

NO. 43805-4

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

TRACFONE WIRELESS, INC., a Delaware Corporation,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

TracFone's complaint describes nothing more than a simple disagreement with the Department over how retail sales taxes apply to sales of airtime cards by independent retailers to customers. The most significant defect in TracFone's complaint relates to standing: TracFone has neither paid, collected, remitted, nor been assessed the retail sales taxes it claims would be excessive in transactions between *other parties*. Accordingly, TracFone cannot meet the requirements for bringing a court action to challenge a tax under RCW 82.32.150 or RCW 82.32.180, regardless of the relief it seeks. In addition, since TracFone does not have a direct interest, it fails to meet the conditions for obtaining declaratory relief under general statutory and common law standards. TracFone's disagreement with the Department does not present a claim for which judicial relief may be granted.

Even if TracFone could show its claims were properly before the court, the claims are without legal merit. TracFone misapplies RCW 82.14B.030(6) to a transaction in which it has no applicability, the sale of airtime cards by independent retailers to consumers, conjuring an alleged statutory violation will never occur. And TracFone's constitutional claims, which are all based in part on its flawed statutory interpretation, fail to state a cognizable claim for violation of its constitutional rights.

For these reasons, the trial court properly dismissed TracFone's new action, and its dismissal order should be affirmed.

II. COUNTERSTATEMENT OF THE FACTS

A. TracFone's Business

TracFone sells cell phones and prepaid wireless telephone services. CP at 70; *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 278, 242 P.3d 810 (2010). TracFone sells its wireless services online through its Internet site, including handsets (cell phones) and airtime cards, as well as through 70,000 independent retail locations throughout the country. *TracFone*, 170 Wn.2d at 278.

When retailers sell airtime cards for use with TracFone cell phones, the cards have no value until activated after sale to the subscriber. *Id.* Activation occurs when the subscriber provides TracFone with the cell phone's serial number and the zip code in which the subscriber will primarily use the phone. *Id.* TracFone sends a code to the cell phone that programs it with the correct home area, telephone number, and rating information. *Id.*

A TracFone cell phone has a service end date. *Id.* Airtime minutes must be used prior to expiration of the service end date or they expire. *Id.* If minutes are not used and no new minutes are added prior to expiration, the cell phone service is deactivated. *Id.* If the subscriber does

purchase additional airtime prior to the service end date, the end date is extended by the service period that applies for the number of minutes added. *Id.* at 279.

B. TracFone's Prior Litigation

The state E-911 tax became effective January 1, 2003, imposing a county and state E-911 tax on “all radio access lines whose place of primary use is located within the state.” Laws of 2002, ch. 341, § 8; RCW 82.14B.030(2), (6). Initially, TracFone paid the tax itself, but by the end of 2003 it had stopped paying the tax and did not collect the tax from its subscribers. *TracFone*, 170 Wn.2d at 280. The Department assessed the E-911 tax, and after paying the assessment, TracFone filed a refund suit, claiming that the statutes governing the state E-911 tax did not apply to prepaid wireless subscribers (as opposed to wireless service customers who receive monthly billings during their service contract). *Id.* at 280-81. The trial court granted summary judgment to the Department.

On direct review, the Supreme Court affirmed summary judgment for the Department, holding that the plain language of former RCW 82.14B.030(4) (currently RCW 82.14B.030(6)) imposed the state E-911 tax on TracFone's prepaid cell phone service. *TracFone*, 170 Wn.2d at 283 (“Use of the word ‘all’ shows legislative intent that each and every radio access line (telephone number) be taxed, whether the service is

telephone service or cell phone service, without implied exceptions”). The Court rejected TracFone’s multiple arguments, which it characterized as “premised chiefly on the way in which [TracFone] conducts its business” *Id.* at 283 & 283-97.

Although the Court recognized that TracFone’s prepaid wireless service model posed some challenges for collecting the tax from subscribers, it concluded that those challenges were not insurmountable and that TracFone had choices. In sum,

[R]egardless of claimed difficulties in collecting the tax from the subscribers, the tax may lawfully be assessed with payment made by TracFone. RCW 82.14B.42(2) unambiguously makes the provider of the cell service ultimately responsible for paying the tax if it is not collected from the subscriber.

170 Wn.2d at 297.

C. TracFone’s Current Litigation

Eleven months after the Court issued the *TracFone* decision, TracFone filed a new lawsuit in Thurston County Superior Court seeking declaratory and injunctive relief. TracFone requested the court to declare that TracFone’s “Price Adjustment Plan,” relating to sales of prepaid cards through third-party retailers, was in compliance with Washington law. CP at 8 (Complaint). Under that Plan, TracFone intended to adjust its wholesale pricing for the cards “by calculating the E-911 Tax due for each

card . . . then incorporating the appropriate E-911 Tax into the total wholesale sales price” on each card sold for resale. CP at 6, ¶ 13.

TracFone alleged that it asked the Department to confirm that retailers could effectively deduct an amount equivalent to the E-911 tax from the retail sales price for purposes of calculating the retail sales tax on the sale. *Id.*, ¶ 16. Because the Department declined to do so, TracFone also sought a declaration that the Department’s position was contrary to law. CP at 8, ¶ 1. Additionally, TracFone sought temporary and permanent injunctive relief requiring the Department to devise a system for collecting the E-911 tax on TracFone’s sales of airtime cards through retailers (as opposed to TracFone’s Internet sales) and enjoining the Department from collecting the E-911 tax until the Department devised that system. *Id.*, ¶ 2.

The Department moved to dismiss TracFone’s complaint because RCW 82.32.150 precludes taxpayers from obtaining declaratory and injunctive relief except to challenge an assessment on constitutional grounds. CP at 10-18. The trial court granted TracFone a continuance to amend its complaint to allege constitutional claims. CP at 66-68.

In its amended complaint, TracFone again sought declaratory and injunctive relief. As before, TracFone alleged that it created a “Price Adjustment Plan” to adjust its prepaid pricing for airtime cards to

incorporate the E-911 tax due under each card into the wholesale price at which it sells the cards to retailers for resale to customers. CP at 71, ¶ 13.

TracFone allegedly advised the Department of its “Plan.” *Id.*, ¶ 14. According to TracFone, the Department deemed the Plan a “method of recouping the E-911 tax from its customers after TracFone itself pays the E-911 tax on behalf of its customers, rather than a Washington Supreme Court approved method of collecting the E-911 Tax from TracFone’s customers.” CP at 71, ¶ 15. TracFone further alleged that in these sales of prepaid cards by third-party retailers, the “amount calculated for the E-911 tax should be excluded from the amount on which Washington retail sales tax is calculated.” CP at 71-72, ¶ 18. The basis for this contention is RCW 82.14B.030(6), which declares that the E-911 tax “is not subject to the state sales and use tax.” CP at 71, ¶ 17.

TracFone also alleged that by adjusting its wholesale pricing of airtime cards to include a sum “allocable” to the E-911 tax in the retail price charged to customers purchasing prepaid cards, TracFone is “collecting” the E-911 tax, and the Department’s refusal to accept its “Price Adjustment Plan” violates state statutes as well as the state and federal substantive and procedural due process clauses, the state and federal equal protection and privileges and immunities clauses, and the interstate commerce clause. CP at 71, ¶ 16, 72-74.

One point TracFone's amended complaint leaves unaddressed is how the higher wholesale and retail prices under TracFone's "Price Adjustment Plan" result in actual remittance of the E-911 tax to the Department. The Department has always understood the Plan to mean that TracFone intended to pay the E-911 tax itself and raise its wholesale prices on sales to retailers in order to recoup that cost. *See* CP at 71, ¶ 15 (alleging the Department deemed the Plan "to be a method of *recouping* the E-911 Tax . . . after TracFone itself pays the E-911 Tax") (emphasis in original). This understanding also is consistent with the E-911 tax statutes and the Supreme Court's holding in *TracFone*. *See, e.g., TracFone*, 170 Wn.2d at 292 ("Either TracFone must collect and pay over to the Department the taxes, or it must pay them itself.")

In this appeal, TracFone has indicated for the first time that it intends for *retailers* to remit the E-911 tax. According to TracFone, when it makes the adjustment to its wholesale pricing to cover the E-911 tax, "[r]etailers could then remit E-911 tax to the department, as well as the sales tax attributable to the purchase price other than the portion comprising the E-911 tax." TracFone Brief at 13.

TracFone sought a declaratory judgment approving its Price Adjustment Plan and declaring the Department's interpretation of RCW 82.14B.030(6) contrary to law. CP at 75, ¶¶ 45-48; CP at 76, ¶ 1.

TracFone also sought injunctive relief preventing the Department from knowingly accepting retail sales tax calculated on the full retail selling prices of TracFone's airtime cards sold through retailers. CP at 75-6, ¶¶ 49-57; CP at 77, ¶ 2.

