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.

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

CORRECTED FIRST BRIEF OF TRACFONE WIRELESS, INC.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 11-6215, 11-6300 Case Name: Ky. CMRS Board v. TracFone Wireless, Inc.

Name of counsel: E. Joshua Rosenkranz

Pursuant to 6th Cir. R. 26.1, TracFone Wireless, Inc., Appellant/Cross-Appellee
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party: Yes.

   TracFone Wireless, Inc. ("TracFone") is majority owned by AMX USA Holding, S.A. de C.V., a foreign entity, which is owned by Sercotel, S.A. de C.V., a foreign entity which is a subsidiary of América Móvil, S.A. B. de C.V., a publicly held foreign corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest: No.

CERTIFICATE OF SERVICE

I certify that on February 13, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to this Court's Rule 34(a), Defendant-Appellant respectfully requests oral argument for this matter. The issues to be resolved are complex matters of statutory interpretation. These questions are important, as they concern significant financial burdens imposed on a large and growing number of individuals who purchase prepaid wireless plans and have a bearing on the interpretation of similar statutes in other states. Oral argument will materially assist the Court in clarifying the issues briefed.

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JURISDICTIONAL STATEMENT[1]

The district court had diversity jurisdiction over this case pursuant to 28 U.S.C. § 1332(a)(1), because the Defendant and the Plaintiff are citizens of different states and the amount in controversy exceeds $75,000. R1, Notice of Removal, ¶ 5. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered final judgment on September 8, 2011, R137, OpIII, and Defendant-Appellant filed its timely notice of appeal on October 7, 2011, R138, Notice of Appeal.

INTRODUCTION

A teeny mouse can delude itself into thinking it is an eagle, but the delusion won't save it when it leaps off the top of the Sears Tower. The mouse in this appeal is Plaintiff-Appellee Kentucky Commercial Mobile Radio Service Emergency Telecommunications Board ("CMRS Board" or "Board") and it has persuaded itself that it is allowed to act like a legislature. The Board has retroactively and impermissibly rewritten two successive versions of a statute to saddle a business with onerous financial obligations that the Kentucky General Assembly never contemplated, and, indeed, foreclosed.

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[1] Documents are cited by record entry in the district court, in the form, "R__." Sealed documents are in a separate Sealed Appendix, which is cited as "S.A." The district court's memorandum opinions and orders entered on August 18, 2010, July 1, 2011 and September 8, 2011 are cited as "OpI," "OpII," and "OpIII," respectively.

In 1998, the General Assembly passed the first version of a statute directing wireless providers to collect from their cell phone users a so-called "CMRS service charge." *See generally* Ky. Rev. Stat. Ann. ("KRS") §§ 65.7621-65.7643 (West 2006). When the legislature passed this law, every wireless provider serving Kentucky residents shared two attributes: (1) they all had retail relationships directly with the consumer or "end user"; and (2) they all entered into long-term contracts with the end user, billing monthly based on the end user's actual usage. In keeping with this conventional approach, the statute imposed a collection obligation only on a wireless provider "who provides [service] to an end user" and it prescribed a collection mechanism "as part of the provider's normal monthly billing process." *Id.* §§ 65.7621(9), 65.7635(1).

Only after the legislature passed the first version of this statute did Defendant-Appellant TracFone Wireless, Inc. ("TracFone") bring Kentucky consumers a very different model of wireless service. The model shuns both of the fundamental features of conventional service—in ways that made the statute simply inapplicable. First, as a general matter, TracFone sells nothing directly to the end user. Like the typical wholesaler, TracFone sells phones and airtime cards to retailers (like Wal-Mart), which in turn sell them to end users. So TracFone generally does not "provid[e] [service] to an end user," within the meaning of the statute. Second, under TracFone's "prepaid" model, end users purchase a specified

number of minutes up front and, whenever they run out, buy extra minutes with an advance payment. Since end users do not buy anything from TracFone and TracFone has no "normal" billing process for them—much less "monthly billing"—the language the General Assembly drafted simply could not stretch to cover TracFone's services. On that basis, both TracFone and other sellers of prepaid services concluded that they were under no obligation to collect the service charge and were certainly not required to pay charges they could not collect.

