**Nos. 11-6215, 11-6300**

# UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY COMMERCIAL MOBILE RADIO SERVICE EMERGENCY TELECOMMUNICATIONS BOARD,

*Plaintiff-Appellee/Cross-Appellant,*

v.

TRACFONE WIRELESS, INC.,

*Defendant-Appellant/Cross-Appellee.*

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On Appeal from the United States District Court
for the Western District of Kentucky,
Case No. 3:08-CV-660-JGH, The Honorable John G. Heyburn II

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**THIRD BRIEF OF TRACFONE WIRELESS, INC.**

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## INTRODUCTION AND SUMMARY OF ARGUMENT[1]

TracFone's opening brief observed that an agency cannot legislate any more than a mouse can fly. The Board's response is, "mice can indeed fly." SBr. 3. This rhetorical gaffe betrays a subtext that flows throughout the Board's brief. The Board clearly has strong views about the statute the General Assembly *should have* enacted in 1998, and the amendments the General Assembly *should have* adopted in 2006. But the statute the Board wants bears little resemblance to either of the statutes the Kentucky General Assembly actually passed. So the Board stretches and strains the statutory language—but mainly just ignores key words—in an effort to achieve a result that accords with the Board's mistaken account of the General Assembly's supposed intent and underlying objectives.

The Board expends more energy developing themes that have nothing to do with statutory construction than it does on the words of the statute itself. It blames TracFone for years of non-payment, without acknowledging that the Board, itself, sat on its hands for five years before suing and for four years before giving content to Option C. It asserts (incorrectly) that it had no power to promulgate the

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[1] The Corrected First Brief of TracFone Wireless, Inc. and Second Brief of Commonwealth of Kentucky Commercial Mobile Radio Service Emergency Telecommunications Board are cited, respectively, as "FBr." and "SBr." All other citation conventions are same as in the First Brief, including the manner in which the relevant statutes are cited in Points I and II. *See* FBr. 1 n.1, 29 n.3.

regulation TracFone proposed, without explaining why, to this day, it has not promulgated any other regulation. It portrays three opinions from other states (one 5-4 and one under review by a higher authority) as a universal consensus in favor of its position, but neglects to mention that TracFone has prevailed twice as often as it has lost.

What little the Board does say about the words of the two versions of the Act is unpersuasive. With respect to the original 1998 Act, the Board urges this Court to avert its gaze from the collection provision's repeated references—in literally every sentence—to "bills" and "billing" and to the mandate that collection be undertaken as part of a CMRS provider's "normal monthly billing process." But this language confirms that the Act required only a certain type of entity to collect and remit the CMRS service charge—namely, an entity in a billing relationship with end users of CMRS. TracFone, the Board concedes, is not such an entity. The Board cannot discount this dispositive fact by chalking it up to TracFone's "cherished business model." SBr. 3. TracFone has every right to operate as it does. In a world where businesses routinely (and legally) do cartwheels to avoid tax liability, it is odd that the Board thinks TracFone was required to change its preexisting business model—and, indeed, its very position within a stream of commerce—in order to bring itself within the terms of statutory language that would otherwise not apply.

The Board's analysis of the amended Act is just as inattentive to the statutory language. The current version of the collection provision contemplates separate treatment for a specified subset of prepaid providers—those, like TracFone, that lack retail contact with end users and are unable to debit end-user accounts—and unambiguously authorizes those providers to elect to have the CMRS service charge determined pursuant to "Option C." Option C leaves it to the Board to set the applicable service charge and collection methodology by regulation. Contrary to the Board's assertions, the text of the Act makes Option C available to qualifying companies whether or not the Board has first taken regulatory action. There is nothing at all "absurd" about choosing an option that the agency has yet to define. SBr. 45. This is the way many—perhaps most—regulations work: The legislature authorizes an agency to issue regulations and the regulated entities wait for the agencies to do their jobs.

What is absurd—or at least not unambiguously right, which is all TracFone has to demonstrate—is the Board's view that it is allowed to adopt an Option C that is no different from Options A and B. When the General Assembly directed the Board to craft a regulation tailored to a particular sort of business model, it intended the Board to craft something *different* for that specialized group.

Maybe there is a place where "mice can indeed fly." But in this country, agencies cannot rewrite statutes.

## ARGUMENT

### I. THE 1998 ACT DID NOT REQUIRE TRACFONE TO COLLECT AND REMIT SERVICE CHARGES.

This is a case about statutory construction. Yet, tellingly, the Board does not begin its argument with the language of the statute. Instead, it opens with a prolix paean to the "intent of the CMRS Act," SBr. 30-31, and only then does it try to back its way into "the plain meaning of the statute." SBr. 31. That is not how statutory construction works. "[A]ny statutory analysis must begin with the plain language of the statute," *AK Steel Corp. v. Commonwealth*, 87 S.W.3d 15, 17 (Ky. Ct. App. 2002), for "[t]he primary rule is to ascertain the intention from the words employed in enacting the statute and not to guess what the Legislature may have intended but did not express," *Osborne v. Commonwealth*, 185 S.W.3d 645, 648 (Ky. 2006) (citation omitted).

In keeping with the established mode of statutory construction, we begin by addressing the Board's position through the lens of the plain text of the 1998 Act, which imposes collection obligations only on those companies that have a billing relationship with end users of CMRS service. *See infra* Section I.A. We then demonstrate that the Board's intent-based arguments do not undermine the statute's plain meaning. *See infra* Section I.B. Finally, we rebut the Board's unsuccessful effort to evade the customary rule that even if there were room for doubt, any ambiguity must be resolved in TracFone's favor. *See infra* Section I.C.

### A. The Board Cannot Escape the Plain Terms of the 1998 Act.

The Board admits that "TracFone does not send a 'bill' to its customers" and that most users of TracFone phones and airtime cards never have any financial contact with TracFone at all, because they purchase TracFone's products from independent retailers. SBr. 8, 11. Yet the Board resists the only conclusion that can reasonably be drawn from these concessions: The terms of the 1998 Act are inapplicable to TracFone.

The Board's resistance rests on what it calls a "consistent mantra in this case." SBr. 5. The "mantra," intoned with metronomic regularity, is a simple syllogism:

> ***Premise:*** The General Assembly intended that every Kentucky cell phone user would *pay* a CMRS charge on every cell phone connection.
>
> ***Conclusions:*** (1) This Court must read the statute to include a mechanism by which to collect from every user; and (2) TracFone must be the one who collects the charge.

*See, e.g.*, SBr. 24, 29-30. The first problem is that Board's premise is wrong. The text of the 1998 Act does not establish that the General Assembly meant for *every* Kentucky cell phone user to pay the CMRS charge, no matter the user's method of obtaining service. *See infra* Section I.A.1. The second problem is that, even if the Board's premise were right, neither conclusion would flow from it. Contrary to the Board's assertions, the opening words of the collection provision do not dictate that TracFone must collect the charge, *see infra* Section I.A.2, and the provision's

repeated references to a billing relationship cannot be written off as inconsequential, *see infra* Section I.A.3.

**1. The statute does not impose the CMRS service charge on the end users of prepaid service.**

The Board seems to take it as given—indeed, as "absolutely clear"—that "the 1998 statute levied the CMRS service charge 'on each CMRS connection' in the Commonwealth without regard to how that CMRS connection might have been bought and sold." SBr. 33 (quoting KRS § 65.7629(3)). The Board, however, conspicuously truncates the relevant language of KRS § 65.7629(3), which indicates exactly the opposite. That provision authorized the Board "[t]o collect the CMRS service charge from each CMRS connection *with a place of primary use, as defined in 4 U.S.C. sec. 124*, within the Commonwealth." KRS § 65.7629(3) (emphasis added); *see also* KRS § 65.7640(1) (stating that "[t]he provisions of 4 U.S.C. secs. 116 to 126 are hereby adopted and incorporated by reference"). The federal statute cited, in turn, provides that the term "place of primary use" "do[es] *not* apply to the determination of the taxing situs of *prepaid* telephone calling services." 4 U.S.C. § 116(c)(1) (emphasis added).

The General Assembly added the reference to federal law in 2002, shortly after that federal statute passed.[2] Thus, at the very least, the 2002 modifications to the CMRS Act make clear that the service charge did not apply to prepaid users from 2002 through 2006 (when the CMRS Act was overhauled). But they also confirm that the Act did not cover prepaid users between 1998 and 2002. After all, there is no reason to believe that the General Assembly in 2002 was seeking to *narrow* the scope of the Act. The General Assembly was simply seeking to ensure that the Act conformed to intervening federal law. And, in so doing, the General Assembly clarified what had been its intention all along—to have the Board collect a service charge from users who obtained CMRS on a postpaid basis.