The Department moved to dismiss TracFone's amended complaint based on res judicata and failure to state a claim upon which relief could be granted. CP at 79-92; 113-32. On July 13, 2012, Judge Thomas McPhee granted the Department's motion and dismissed TracFone's amended complaint. CP at 149-50. As he explained in his oral ruling, Judge McPhee dismissed the claim for injunctive relief under RCW 82.32.150 because TracFone was not challenging an "assessment" of taxes, even though its amended complaint raised constitutional claims. RP at 46 ("No taxes have been assessed here against TracFone, and so I conclude that no action may be brought under RCW 82.32.150"). Assuming, without deciding, that RCW 82.32.150 did not entirely dispose of the claim for declaratory relief, Judge McPhee also concluded that TracFone did not have the requisite standing under the Uniform Declaratory Judgments Act, RCW 7.24, and that the matter should be dismissed. RP at 46-50. Judge McPhee did not reach the merits of TracFone's constitutional claims. *Id.* at 39.

III. COUNTERSTATEMENT OF THE ISSUES

1. RCW 82.32.150 requires payment of a tax before the court may hear an action challenging the tax. Is TracFone precluded from obtaining judicial relief when TracFone has neither paid nor been assessed any retail sales taxes on a third party's sale of airtime cards to customers?

2. Has TracFone failed to state a claim for declaratory relief when (a) the persons affected by how and in what amount retail sales taxes are collected on retailer sales of airtime cards are the retailers and customers, not TracFone, (b) TracFone does not (and cannot) allege it will be directly damaged in those transactions, and (c) TracFone's claims rest solely on speculative harm?

3. Under RCW 82.14B.030(6) and other E-911 tax statutes, which require radio communications service companies to collect and remit the E-911 tax from subscribers or pay it themselves, is TracFone's Price Adjustment Plan contrary to law because it imposes duties on independent retailers not authorized by statute and requires them to violate the requirement in RCW 82.08.010 to impose retail sales tax on the full "selling price"?

4. Has TracFone failed to state a claim for deprivation of its substantive due process, procedural due process, or equal protection rights where the Department has not assessed or attempted to collect disputed

taxes from TracFone and has merely expressed its opinion as to how retail sales taxes apply in transactions to which TracFone is not a party?

IV. ARGUMENT

A trial court's decision on a CR 12(b)(6) motion to dismiss is reviewed de novo as a question of law. *U.S. Oil Trading, LLC v. Office of Financial Management*, 159 Wn. App. 357, 361, 249 P.3d 630 (affirming CR 12(b)(6) dismissal), *review denied*, 171 Wn.2d 1025 (2011). Trial courts may grant dismissal under CR 12(b)(6) only "if it appears beyond reasonable doubt that no facts exist that would justify recovery." *Id.* (quoting *Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 376, 166 P.3d 662 (2007)). Courts presume that all facts alleged in the plaintiff's complaint are true. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717, 189 P.3d 168 (2008) (affirming CR 12(b)(6) dismissal). However, the court is not required to accept that the legal conclusions of the complaint are true. *Id.* at 717-18 (citing *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987), *appeal dismissed*, 488 U.S. 805 (1988)).

The trial court properly dismissed TracFone's amended complaint because TracFone has not alleged a claim the court could hear and decide. The only tax TracFone challenges is the retail sales tax on sales by third-party retailers to their customers, and TracFone has not paid, collected,

remitted, or been assessed that tax. Because TracFone is not a party to those transactions, it will *never* pay, collect, remit, or be assessed those taxes. Whether TracFone's allegations are examined under statutes limiting access to the court in tax disputes, the general conditions on obtaining declaratory relief, or common law standards, TracFone's claims are not legally cognizable because TracFone is not the proper party to bring the tax issue it raises before the court.

The trial court never reached the merits of TracFone's statutory and constitutional legal arguments and this Court need not either. But if it does, the Court should reject TracFone's interpretation of the effects of RCW 82.14B.030(6) on the transactions at issue as inconsistent with the requirements of the E-911 tax statutes and the retail sales tax statutes. Moreover, TracFone's constitutional claims are entirely without legal foundation under any conceivable facts consistent with the amended complaint.

A. The Legislature Has Imposed Specific Mandatory Requirements For Challenging Excise Taxes In Court, And TracFone Has Not Met Those Requirements.

The right and manner by which citizens may sue the State of Washington is circumscribed by the State Constitution. Article II, section 26 of the Washington Constitution provides: "The legislature shall direct by law, in what manner, and in what courts, suits may be brought against

the state.”¹ Pursuant to this provision, the Legislature has explicitly directed what types of court actions may be filed against the State to challenge the Department’s administration of tax statutes.

The right to sue the State or a state agency must be derived from statute, and the Legislature may establish conditions that must be met before that right may be exercised. *Nelson v. Dunkin*, 69 Wn.2d 726, 729, 419 P.2d 984 (1966). This principle applies in actions challenging an excise tax: “Since a right has been granted to plaintiffs to recover any overpayment of tax, the right must be exercised in the manner provided by the statute.” *Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 575, 403 P.2d 880 (1965). TracFone’s present action is not authorized by statute.

The Legislature has been very specific in delimiting the circumstances under which taxpayers may bring disputes about state excise taxes to court, and these statutes provide the exclusive means for resolving tax disputes. First, the Legislature allows taxpayers who have been assessed back excise taxes, interest, or penalties, or who seek an excise tax refund to elect whether to pursue a challenge at the Board of Tax Appeals or go straight to superior court. *Compare* RCW 82.03.130 *and* .190 *with* RCW 82.32.180. If the taxpayer chooses to appeal to the

¹ See *Coulter v. State*, 93 Wn.2d 205, 207, 608 P.2d 261 (1980) (“We start with the proposition that the abolition of sovereign immunity is a matter within the legislature’s determination. This is not because the court says so, but because the constitution so states.”) (citation omitted).

Board, a formal proceeding before the Board is governed by the APA.

RCW 82.03.160. If disappointed with the Board's decision, the taxpayer may then seek judicial review, but only if the taxpayer "shall have first paid in full the contested tax" RCW 82.03.180.

If a taxpayer wishes to file a refund action directly in superior court, it must first pay the tax, and it must file the action in Thurston County:

Any person, except one who has failed to keep and preserve books, records, and invoices as required in this chapter and chapter 82.24 RCW, *having paid any tax as required* and feeling aggrieved by the amount of the tax *may appeal to the superior court of Thurston County*, within the time limitation for a refund provided in chapter 82.32 RCW or, if an application for refund has been made to the department within that time limitation, then within thirty days after rejection of the application, whichever time limitation is later.

...

... [B]ut no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided.

RCW 82.32.180 (emphasis added). RCW 82.32.180 creates "a cause of action for taxpayers 'feeling aggrieved by the amount of the tax' *paid*."

Lacey Nursing Ctr., Inc. v. Dep't of Revenue, 128 Wn.2d 40, 50, 905 P.2d 338 (1995) (emphasis added).

The Legislature also has imposed certain mandatory conditions on *all* excise tax actions in superior court:

All taxes, penalties, and interest shall be *paid in full* before *any* action may be instituted in *any* court to contest all or any part of such taxes, penalties, or interest. *No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty or any part thereof, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state.*

RCW 82.32.150 (emphasis added). According to the plain language of the statute, the only time the collection of a tax may be prospectively enjoined is when a tax assessment violates the federal or state constitution. RCW 82.32.150. This restriction supports society's strong interest in the efficient collection of taxes by preventing tax disputes from delaying payment of excise taxes into the public treasury. *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 793-94, 796, 638 P.2d 1213 (1982); *see also California v. Grace Brethren Church*, 457 U.S. 393, 410 n.23, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982) (acknowledging the danger inherent in needless disruption of tax streams into state treasuries); *Booker Auction Co. v. Dep't of Revenue*, 158 Wn. App. 84, 89, 241 P.3d 439 (2010) (court does not have jurisdiction to hear a tax challenge until the excise tax is paid, and referring to catastrophic effects on state government if this rule were not upheld); *Barry v. AT&T Co.*, 563 A.2d 1069, 1074 (D.C. 1989) (recognizing the "universal principle" that courts should refrain from imposing injunctions and declaratory relief in cases involving the

collection of taxes absent clear proof of a lack of remedy at law and emphasizing that the “pay and sue” rule should be circumvented only in extraordinary circumstances).

In sum, a taxpayer challenging an excise tax in superior court, but who is not appealing a Board decision in a formal proceeding under the APA, must file in Thurston County. RCW 82.32.180. Moreover, a taxpayer filing *any* action in *any* court to contest an excise tax, penalty, or interest, must first pay the tax in full. RCW 82.03.180; RCW 82.32.150; RCW 82.32.180.² The only possible exception is when an excise tax, penalty, or interest has been assessed and the taxpayer challenges the constitutionality of the tax. RCW 82.32.150.³ TracFone has neither paid nor been assessed the tax it challenges here, which means its action does not fall within the Legislature’s limited waiver of sovereign immunity for tax challenges against the State and is barred.

This Court recently considered RCW 82.32.150 in *AOL, LLC v. Dep’t of Revenue*, 149 Wn. App. 533, 205 P.3d 159 (2009). The Court

² There is no question that the provisions of RCW 82.32 apply to both retail sales taxes and the E-911 tax. *See* RCW 82.14B.061(1) (“Chapter 82.32 RCW . . . applies to the administration, collection, and enforcement of the state and county enhanced 911 excise taxes”); RCW 82.32.010 (chapter applicable to retail sales taxes imposed under RCW chapter 82.08 and E-911 taxes imposed under RCW chapter 82.14B).