Nevertheless, the Board insists that TracFone must now pay the service charges that the end users owed. The Board believes that since the General Assembly required other wireless services to collect the charge, it must have intended TracFone to collect it as well—even though it never said so, never explained how much to collect, and never directed how. The Board effectively amended the statute to say, "Just collect something from someone, even if you can't get it from the end user—and failing that pay it yourself."

In 2006, the General Assembly explicitly acknowledged that the first version of the statute did not say that: The General Assembly observed that the 1998 version left a "loophole" that "*allow[ed]* 'prepaid' wireless phone services to not remit the … surcharge." R75-3, Fiscal Note, at 2, S.A. 262 (emphasis added). It amended the statute to close that gap and specify, for the first, time, that "customers who purchase … service on a prepaid basis" would henceforth be

subject to the service charge. KRS § 67.7635(1) (West Supp. 2006). Specifically, the statute granted the wireless provider the right to "elect[]" among three options. *Id.* Two of the options (Options A and B) made sense for providers that had direct financial contact with consumers (whether by selling directly to them or having access to their accounts). But the legislature understood that certain services, like TracFone, did not. For these services—i.e., "providers that 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"—the legislature granted an extra option, Option C. *Id.* § 65.7635(1)(c). The legislature delegated to the Board the responsibility of putting flesh on Option C's bones, by defining, by "regulation" both how much the charge would be and what the "collection methodology" would be. *Id.*

TracFone promptly elected Option C, for the other options were either impossible or impracticable. But to this day, the Board has never promulgated a regulation under Option C. Instead, it waited four years and then engaged in another exercise of legislative revision: The Board abolished Option C—essentially, deleting it from the statute—and declared that TracFone must use Option A. Worse yet, the Board ordered TracFone to make the payments it never collected from consumers for the entire four years that had elapsed while TracFone was waiting for the Board to act on its election, even though throughout those four

years, TracFone had no way of knowing (1) whether the collection obligation would fall to it (or, for example, to the retailer); (2) how much it was supposed to collect; or (3) how.

The district court largely upheld the Board's foray into legislative redrafting with respect to both versions of the statute. In so doing, it declined to apply the age-old maxim that statutes imposing taxes (or, here, fees) must be given the narrowest reasonable construction. Instead, it allowed the Board to adopt policy approaches it thought more suitable and engraft them onto the statute.

An agency cannot legislate any more than a mouse can fly. This Court should reverse.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err in holding that TracFone was required to collect and remit service charges under the 1998 version of the statute?

2. Did the district court err in holding that (A) the Board could override TracFone's statutorily authorized election of Option C and direct that it must adopt one of the other options; and (B) TracFone must pay service charges out of its own pocket for the four-year period in which the Board refused to promulgate a regulation or provide any guidance on how to collect the service charge?

STATEMENT OF THE CASE

This action was commenced when CMRS Board filed a complaint against TracFone in the Jefferson County Circuit Court of Kentucky on October 14, 2008. R1-2, Complaint. After removing the case to federal court, R1, Notice of Removal, TracFone filed an answer and counterclaim, which it later amended. R63, Am. Answer. The district court ruled on two sets of cross-motions for summary judgment in memorandum opinions and orders dated August 18, 2010, and July 1, 2011. R91-92, OpI; R130, OpII. On September 8, 2011, the district court entered final judgment, granting the Board the service charges, attorneys' fees, and costs. R137, OpIII.

STATEMENT OF FACTS

TracFone Sells Wireless Phone Cards to Retailers, Without Conducting Any Transaction With, or Sending Any Bills to, Consumers

This is a tale of two services. It involves two fundamentally different modes of wireless telephone service with starkly different financial relationships with the consumer: intense and none.