**2. The first few words of the statute do not obligate TracFone to collect the charges from end users with whom it has no billing relationship.**

In any event, even granting the Board's questionable premise that the 1998 Act imposes a service charge on *all* cell phone users in the Commonwealth, the Board's conclusions do not follow. For starters, legislatures do not always fully

[2] Significantly, the General Assembly inserted different language into *another* telecommunications fee statute as part of the same 2002 Act in which it added the "place of primary use" language to KRS § 65.7629(3). The General Assembly expressly provided that this *other* statute would apply "[i]n the case of a communication, *other than mobile telecommunications services as defined in 4 U.S.C. sec. 124*" (e.g., prepaid service). KRS § 139.100(4)(b) (emphasis added). Given that the General Assembly plainly knew how to use such language, its decision not to do so in KRS § 65.7629(3) speaks volumes.

achieve their objectives, particularly when the world changes in ways they never anticipated. It is perfectly possible—indeed, almost indisputable—that the General Assembly did not provide a mechanism for *anyone* to *collect* from prepaid users, because it just did not anticipate their existence.

Moreover, even if *someone* must collect, that does not mean TracFone must be that someone. In arguing that it must be TracFone, the Board seizes on the first few words of the statute's collection provision, which instruct "[e]ach CMRS provider [to] act as a collection agent." KRS § 65.7635(1). But those words cannot bear the weight the Board piles on them. In the prepaid model, there can be *three* entities involved in the provision of wireless service: There is the network provider (e.g., AT&T), who furnishes the wireless network infrastructure and is thus the only entity that is truly indispensible to enabling wireless users to communicate; there is the middleman (here, TracFone), who cobbles together network capacity from network owners and sells airtime units to a retailer; and there is the independent retailer (e.g., Target), who resells airtime to the consumer and is thus the only entity in direct financial contact with the consumer.

Because every company in this supply chain might, in some sense, be seen as a "provider" of wireless service, the Board gets nowhere with its repeated pronouncement that "*all companies* who provide wireless service must collect those fees." SBr. 4, 32 (emphasis added). Surely, the General Assembly did not

intend to impose duplicative collection obligations on everyone in the chain of commerce who plays some role in the delivery of CMRS to the end user. The exercise in statutory construction requires the court to decide which *one* of several entities best fits the statutory description of *the* CMRS provider who must collect the service charge. Without explanation, the Board maintains that the statute imposes the collection obligation only on the middleman and not the others. But the rest of the statute points elsewhere. In at least four ways, the statutory language indicates that the "CMRS provider" who must collect is the one closest to the consumer in the supply chain.

First, of course, is the repeated reference to "bills" and "billing," discussed in more detail below, *see infra* Section I.A.3. TracFone, as the middleman, issues nothing resembling a bill.

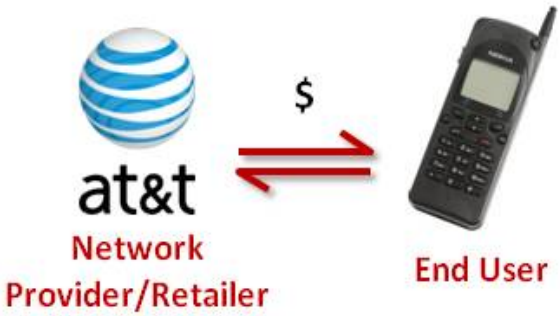
Second, as is discussed in the opening brief, the statute defines "CMRS provider" as the "person or entity who provides CMRS *to an end user*, including resellers." KRS § 65.7621(9) (emphasis added); FBr. 30. If one had to choose *one* entity in the supply chain that best matches that description, it would not be the middleman who (as the Board concedes) essentially functions as a wholesaler. SBr. 24. It would be either the retailer who sells the CMRS directly to the end user or the network owner who provides the essential technological infrastructure without which there could be no wireless service at all.

Third, and perhaps most vivid of all, is the statute's treatment of "resellers." As the illustration on the next page shows, a "reseller" is a company that has no wireless network of its own. Back in 1998 (and still today), resellers would purchase wireless service from network owners (e.g., AT&T) and, in turn, resell the service *to end users*. The reseller would bill the end users under the traditional postpaid monthly billing model. The Board has always understood that AT&T, which was the true source of the CMRS, was not the "CMRS provider" who was obligated to collect the charge. Rather, the reseller, alone, had the obligation. Why? For the two reasons recited immediately above. Accordingly, when AT&T sells directly to the end user, it is obliged to collect the charge, because it is the relevant "entity who provides CMRS *to an end user*." But when AT&T sells to a reseller, who in turn sells to the end user, AT&T no longer has a collection obligation. While AT&T might in some sense still be said to "provide service," it is not the entity that the statute treats as "provid[ing] CMRS *to an end user*." The reseller is that entity—and *it* is the one with the collection obligation.

Thus, the Board is flatly wrong when it asserts that TracFone "cannot avoid its obligations as a service provider simply by marketing and selling its service through a third-party retailer." SBr. 35 (emphasis omitted). Everything the Board says about TracFone applies equally when AT&T sells airtime to resellers:

# CMRS Business Models – Old and New

## Known by 1998




**Board's Position**

AT&T is the "CMRS provider"


Reseller, not AT&T, is the "CMRS provider"

## Emerged Since 1998


**Board's Position**

AT&T and the retailer are NOT the relevant "CMRS provider" (the "entity who provides CMRS to an end user"), but TracFone is.

AT&T, too, is "not a passive seller of a widget"; rather, it is "in the business of providing wireless service to customers throughout the United States." SBr. 35. Yet, that does not mean that AT&T is always treated as *the* "CMRS provider" responsible for collecting the service charge. AT&T is the "CMRS provider" with the collection responsibility only when it sells directly to the consumer.

The result should be no different in the prepaid context just because an *additional* middleman stands between the original source of CMRS and the end user. As is the case under the traditional postpaid reseller model, AT&T is still, in some colloquial sense, a "CMRS provider"—and indeed is the only entity whose service is essential to allowing an end user to make a phone call. And just like the reseller in the old regime, Target is the entity under the prepaid model with the direct financial relationship with the end user and is providing the end user with the phone and the airtime, without which the user would get no service. But now TracFone is in the middle. The Board has never explained why it picks the middleman as the only one with the collection obligation—or, more to the point, where in the statute the General Assembly made that choice.

Fourth, the statute provides no mechanism by which the middleman in TracFone's position *can* collect. In making this point in its opening brief, TracFone challenged the Board to explain how, exactly, TracFone was supposed to collect a monthly charge from a consumer with whom it has no financial

relationship (and about whom it knows essentially nothing). The Board has no answer, because the statute furnishes no mechanism.

The closest the Board comes is to suggest that TracFone could change the way it does business. According to the Board, "[i]f TracFone wanted to determine how much airtime each customer utilized each month, it could seek out that information" from "other providers," such as AT&T. SBr. 9. But that assertion does not explain why, under the terms of the Act, TracFone—as opposed to the "other providers" who actually have the information—must be the one to collect.

It is no answer for the Board simply to attempt to characterize every end user of a TracFone airtime card as a "TracFone customer, regardless of whether he purchased that airtime through a retailer." SBr. 24; *see also* SBr. 34. For one thing, the end user is more aptly described as the "customer" of the retailer who exchanges cards for cash at the cash register. For another, smacking the label "*TracFone* customer" on the end user does not somehow change TracFone's position in the stream of commerce or help answer which entity in that chain is the one who must collect.

Nor does the Board gain traction by pointing out that end users must contact TracFone in order to activate their phones and obtain a phone number. SBr. 34. Notably, the CMRS Act does *not* define "CMRS provider" as "an entity who provides *a CMRS connection* [i.e., a phone number] to an end user." *See* KRS

§ 65.7621(6) (defining "CMRS connection" as "a mobile handset telephone number assigned to a CMRS customer"). It defines "CMRS provider" as the entity who provides "CMRS"—*the service*—to the end user. By assigning consumers a telephone number, TracFone may enable them to become CMRS users, just as Weber enables consumers to become propane users by outfitting its barbecue grills with connections to propane tanks. Just as Weber's hardware does not make it a "propane provider," TracFone's connection does not make it *the* one entity that should be treated as the "CMRS provider" with the obligation to collect.