³ The Administrative Procedure Act also allows a person challenging the validity of an agency rule to do so by petitioning for a declaratory judgment. RCW 34.05.570(2). TracFone does not challenge the validity of any Department rule in its amended complaint and has not invoked the court’s jurisdiction under the APA.

recognized the intent of the Legislature to limit a taxpayer's access to courts without first paying in full all taxes, penalties, and interest unless the taxpayer alleges an assessment is unconstitutional:

Thus, [the statute] appears to allow a taxpayer to seek a judicial injunction against the Department's collection of any tax or penalty solely on grounds that such "assessment" is unconstitutional, RCW 82.32.150. Then, and only then, does the legislature allow a taxpayer access to the courts without first paying the full assessed taxes, penalty, and interest, which the first sentence otherwise requires.

Id. at 547 (affirming trial court's dismissal of tax refund suit where taxpayer failed to pay the entire sum assessed).

The decision in *AOL* is consistent with multiple appellate decisions over the decades applying the unambiguous requirements of RCW 82.32.150 and RCW 82.32.180. In 1936, for instance, the Washington Supreme Court held that the superior court for Yakima County had no jurisdiction to consider a suit in the nature of an interpleader action to determine whether a voluntary athletic association was liable for tax on admission to baseball games. *Weber v. School Dist. No. 7 of Yakima Cnty.*, 185 Wash. 697, 56 P.2d 707 (1936). Quoting the session law sections that were later codified as RCW 82.32.150 and RCW 82.32.180, the Court held that the disputed tax should have been filed with the state tax commission, rather than into court, and the action should have been

filed in Thurston County. *Id.* at 703-05; *see* Laws of 1935, ch. 180 §§ 198-99. “An action can not be maintained against the state without its consent, and when the state does so consent, it may fix the place in which it may be sued.” *Id.* at 703. Any other result “would be to defeat the manifest intent of the legislature.” *Id.*

The Department has not issued any “assessment” of E-911 taxes or retail sales taxes against TracFone related to sales by third-party retailers of airtime cards to customers. It is plain from the amended complaint that TracFone simply disagrees with the Department’s opinion regarding the tax implications of TracFone’s “Price Adjustment Plan.” *See* CP at 71-72. Accordingly, the plain language of RCW 82.32.150 clearly prohibits any court from granting the injunctive relief TracFone requests. To conclude otherwise would be to defeat the manifest intent of the Legislature, as the Supreme Court warned against years ago.

The same is also true for the requested declaratory relief. The phrase “restraining order or injunction” in RCW 82.32.150, properly read, should be construed to include declaratory relief. *See Grace Brethren Church*, 457 U.S. at 407-08 (construing the phrase “enjoin, suspend or restrain” in the federal Tax Injunction Act, 28 U.S.C. § 1341, to include declaratory relief); *National Private Truck Council v. Oklahoma Tax Comm’n*, 515 U.S. 582, 591, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995)

(quoting *Grace Brethren Church* for the proposition that “there is little practical difference between injunctive and declaratory relief.”).

Allowing declaratory judgment actions in the absence of a constitutional challenge to an actual assessment would completely undermine the policy underlying RCW 82.32.150 and RCW 82.32.180, the public’s interest in not disrupting tax streams into the state treasury. *Booker Auction*, 158 Wn. App. at 89 (affirming dismissal of taxpayer’s challenge to Department’s instructions on how to report taxes). Part of the relief TracFone seeks is a declaration that imposing retail sales tax on the full selling price of prepaid cards when TracFone has adjusted its wholesale pricing to cover the E-911 is unlawful. CP at 75-77, ¶ 48 & ¶ 1 of Prayer for Relief. Such a declaration, if granted, would preclude collection of some of the retail sales taxes the Department would otherwise receive in these sales, just as an injunction would. Thus, the same limitations on suits should apply. *See M.A. Mortenson Co. v. Minnesota Comm’r of Revenue*, 470 N.W.2d 126 (Minn. App. 1991) (adopting *Grace Brethren* reasoning to hold that Minnesota’s statute precluding suit “to enjoin the assessment or collection of any taxes” barred action for declaratory relief).⁴

⁴ Interpreting the requirements of RCW 82.32.150 to apply equally to actions for declaratory relief also mirrors the justiciable controversy requirement for invoking the court’s jurisdiction under the Uniform Declaratory Judgments Act. This case illustrates

This Court should affirm dismissal of TracFone's amended complaint on the ground that because there is no "assessment" of taxes against TracFone, RCW 82.32.150 precludes injunctive and declaratory relief requested.

B. TracFone's Claims For Declaratory Relief Are Not Justiciable.

In addition to failing to meet the requirements of RCW 82.32.150, TracFone's claims for declaratory relief are defective and were properly dismissed for failing to meet the requirements of the Uniform Declaratory Judgments Act and cases applying it.⁵ Under the UDJA, RCW 7.24.020 determines who has standing: a person "whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." RCW 7.24.020; *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004). TracFone's claims fail at the outset to support a cause of action under the UDJA because TracFone is not the person "whose rights, status or other legal relations are affected by" the

the point: If there has been no "assessment" of taxes, penalties, or interest, and a taxpayer merely has a disagreement with the Department as to how a tax statute applies, the controversy is not "ripe" for decision.

⁵ This is an alternative basis for dismissal of the claims for declaratory relief.

amount of retail sales tax an independent retailer collects from customers purchasing airtime cards.⁶

The requirements of RCW 7.24.020 are reflected in the justiciable controversy requirement. Before the jurisdiction of a court is invoked, there must be a justiciable controversy, which is defined as:

- (1) An actual, present, and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement;
- (2) between parties having genuine and opposing interests;
- (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic; and
- (4) a judicial determination of which will be final and conclusive.

To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001), *cert. denied*, 535 U.S. 931 (2002). Inherent in these requirements are the doctrines of standing, ripeness, and mootness, and the federal case-or-controversy requirement. *Id.*

To establish harm under the Act, the justiciable controversy must be based on allegations “of harm personal to the party that are substantial rather than speculative or abstract.” *Grant Cnty.*, 150 Wn.2d at 802. This relates to the doctrine of standing, “which prohibits a litigant from raising

⁶ TracFone freely admits that it has no standing to challenge the amount of retail sales taxes collected in these sales “either at the agency level or through a tax refund suit under RCW § 82.32.180.” TracFone Brief at 26.

another's legal right." *Grant Cnty.*, 150 Wn.2d at 802; *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994).

If the four justiciability requirements are not met, the court "steps into the prohibited area of advisory opinions." *To-Ro*, 144 Wn.2d at 416; *Walker*, 124 Wn.2d at 411-12. Here, none of the requirements are satisfied, but the Department will focus on the third requirement.

To meet this requirement, a litigant must show it "will be *directly* damaged in person or in property" by enforcement of the challenged statute. *To-Ro Trade Shows*, 144 Wn.2d at 411-12 (emphasis in opinion; citation omitted). In *To-Ro*, the Supreme Court held this requirement was lacking where an RV trade show sponsor claimed an economic loss when the Department of Licensing closed down the exhibit of an RV dealer that did not have a license to do business in Washington. *Id.* at 411-15 (also concluding trade show sponsor lacked standing). The Court relied on earlier cases reaching the same result based on indirect harm. *See Yakima Cnty. Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 379-80, 858 P.2d 245 (1993) (fire district lacked standing to challenge homeowner agreement to support future annexation); *Washington Beauty College, Inc. v. Huse*, 195 Wash. 160, 165, 80 P.2d 403 (1938) (interest of hairdressing school was too remote to present justiciable issue to challenge statute

requiring high school education as a prerequisite to become a licensed hairdresser).

Here, the interests and harm TracFone alleges are indirect and “potential,” rather than “direct and substantial.” The harm alleged is mainly to retail customers. In TracFone’s view, the primary evil of the Department’s alleged “policy” is that customers purchasing prepaid wireless cards at retail establishments will be required to pay “excessive” retail sales taxes “on a massive scale.” CP at 76, ¶ 52; *see also* CP at 72, ¶ 22. This, TracFone claims, will result in a competitive disadvantage to TracFone. *Id.* In other words, TracFone alleges that because customers will be paying higher retail sales taxes, they will purchase fewer cards, and TracFone will lose business to other wireless telephone service providers. *See id.* ¶ 54.