Until recently, wireless telephone service was synonymous with long-term contractual commitments at fixed monthly rates. Under this "postpaid" approach, the consumer signs up with a provider for a long-term contract. As part of that contract, the consumer gets a set monthly airtime allowance. The provider sends the customer a monthly bill based on the chosen plan. Any additional charges the

customer incurred in the previous month (for example, for exceeding the airtime allowance) typically appear on the bill as separate line items, along with various taxes and fees. A central feature of this service is that the service provider—say, Verizon or AT&T—is engaged in direct financial transactions with the consumer with metronomic regularity. Every month the consumer writes a check to the provider based on her exact past usage. Moreover, the provider is fairly omniscient: It always knows how much each customer is using her phone—to the minute. *See generally* R118-13, Carter Dep., at 86-88.

New to the wireless scene is a fundamentally different business structure that TracFone pioneered beginning in 1996, but did not bring to Kentucky until 1999. R92, OpI, at 4. TracFone's structure differs from conventional wireless service in two fundamental ways. The first difference is how the consumer pays for service. TracFone's service is "prepaid." The consumer buys "airtime cards." Each airtime card represents a specified number of minutes—say, five hundred minutes. R75-3, Salzman Dep., at 76-78, S.A. 131-32. The card has a unique code, which the consumer—typically called the "end user"—punches into the cell phone. TracFone's proprietary software recognizes the code and allows calls to be made from the phone until those minutes are depleted. Upon purchasing those minutes, the end user has no ongoing financial relationship with the seller. The end user

signs no service contract and receives no monthly bill. *Id.* at 70-71, S.A. 130; R75-3, Salzman Letter, S.A. 215.

A chatty Cathy might devour those five hundred minutes in four days, while a hermetical Herman might nibble away at the minutes over the course of a year. Either way, upon consuming those minutes, the end user is free to buy another card with more time. Or she can just stash the phone in the closet and buy wireless service elsewhere (or not at all). *See generally* R75-3, Salzman Dep., at 74-78, S.A. 131-32.

In contrast to the omniscient postpaid wireless providers, TracFone has no way of knowing how much airtime the user has consumed or, conversely, how much time is left on his handset. TracFone does not have its own wireless network. Rather, TracFone purchases airtime at wholesale from network owners such as Verizon and AT&T and resells it in the form of airtime cards. R68, Stip., ¶ 26. Thus, when a consumer uses a TracFone handset, she is actually using another provider's physical network. The information on how much airtime she has used resides exclusively in her handset. R68, Stip., ¶¶ 27, 45-46; R75-3, Lang Email, S.A. 171. TracFone cannot gauge how much time an end user has consumed on the AT&T or Verizon networks any more than Weber can gauge how much gas is left in a homeowner's propane tank. *See* R75-3, Pollack Dep., at 134-73, S.A. 124; R75-3, Salzman Letter, at 3, S.A. 218.

The second fundamental difference between TracFone's service and conventional wireless service lies in the financial relationship with the end user—or, more accurately, the lack of relationship. Like most any product, an airtime card can be sold directly to the end user or it can be sold at wholesale prices to a retailer who then resells it. A small fraction of TracFone users purchase their handset and airtime cards directly from TracFone by phone or internet. R68, Stip., ¶ 70; *see also* R75-3, Pollack Dep., at 58-61, S.A. 121. TracFone has been collecting and remitting the fees on those direct sales since September 2009. R68, Stip., ¶ 70.

The vast majority of TracFone end users, however, never engage in a financial transaction with TracFone. Unlike the major postpaid providers, TracFone has no retail stores in Kentucky or elsewhere. TracFone is a wholesaler. It sells phones and airtime cards to retailers, such as Wal-Mart, Target, and Walgreens. R75-3, Salzman Dep., at 76-77, S.A. 131. The retailers then resell them to end users. R75-3, Salzman Letter, S.A. 244. TracFone has no more of a relationship with the ultimate user of its products than Microsoft has with the ultimate user of the software packages it sells at wholesale to Best Buy. *See* R75-3, Salzman Letter, at 1-2, S.A. 216-17. TracFone does not even know the price the customer has paid. Each retailer decides for itself how much to charge consumers

for TracFone's cell phones and for each card. R75-3, Pollack Dep., at 78-81, S.A. 123.