### 3. The Board's rationale for ignoring the various statutory references to "bills" and "billing" is unavailing.

While the Board's flawed interpretation of the first few words of the 1998 Act's collection provision is reason enough to reject its position, the provision's many references to "bills" and "billings" are nails in the coffin. The Board scarcely acknowledges the command that the service charge "shall" be collected "as part of the provider's *normal monthly billing process*." KRS § 65.7635(1) (emphasis added). And it does not even mention the direction that a CMRS provider must "list the CMRS service charge as a separate entry *on each bill*" and that if it receives only "a partial payment for *a monthly bill*," it "shall first apply the payment against the amount the CMRS customer owes the CMRS provider." KRS § 65.7635(1) (emphasis added); *see also* KRS § 65.7629(3) ("The CMRS service charge … *shall be collected in accordance with KRS 65.7635*." (emphasis

added)). These references to "bill" and "billing," which appear in *every* sentence of KRS § 65.7635(1), eviscerate both of the conclusions in the Board's "mantra": (1) they confirm that the General Assembly did not designate anyone to collect from the population of prepaid end users; and (2) they reinforce the view that if the statute designates someone to collect, it is not TracFone, which does not have any financial relationship with end users at all, much less a "billing" relationship.

Despite the lip service the Board pays to the axiom that it is improper to read a statute in a way that saps certain words of meaning, *see, e.g.*, SBr. 31, it treats the repeated references to "bills" and "billing" as if they were not in the statute. It insists that giving them meaning is drawing "distinctions without a difference." SBr. 8. The Board's only explanation for why it is permitted to read those words out of the statute substitutes angry vitriol for analytic vigor: "[A]ny 'ambiguity' in KRS § 65.7635(1)," the Board asserts, "was created solely by the prepaid business model itself and prepaid providers' *choice* not to send its customers any kind of traditional 'bill.'" SBr. 38. At every turn, the Board tries to depict TracFone as a scofflaw devising a "marketing and payment methodology" merely "to avoid its statutory obligations." SBr. 24; *see also* SBr. 3, 28 n.12, 36, 41-42.

As an initial matter, it is undisputed that TracFone did not invent the prepaid business model to avoid service charges, but to offer mobile phone users an alternative to long-term contracts and monthly bills. The Board obliquely

acknowledges this point when it notes that TracFone first developed this model (in other states) in 1996, well before the General Assembly passed the 1998 Act. SBr. 29 n.14. Moreover, this case is not about a trivial distinction in "marketing" or "payment methodology," SBr. 24, but a company with a fundamentally different position in the stream of commerce.

More importantly, the Board's attack betrays a fundamental misunderstanding of how tax codes and fee statutes work. The General Assembly drafted a statute that expressly covers a specific business model. TracFone has a different business model. The consequence of this disjunction is not, as the Board suggests, that TracFone was required to "alter its cherished business model," SBr. 3—or behave as if the General Assembly had intended to cover a business model it never imagined. The consequence is that the statute does not apply to TracFone.

This Court emphatically made this point in almost identical circumstances in *OfficeMax, Inc. v. United States*, 428 F.3d 583 (6th Cir. 2005). There, this Court confronted a federal statute tailored to a particular method of selling long-distance telephone service. The law imposed an excise tax on "telephonic quality communication for which … there is a toll charge which varies in amount with the distance and elapsed transmission time of each individual communication." *Id*. at 586 (quoting 26 U.S.C. § 4252(b)(1)). When Congress enacted this provision,

AT&T (then the nation's sole long-distance provider) "imposed a toll charge based on variations in both the time and distance of each call." *Id*. Over time, the long-distance market evolved, and companies began to offer "nationwide long-distance plans for flat per-minute rates." *Id*. The IRS took a position that was analytically indistinguishable from the position the Board takes here, arguing that all long-distance calls were taxable, even though long-distance companies had abandoned the business model described in the statute.

In language that seems tailor-made to this case, this Court rejected any such retrofitting: "A legislature that chooses to define eligibility for taxation based on how a *private entity* chooses to charge for [its] service … can hardly be treated as a body that means to impose a tax for all time. Just the opposite seems to be true." *Id.* at 593. The Court offered a useful analogy: "a statute enacted in 1890 that taxed sales of 'any vehicle of transportation designed to convey passengers by land or sea' would not cover sales of traditional airplanes, even though the legislator's purpose in 1890 could fairly be characterized as taxing all modes of transportation." *Id*. As the Eleventh Circuit explained in reaching the same conclusion on similar facts, "if the statutory language no longer fits the infrastructure of the industry, the IRS needs to ask for congressional action to bring the statute in line with today's reality. It cannot create ambiguity that does not exist or misinterpret the plain meaning of statutory language to bend an old law

toward a new direction." *American Bankers Ins. Group v. United States*, 408 F.3d 1328, 1333 (11th Cir. 2005) (citations and internal quotation marks omitted). If a statute imposing a levy on long-distance calling charges that vary by both distance and time does not apply when a carrier's charges vary by time alone, then surely a statute requiring collection through a "normal monthly billing process" does not apply when a company has no billing process at all.

*OfficeMax* is in line with the deeply rooted axiom that taxpayers are entitled to structure their affairs to avoid the application of statutes written in terms of a specific business model. *See, e.g.*, *Estate of Kluener v. Comm'r*, 154 F.3d 630, 634 (6th Cir. 1998) ("Any taxpayer 'may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.'" (quoting *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934) (L. Hand, J.), *aff'd*, 293 U.S. 465 (1935)). If a company can place itself outside the scope of a tax or regulatory provision by altering its business method *even when the company is motivated by a desire to reduce its tax or regulatory burden*, then the same must be true when a company chooses its business method with no such motivation. *Cf. Procter & Gamble Co. v. Comm'r*, 961 F.2d 1255, 1260 (6th Cir. 1992) ("There is no question that [a company] may legally structure its affairs in its own best interest.").

The Board cannot salvage its textual argument by pointing to cases from other jurisdictions that construe other wireless E911 statutes. SBr. 40-41. For starters, the Board is wrong to imply that these decisions reflect some sort of consensus view in favor of its position. While three courts have held that their states' statutes impose collection obligations on prepaid companies, a number of states (e.g., Florida, New Mexico, New York, and North Carolina) accepted TracFone's position and authorized refunds of erroneously remitted charges without even attempting to litigate the issue (one, Florida, pursuant to an opinion of the state's Attorney General), and courts in three other states (Georgia, Michigan, and Montana) ruled in favor of prepaid companies. *See* R75-3, Pollack Dep., at 50, S.A. 119; R75-3, Fla.Wireless Board Letter, S.A. 220; *see also Alltel Commc'ns, LLC v. Montana Dep't of Revenue*, No. CDV-2010-981, 2012 Mont. Dist. LEXIS 28, at *5-11 (Mont. Dist. Ct. Feb. 22, 2012); *Fulton Cnty. v. T-Mobile, South LLC*, 699 S.E.2d 802, 804-05 (Ga. Ct. App. 2010); *TracFone Wireless, Inc. v. Dep't of Treasury*, No. 275065, 2008 WL 2468462, at *4 (Mich. Ct. App. June 19, 2008).[3] The weight of authority is thus in TracFone's favor.

[3] In Georgia, the government conceded that the prepaid company was not required to collect the service charge, but resisted the company's refund request; the court ruled in the company's favor. *See T-Mobile*, 699 S.E.2d at 810.

In any event, two of the three cases that the Board invokes revolved around statutes that are very different from Kentucky's. The statutes in those cases did not direct that collection "shall" occur "as part of the provider's normal billing process." KRS § 65.7635(1). In the first case, the statute at issue did not even mention billing in the section imposing the collection obligation—and the court still split 5-4. *See TracFone Wireless, Inc. v. Washington Dep't of Revenue*, 242 P.3d 810, 814 (Wash. 2010) (citing Wash. Rev. Code § 82.14B.030(4)). In the second case, the intermediate appellate court noted that the statute did not "require[] that the fee be assessed in a monthly bill or collected on a monthly basis"—and the Texas Supreme Court is reviewing the case on the merits. *Commission on State Emergency Commc'ns v. TracFone Wireless, Inc.*, 343 S.W.3d 233, 239 (Tex. Ct. App. 2011), *pet'n for review filed*, No. 11-0473 (Tex. June 20, 2011). Had these courts confronted Kentucky's statute—saturated with reference to bills and billing—they probably would have reached the opposite result. The third case the Board cites did involve a statute with language similar to Kentucky's. *See T-Mobile South, LLC v. Bonet*, __ So. 3d __, No. 1100107, 2011 WL 6004616 (Ala. Dec. 2, 2011). That case, however, has limited value, because it rests on principles of agency deference that are inapplicable here. *See id*. at *10-12.