The result should be the same here as in *To-Go* and similar cases. Since TracFone neither collects, pays, nor remits retail sales taxes when third-party retailers sell TracFone cards to customers, any harm to TracFone from the retailers’ alleged “excessive” taxation of those customers is necessarily derivative of, or secondary to, the impact to those

customers, rather than “direct.” The customers might have standing to challenge that taxation, but TracFone does not.⁷

In addition to being indirect, the harm TracFone alleges is potential and speculative. Absent from the amended complaint and TracFone’s other filings is any allegation that TracFone actually has implemented its Price Adjustment Plan and that retailers actually have charged what TracFone considers “excessive” retail sales taxes when selling TracFone’s prepaid calling cards. Instead, TracFone alleges that the result of the Department’s “policy” is that customers “are to be charged excessive retail sales tax on a massive scale,” causing a competitive disadvantage to TracFone that includes the “potential” loss of business. CP 72, ¶¶ 22-23; *see also* ¶ 47 (“potential loss”), ¶ 52 (TracFone “will be substantially damaged” and customers “will be forced to pay”); CP 39, ¶ 7 (declaration

⁷ TracFone criticizes the trial court for focusing on the amount or sufficiency of the alleged damages in its oral ruling. TracFone Brief at 18-21. However, the court’s comments showed it understood the difference between direct and indirect damage:

The contention of the taxpayer here, TracFone, is not that it is damaged 5 cents on that transaction, because it is not. And it can’t allege and has not alleged that it is. Rather, the contention is that the imposition of that additional amount of money on the transaction for the full retail price of the airtime card, including an amount that would be the E-911 tax if it was collected at that time, will so affect TracFone’s competitive position that it will suffer significant damages in its competition with other sellers of similar cards who apparently would not have the same obligation or responsibility.

As a matter of law, I conclude that that is not a showing of direct damages.

RP at 48-49 (6/22/12).

stating the Department’s interpretation “would result in collection . . . of monies in excess” of the retail sales tax).

If TracFone had actually implemented its Price Adjustment Plan and suffered a loss in business due to the Department’s interpretation of the tax statutes, TracFone surely would have alleged it. But TracFone’s claims for relief rest solely on speculative or theoretical harm, rather than any actual or substantial harm. This is an additional reason why TracFone has failed to establish the third requirement for a justiciable controversy. *See Postema v. Snohomish Cnty.*, 83 Wn. App. 574, 585, 922 P.2d 176 (1996) (no justiciable controversy in challenge to goal in county ordinance where record contained no indication that the goal had affected the development of plaintiff’s property or its value).

C. TracFone’s Legal Claims Are Based On A Misreading Of RCW 82.14B.030(6) And Other Statutes.

TracFone’s statutory claim and constitutional claims are all based on TracFone’s opinion of how a sentence in RCW 82.14B.030(6) applies to these third-party retailer transactions under TracFone’s Price Adjustment Plan. TracFone misreads the statute.

The Supreme Court has instructed in many cases that a court’s goal in construing a statute is “to determine and give effect to the legislature’s intent.” *TracFone*, 170 Wn.2d at 281(citing *Dep’t of Ecology v. Campbell*

& Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). The plain meaning of a statute is discerned “from all that the Legislature has said in the statute and related statutes” that disclose legislative intent. *TracFone*, 170 Wn.2d at 281 (quoting *Campbell & Gwinn*, 146 Wn.2d at 11). The court looks to “the ordinary meaning of the language at issue, the context of the statutes in which the provision is found, related provisions, and the statutory scheme as a whole.” *TracFone*, 170 Wn.2d at 281 (quoting *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010)). Applying these standards to the E-911 tax statutes demonstrates that TracFone’s Plan is contrary to statutory requirements.

1. The E-911 tax statutes unambiguously require TracFone, not independent retailers, to collect and remit the E-911 tax to the Department.

In RCW 82.14B.030, the Legislature imposes county and state E-911 taxes on “switched access lines,” “radio access lines,” and “interconnected voice over internet protocol service lines.” See RCW 82.14B.020(4), (8), (11) (definitions). Subsection 6 addresses the state E-911 tax on “radio access lines”:

A state enhanced 911 excise tax is imposed on all radio access lines whose place of primary use is located within the state in an amount of twenty-five cents per month for each radio access line. The tax must be uniform for each radio access line. The tax imposed under this section must be remitted to the department by radio communications service companies, including those companies that resell

radio access lines, on a tax return provided by the department. Tax proceeds must be deposited by the treasurer in the enhanced 911 account created in RCW 38.52.540. The tax imposed under this section is not subject to the state sales and use tax or any local tax.

(Emphasis added). A related provision addresses how the E-911 is to be collected: “The state enhanced 911 excise tax . . . must be collected from the subscriber by the radio communications service company . . . providing the radio access line to the subscriber.” RCW 82.14B.040(2); *see also* RCW 82.14B.042 (the E-911 tax “must be paid by the subscriber” to the radio communications service company and the company “must collect from the subscriber” the full amount of the tax).

In *TracFone*, the Supreme Court held that these provisions and others in the E-911 tax statutes were unambiguous: “[T]here is no ambiguity in the statutes as to what is being taxed, how the tax is to be assessed, or whether the tax is owed.” *TracFone*, 170 Wn.2d at 296. A radio communications service company such as TracFone must collect the tax from its subscribers and remit it to the Department. The Court also recognized that the statutes expressly allow for TracFone to pay the E-911 tax itself if it is not collected from subscribers for any reason. *Id.* at 289; RCW 82.14B.042(2).

The Court in *TracFone* also addressed the sales of TracFone’s prepaid cards by independent retailers to customers. First, the Court

confirmed that because the retail stores are not subscribers, they do not owe the tax and TracFone has no obligation to collect the tax from the retailers. *Id.* Second, the Court explained that just as those retailers have no obligation *to pay* the E-911 tax to TracFone in wholesale transactions, they also have no obligation *to collect* the E-911 tax from customers purchasing prepaid cards. “[T]he statutes place the responsibility for collecting the state E-911 tax from the subscribers on the radio communications companies providing the access lines, here, TracFone.” *Id.* at 296; *see* RCW 82.14B.040.

After the *TracFone* decision, TracFone had several options for card sales through third-party retailers: (a) collect the tax directly from customers by obtaining billing information when the card is activated, deducting minutes representing a value comparable to the tax, or otherwise; (b) pay the tax itself, and recoup the cost by raising the wholesale price to retailers; or (c) pay the tax itself without recouping the cost. *See TracFone*, 170 Wn.2d at 292-93. TracFone has tried something different, and it is contrary to the statutory scheme.

2. TracFone’s reading of the last sentence in RCW 82.14B.030(6) is inconsistent with the remainder of the provision and related E-911 tax provisions.

Under TracFone’s Price Adjustment Plan, TracFone increases its wholesale price of the airtime cards to cover the amount it deems

“allocable” to the E-911 tax, and retailers pass on that extra cost to customers with a higher retail selling price. CP at 71, ¶ 13; CP at 75, ¶ 48. However, TracFone expects retailers to deduct the amount of the E-911 tax from the full sales price before calculating retail sales tax. CP at 71-71, ¶¶ 18-20. Finally, TracFone expects retailers to “remit E-911 tax to the department, as well as the sales tax attributable to the purchase price other than the portion comprising the E-911 tax.” TracFone Brief at 13. TracFone’s dispute with the Department centers on the last sentence of RCW 82.14B.030(6), which provides: “The tax imposed under this section is not subject to the state sales and use tax or any local tax.” TracFone alleges that the amount of the retail sales price “allocable” to the E-911 Tax when TracFone has raised its wholesale price to cover that cost “should be excluded” from the measure of the retail sales tax third-party retailers collect from those customers. CP at 71-72, ¶ 18. TracFone further alleges that the Department’s instruction that retailers should collect retail sales tax on the full retail selling price of airtime cards “is contrary to Washington law and the state and federal constitutions.” CP at 75, ¶ 48.

TracFone’s arguments are without merit under the E-911 tax statutes. There is no “tax-on-a-tax” in violation of RCW 82.14B.030(6) under TracFone’s Plan because retailers have no obligation, and *no*

statutory authority, to collect or remit the E-911 tax from customers purchasing airtime cards. Only TracFone may collect the E-911 tax from subscribers, and only TracFone may remit the tax. RCW 82.14B.030(6); RCW 82.14B.040(2); RCW 82.14B.042(1).

TracFone incorrectly assumes that by raising its wholesale price for airtime cards in an amount sufficient to cover the E-911 tax, it is thereby “collecting” the tax from subscribers. TracFone Brief at 6; CP at 71, ¶¶ 13, 15; CP at 106. But no money changes hand between TracFone and subscribers when a customer purchases an airtime card from a third-party retailer, so TracFone cannot be “collecting” the tax in those third-party transactions. And retail sales tax imposed on the ultimate sale of the card to a consumer does not “impose” retail sales tax on the E-911 tax in violation of RCW 82.14B.030(6) because retailer is merely selling the card.⁸

⁸ TracFone’s arguments confuse the imposition of a tax with the economic effect of a tax. It is true that when TracFone raises the price of prepaid cards to cover the cost of the E-911 tax, the ultimate consumer will bear the *economic burden* of that cost in the form of a higher retail sales price. But courts distinguish between improper imposition of a tax and merely bearing the economic burden of a tax. For instance, in addressing the issue of the federal government’s immunity from state taxation, the United States Supreme Court has repeatedly rejected the notion that state taxes with an indirect economic effect on the United States were barred, even when the federal government shouldered “the entire economic burden of the levy.” *United States v. New Mexico*, 455 U.S. 720, 734, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982) (citing *Alabama v. King & Boozer*, 314 U.S. 1, 62 S. Ct. 43, 86 L. Ed. 3 (1941) and other cases); *see also E.I. DuPont de Nemours & Co. v. State*, 44 Wn.2d 339, 349-50, 267 P.2d 667 (1954) (fact that economic burden of an excise tax upon an independent contractor rested upon federal government does not render the tax invalid). Similarly, consumers who purchase prepaid wireless cards from third-party retailers will bear the economic burden of TracFone’s

Likewise, the retailers in those third-party transactions are not “collecting” the E-911 tax from customers. They have no statutory authority to do so, and the E-911 tax statutes impose no duties on them. Thus, they will have no occasion to “subject” the E-911 tax to retail sales tax in violation of RCW 82.14B.030(6). They do, however, have a statutory duty to impose the retail sales tax on the full “selling price” of all tangible personal property they sell to customers in their stores, which is another reason why TracFone’s “tax-on-a-tax” argument lacks merit.