The vast majority of cell phone users today continue to purchase their service through the conventional postpaid/direct-relationship model. Postpaid service remains the primary offering of the mega providers such as Verizon. But TracFone's prepaid/no-relationship model has enjoyed growing popularity. This model is especially attractive to consumers whose phone usage fluctuates from month to month (making it difficult to stay within a set monthly allowance), those who rarely use wireless service, and those who are ineligible for postpaid service due to a lack of credit. R75-3, Salzman Letter, at 1, S.A. 216.

Federal Law Extends Emergency 911 Service to Wireless Telephones, Intending to Shield Providers from the Cost

The statute at issue in this case was born out of a federal mandate. With the proliferation of cell phones in the 1990s, the Federal Communications Commission ("FCC") needed to ensure that cell phone users could reach the right 911 operator in an emergency, just as landline users can. Its solution was embodied in a 1996 FCC order. *See In re Revision of the Comm'n Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Sys.*, 11 FCC Rcd. 18,676 (1996). The order required wireless providers to participate in various enhancements, called "E911," the most important of which was to ensure that 911 calls made from their handsets

would be routed to the closest public safety answering point ("PSAP"). *Id.* at 18,682-83.

These upgrades were costly for both the wireless carriers and the PSAPs. Since the cell phone users were the beneficiaries, the FCC concluded that they, not the carriers, must bear the costs. The FCC considered it "fundamental" "that carriers must be able to recover their costs of providing E911 services." *Id*. at 18,722. Accordingly, the FCC required carriers to overhaul their systems in any particular state "*only if*" the state had set up "a mechanism for the recovery of costs relating to the provision of such services." *Id*. at 18,684 (emphasis added).

Kentucky Enacts Legislation to Implement the Federal 911 Mandate

The Kentucky General Assembly responded with legislation expressly designed "to fulfill the [FCC's] mandate" to devise a funding system that shifted the cost to end users. R77-1, Board's Mem. ISO SJ, at 5-6, S.A. 279-80; *see also* KRS § 65.7625(3) (West 2006). This case involves two disputes—one about the original Act passed in 1998 and another about a 2006 amendment.

The 1998 Act created the CMRS Board, the Plaintiff-Appellee in this case, to lead the statewide effort to improve emergency capabilities in the wireless arena, formally known as "commercial mobile radio service" or "CMRS." KRS §§ 65.7625(3), 65.7629 (West 2006). To finance the effort, the Act established a "CMRS fund." *Id*. § 65.7627. In keeping with the FCC's order, the Act directed

that consumers would finance the CMRS fund through a "CMRS service charge" of "seventy cents ($0.70) per month per CMRS connection." *Id*. § 65.7629(3). The key disputed provision in this case is Section 65.7635, which dictates who must collect the service charge. At every turn, that section broadcasts the intention to impose an obligation only on providers that had direct financial contact with consumers and billed them monthly. As originally drafted, that section provided:

> Each CMRS provider shall act as a collection agent for the CMRS fund … [and] shall, *as part of the provider's normal monthly billing process*, collect the CMRS service charges levied upon CMRS connections … from each CMRS connection to whom the billing provider provides CMRS.

Id. § 65.7635(1) (emphasis added). The provision continued:

> Each *billing provider* shall list the CMRS service charge as a separate entry *on each bill* which includes a CMRS service charge. If a CMRS provider receives a partial payment for a *monthly bill* from a CMRS customer, the provider shall first apply the payment against *the amount the CMRS customer owes the CMRS provider*.

Id. (emphasis added).

The Act included a definitional section. It began with the caveat that the various definitions would apply "unless the context requires otherwise." *Id*. § 65.7621. With that caveat, the Act offered the following definition of "CMRS provider": "a person or entity who provides CMRS to an end user, including resellers." *Id*. § 65.7621(9).

