunications service to Idaho customers, it would be a telecommunications provider under subsection (b) despite the fact that it is not providing wireless service per se.

unavailing; because *the language* of subsection (b) specifies a type of *provider*, not a type of service. TracFone’s suggestion that the two terms are synonymous runs afoul of the principles of statutory interpretation: that the clearest expression of the legislature’s intent is the language of the statute itself and if it is clear it must be applied as it reads.

The same fundamental error stymies TracFone’s argument that the lower court decision renders subsection (b) a nullity. “The implication of the district court’s conclusion results in a reading of subsection (d) that swallows the communications services already covered in the preceding subsections.” Appellant’s Opening Brief at 34. This argument again ignores the statute’s plain language and pretends that subsection (b) covers services, when instead it covers a type of provider. What’s more, even if subsection (d) did encompass another subsection, statutory catch-all provisions often do, and are routinely upheld by this Court. See *State v. Anderson*, 154 Idaho 54, 294 P.3d 180 (2013), in which this Court was charged with interpreting a kidnapping statute which read in pertinent part, “with intent to keep or conceal it from its custodial parent, guardian or other person having lawful care or control thereof. . . .” The Court reasoned that “[t]he catch-all provision ‘or other person having lawful care or control’ would encompass [the father] regardless of whether he is considered a custodial parent, and held that both determinations applied. *Id.* at 57-58, 294 P.3d at 183-184. There was no apparent concern that the catch-all nullified the other categories. *See id.*

TracFone asserts that if the argument above fails to persuade the Court that Idaho Code § 31-4802(13) unambiguously does not apply to TracFone, at the least it proves the statute is ambiguous. This too is unavailing; TracFone’s argument—we provide exactly the same service as wireless carriers so subsection (b) should apply to us, but you can’t apply subsection (b) to us because we are not wireless carriers—presents an imaginary quandary. This manufactured cunundrum *only* exists if subsection (d) is ignored entirely. Subsection (d) removes all doubt that TracFone is a telecommunications provider under the IECA.

A statute is only ambiguous if it is capable of more than one *reasonable* construction. *2007 Legendary Motorcycle*, 154 Idaho at 353, 298 P.3d at 247 (emphasis added). TracFone is

unable to provide any *reasonable* alternative construction of the Idaho Code § 31-4802(13) that doesn't run counter to the plain language used by the legislature in drafting it. This is because there is none. Thus, being unable to provide any plausible alternative interpretation of the statute, TracFone instead suggests that the Court simply ignore it altogether.

Idaho Code § 31-4802(13) is plain on its face and the district court correctly held that the definition of telecommunication provider applies to Tracfone.

b. The minor syntactical errors in Idaho Code § 31-4802(13) do not make the statute ambiguous.

Having first asked this Court to essentially ignore Idaho Code § 31-4802(13)(d) in its entirety, TracFone then argues that the syntactical error that occurs when reading subsections (b) and (d) together with the introductory phrase of Idaho Code § 31-4802(13), render the statute “incomprehensible”.⁵ Appellant’s Opening Brief at 49.

The district court correctly determined that incorrect syntax or awkward sentence structure does not diminish the impact of the clear, unambiguous expression of the legislature’s intent in Idaho Code § 31-4802(13)(d). As it stated in its Memorandum Decision and Order re: TracFone’s Motion for Reconsideration:

TracFone’s conclusory assertion that these errors by virtue of their mere existence introduce ambiguity into the statute or render it incoherent are unpersuasive, and the Court continues to believe that the drafting errors in section 31-4802(13) introduce no ambiguity into this section or into the Act read as a whole.