### B. The General Assembly's Purported Purpose Cannot Override the Statutory Language.

In trying to prove the syllogism embedded in its mantra, the Board puts more stock in the General Assembly's "plain intent" than in the statutory language. SBr. 30. But the imputed legislative intent does not get the Board anywhere. If there is one thing we know, it is that the legislature did not express *any* intent regarding the collection obligations of prepaid companies when it enacted the 1998 Act. There is no indication that the legislature was even aware of the prepaid business model. This is therefore not a case in which we can look to the legislative record for evidence of what the legislature actually thought about the specific question the Court now faces. So what the Board is really proposing is that this Court should divine what the legislature would have wanted to do had it focused on the prepaid business model.

There are at least two fundamental problems with the Board's proposed mode of analysis. First, courts are not legislative mind readers. They cannot reliably determine how legislatures—bodies that face myriad competing demands—would have chosen to address complicated, multifaceted problems. As the Supreme Court has put it, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) (emphasis omitted).

Here, for instance, the General Assembly balanced its desire to fill the coffers of the CMRS fund against other concerns. As the Board acknowledges, the General Assembly was also seeking to give effect to the Federal Communication Commission's E911 directives. SBr. 4-5, 30. The General Assembly went so far as to incorporate the relevant FCC order into the 1998 Act and to charge the Board and its administrator with carrying it out. *See* KRS §§ 65.7621(11), 65.7625(3), 65.7629(1). The Board does not contest that a "fundamental" aspect of the FCC's order was the principle that cell phone users should bear the costs of upgrading 911 systems and that carriers should be allowed to recover any upgrade-related outlays. *See* FBr. 10; SBr. 5 n.4 (asserting that the FCC's concern with cost recovery receded *after* the 1998 Act was passed). Nor does the Board dispute that this is why the General Assembly took such care to tie collection obligations to billing relationships and to specify how collection would occur. Consistent with the FCC order, the General Assembly wanted to ensure that all money flowing into the CMRS fund was coming directly out of the pockets of CMRS customers rather than CMRS providers.

The Board's effort to stretch the text of the 1998 Act to cover prepaid companies is inconsistent with the General Assembly's concern with cost recovery. Given how carefully the General Assembly delineated a billing-based collection mechanism to assure cost recovery, it is unlikely that the General Assembly would

have intended to impose remittance obligations on non-billing entities for whom the statute, as written, provided no comparable guidance and thus no comparable cost recovery assurance.

The second problem with the Board's mode of analysis is that, even when a court believes it can say with confidence what the legislature would have done, the court cannot simply disregard what the legislature actually did. That is the point this Court was making in *OfficeMax* with its hypothetical about a legislature that adopts a fee on cars and boats, and a taxing authority that tries to apply it to airplanes. 428 F.3d at 593; *see supra* at 17. The responsibility of updating statutes to account for changing circumstances is legislative, not judicial. *See, e.g.*, *Kentucky Unemployment Ins. Comm'n v. Hamilton*, __ S.W.3d __, No. 2010-SC-000252, 2011 Ky. LEXIS 176, at *10 (Ky. Dec. 22, 2011) ("If the plain words chosen by the legislature do not effectuate its purpose, it is for the General Assembly, not the courts, to re-write the statute, even if the statute as written produces an unsatisfying result.").

Here, the process of legislative revision worked as it should. Once the General Assembly became aware of the prepaid business model, it considered whether and how prepaid companies should be required to collect the CMRS service charge. And, in 2006, it amended the 1998 Act to cover prepaid and to specify certain collection mechanisms that comport with the prepaid business

model. The 2006 amendments show that, had the General Assembly actually considered prepaid wireless service in 1998, it likely would have adopted a *different* statute. The statute that the General Assembly did adopt in 1998 thus can hardly be said to reflect some affirmative intent on the part of the legislature to impose collection obligations on prepaid companies.

The Board does not dispute that "courts must presume that the legislature intended to effect a change in the law." *Brown v. Sammons*, 743 S.W.2d 23, 24 (Ky. 1988); *see* FBr. 35. The Board asserts, however, that the 2006 amendments merely clarified existing law. SBr. 43. That assertion contradicts both the General Assembly's and the Governor's explicit statements that the 2006 amendments were not clarifications but, rather, were directed at "clos[ing] a 'loophole' that allows 'prepaid' wireless phone service to not remit the surcharge." R75-3, Fiscal Note, at 2; S.A. 262.

The Board tries to minimize the General Assembly's statement by suggesting that the Fiscal Note in which it appeared was principally designed to "estimate the financial impact of a statute, not to indicate the [statute's] purpose." SBr. 44. But regardless of *why* Fiscal Notes are created, the fact is that they are presented to legislators along with the legislative text and thus necessarily inform legislators' understanding of what they are voting on. *See* KRS §§ 6.955, 6.960 (requiring fiscal notes to be "attached to each copy of the bill" before any bill

"which relates to any aspect of local government … shall be voted on"); *see also Petitioner F v. Brown*, No. 2006-CA-002450, 2008 Ky. App. Unpub. LEXIS 532, at *7-8 (Ky. Ct. App. Feb. 22, 2008) (upholding trial court's reliance on a fiscal note as "persuasive" evidence of legislative intent). The Board's explanation, moreover, does not in any way address the Governor's pronouncement that the 2006 amendments were designed to "clos[e]" the "loophole on prepaid cell phones." R75-3, Press Release, at 2, S.A. 258. As far as legislative history goes, this is about as definitive as it gets.

Even putting this evidence aside, the Board dramatically understates the significance of the 2006 amendments. The amendments did not "merely" add "collection options for prepaid providers." SBr. 43. The amendments added language that, for the first time, expressly granted the Board "the power[] and dut[y]" to "collect the CMRS service charge" from "prepaid CMRS connections." KRS § 65.7629(3) (West Supp. 2006). The amendments also went beyond simply describing how the CMRS service charge will be "collected" for "customers who purchase their CMRS services on a prepaid basis"; they set forth how the charge "shall be *determined*" in the first place. *Id*. § 65.7635(1). The Board certainly offers nothing to rebut the presumption that these changes "effect[ed] a change in the law itself." *City of Somerset v. Bell*, 156 S.W.3d 321, 326 (Ky. Ct. App. 2005) (quoting *Inland Steel Co. v. Hall*, 245 S.W.2d 437, 438 (Ky. 1952)); *see also Alltel*

*Commc'ns*, 2012 Mont. Dist. LEXIS 28, at *11 (describing "the fact that the legislature found it necessary to amend [Montana's wireless fee] statute to specifically provide application to prepaid services" as "persuasive" evidence that the prior version of the statute did not cover prepaid).

### C. Any Ambiguity Concerning the Coverage of the 1998 Act Must Be Resolved in TracFone's Favor.

The Board does not dispute that statutes imposing taxes and similar charges must be strictly construed against the government. *See, e.g.*, *George v. Scent*, 346 S.W.2d 784, 789 (Ky. 1961). The Board continues to maintain, however, that this principle of construction does not apply here because TracFone is supposedly seeking an "exemption" from collecting and remitting the CMRS service charge. The Board goes so far as to suggest that TracFone is required to "prove beyond a reasonable doubt that the General Assembly intended to exclude prepaid customers and providers from the ambit of the CMRS Act." SBr. 39. The Board's attempt to shift the burden to TracFone turns the strict construction rule on its head.

None of the cases the Board cites stands for the proposition that when a party challenges the *scope* of a tax statute, the party is somehow seeking an "implied exemption" and is precluded from invoking the principle of strict construction. If they did, statutory ambiguities would *never* be resolved in the taxpayer's favor.

Contrary to the Board's position, courts routinely construe tax statutes in favor of the taxpayer in closely analogous cases. This Court, for instance, recently considered the claims of various online travel companies that they "were not within the purview" of the "transient room tax" imposed by two local Kentucky ordinances. *Louisville/Jefferson Cnty. Metro. Gov't v. Hotels.com, L.P.*, 590 F.3d 381, 383 (6th Cir. 2009). Applying Kentucky law, this Court declared that the ordinances must be construed "in favor of the taxpayer." *Id*. at 389 (quoting *Scent*, 346 S.W.2d at 789). This Court did not place the burden on the travel companies on the ground that they were after some sort of "implied exemption," and it certainly did not suggest that those companies had to prove that they were not subject to the tax "beyond a reasonable doubt." Here, the 1998 Act's focus on the provision of service "to an end user," its treatment of "resellers," and its emphasis on "bills" and "billing" raise, at the very least, serious doubts as to whether the statute applies to non-billing, wholesale-type entities such as TracFone. Those doubts must be resolved in TracFone's favor.