TracFone Does Not Collect Service Charges Under the 1998 Act

TracFone *has never collected service charges from end users* who buy the product at a retail outlet. Any suggestion that it has (as the Board has suggested at points in this litigation) is demonstrably false. For reasons described above, TracFone does not have the contact with end users that would facilitate collection. And TracFone understood that it had no obligation to "act as a collection agent" to collect fees from any "end user" whom the "service provider" never bills at all, much less pursuant to a "normal monthly billing process." *Id*. § 65.7635(1).

While TracFone never *collected* the charges from end users, it did briefly *pay* the charges *out of its own pocket*. It was an error made by an outside tax consultant. The consultant uncritically relied on a third party's tax software that did not properly take account of the different types of wireless service. R75-3, Pollack Dep, at 49-52, S.A. 118-19. From 2000 to 2003, TracFone, still in its infancy and overwhelmed with its explosive growth, dutifully paid what the consultant directed. The total amount paid was just over $764,000. R75-3, Report of Payments, S.A. 174. TracFone caught the error after an independent review of its tax obligations and explained its mistake to the Board, advising the Board that it would not be making further payments. *See* R75-3, Salzman Dep., at 34-41, S.A. 127-28; R75-3, Remittance Form, S.A. 241.

Other sellers of prepaid services acted exactly as TracFone did. A little over a year after the 1998 Act went into effect, Sprint announced to the Board its view that the Act did not reach prepaid services. R75-3, Wilson/Patterson Emails, S.A. 248-49. Neither Cingular Wireless (later, AT&T) nor Verizon paid the charge for their prepaid customers. R75-3, Mosley Aff., S.A. 251; R75-3, Zeppetalla Aff., S.A. 254. Virgin Mobile and T-Mobile both demanded refunds of payments they mistakenly made on prepaid sales. R75-3, Skaggs Dep., at 58-9, 220-21, S.A. 143, 151.

When TracFone discovered that it had made similar erroneous payments in Florida, that state's Attorney General agreed that the charges "should not have been remitted to the board" and authorized a refund. R75-3, Fla. Wireless Board Letter, S.A. 219. So, too, did New York and North Carolina. R75-3, Pollack Dep., at 50, S.A. 119. Kentucky's Board, in contrast, declined to grant TracFone any refund. R68, Stip., ¶ 62.

The General Assembly Amends the Act to Cover Prepaid Providers

TracFone was barely off the ground—and not yet in Kentucky—when the General Assembly passed the 1998 Act. So the General Assembly obviously had not focused on whether or how to collect service charges under a prepaid model, much less under a prepaid model like TracFone's involving no direct financial relationship with the end user. But that changed as TracFone and other prepaid

services became more popular. Kentucky's Governor proposed legislation in early 2006 declaring the need to close a "loophole on prepaid cell phones." R75-3, Press Release, at 2, S.A. 258. The General Assembly, too, in its official "Fiscal Note," described the amendment as "clos[ing] a 'loophole' that allows 'prepaid' wireless phone services to not remit the [911] surcharge." R75-3, Fiscal Note, at 2, S.A. 262.

The 2006 amendment added language to the 1998 Act that for the first time imposes obligations on "CMRS customers who purchase CMRS services on a prepaid basis." KRS § 65.7635(1) (West Supp. 2006). The changes to Section 65.7635(1) are indicated in redline on the first page of the Statutory Addendum. For present purposes, it suffices to say that the amendments provide that for "prepaid" services the "CMRS service charge shall be determined according to one (1) of the following methodologies *as elected by the CMRS provider*." *Id.* § 65.7635(1) (emphasis added). The statute then enumerates three options, commonly referred to as Options A, B, and C. Options A and B, which are available to any prepaid service, are specifically described:

> ***"Option A"***—"The CMRS provider shall collect, on a monthly basis, the CMRS service charge specified in KRS 65.7629(3) from each active customer whose account balance is equal to or greater than the amount of service charge." KRS § 65.7635(1)(a).
>
> ***"Option B"***—"The CMRS provider shall divide its total earned prepaid wireless telephone revenue received with respect to its prepaid customers in the Commonwealth within the monthly 911 emergency

> telephone service reporting period by fifty dollars ($50), multiply the quotient by the service charge amount, and pay the resulting amount to the Board." *Id*. § 65.7635(1)(b).