(R. at 001853) (citation omitted). This decision is in line with other decisions in Idaho and federal courts. While rules of sentence structure and grammar are legitimate considerations when interpreting a statute, “ultimately our task is to interpret the statute not as a professor of English grammar would parse it but as the legislature intended it.” *State v. Paciorek*, 137 Idaho 629, 632, 51 P.3d 443, 446 (Idaho Ct. App. 2002) (holding that an adjective modified all the acts

⁵ If read as a continuation of the introductory phrase, subsection (b) reads as follows: “Telecommunications Provider” means any person providing: any wireless carrier providing telecommunications service to any customer having a place of primary use within this state.” Subsection (d) shares the same grammatical defect: “Telecommunications Provider” means any person providing: 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. . . .”

in a statute, despite the incorrect placement of commas and the disjunctive “or”). As the Ninth Circuit Court of Appeals stated:

Neither rules of grammar, punctuation nor syntax are decisive of the construction of a statute, if their strict observance would render ineffective any portion of it. Because of this the Supreme Court has stated: “It has often been said that punctuation is not decisive of the construction of a statute. * * * Upon like principle we should not apply the rules of syntax to defeat the evident legislative intent.”

De Gorter v. Fed. Trade. Comm’n, 244 F.2d 270, 278 (9th Cir. 1957) (footnote omitted). In that case, the court acknowledged that the statute in question was constructed incorrectly, but stated that “we cannot destroy its obvious meaning because, in a slow and arduous process of the enactment of the statute, a clause which has a distinct meaning was inserted in the wrong place.” *Id.* Other more recent federal decisions affirm that statutory provisions do not become ambiguous simply because they are poorly drafted. *In re Reswick*, 446 B.R. 362, 370 (B.A.P. 9th Cir. 2011); *see also In re Varner*, 2009 WL 1458707 (Bankr. D. Idaho 2009) (courts apply even poorly worded statutes as written).

Plain, unambiguous language, such as that in Idaho Code § 31-4802(13)(d), cannot be read out of a statute simply because of “inartful” drafting. TracFone has cited no precedent in Idaho law that would allow for the invalidation of plain and unambiguous statutory language simply because it appears in sentences that cannot be diagrammed properly. TracFone’s request that this Court simply abandon the entire subsection on the basis of syntax contravenes the clear intent of the legislature, runs counter to Idaho law and should be denied.

B. The 2013 Legislation has no bearing on whether the IECA applied to TracFone prior to January 1, 2014.

Having correctly determined that TracFone is a telecommunications provider, and that it provides access lines in Idaho (TracFone has never disputed this), the district court properly held that Idaho Code § 31-4804(2) obligated TracFone to collect the 911 Fee from its customers, prior to January 1, 2014. Idaho Code § 31-4804(2) states that:

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.

(Emphasis added).

TracFone contends that the court should have looked to legislation enacted in 2013 that created a new method for collecting the 911 Fee from prepaid wireless customers, to determine whether the prior version of the IECA applied to TracFone. The court declined to do so, stating that “where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature. Because the Court has concluded that the relevant language of the statute is unambiguous, there is no occasion for the Court to consult extrinsic evidence like pending amending legislation, and the Court will not do so.” (R. at 001856-001857).

The district court properly declined to consider the 2013 legislation in its determination of whether the prior version of the IECA applied to TracFone. Yet, even if it had, the 2013 legislation provides nothing relevant to the analysis of whether the unequivocal mandate of Idaho Code § 31-4804(2) applied to TracFone. The 2013 legislation simply provides a new mechanism for 911 Fee collection that is specific to prepaid wireless service. Its existence does nothing to suggest that prepaid was not covered by the IECA before. In fact, the statement of purpose of the legislative bill for the 2013 legislation expressly says: “[t]he question of whether the existing law applies to prepaid wireless service is currently subject to pending litigation. This bill provides no inference on the question of whether current statutes apply to prepaid wireless service.” (R. at 001650). (House Bill No. 79 was ultimately replaced with House Bill 0193, but the statement of purpose retained the statements quoted above.)

It certainly is no surprise that a new collection mechanism should be included in the IECA, as there has never been a dispute about the fact that monthly collection was inconvenient for telecommunications providers offering a prepaid service. And if for example, it became the industry standard for VoIP service to be billed in a wholly novel way, it’s possible the legislature

might contemplate adding a third collection mechanism. But that would not imply that VoIP was not previously obligated to collect the 911 fee.