## II. TRACFONE ALSO DOES NOT OWE FEES UNDER THE 2006 VERSION OF THE STATUTE.

With respect to the 2006 amendments, the Board does not dispute the basic contours of the statutory scheme. Everyone agrees that the CMRS Act now describes how the CMRS service charge is to be calculated and collected with respect to "CMRS customers who purchase CMRS services on a prepaid basis."

KRS § 65.7635(1). Specifically, the statute gives prepaid companies "three options." SBr. 24. They may choose to collect the service charge each month from active customers whose account balance equals or exceeds the amount of the charge (Option A). They may opt to pay a fraction of the total amount of revenue they receive in direct sales from their prepaid customers in the Commonwealth (Option B). And a subset of them (those who "do not have the ability to access or debit end user accounts, and do not have retail contact with the end-user or purchaser of prepaid wireless airtime") may choose what the Board aptly calls "door number three," SBr. 25, which is to leave it to the Board to specify an alternative methodology through administrative regulations (Option C). *See* KRS § 65.7635(1). The Board does not dispute that TracFone falls within the subset of prepaid providers that Option C describes. Nor does the Board dispute that TracFone formally elected Option C shortly after the amended Act took effect.

The disagreement is over (1) the legal effect of TracFone's decision to elect Option C and (2) the legality of the Board's pronouncement that Option C will not be an alternative methodology, but, rather, a direction to adopt Option A (and then, at the district court's insistence, a direction to adopt either Option A or B). Far from being a "calculated ploy," SBr. 44, TracFone's Option C election was fully consistent with the plain text of the amended Act, and the Board had no right to reject it and demand that TracFone choose one of the other options. *See infra*

Section II.A. That demand is invalid in any event for the independent reason that the Board did not follow a proper administrative process. *See infra* Section II.B. At the very least, it was impermissible for the Board to order TracFone to remit fees retroactively. *See infra* Section II.C.

### A. The Amended Act Allows Certain Qualifying Companies Like TracFone to Elect Option C as an Alternative to Options A and B.

The two questions of statutory construction posed by the Board's brief are related. We demonstrate first that, as the district court held, TracFone was fully within its rights to elect Option C before the Board promulgated a regulation giving it content. We then briefly address the Board's (almost non-existent) argument that it was authorized to direct an Option C elector to elect Option A or B.

#### 1. The amended Act allowed TracFone to elect Option C and await the Board's action giving it content.

TracFone did not focus on this first point in its opening brief, because the district court decided it in TracFone's favor. In the court's words, "[t]here is simply no statutory support for the Board's proposition that, while awaiting advice on the proper method of collection under Option C, the provider must utilize either Option A or B to collect and remit fees." R92, OpI, at 23. The most emphatic assertion the Board can muster in response is that its construction of the statute is "non-absurd." SBr. 49. "Non-absurd," of course, is not the standard. For reasons

described above (and not disputed as to the 2006 amendment), the Board must establish not just that its reading is plausible, but that it is unambiguously correct. *See supra* at 26-27. The Board does not even try to meet that burden, and it cannot. The plain language, structure, and purpose of the amended Act all support the district court's conclusion that TracFone was permitted to choose Option C and await the Board's further action, if any. That is why the Board dwells on extraneous arguments that have nothing to do with these conventional tools of statutory construction.

***Plain language.*** The plain language leaves no doubt that the district court's conclusion on the threshold question was correct. The amended Act provides that, for prepaid providers, "the CMRS service charge shall be determined according to one (1) of the following methodologies *as elected by the CMRS provider*." KRS § 65.7635(1) (emphasis added). It then lists (a), (b), and (c), in turn. The statute does not indicate that the third option stands on different footing from the first two. And it certainly does not indicate that a provider's right to elect Option C is somehow contingent on the Board's first taking regulatory action. The sole limitation on Option C is that it is available only to a subset of providers—a subset that, as the Board admits, includes TracFone. The statutory analysis is as simple as that.

Once again, the Board does not seriously grapple with the statutory text. If, as the Board suggests, the General Assembly intended to "grant the CMRS Board discretion to implement a regulation (or regulations), and *only then* to allow a CMRS provider to elect Option C," SBr. 49, it could have said exactly that. Or it could have said "providers may choose between Options A and B and, if and when the Board promulgates regulations setting forth another methodology for determining the CMRS service charge, then providers may also elect Option C." Or it could have laid out the three options and then added a coda to Option C: "provided that, no CMRS provider shall elect this option unless and until the Board promulgates such administrative regulations." But the amended Act says none of those things.

All the Board offers by way of analysis of the statutory language is the argument that the statute provides that the Board "'may' (i.e., has discretion to), promulgate a regulation, or it has discretion not to promulgate a regulation." SBr. 50. Even assuming the Board's reading of the word "may" were right, it would not matter. TracFone is not arguing that it can require the Board to do anything. Rather, TracFone's argument is that once it validly elects Option C, the Board was bound by that election. If the Board wants collections to be made under Option C, it should promulgate regulations that give that option content. If it fails to do so, it

must forgo collections from the end users of those providers who properly elect Option C.[4]

"[P]atently absurb [sic]," cries the board. SBr. 45. The Board's position seems to be that no legislature would ever leave a statutory goal unimplemented until an agency promulgates implementing regulations. That is obviously wrong. Legislatures routinely do exactly that, understanding that some objectives (even important ones) will go unmet unless and until the agency proceeds. *See, e.g.*, *Sweet v. Sheahan*, 235 F.3d 80, 86-87 (2d Cir. 2000) (no obligation to comply with statute until agency promulgates implementing regulation); *United States v. Murphy*, 809 F.2d 1427, 1430 (9th Cir. 1987) (statute imposes no obligations in absence of implementing regulation). What is absurd—and what the General Assembly almost certainly neither intended nor expected—is that the Board would take four years to even take a position as to what Option C means and six years

[4] It seems more likely that the General Assembly did *not* intend to give the Board the option to choose not to promulgate Option C regulations. If the General Assembly had intended to give the Board that discretion, it would have said "*the board may promulgate regulations* to collect the service charge from such end users." Instead, it said that "[i]n the case of [certain specified] CMRS providers … the CMRS service charge and collection methodology *may be determined by administrative regulations* promulgated by the board." KRS § 65.7635(1)(c) (emphasis added). The import of this locution is that this is a choice that a qualifying CMRS provider "may" take—not that the legislature wanted to leave the Board free to leave the money on the table or undermine existing prepaid businesses by never promulgating a regulation.

(and counting) to promulgate the formal regulations the General Assembly contemplated. The Board exhibits a severe case of projection when it accuses TracFone of a "ploy to 'elect' Option 'C,'" and then "sit[] on its hands, and wait for the CMRS Board to promulgate an 'acceptable' regulation." SBr. 44-46. When TracFone made that election, there was no way it possibly could have known that the Board would sit on *its* hands for six years.

Whatever the Board's justification for its delay, its position about the consequence of the delay is demonstrably wrong. Just this Term, the Supreme Court rejected exactly the argument the Board is making here in the context of a similar regulatory void between the passage of an act and the promulgation of regulations. *See Reynolds v. United States*, 132 S. Ct. 975 (2012). At issue there was a provision of the Sex Offender Registration and Notification Act that began by stating, "A sex offender shall register, and keep the registration current." *Id.* at 979 (quoting 42 U.S.C. § 16913(a)) (emphasis omitted). Another subsection declared, "The Attorney General shall have the authority to specify the applicability of the [registration] requirements … to sex offenders convicted before the enactment of this chapter … and to prescribe rules for the registration of any such sex offenders." *Id*. (quoting 42 U.S.C. § 16913(d)) (emphasis omitted). Like the Board here, the government asserted that the statute, of its own force, imposed registration obligations on all sex offenders, even those convicted before the statute

was enacted. It would be "absurd," the government argued, to read the statute not to apply to all sex offenders, particularly given that "one basic purpose" of the statute was to establish a comprehensive nationwide sex offender registration system. *Id*. at 982-83.