3. TracFone’s interpretation of RCW 82.14B.030(6) is inconsistent with the requirements of the retail sales tax statutes and the statutory scheme as a whole.

When TracFone sells airtime cards through retailers, the provisions of the retail sales tax chapter, RCW 82.08, govern the actions of those retailers. The measure of the retail sales tax is the “sales price” or “selling price.” RCW 82.08.020(1). The definition of “sales price” requires retailers to impose the retail sales tax on the full amount of their cost:

“Sales price” means the total amount of consideration, . . .
No deduction from the total amount of consideration is allowed for the following: (i) *The seller’s cost of the property sold*; (ii) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, *and any other expense of the seller*; . . .

costs to provide wireless service through that business model, whether in the form of labor, equipment, normal overhead, or any other cost. This will include TracFone’s cost of paying the E-911 tax itself when it chooses not to attempt any direct collection of the tax from these subscribers.

RCW 82.08.010(1)(a) (emphasis added).

Retailers offering TracFone airtime cards do not have an obligation to collect the E-911 tax. That obligation is TracFone's. RCW 82.14B.042(2). The amount of the tax from the subscriber to the radio communications service company constitutes a debt from the subscriber to the company. RCW 82.14B.042(3). If TracFone chooses to increase the wholesale price of the airtime card in an amount it deems "allocable" to the E-911 tax, doing so does not impose the retail sales tax on the E-911 tax in violation of RCW 82.14B.030(6). Rather, the wholesale price increase is simply translated into an increased cost to the retailer, which the retailer may not deduct for retail sales tax purposes. RCW 82.08.010(1)(a). Those retailers are required to collect retail sales tax on the full "selling price" of prepaid wireless cards they sell. TracFone's interpretation of RCW 82.14B.030(6), not the Department's, is contrary to the statutes.

TracFone may argue as it did below that the Department's interpretation is incorrect because retailers may deduct from the "selling price" "any taxes legally imposed directly on the consumer" under RCW 82.08.010(1)(b). *See* CP at 106. The argument is misleading because it fails to consider the full clause, which provides that the "selling price"

“does not include . . . any taxes *legally imposed* directly on the consumer *that are separately stated* on the invoice, bill of sale, or similar document given to the purchaser.” RCW 82.08.010(1)(b) (emphasis added). The E-911 tax is “legally imposed” on subscribers, but since third-party retailers are not authorized to collect the E-911 tax from subscribers and subscribers are not authorized to pay the E-911 tax to anyone other than radio communications service companies, the E-911 tax cannot be “legally imposed” as part of those transactions. No bill of sale reflecting sale of a prepaid wireless card by a third-party retailer will reflect collection of the E-911 tax.

4. The Supreme Court did not approve TracFone’s proposed collection plan for the E-911 tax, or bless its interpretation of RCW 82.14B.030(6).

TracFone argues that the Supreme Court “expressly ruled” and approved the E-911 collection method contemplated by TracFone’s Price Adjustment Plan. TracFone Brief at 5, 6, 13. But the Supreme Court did no such thing.

Following its conclusion that TracFone must “collect and pay over to the Department the taxes, or it must pay them itself,” *TracFone*, 170 Wn.2d at 292, the Court briefly addressed some suggestions the Department had made for how TracFone could collect the E-911 tax:

Lastly, the Department has in fact suggested various ways for TracFone *to collect the tax from its subscribers* at the statutory flat monthly rate of taxation such as adjusting its prepaid pricing or deducting minutes from the subscriber's account to pay the taxes, and *alternatively suggests that TracFone pay the tax itself*, as RCW 82.14B.042(2) requires if the tax is not collected from the subscribers.

Id. at 292-93 (footnote 12 omitted; emphasis added). TracFone claims language in footnote 12 of the decision shows “specifically how to perform the calculation” in order to adjust its prepaid pricing to include the E-911 tax “in the amount charged to customers.” TracFone Brief at 6.

Contrary to TracFone’s assertion, footnote 12 does not provide approval of TracFone’s Plan. It is clear from the context of the opinion that footnote 12 was a response to an argument in the dissent regarding what amount should be collected in situations where the radio communications service company collects the E-911 tax at the point of sale. The Court was not addressing sales of airtime cards by third-party retailers, which are the sales at issue here.⁹

⁹ Later in the opinion the Court did address sales by retail stores, and it concluded that there was “no question” about whether TracFone should collect the E-911 tax from those retailers and “no issue” about whether retailers had an obligation to collect the tax from customers. *Id.* at 295-96. In these sales, as in TracFone’s internet sales, “the statutes place the responsibility for collecting the state E-911 tax from the subscribers on the radio communications companies providing the access lines, here TracFone.” *Id.* at 296. And if a radio communications company’s method of doing business makes direct collection from the subscriber difficult, “RCW 82.14B.042(2) unambiguously makes the provider of the cell service ultimately responsible for paying the tax if it is not collected from the subscriber.” *Id.* at 297.

In summary, TracFone’s claim that the Department’s so-called “policy” requiring retail sales tax to be collected on the full “selling price” of prepaid cards is contrary to Washington law is not supported by the E-911 tax, the retail sales tax statutes, or by the Court’s decision in *TracFone*.

D. TracFone Fails To State A Claim For Relief Under Any Constitutional Theory.

All of TracFone’s constitutional claims rest on its defective statutory argument that RCW 82.14B.030(6) would be violated if independent retailers imposing sales tax on the full selling price of airtime cards. Because TracFone’s statutory theory lacks legal merit, TracFone’s constitutional theories also fail to state a claim upon which relief can be granted.¹⁰ In addition, when examined individually, the claims fail to state any legally viable constitutional theory. The defects in these claims highlight TracFone’s lack of standing.

¹⁰ In its opening brief, TracFone has not assigned error or provided any legal authority in support of the claims in its amended complaint that the Department’s actions have abridged TracFone’s privileges and immunities under the state or federal constitutions or violated the Commerce Clause of the United States Constitution. TracFone has apparently abandoned these particular theories, and the Court should not consider them if TracFone raises them in reply. *See Bercier v. Kiga*, 127 Wn. App. 809, 824-26, 103 P.3d 232 (2004).

1. The Department's opinions and advice to TracFone have not deprived TracFone of life, liberty, or property.

States may not deprive any person “of life, liberty, or property, without due process of law. U.S. Const. art. XIV, § 1. TracFone has failed to allege a substantive due process claim on which relief may be granted. A substantive due process violation is an action that is “fundamentally unfair,” resulting in a deprivation of life, liberty or property. *Mudarri v. State*, 147 Wn. App. 590, 616, 196 P.3d 153 (2008), *review denied*, 166 Wn.2d 1003 (2009). TracFone has not alleged in its amended complaint any action the Department has taken that has deprived, or could deprive, TracFone of life, liberty, or property. All the Department has done is to give its opinion on how the E-911 tax applies and how retail sales tax should be collected. The fact that sales tax may be calculated on an increased retail price of the airtime card does not result in a fundamental unfairness to TracFone or any constitutional violation.

TracFone alleges that the Department's “policy” of requiring retailers to collect retail sales tax on the full “selling price” of prepaid wireless cards is not rationally related to a lawful state objective and is arbitrary and capricious. CP at 73, ¶¶ 29-30. TracFone claims “a deprivation of property” and violation of substantive due process requirements. *Id.*, ¶¶ 28, 30.

A law that does not interfere with fundamental rights or liberty interests is subject to rational basis review, which requires only that the law be rationally related to a legitimate government interest. *American Legion Post #149 v. Dep't of Health*, 164 Wn.2d 570, 604, 192 P.3d 306 (2008) (citing *Washington v. Glucksberg*, 521 U.S. 702, 728, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997)). Agency action is arbitrary and capricious only if it is “willful and unreasoning action in disregard of facts and circumstances.” *United Parcel Service v. Dep't of Revenue*, 102 Wn.2d 355, 365, 687 P.2d 186 (1984) (quoting *Skagit Cnty. v. Dep't of Ecology*, 93 Wn.2d 742, 749, 613 P.2d 115 (1980)).

The State has a legitimate interest in raising revenue to provide various government services through the use of a retail sales tax and in providing E-911 service through an E-911 tax. *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1192-93 (9th Cir. 2008); RCW 82.14B.010 (legislative findings for E-911 tax). The Department’s “policy” of requiring retailers to collect retail sales tax on the full “selling price” is neither irrational nor arbitrary and capricious, because it is required by RCW 82.08.010(1) and 82.08.020, and the E-911 tax provisions do not authorize such third-party retailers to act as proxies for radio communications service companies in collecting the E-911 tax from retail customers.