The 2013 legislation, offered by TracFone was offered as extrinsic evidence of the meaning of a clear and unambiguous statute, was rightly disregarded by the lower court in its determination. Even if it had been considered, it provides no relevant information as to the applicability of the IECA to TracFone prior to January 1, 2014.

C. The District Court was correct in striking irrelevant evidence presented by TracFone in support of its memoranda.

TracFone asserts that the district court erred in striking hundreds of pages of statements and opinions of IECC Members and telecommunications carriers, among others, as to the applicability of the IECA. TracFone apparently offered the statements as evidence both of the Act's ambiguity and extrinsic evidence of legislative intent.

As stated above, where a statute is unambiguous, as is the case here, courts do not look for other evidence of legislative intent. Even if that were not the case here, the statements cited by TracFone had no probative value with regard to the questions before the Court, which were 1) whether TracFone is a telecommunications provider under Idaho Code § 31-4802(13); 2) whether it provides access lines under Idaho Code § 31-4802(1); and 3) whether it is therefore obligated to collect a fee pursuant to Idaho Code § 31-4804.

The statements referenced by TracFone do not address the language of the Act itself. There is no opinion offered by commission members as to whether TracFone fits within the definition of "telecommunications provider" provided by the Act, or whether it provides "access lines" as those are defined in the Act. There is no discussion that would even suggest that the commission members had read those particular subsections of the Act, much less engaged in a discussion as to their meaning or applicability.

What's more, even if the statements did explicitly discuss the meaning of the relevant statutory provisions, statements by individual Commission members are no more a reflection of the IECC's position on the scope of the Act than the comments of an individual legislator are a

reflection of the legislature as a whole. And, under Idaho law, even the statement of a legislator who participated in the enactment or amendment process is not to be considered as evidence of legislative intent. *Gillihan v. Gump*, 140 Idaho 264, 269, 92 P.3d 514, 519 (2004) (The court will not consider the post-enactment statement of a single legislator to determine legislative intent, because “the beliefs of one legislator do not establish that the legislature intended something other than its express declaration.”) (abrogated on other grounds by *Gonzalez v. Thacker*, 148 Idaho 879, 231 P.3d 524 (2009)).

The only evidence of the IECC’s official position on the matter is the formal action taken by it in this litigation and before the IPUC, all of which supports the contention that prepaid wireless providers should have been (and should be) collecting the 911 Fee pursuant to the statute. Thus, the district court, after determining that the evidence offered contained no official statement or official IECC position on the issue before it (R. at 001842), properly struck the evidence as irrelevant.⁶

[It] is undisputed that the only official position taken by the [IECC] on this issue is that TracFone was and is obligated under the Act; there is no statement by the [IECC] endorsing TracFone’s reading of the statute for the Court to consider as evidence of ambiguity in the statute. The unadopted statements of individual [IECC] members are simply entitled to no weight with regard to the question presented and are irrelevant.

(R. at 001843).

The district court decision to grant the motions to strike TracFone’s evidence was proper and should be affirmed.

⁶ What’s more, even if the IECC had taken an official position on the issue, it would not stand if it departed from the language of an unambiguous statute. Even a state agency’s interpretation of statutes it is entrusted to administer will not stand if that interpretation conflicts with the plain language of the statute, because the court “must give effect to the unambiguously expressed intent of Congress.” *J.R. Simplot Co., Inc. v. Idaho State Tax Comm’n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991) (citation omitted). Courts cannot follow an agency’s construction if it contradicts the clear expression of the legislature. *Hamilton ex rel. Hamilton v. Reeder Flying Serv.*, 135 Idaho 568, 572, 21 P.3d 890, 894 (2001).

D. The State and the IECC should be awarded attorney's fees on appeal, and TracFone's request for attorney's fees should be denied.