The Supreme Court rejected the government's argument and held "that the Act's registration requirements do not apply to pre-Act offenders until the Attorney General specifies that they do apply." *Id*. at 978. The Court explained that, far from being "absurd," this reading of the statute "efficiently resolve[d] what Congress may well have thought were practical problems arising when the Act sought to apply the new registration requirements to pre-Act offenders." *Id*. at 981. Congress left it to the Attorney General to resolve these difficulties and did not insist that pre-Act offenders try to figure it out for themselves in the meantime. So, too, here. Rather than requiring companies in TracFone's shoes to attempt to navigate the uncertain terrain of Options A and B, the General Assembly left it to the Board to determine the applicable service charge and collection methodology. What the General Assembly emphatically did *not* do was authorize the Board to dictate, through regulatory *in*action, that companies qualified to elect Option C must instead choose A or B.

***Structure & purpose.*** Beyond defying the statutory text, the Board's attempt to shut the door on Option C is inconsistent with the evident intent of the

General Assembly in structuring the amended Act as it did. The General Assembly could have adopted a one-size-fits-all approach for determining and collecting the CMRS service charge applicable to prepaid wireless users, just as it did for postpaid wireless (namely, by requiring all postpaid providers to collect the charge through their billing process). Or it could have provided a two-sizes-fits-all approach, and ignored the special needs of the sorts of businesses described in Option C.

The General Assembly recognized, however, that prepaid providers do not come in one size—or even two. They differ in terms of their level of retail contact with end users and their ability to monitor and access end-user accounts. Traditional providers like Verizon and AT&T—companies with retail stores and their own wireless networks—have become major players in the prepaid market. Companies like TracFone operate differently. They purchase airtime from network owners at wholesale and resell it through independent retailers. *See, e.g.*, R68 Stip, ¶ 26; R75-3, Salzman Dep., at 76-77, S.A. 131; R75-3, Salzman Letter, S.A. 245. Companies with these characteristics—the characteristics described in Option C—have trouble complying with Options A and B. *See* FBr. 44-49. Understanding this, the General Assembly acted to assure this category of companies that they would not be forced to attempt to collect the CMRS service charge under Options A or B. In short, the General Assembly adopted Option C precisely because it did

not want to impose burdens that would be more onerous for some companies than others. The whole point of the three-option approach was to ensure that companies like TracFone would not be penalized for—or required to change—their perfectly legitimate business model.

The Board responds that "ALL prepaid providers, generally, occupy the same 'position in the stream of commerce' as TracFone, i.e., they are prepaid providers who sell a majority of their prepaid services through third-party retailers." SBr. 51. Thus, the Board continues, the General Assembly presumably would not have gone "through the process of … add[ing] two collection methodologies for prepaid providers (Options A and B) that they never really intended to be workable or utilized by most if not all prepaid providers for the majority of their transactions." SBr. 51-52. Both the premise and the conclusion are flawed. The Board's factual premise (which is notably naked of any record citation) is simply untrue. All the business models depicted in the illustration at page 11 have developed a prepaid program. Telecom behemoths AT&T and Verizon—companies with their own networks and retail outlets—both have vibrant prepaid businesses. R68, Stip, ¶ 24. Companies that are mainly in the prepaid business (including TracFone) make varying degrees of direct-to-consumer sales that would not qualify for Option C treatment but would be suitable for Options A or B. As to the conclusion, the possibility that a higher volume of sales would

qualify for Option C than for the other two options does not undermine the conclusion that the General Assembly wanted Option C to be available for qualifying providers. If anything, it suggests that the General Assembly did not expect the Board to allow Option C to lie fallow as it has for so many years.

***Extraneous arguments.*** The Board's remaining arguments concerning TracFone's entitlement to elect Option C have no connection to the statutory text—or any other legitimate device of statutory interpretation—and are easily dismissed.

The Board repeatedly emphasizes that "all other prepaid providers have been dutifully remitting pursuant to either Option A or B." SBr. 45; *see* SBr. 53, 55 n.24, 56. But "everybody does it" has no greater legitimacy as a device of statutory construction than as an excuse for drunk driving. Surely, the Board would not concede that it should lose under the 1998 Act because *no* prepaid provider believes it had a legal obligation to collect the fees. *See, e.g.*, R75-3, Mosley Aff., S.A. 251; R75-3, Zeppetalla Aff., S.A. 254; R75-3, Skaggs Dep., at 58-9, 220-21, S.A. 143, 151.

Next, the Board builds much of its argument around the proposition that it is theoretically *possible* for TracFone to "comply with either Option A or B," if, for example, it "requir[ed] additional information from … carriers" (who are free to reject the requirement). SBr. 46. TracFone has already demonstrated why those

options are either impossible or impracticable. *See* FBr. 45-46. Regardless, this exercise in statutory interpretation does not depend on defining how difficult one option or the other is for a particular company. It depends on whether the company qualifies for Option C, which TracFone indisputably does, and on whether the General Assembly meant what it said when it provided that the individual company has the right to "elect[]" that option.

On this point, the Board proclaims, *Gotcha!* "[I]t was *TracFone* who first proposed the Tennessee Model in Kentucky as a feasible remittance methodology," so how can it now claim that it "cannot comply"—at least with Option B? SBr. 47. The truth is that TracFone withdrew its support for the Tennessee Model well before the legislature took up the 2006 amendments. As the Board acknowledges, TracFone urged the General Assembly *not* to thrust that model on businesses like TracFone—precisely because the model was impractical and unfair—but instead to craft (or direct the Board to craft) a model more suited to its circumstances. The General Assembly heeded its request by guaranteeing an Option C. Moreover, the Tennessee Model that TracFone once supported is different from—and less onerous than—Option B.

Finally, the Board complains that it lacks the authority to adopt the regulation TracFone has proposed—a point-of-sale collection method. It is not clear how this supposed lack of authority affects the statutory analysis. TracFone

was under no obligation to propose *any* regulation. And, as the Board itself points out, it is not required to adopt regulations "at the beckoning of each" Option C elector. SBr. 49. Similarly, it is simply not true that "the only regulation that TracFone will accept is point of sale collection." SBr. 25. That was TracFone's *proposal*. If the Board believes it cannot mandate point-of-sale collection, it is free to propose an alternative regulation, so long as it accords with the terms of the statute. The problem is the Board has never come up with any alternative.

In any event, to the extent it matters, the Board's point-of-sale analysis is incorrect. First, the Board is flat wrong when it asserts that "*the General Assembly* expressly declined to require retailers to collect CMRS service charges." SBr. 52. The Board's only supporting evidence is that TracFone lobbyists apparently suggested to several legislators the possibility of writing a point-of-sale collection requirement directly into the statute. *See id*. Of course, the decision of individual legislators not to draft statutory amendments *requiring* point-of-sale collection does not mean that those legislators—let alone the General Assembly as a whole—meant to take point-of-sale off the table as a regulatory option for the Board. *Cf. Reynolds*, 132 S. Ct. at 981 (recognizing that it is often "efficient and desirable" to leave such questions to administrative bodies). Moreover, TracFone's lobbying activities are not part of the official legislative record and do not constitute competent evidence of the General Assembly's intent. *See, e.g.*,

*Board of Trs. of the Judicial Form Ret. Sys. v. Attorney Gen.*, 132 S.W.3d 770, 786 (Ky. 2003) (declaring that "the intention and purpose" of the legislature "may not be established by parole testimony or other evidence de hors [i.e., outside] the journals containing the proceedings of the body that brought into existence the particular law under consideration" (quoting *Wheeler v. Board of Comm'rs*, 53 S.W.2d 740, 742 (Ky. 1932)); *see also Straaten v. Shell Oil Prods. Co.*, __ F.3d __, No. 11-8031, 2012 U.S. App. LEXIS 7789, at *7 (7th Cir. April 18, 2012) ("Legislative history may help decode ambiguous statutory text, but what lobbyists told the staff is not legislative history.").

Second, the Board is equally wrong when it asserts that it "has no jurisdiction over retailers," SBr. 25, because the amended Act states that "only the 'CMRS provider' … is required to collect and remit" the service charge, SBr. 53. Even if that were true, the argument would be unavailing. As is explained more fully above, the General Assembly was careful to define "CMRS provider" to "includ[e]" a "reseller[]." KRS § 65.7621(9); *see supra* at 10-12. The Board would undoubtedly agree that this provision would cover Target if it resold airtime from AT&T and billed customers monthly. The Board has not explained why Target would not be a "reseller"—and therefore a "CMRS provider"—just because it resells on a prepaid basis.