The cases TracFone relies on do not support its claim. First, this case does not concern regulations on the use of real property, the question whether a “taking” has occurred without just compensation, or an exercise of the State’s police power. See *Presbytery of Seattle v. King Cnty.*, 114 Wn.2d 320, 787 P.2d 907 (1990), *cert. denied*, 498 U.S. 911 (1990); *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988); TracFone Brief at 22. Thus, the test TracFone posits is inapposite. Second, even assuming TracFone were correct (which it isn’t) and the Department’s interpretation would result in so-called “double taxation” or a “tax on a tax,” there is no *constitutional* bar to imposing retail sales tax on the E-911 tax, *per se* or otherwise. In the case TracFone cites to support its argument to the contrary, *DeRoche*, the court said no such thing. See *In re DeRoche*, 287 F.3d 751 (9th Cir. 2002). The only issue was identifying what event gave rise to a state industrial commission’s claim for reimbursement from an uninsured employer, for purposes of discharging the claim in bankruptcy as an excise tax. *Id.* at 755. The case did not involve constitutional claims.

TracFone also relies on a case concerning a former county excise tax on sales of real property. See *State ex rel. Namer Inv. Corp. v. Williams*, 73 Wn.2d 1, 435 P.2d 975 (1968) (applying former RCW Ch. 28.45); TracFone Brief at 21, 23. The issue was whether the tax could be

applied to a lease with an unexercised option to purchase. *Namer*, 73 Wn.2d at 2. The court rejected the taxpayer's due process and equal protection arguments. *Id.* at 6-7. In the course of rejecting a different constitutional argument (not raised here), the court addressed the "selling price" definition for that tax, stating: "The basis for any excise tax to be levied, then, must be the actual consideration paid or delivered or contracted to be paid or delivered in exchange for the ultimate transfer of the designated interest in real property." *Id.* at 9. This point supports the Department, not TracFone, because the same is true for application of the retail sales tax: Under RCW 82.08.010(1), the basis for the retail sales tax is, as the court said, the "actual consideration paid or delivered" in exchange for transfer of the airtime card from the retailer to the customer. If the customer pays the retailer \$100 to purchase the card, the retail sales tax is calculated on that amount (which is "the total amount of consideration" under the "selling price" definition), regardless of whether the retail price or the retailer's wholesale cost includes an amount equaling the E-911 tax when TracFone chooses not to collecting the E-911 tax from subscribers after they purchase the cards.

In another case TracFone cites, local tax officials assessed property tax on "talking sets" leased by telephone companies from AT&T for use in providing telephone service to customers, even though the California

constitution allowed such telephone companies to pay a gross receipts tax to the state in lieu of any state or local property taxes on their operating property. See *Hopkins v. Southern Cal. Tel. Co.*, 275 U.S. 393, 48 S. Ct. 180; 72 L. Ed. 329 (1928); TracFone Brief at 24-25. The local officials threatened to disconnect the talking sets and sell them, disrupting the system. *Hopkins*, 275 U.S. at 396. The Court held that enforcing the local assessment would violate the telephone companies' rights under the Fourteenth Amendment, and it granted an injunction. *Id.* at 397-403.

The difference between this case and *Hopkins* is clear. The taxpayer in *Hopkins* had a right under the California constitution to be free of state and local property taxes on the operating property used in its telephone system. The actions of the local tax officials threatened to deprive the companies of that right without due process of law. Here, TracFone simply attempts to turn a disagreement with the Department over the interpretation of a statute into a constitutional claim. The Department has not threatened to seize any of TracFone's property.

TracFone's substantive due process allegations do not state an actionable claim.

2. TracFone has not been deprived of its property without due process of law.

To obtain relief on a procedural due process claim, a plaintiff “must establish . . . (1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; [and] (3) lack of process.” *Shanks v. Dressel*, 540 F.3d 1082, 1090 (9th Cir. 2008). TracFone’s due process claim is truly novel. TracFone argues that because it lacks standing to bring a refund claim at the Department or in court challenging the alleged “excessive” retail sales tax, its procedural due process rights will be violated if it is not allowed to challenge the Department’s “policy” in this action. CP at 73, ¶¶ 33-35; TracFone Brief at 26. In other words, it equates its lack of a right to process (element (3)) with the deprivation of a protected property interest (elements (1) and (2)). The Court should reject this circular reasoning.

“The deprivation of a procedural right to be heard . . . is not actionable when there is no protected right at stake.” *Shanks*, 540 F.3d at 1092 (quoting *Gagliardi v. Village of Pawling*, 18 F.3d 188, 193 (2d Cir. 1994)). Again, TracFone relies on *Hopkins*, and the differences between that case and this one demonstrate the deficiency in TracFone’s claim. The plaintiffs in *Hopkins* had a constitutionally guaranteed right to pay a single gross receipts tax in lieu of state and local property taxes on their

operating property. *Hopkins*, 275 U.S. at 397-98. The local tax officials threatened to deprive the telephone companies of that right. There was no issue of standing in the case, and the quotation TracFone relies on merely addresses the Court's discussion of why equitable relief was permissible, given that the plaintiffs had no adequate remedy at law.

Here, there is no action threatened by the Department to deprive TracFone of its property. TracFone has no protected right to determine the measure of the retail sales tax on sales by third-party retailers of prepaid wireless cards to subscribers, which are transactions in which TracFone neither collects nor pays the sales tax. Accordingly, TracFone has no right to a hearing on the subject. Lack of standing does not create a constitutionally protected property interest.

3. No relief can be granted on TracFone's equal protection claims.

Equal protection under the law is required by the Fourteenth Amendment and by Article I, section 12 of the Washington Constitution. *American Legion*, 164 Wn.2d at 608. Equal protection requires that all similarly situated persons be treated alike. *Id.* TracFone has not alleged that the Department's alleged "policy" creates any suspect classifications or burdens any fundamental rights. Accordingly, the review is under the rational basis standard. Under that standard, a classification passes muster

if “it bears a rational relation to some legitimate end.” *Id.* at 609 (quoting multiple cases).

The laws at issue here create no classifications that single out TracFone or any other prepaid wireless provider. All radio communications service companies are required to remit the E-911 tax to the Department. RCW 82.14B.030(6); *TracFone*, 170 Wn.2d at 294. And all retailers of prepaid wireless services, and all third-party retailers that sell prepaid wireless cards for wireless service providers, are required to collect retail sales tax on the full “selling price” of the cards or services. RCW 82.08.020. Likewise, the Department’s rejection of TracFone’s suggestion that third-party retailers should be allowed to do otherwise creates no “classification” – it simply applies the governing statutes according to their plain meaning.

Even if a classification were present, it would not be invalid merely because it impacted taxpayers in an industry according to their method of operation. Legislative bodies have very broad discretion to make classifications for purposes of taxation. *Sonitrol N.W., Inc. v. City of Seattle*, 84 Wn.2d 588, 590-91, 528 P.2d 474 (1974). For purposes of excise taxes on businesses, “a classification based solely on a difference in the method of operation of a particular kind of business is permissible.” *United Parcel Service, Inc. v. Dep’t of Revenue*, 102 Wn.2d 355, 368, 687

P.2d 186 (1984) (rejecting equal protection challenge to allowing use tax exemption only for vehicles crossing state lines); *Sonitrol*, 84 Wn.2d at 591 (substantially higher tax on centrally monitored burglar alarm system than other alarm systems did not violate equal protection clause).

In other words, even if the “selling price” of prepaid cards might be higher when the cards are sold in a retail store than when they are sold on the Internet, giving rise to a slightly higher retail sales tax, no violation of equal protection rights results. This is true even if it puts some wireless service providers at a competitive disadvantage: “Only where a tax is confiscatory and intended to drive a class out of business altogether, will the competitive element be considered.” *Sonitrol*, 84 Wn.2d at 593.

The Department’s “policy” of requiring storefront retailers to collect retail sales tax on the full selling price of the prepaid cards is rational, rather than arbitrary and capricious, because it is dictated by the retail sales tax statutes and because the E-911 tax statutes place the burden of collecting and remitting the tax entirely on radio communications service companies. RCW 82.08.010(1)(a); RCW 82.14B.030(6); .042.¹¹

¹¹ To support its substantive due process and equal protection claims, TracFone relies on a federal district court case to argue that the Department’s position is “unreasonable.” *Commonwealth of Kentucky Commercial Mobile Radio Serv. Emergency Telecomm. Bd. v. TracFone Wireless, Inc.*, 735 F. Supp. 2d 713 (W.D. Ky. 2011); TracFone Brief at 24. The Kentucky statute has a similar prohibition to Washington’s on charging retail sales tax on the E-911 tax, and TracFone relied on that provision to argue that complying with the Kentucky Act was impossible. 735 F. Supp. 2d at 725. The court rejected that argument. The court assumed that having third-party

TracFone has not alleged a basis for relief under an equal protection claim.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's dismissal of TracFone's amended complaint.

RESPECTFULLY SUBMITTED this 6th day of February, 2013.

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Senior Counsel
Attorneys for Respondent
State of Washington, Department of
Revenue

retailers collect the sales tax on the full retail price would be “unauthorized,” but it did so without any discussion of Kentucky’s retail sales tax statutes or the other provisions of the E-911 tax statutes. *Id.* It also gave no hint that TracFone’s constitutional rights would be affected by this scenario. This Court must be guided by Washington statutes, rather than unsupported assumptions about the statutes of other states.