TracFone asks this Court to award it attorneys fees on the basis that the State, the IECC and the Counties have acted without a reasonable basis in fact or law, stating that they “clearly knew that there was no existing basis at law” to impose the 911 Fee collection obligation on TracFone. This request ignores a rather large elephant in the room: the plain language of the IECA, which unambiguously applied to TracFone prior to January 1, 2014. Further, an entirely separate agency, the IPUC, determined, even after TracFone’s Petition for Reconsideration, that TracFone was “clearly a telecommunications provider” and that it was obligated to collect and remit the 911 Fee. (R. at 000932). Finally, the district court provided a well-reasoned opinion supporting the position taken by the State and the IECC. To argue that there is no reasonable basis in law for the State and the IECC’s position is nonsense.

On the contrary, the fact that TracFone has pursued this appeal despite all of the foregoing, and despite having taken contradictory positions as to its status as a telecommunications provider, demonstrates that it is TracFone that has acted without a reasonable basis in fact or law. For that reason, the State and the IECC respectfully request that the Court deny TracFone’s request for attorney’s fees and that the Court award reasonable attorney’s fees to the State and the IECC, pursuant to Idaho Code § 12-117(1).

V. CONCLUSION

For the foregoing reasons, the State and the IECC respectfully request that the Court affirm the lower court’s determination that TracFone is a telecommunications provider pursuant to Idaho Code § 31-4802(13), and that, prior to January 1, 2014, TracFone was obligated to collect and remit the 911 Fee pursuant to Idaho Code § 31-4804(2). The State and the IECC also request that the Court affirm the district court decision to strike evidence offered by TracFone, deny TracFone’s request for attorney’s fees, and award reasonable attorney’s fees to the State and the IECC.

DATED this 29th day of October, 2014.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By 
SHASTA KILMINSTER-HADLEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October, 2014, I caused to be served a true and correct copy of the foregoing by the following method to:

Dean J. Miller
Chas. F. McDevitt
McDevitt & Miller, LLP
420 West Bannock Street
P.O. Box 2564-83701
Boise, ID 83702

- U.S. Mail
- Hand Delivery
- Certified Mail, Return Receipt Requested
- Overnight Mail
- Facsimile: (208) 336-9612
- Email: joe@mcdevitt-miller.com
chas@mcdevitt-miller.com

Mitchell F. Brecher
Debra McGuire Mercer
Greenberg Traurig, LLP
2101 L Street, NW, Suite 1000
Washington, DC 20037

- U.S. Mail
- Hand Delivery
- Certified Mail, Return Receipt Requested
- Overnight Mail
- Facsimile: (202) 261-0152
- Email: brecherm@gtlaw.com
mercerdm@gtlaw.com

Richard H. Greener
Greener Burke Shoemaker, P.A.
950 W. Bannock Street, Suite 950
Boise, ID 83702

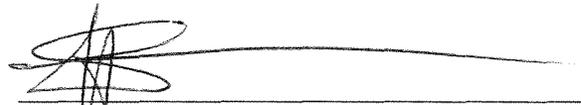
- U.S. Mail
- Hand Delivery
- Certified Mail, Return Receipt Requested
- Overnight Mail
- Facsimile: (202) 261-0152
- Email: rgreener@greenerlaw.com
tlloyd@greenerlaw.com

Michael J. Kane
Michael Kane & Associates, PLLC
1087 W. River Street, Suite 100
P.O. Box 2865
Boise, ID 83701-2865
*Attorney for Intervenor/Counter-claimant
Idaho Association of Counties, Inc.*

- U.S. Mail
- Hand Delivery
- Certified Mail, Return Receipt Requested
- Overnight Mail
- Facsimile: (208) 342-2323
- Email: mkane@ktlaw.net

Greg H. Bower
Sherry A. Morgan
James K. Dickinson
Ada County Prosecutor's Office, Civil
Division
200 W. Front Street, Room 3191
Boise, ID 83702
*Attorneys for Intervenor/Counter-defendant
Ada County and the Ada County Board of
Commissioners*

- U.S. Mail
- Hand Delivery
- Certified Mail, Return Receipt Requested
- Overnight Mail
- Facsimile: (208) 287-7719
- Email: smorgan@adaweb.net
jimd@adaweb.net



SHASTA KILMINSTER-HADLEY
Deputy Attorney General