In any event, as TracFone's opening brief explains, the amended Act does not say that only a "CMRS provider" can be the collection agent under Option C. FBr. 47. While the General Assembly drafted Options A and B to place obligations on the "CMRS provider," the General Assembly conspicuously shifted to the passive voice in Option C. Option C does not state that the Board may promulgate regulations specifying how "CMRS providers" should collect and remit the service charge. It says, "the CMRS service charge and collection methodology may be determined by administrative regulations promulgated by the board to collect the service charge *from … end users*." KRS § 65.7635(1)(c) (emphasis added). Likewise, § 65.7629, which sets forth the Board's "powers and duties," authorizes the Board "[t]o collect the CMRS service charge *from each CMRS connection*." KRS § 65.7629(3) (emphasis added). It does not limit the Board to collecting the CMRS service charge from "CMRS providers." While the Board may prefer not to promulgate a point-of-sale regulation, it certainly has the statutory authority to do so. And until the Board issues *some* regulation setting forth the service charge and collection methodology applicable to Option C electors, TracFone has every right to await the Board's direction on who must collect and how.

### 2. When the General Assembly directed the Board to specify an Option C methodology, it meant a methodology that was different from Options A and B.

Having expended so much effort arguing that Option C was not available to TracFone until the Board defined it, the Board expends little additional energy defending the Option C that it ultimately defined—essentially that "Option C is Option A or B."

The statutory language tolerates no such sleight of hand. The direction that "the CMRS service charge shall be determined according to one (1) of the following methodologies *as elected by the CMRS provider*," KRS § 65.7635(1) (emphasis added), obviously means that the CMRS provider may elect among three *different* methodologies. In normal parlance, no one (other than Thomas Hobson) would ever say, "I'll give you three choices: You can choose A or B. And your third choice is A or B." And for reasons described fully above, it is especially wrong to eliminate the one choice that the legislature contemplated as the *special* choice for the carefully specified subset of businesses for which Options A and B are, at the very least, ill-suited. *See supra* at 34-37.

The Board's entire analysis of the statutory language resides in a one-paragraph retread of the argument about the permissiveness of the word "may," *see* SBr. 50, which is simply beside the point. Beyond that, the Board's other arguments as to why it had no obligation to give unique content to Option C rehash

the arguments that TracFone was obligated to follow Options A or B unless and until the Board furnished a (different) Option C: (1) if Option C is available, then few prepaid providers would use Options A or B (SBr. 50-51, rebutted *supra* at 36-37); (2) TracFone "has provided no other collection methodology" (SBr. 52, rebutted *supra* at 38-39); and (3) "the CMRS Board has … no authority over retailers" (SBr. 53, rebutted *supra* at 39-41). The arguments do not get any more compelling by repetition.

### B. In Addition to Contravening the Terms of the Amended Act, the Board's Action Is Void Because the Board Did Not Conduct Formal Rulemaking.

Even if the Board may effectively override Option C and require Option C electors to collect and remit the service charge pursuant to Option A or B, the Board cannot do so by fiat. The Board does not dispute that the statute authorizes it to "determine[] *by administrative regulations*" the mechanism for calculating and collecting the service charge "from [the] end users" of Option C electors. KRS § 65.7635(1)(c) (emphasis added). That means the Board must go through a proper administrative process—something it concededly did not do here.

The Board misapprehends this argument. It asserts that the amended Act "does not require [it] to engage in [any] rulemaking whatsoever, much less require it to enact a regulation stating that it is *not* going to enact a regulation." SBr. 54. The Board also states (correctly) that it need not "engage in rulemaking to

implement every single discretionary decision." *Id*. But these observations miss the point. This is not a circumstance in which the Board declined to act or merely made some sort of case-specific interpretative ruling. Rather, the Board has "determine[d]" what "the CMRS service charge and collection methodology" will be for Option C electors. KRS § 65.7635(1)(c). Specifically, it has decreed that Option C electors must collect and remit the service charge pursuant to Option A or B. Under the plain terms of the Act, if the Board chooses to make such a determination, it must do so "by administrative regulations." *Id*.; *see also* KRS § 13A.120(6) ("No administrative body shall issue standards or by any other name issue a document of any type where an administrative regulation is required or authorized by law."). Having failed to do so, the Board's determination is "null, void, and unenforceable." *Id*. § 13A.120(4).

This result makes sense. If the Board wishes to require companies that qualify for Option C to comply with Options A or B, then the Board should first be required to provide notice of its intentions and give those companies (and the public) an opportunity be heard on the matter. Interested parties deserve the chance to convince the Board that it would be unreasonable to impose Options A or B on companies that lack retail contact with end users or the ability to debit end-user accounts. *Cf. Baker v. Commonwealth*, No. 2005-CA-001588-MR, 2007 WL 3037718, at *35 (Ky. Ct. App. Oct. 19, 2007) (stating that Kentucky's notice,

comment, and hearing requirements "were designed to prevent administrative agencies from abusing their authority").

### C. At the Very Least, the Board's Action Should Not Be Given Retroactive Effect.

The Board does not dispute the basic principle that retroactivity is disfavored. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Moore v. Stills*, 307 S.W.3d 71, 80 (Ky. 2010). But the Board insists that its "direction to TracFone to remit pursuant to Options A or B [was] merely 'remedial' and 'd[id] not come within the rule prohibiting retroactive application.'" SBr. 57 (quoting *Moore*, 307 S.W.3d at 80-81). This is so, the Board maintains, because it "is not attempting to impose any *new obligation* on TracFone." *Id.*

Of course, this Court must reject this position if it agrees with the district court's holding that TracFone, having validly elected Option C in 2006, "ha[d] no legal obligation … to remit fees for its non-direct customers until the CMRS Board advise[d] it [in 2010] of the proper method of collection." R92, OpI, at 23. As long as that is true—and it is—*any* obligation ultimately imposed on TracFone in 2010 was, by definition, a "new obligation."

On this issue, the Board ignores the central point TracFone made in its opening brief when it asserts that the amended Act merely "added collection methodologies" to make it "easier for prepaid providers" to collect the service charge. SBr. 57. The point is that ex ante, in 2006, TracFone had no way of

knowing what Option C would say. Not only was the "collection methodology" unknown, but the Board was to decide "*the CMRS service charge*" itself, *id*. § 65.7635(1)(c) (emphasis added)—i.e., the very amount of the service charge for end users that fell under Option C. *See* FBr. 52-53. The alternatives open to the Board under Option C were infinite. The Board could have decided that TracFone would have to tack on a 1% charge onto every airtime card, which would then be passed on to every consumer without markup. It could have decided that TracFone would collect nothing, but retailers would (as TracFone proposed). Or, if the Board is to be taken seriously, it could have decided never to issue any Option C regulation at all—thereby imposing no collection obligation on anyone.

Until the moment the Board told TracFone, in 2010, that it must choose Options A or B, TracFone simply did not "know what the law [was]" and could not "conform [its] conduct accordingly." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1993). Thus, the Board's 2010 order to remit fees back to 2006, was not merely "clarify[ing] existing law," but "giv[ing] past conduct or transactions new substantive legal consequences." *Moore*, 307 S.W.3d at 81.

The conclusion does not change just because what the Board ultimately decided to do was to define Option C as the equivalent of one of the other two options. That outcome was no more knowable in 2006 than any of the other options. Therein lies the fallacy of the Board's assertion that what it did four years

too late was no different than if it had "simply voted on TracFone's request for a regulation in 2006, informed TracFone that it was not going to implement a regulation, and told them to remit pursuant to Option A or B." SBr. 60. There is a huge difference. If the Board had done that, TracFone would have other complaints (e.g., substantive misapplication of the law and failure to follow regulatory formalities), but TracFone could not complain that the pronouncement would have been retroactive. Thus, the Board merely substitutes antithesis for analysis when it protests that it "is ridiculous" to give "TracFone … a 'free pass' from collecting and remitting CMRS service charges that it [would] otherwise [have] owed for almost six years because the CMRS Board failed to utter those words." *Id.* The very point of the presumption against retroactivity is that it makes all the difference in the world whether an agency issues directives in advance or six years after the fact.

The Board also does not even try to respond to the point that there is no source of statutory authority for its action. *See* FBr. 52. Option C permits the Board to determine the methodology for "collect[ing] the service charge from … end users." KRS § 65.7635(1)(c). It does not authorize the Board to require an Option C elector (or anyone else) to make out-of-pocket payments representing charges from past periods that were neither imposed on nor collected from end users. *Cf.* KRS § 446.080(3) ("No statute shall be construed to be retroactive,

unless expressly so declared."). The Board's order to TracFone to remit fees for the period from 2006 to 2010 pursuant to Options A or B does not serve "to collect the service charge from … end users"; rather, it places the financial burden squarely on TracFone's shoulders.