PROOF OF SERVICE

I certify that I caused to be served a copy of this document, via
electronic mail, on the following:

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I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 10th day of February, 2013, at Tumwater, WA.


Carrie Parker, Legal Assistant

APPENDIX

RCW 82.32.150

Contest of tax — Prepayment required — Restraining orders and injunctions barred.

All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest. No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty or any part thereof, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state.

[1961 c 15 § 82.32.150. Prior: 1935 c 180 § 198; RRS § 8370-198.]

RCW 82.32.180
Court appeal — Procedure.

Any person, except one who has failed to keep and preserve books, records, and invoices as required in this chapter and chapter 82.24 RCW, having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county, within the time limitation for a refund provided in chapter 82.32 RCW or, if an application for refund has been made to the department within that time limitation, then within thirty days after rejection of the application, whichever time limitation is later. In the appeal the taxpayer shall set forth the amount of the tax imposed upon the taxpayer which the taxpayer concedes to be the correct tax and the reason why the tax should be reduced or abated. The appeal shall be perfected by serving a copy of the notice of appeal upon the department within the time herein specified and by filing the original thereof with proof of service with the clerk of the superior court of Thurston county.

The trial in the superior court on appeal shall be de novo and without the necessity of any pleadings other than the notice of appeal. At trial, the burden shall rest upon the taxpayer to prove that the tax as paid by the taxpayer is incorrect, either in whole or in part, and to establish the correct amount of the tax. In such proceeding the taxpayer shall be deemed the plaintiff, and the state, the defendant; and both parties shall be entitled to subpoena the attendance of witnesses as in other civil actions and to produce evidence that is competent, relevant, and material to determine the correct amount of the tax that should be paid by the taxpayer. Either party may seek appellate review in the same manner as other civil actions are appealed to the appellate courts.

It shall not be necessary for the taxpayer to protest against the payment of any tax or to make any demand to have the same refunded or to petition the director for a hearing in order to appeal to the superior court, but no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided.

The provisions of this section shall not apply to any tax payment which has been the subject of an appeal to the board of tax appeals with respect to which appeal a formal hearing has been elected.

[1997 c 156 § 4; 1992 c 206 § 4; 1989 c 378 § 23; 1988 c 202 § 67; 1971 c 81 § 148; 1967 ex.s. c 26 § 51; 1965 ex.s. c 141 § 5; 1963 ex.s. c 28 § 9; 1961 c 15 § 82.32.180. Prior: 1951 1st ex.s. c 9 § 12; 1939 c 225 § 29, part; 1935 c 180 § 199, part; RRS § 8370-199, part.]

Notes:

Effective date -- 1992 c 206: See note following RCW 82.04.170.

Severability -- 1988 c 202: See note following RCW 2.24.050.

Appeal to board of tax appeals, formal hearing: RCW 82.03.160.

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**SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY**

TRACFONE WIRELESS, INC., a Delaware corporation,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT OF REVENUE;

Defendant.

11-2-02437-4

**FIRST AMENDED
COMPLAINT FOR
DECLARATORY RELIEF AND
INJUNCTIVE RELIEF**

Plaintiff TracFone Wireless, Inc. ("TracFone" or "Plaintiff") hereby alleges for its Complaint against Defendant Washington State Department of Revenue ("DOR" or "Defendant"), on personal knowledge as to Plaintiff's own activities, and on information and belief as to the activities of others, as follows:

I. PARTIES

1. Plaintiff TracFone is a Delaware corporation.
2. Defendant Washington State Department of Revenue is a government entity with its principal location in Olympia, Washington.

II. JURISDICTION AND VENUE

3. This Court has original jurisdiction over the subject matter of this action pursuant to RCW § 2.08.010.
4. Venue is proper in Thurston County pursuant to RCW § 4.12.025 (general

1 jurisdiction) because at all times relevant herein, Defendant maintained a principal place
2 of business in Thurston County, Washington; and venue is proper in Thurston County
3 pursuant to RCW § 4.12.020 (specific jurisdiction) because Defendant's actions which
4 are the subject of this complaint occurred in Thurston County, Washington.

5 III. FACTS

6
7 **A. Washington's E-911 Tax Law has been interpreted by the Washington
8 Supreme Court to require TracFone to collect the E-911 Tax from its
9 customers.**

10 5. TracFone is a provider of prepaid cell phone services.

11 6. TracFone distributes prepaid cell phones and prepaid cell phone cards (the
12 "Cards") through independent retail stores and other locations (collectively, the
13 "Retailers") and online. The Retailers are in Washington State, among other locations.

14 7. The Cards reflect blocks of prepaid cell phone minutes, which are loaded
15 onto a prepaid phone when a TracFone customer adds airtime.

16 8. Washington now imposes a tax on consumers of cell phone services to fund
17 emergency 911 services (the "E-911 Tax"). RCW § 82.14B.030.

18 9. The E-911 Tax is a fixed sum. The Washington Supreme Court has ruled
19 that the E-911 Tax must be imposed each month, for each cell phone number that is
20 assigned to a consumer during that month.

21 10. The Washington Supreme Court has interpreted the E-911 Tax law to
22 require the providers of prepaid cell phone services to collect that tax from their
23 customers and remit the E-911 Tax to the DOR.

24 11. In *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273 (2010) (the
25 "Previous Lawsuit"), TracFone contested the legality of requiring prepaid cell phone
26 providers to collect the E-911 Tax.

27 12. In the Previous Lawsuit, the Washington State Supreme Court held that
28 TracFone could legally "collect the (E-911 Tax) from its subscribers" by "adjusting its
prepaid pricing" upward to include an amount allocable to the E-911 Tax owed by that

1 customer. The Supreme Court said “TracFone’s service is sold in blocks of time that
2 carry with them a fixed period of time in which the cell phone number is assigned to the
3 subscriber. All that is necessary is to take this ascertainable period of time, in months,
4 and multiply by 20 cents.” 170 Wn.2d at 292, 293 n.12.

5 **B. TracFone’s “Price Adjustment Plan” complies with the Washington**
6 **Supreme Court’s directive to collect the E-911 Tax by increasing the**
7 **TracFone Cards’ purchase price.**

8 13. Pursuant to the Supreme Court’s express permission, TracFone developed a
9 plan for adjusting the price of the Cards to include the E-911 Tax (the “Price Adjustment
10 Plan”). Under the Price Adjustment Plan, TracFone adjusts its prepaid pricing for the
11 Cards by calculating the E-911 Tax due for each card according to the above formula,
12 then incorporating the appropriate E-911 Tax into the total wholesale sales price for each
13 Card sold to Retailers for resale.

14 14. TracFone advised the DOR of the Price Adjustment Plan.

15 15. The DOR then adopted a policy deeming the Price Adjustment Plan to be a
16 method of *recouping* the E-911 Tax from its customers after TracFone itself pays the E-
17 911 Tax on behalf of its customers, rather than a Washington Supreme Court approved
18 method of collecting the E-911 Tax from TracFone’s customers.

19 **C. DOR Refused to honor the Washington Supreme Court’s approval of the**
20 **Price Adjustment Plan.**

21 16. Based on its rejection of the Washington Supreme Court’s approval of the
22 Price Adjustment Plan, and its adoption of a policy deeming the Price Adjustment Plan to
23 be a method of recouping, as opposed to collecting, the E-911 Tax, the DOR adopted a
24 policy for calculating the retail sales tax charged on TracFone’s prepaid cards that
25 violates Washington law and applicable constitutional principles.

26 17. The E-911 Tax law provides that no sales tax may be imposed on the E-911
27 Tax. RCW § 82.14B.030(6) (“The tax imposed under this section is not subject to the
28 state sales and use tax or any local tax.”)

18. Therefore, the amount of the purchase price of the TracFone Cards that is

1 allocable to TracFone's collection of the E-911 Tax should be excluded from the amount
2 on which Washington retail sales tax is calculated.

3 19. TracFone advised the DOR that, per the Price Adjustment Plan, the DOR
4 should not require TracFone's retail partners to calculate retail sales tax on the entire
5 purchase price of a TracFone Card.

6 20. But the DOR rejected that advice, and formally notified TracFone and its
7 retailers that a violation of the DOR's policy requiring retail sales tax to be calculated on
8 the entire purchase price of the TracFone cards will result in tax prosecution.

9 21. By contrast, the DOR adopted a policy that sellers of prepaid wireless
10 services who sell their services over the Internet to Washington consumers should only
11 collect a retail sales tax from their customers that is based on an amount that excludes the
12 E-911 Tax. The DOR adopted the same policy for providers of post-paid wireless
13 services.

14 22. As a result, TracFone's customers are to be charged excessive retail sales
15 tax on a massive scale, seriously impacting TracFone's ability to compete with post-paid
16 providers and prepaid providers who sell their services over the internet.

17 23. This competitive disadvantage causes actual and substantial injury to
18 TracFone's business, including but not limited to the potential for tens of millions of
19 dollars of lost business in Washington each year.

20 **D. The DOR's policies violate multiple state and federal constitutional**
21 **protections.**

22 24. The DOR's policies violate multiple protections TracFone is entitled to
23 under the United States Constitution and the Washington State Constitution.

24 **1. State and Federal Substantive Due Process**

25 25. The Fourteenth Amendment to the United States Constitution, and the
26 Washington Constitution, prohibit state and local governments from depriving persons of
27 life, liberty, or property without certain steps being taken to ensure fairness.

1 26. State laws and actions depriving citizens of life, liberty and property do not
2 satisfy the substantive due process provisions of the state or federal constitutions unless
3 they are rationally related to a lawful state objective.

4 27. State laws and actions that are arbitrary or capricious also violate
5 substantive due process.

6 28. The DOR's policy of imposing a retail sales tax on the portion of a
7 TracFone Card allocable to the E-911 Tax TracFone collects from its customers
8 constitutes both a deprivation of property and liberty.

9 29. The DOR's policies are not rationally related to a lawful state objective,
10 including because they directly contradict the Washington Supreme Court's express
11 approval of TracFone's Price Adjustment Plan and RCW § 82.14B.030(6)'s prohibition
12 on charging retail sales tax on the E-911 Tax.

13 30. Additionally, because the DOR's policies are arbitrary and capricious, they
14 violate state and federal substantive due process requirements.

15 **2. State and Federal Procedural Due Process**

16 31. The DOR's policies also violate state and federal procedural due process
17 requirements.

18 32. The due process provisions of the state and federal constitutions require
19 that parties impacted by a deprivation of life, liberty or property receive notice and an
20 opportunity to be heard by an unbiased tribunal with respect to that deprivation.

21 33. Because TracFone is not the tax payer with respect to Washington retail
22 sales tax charged on TracFone Cards, TracFone is not authorized by Washington statute
23 to administratively dispute the DOR's unlawful imposition of that tax.

24 34. Unless TracFone is able to challenge the DOR's unlawful conduct before
25 this Court, it will have no opportunity to be heard by an unbiased tribunal about the
26 DOR's wrongful conduct.

27 35. This constitutes a violation of TracFone's procedural due process rights.
28

1 **3. State and Federal Equal Protection and Privileges and Immunities**

2 36. The Fourteenth Amendment to the United States Constitution provides that
3 no state actor shall abridge any person's privileges and immunities under the law or deny
4 to any person within its jurisdiction the equal protection of the laws.

5 37. These requirements are combined within the equal privileges and
6 immunities provision in Article 1 § 12 of Washington's state Constitution.

7 38. These requirements prohibit discriminatory classifications for legislation
8 and/or enforcement of law unless those classifications or discriminatory enforcement are
9 rationally related to a lawful state objective, and are not arbitrary or capricious.

10 39. The DOR's policy of imposing retail sales tax on the portion of the
11 TracFone Cards' purchase price allocable to the E-911 tax discriminates against
12 TracFone and is arbitrary and capricious.

13 40. Among other things, with no rational relationship to a state objective, it
14 favors post-paid wireless providers and prepaid providers who sell their services over the
15 Internet.

16 41. This constitutes a violation of TracFone's right to equal protection and
17 unabridged privileges and immunities under the law.

18 **4. Interstate Commerce Clause**

19 42. The Interstate Commerce Clause prevents Washington from discriminating
20 against or unduly burdening interstate commerce.

21 43. The DOR's policy violates the Interstate Commerce Clause because it both
22 excessively burdens interstate commerce, and discriminates against out-of-state providers
23 of wireless services.
24

25
26 **IV. FIRST CAUSE OF ACTION
DECLARATORY RELIEF**

27 44. Plaintiff reincorporates and re-alleges the allegations in paragraphs 1
28 through 43 as though fully set forth herein.

1 45. An actual dispute exists between TracFone and the DOR regarding the
2 Price Adjustment Plan and the legality and constitutionality of the DOR's imposition of
3 retail sales tax on the portion of the TracFone Cards' selling price allocable to the E-911
4 Tax.

5 46. TracFone and the DOR have genuine and opposing interests which are
6 direct and substantial, and of which a judicial determination will be final and conclusive.

7 47. TracFone's interest in the outcome of that dispute is actual and substantial,
8 in that the impact caused to TracFone's business based on the outcome of that
9 controversy involves the potential loss of tens of millions of dollars of business per year.

10 48. TracFone is entitled to a declaratory judgment confirming that the Price
11 Adjustment Plan is in compliance with Washington law; that retailers who calculate retail
12 sales tax based on the entire portion of a TracFone Card's purchase price without
13 excluding the portion allocable to the E-911 Tax do so erroneously; and that the DOR's
14 imposition of retail sales tax on the portion of the TracFone Cards' purchase price
15 allocable to the E-911 Tax is contrary to Washington law and the state and federal
16 constitutions.

17
18 **V. SECOND CAUSE OF ACTION**
19 **INJUNCTIVE RELIEF**

20 49. TracFone incorporates the allegations set forth in paragraphs 1 through 48
21 above as though fully set forth herein.

22 50. The DOR's imposition of a retail sales tax on the portion of the TracFone
23 Cards' selling price allocable to the E-911 Tax constitutes a clear violation of law,
24 including violating Washington statutes and the state and federal constitutions.

25 51. The DOR's knowing acceptance from retailers of retail sales taxes
26 calculated on the entire purchase price of a TracFone Card allocable to the E-911 Tax
27 constitutes unjust enrichment and a violation of Washington law and the state and federal
28 constitutions.

 52. TracFone will be substantially damaged by the foregoing violations of law

1 because its customers will be forced to pay excessive taxes on a massive scale, resulting
2 in a competitive disadvantage to TracFone resulting in the loss of tens of millions of
3 dollars in lost business per year.

4 53. The loss sustained by TracFone cannot be measured because it would be
5 impossible to ascertain the amount of loss to TracFone attributable to the wrongful
6 conduct of the DOR.

7 54. The DOR's policy of imposing excessive taxes on the TracFone Cards
8 threatens injury in fact to TracFone because the more TracFone's actual or potential
9 customers pay for each TracFone Card, the fewer TracFone Cards they are likely to
10 purchase.

11 55. Unless the DOR is restrained and enjoined from unconstitutionally
12 imposing or accepting excessive taxes on the TracFone Cards, TracFone will be
13 irreparably damaged. It would be difficult to ascertain the exact or approximate amount
14 of compensation which could afford adequate relief for such acts, and a multiplicity of
15 judicial proceedings may be required.

16 56. TracFone's remedy at law is not adequate to compensate it for injuries
17 threatened by the imposition of excessive taxes on purchasers of TracFone Cards.

18 57. Therefore, TracFone is entitled to injunctive relief pursuant to the
19 principles of equity and the common law.

20 VI. PRAYER FOR RELIEF

21 WHEREFORE, Plaintiff prays for the following relief:

- 22 1. A declaration providing all or any of the following:
- 23 a. that the Price Adjustment Plan complies with Washington law;
 - 24 b. that the DOR's imposition of retail sales tax on the portion of the
25 TracFone Cards' selling price allocable to the E-911 Tax is unlawful, including violating
26 the state and federal constitutions; and
 - 27 c. that a retailer's calculation of retail sales tax on the entire purchase
28

1 price of a TracFone Card without excluding the portion of the purchase price allocable to
2 the E-911 Tax is inconsistent with Washington law and the state and federal
3 constitutions.

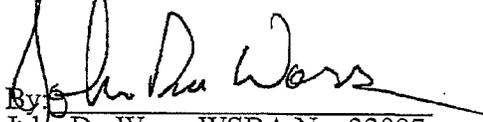
4 2. A temporary, preliminary, and permanent injunction requiring the DOR to
5 refrain from imposing or knowingly accepting retail sales tax calculated on the portion of
6 a TracFone Card's purchase price allocable to the E-911 Tax.

7 3. Attorneys' fees and costs in an amount to be determined at trial.

8 4. Such further relief as the Court deems proper.

9 DATED this 21st day of February 2012.

10
11 **NEWMAN DU WORS LLP**

12
13 
14 By: John Du Wors
15 John Du Wors, WSBA No. 33987
16 1201 Third Avenue, Suite 1600
17 Seattle, Washington 98101

18 Attorneys for Plaintiff TracFone Wireless, Inc.

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

TRACFONE WIRELESS

Plaintiff/Petitioner

vs

No. 11-2-02437-4

DECLARATION OF

WA STATE D.O.R.

EMAILED DOCUMENT

(DCLR)

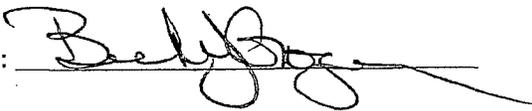
Defendant/Respondent

Pursuant to the provisions of GR 17, I declare as follows:

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2. My address is: 120 Pear Street NE, Olympia, WA 98506
3. My phone number is (360) 754-6595
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I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: February 21, 2012, at Olympia, Washington.

Signature: 

Print Name: BECKY GOGAN

WASHINGTON STATE ATTORNEY GENERAL

February 06, 2013 - 4:38 PM

Transmittal Letter

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Case Name: Tracfone Wireless, Inc. v. DOR

Court of Appeals Case Number: 43805-4

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Comments:

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