In arguing otherwise, the Board invokes *J. Branham Erecting & Steel Service Co. v. Kentucky Unemployment Insurance Commission*, 880 S.W.2d 896 (Ky. Ct. App. 1994). There, an administrative agency miscalculated two companies' unemployment insurance assessments, later recognized its error, and instructed the companies to remit additional funds. It was "undisputed" that the companies were subject to the assessment statute and that they were not being asked to pay any more than they would have owed "had the initial assessment been properly calculated." *Id*. at 897. In other words, it was crystal clear that the agency's instruction to remit additional funds did not impose any new substantive legal consequences. The companies were simply being asked to pay what they were admittedly obligated to pay all along.

What the Board did here is completely different. This was not a matter of everyone knowing what Option C required all along and the Board simply misstating it. It was a matter of the Board sitting on its hands when (as the district court found) TracFone had no obligation, declaring four years later what the obligation would be prospectively, and then insisting that TracFone also pay that

obligation retroactively—with the only justification being that the new obligation turned out to be the same as the obligation TracFone would have confronted had it never chosen Option C.

That is impermissible retroactivity, plain and simple.

## III. THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN DENYING THE BOARD PREJUDGMENT INTEREST.

If this Court reverses the district court's liability determination, the Board's cross-appeal becomes moot. In its cross-appeal, the Board raises two challenges to the district court's decision to deny the Board prejudgment interest. Both are meritless.

***First***, the Board maintains that "[t]he amounts owed by TracFone … [we]re clearly liquidated"—i.e., known with certainty at the start of the litigation—and thus were automatically subject to prejudgment interest under Kentucky law. SBr. 65. Obviously, the fact that the district court ultimately calculated the amount of TracFone's liability does not mean that the Board's demand was liquidated. As the Kentucky Supreme Court has explained, "one must look at the nature of the underlying *claim*, not the final award" "in determining if a claim is liquidated or unliquidated." *3D Enters. Contracting Corp. v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 174 S.W.3d 440, 450 (Ky. 2005). Were it otherwise, every demand resulting in an award of damages would be deemed liquidated.

The Board does not argue otherwise. Its argument is that, because the "amounts owed by TracFone are set forth by statute," the extent of TracFone's potential liability was reducible to a sum certain from the moment the Board filed suit. SBr. 65. As the district court correctly recognized, the "method of calculating" and "extent" of TracFone's liability were "always … in doubt." R137, OpIII, at 5.

Consider the situation in the wake of 2006 amendments. When the Board sued in 2008, TracFone had elected Option C but had received no formal guidance as to whether or how it should collect the service charge. TracFone did not even know what "the CMRS service charge" would be, as that was for the Board to "determine[]." KRS § 65.7635(1)(c) (West Supp. 2006). In 2010, two years *after* filing suit, the Board directed TracFone to remit fees under Option A and to do so retroactively. R118-32, Lucas Letter. TracFone responded that it would instead remit fees under Option B, and the district court ultimately upheld TracFone's right to do so. *See* R118-37, Salzman Letter; R130, OpII at 2. As the Board acknowledges, the Board's view of what was owed was significantly higher than what the district court awarded. R118-30, Tr. of CMRS Board Meeting, at 5-12. It was therefore not until the end of the litigation—when the court determined the appropriate collection method—that the TracFone's liability became "reduced to

certainty in respect to amount." *Nuncor Corp. v. Gen. Elec. Co.*, 812 S.W.2d 136, 141 (Ky. 1991) (quoting *Black's Law Dictionary* 1537 (6th ed. 1990)).

The situation before the 2006 amendments was similarly uncertain. The original Act did not specify what an acceptable method of collection would be for a prepaid provider like TracFone, and the various possibilities produced different results in terms of the amount of liability. The Board asserted that TracFone should be forced to turn over an amount equal to $0.70 per month for every end user of TracFone's products. R134, Pl.'s Mot. for Final J. at 1-5, S.A. 875-79. But that was by no means the *only* possible way to calculate how much TracFone owed. TracFone contended that, if it was subject to liability under the 1998 Act, then the amount due should be calculated using a method akin to the one described in Option B of the amended Act. R135, Def.'s Opp. to Pl.'s Mot. for Final J. at 2-7, S.A. 924-29. The parties' competing calculations differed by more than $1.8 million. *Compare* R136, Pl.'s Reply in Supp. Mot. Final J. at 4, S.A. 904 (demanding approximately $2.5 million) *with* R135, Def.'s Opp. to Pl.'s Mot. for Final J. at 7, S.A. 929 (arguing for approximately $700,000).

In short, at the time the Board sued, there was no way to know with certainty the "extent" of TracFone's possible liability, and thus the Board's demand was plainly unliquidated. *Owensboro Mercy Health Sys. v. Payne*, 24 S.W.3d 675, 679 (Ky. Ct. App. 1999); *see also BSME Contracting, Inc. v. Jones*, No. 2011-CA-

000588-MR, 2012 Ky. App. Unpub. LEXIS 101, at *4 (Ky. Ct. App. Feb 3, 2012) (claim unliquidated where parties "disputed the amount owed" under terms of contract).

***Second***, as a fallback, the Board argues that, even if its claims against TracFone are unliquidated, the district court was required to award prejudgment interest. SBr. 66. The Board acknowledges that the decision to grant or deny prejudgment interest on unliquidated claims is entrusted to the sound discretion of the trial court, exercised "in accordance with the principles of equity, to accomplish justice in each particular case." *Nuncor Corp.*, 812 S.W.2d at 143 (quoting 47 C.J.S. *Interest & Usury* § 6 (1982)); *see also Ventas, Inc. v. HCP, Inc.*, 647 F.3d 291, 328 (6th Cir. 2011). This Court cannot reverse unless it reaches "a definite and firm conviction that the trial court committed a clear error of judgment." *Harlamert v. World Finer Foods, Inc.*, 489 F.3d 767, 773 (6th Cir. 2007). Far from committing "clear error," the district court here was clearly right.

Kentucky courts routinely deny prejudgment interest where the defendant "in good faith, disputed its liability." *Owensboro Mercy*, 24 S.W.3d at 679; *see Meridian Citizens Mut. Ins. Co. v. Horton*, No. 5:08-CV-302, 2010 WL 1253084, at *9 (W.D. Ky. March 25, 2010) ("Kentucky courts rarely award prejudgment interest for 'unliquidated' claims based on equitable considerations and where they do, allegations of bad faith are often involved."). The district court

was justified in following this norm, for it recognized that this action did "not arise due to some bad faith or egregious conduct by [TracFone]," and TracFone had "reasonable grounds for believing that its actions were appropriate." R137, OpIII at 3; *see, e.g.*, *Ventas, Inc. v. HCP, Inc.*, No. 3:07-CV-238, 2009 WL 3855638, at *9 (W.D. Ky. Nov. 17, 2009) (denying prejudgment interest where the questions were "very close"), *aff'd*, 647 F.3d 291 (6th Cir. 2011). Indeed, the district court believed that the questions before it were "difficult," "confounding," and "complex," R92, OpI, at 11-12; R137, OpIII, at 3, and found for TracFone on several significant issues.

The Board's only argument is that TracFone "had 'unfettered' use [of] its money" for almost eight years. SBr. 66. But that is true of any defendant until judgment is entered. In any event, the Board is to blame for most of the delay. The Board waited five years to sue, and waited more than four years to act on TracFone's election of Option C, doing so only after the district court prompted it to. *See* R68, Stip., ¶ 48; R92, OpI, at 23; R118-25, Tr. of CMRS Board Meeting, at 28-32; *Nuncor Corp.*, 812 S.W.2d at 144 (delay in filing suit militates against award of prejudgment interest). In these circumstances, the Board cannot come close to establishing that the district court "committed a clear error of judgment." *Harlamert*, 489 F.3d at 773. Accordingly, this Court should sustain the district court's discretionary decision.

## CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed, and the Board's cross-appeal should be dismissed as moot.

Dated: May 14, 2012

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)**

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Sixth Circuit Rule 32, I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 12,938 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: May 14, 2012 ORRICK, HERRINGTON & SUTCLIFFE LLP

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on May 14, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*/s/* E. Joshua Rosenkranz
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**SUPPLEMENTAL DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS**

| Record No. | Description | S.A. No. |
|---|---|---|
| 135 | Defendant TracFone Wireless, Inc.'s Response in Opposition to Plaintiff CMRS Board's Motion for Final Judgment | 921 |