In contrast, the legislature reserved Option C only for a specific subset of prepaid services and directed the Board to describe the methodology for them:

> ***"Option C"***—"In the case of CMRS providers that 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, the CMRS service charge and collection methodology may be determined by a administrative regulations promulgated by the board to collect the service charge from such end users." *Id*. § 65.7635(1)(c).

As important as the changes are the aspects of the relevant CMRS statute that remained unchanged. At every turn, the statute continues to emphasize that the service charge is levied on the end user, not the provider; the provider merely serves as the collection agent, when appropriate.

TracFone Elects Option C, But the Board Fails to Promulgate Implementing Regulations

After the amendments took effect on July 12, 2006, TracFone promptly elected Option C. R68, Stip., ¶ 48; R75-3, Lang Dep., at 248, S.A. 163; *see* R92, OpI, at 20. The Board did not dispute that TracFone was eligible to make this election. R92, OpI, at 21. But for over four years, the Board did nothing to give content to Option C.

The lapse was not for lack of effort on TracFone's part. TracFone immediately submitted a proposal for Option C: a so-called "point-of-sale" regulation that would have required retailers to collect the service charge directly

from purchasers of prepaid phones and calling cards at the cash register. R75-3, Am. Interrog. Responses, at 7-8, S.A. 91-92. The point-of-sale approach recognizes that it is the retailer, not TracFone, that makes the sale to the consumer, and the consumer, in turn, is the one who is supposed to be paying the charges. In fact, the retailer knows exactly how much airtime the consumer is purchasing. By the time the Board actually considered the proposal, 13 states (and the District of Columbia) had successfully implemented this point-of-sale approach. R118-14, Salzman Email. Six more states (and a territory) have implemented it since. *See* 2011 N.C. Sess. Laws. 122 (H.B. 571); 2011 Ga. Laws Act 187 (S.B. 156); 2011 Utah Laws Ch. 273 (H.B. 303); 2011 Ill. Legis. Serv. 97-463 (West) (S.B. 2063); 2011 Kansas Sess. Laws Ch. 84 (S.B. 50); V.I. Code Ann. Tit. 33, § 58 (2011); 2010 Pa. Legis. Serv. 118 (West) (H.B. 2321).

Despite TracFone's repeated prodding, the Board did not conduct formal proceedings on TracFone's proposal or on any rule that would give content to Option C. R75-3, Resp. to Request for Admission, at 21-22, S.A. 105-06; R75-3, Skaggs Dep., at 178-84, S.A. 147-48; *see also* R92, OpI, at 7.

The Board Sues and the District Court Issues a Split Decision

After two years of hibernation, the Board sprang to action—not with a long-awaited Option C regulation, but with an unexpected lawsuit. The Board sued TracFone in 2008 in state court. It alleged that TracFone owed unpaid CMRS

charges for the period after the 2006 amendments. R1-2, Complaint, ¶¶ 26-36, 40-43. It also took the position that TracFone owed charges for the period before the General Assembly amended the statute to cover prepaid services. *Id.* TracFone removed to federal court. R1, Notice of Removal. It then filed a counterclaim asserting that it was entitled to reimbursement for the sums it erroneously remitted between 2000 and 2003. R63, Am. Answer.

On cross-motions for summary judgment, the district court issued a split decision on August 18, 2010, distinguishing TracFone's obligations before and after the 2006 amendments. R92, OpI.

As to the pre-2006 period, the district court held that "TracFone was required to collect and remit service fees under the [original] 1998 Act." *Id.* at 7. TracFone, the court reasoned, was a "CMRS provider"; its customers were "CMRS customers" "obligated to pay" service charges; and the statute compelled "[e]ach CMRS provider [to] act as a collection agent." *Id.* at 9-10. In the court's view, it was irrelevant that "th[e] statutory method of collection" set forth in the 1998 Act—namely, recovering the charges "as part of the provider's normal monthly billing process"—"d[id] not comport with TracFone's chosen business model." *Id.* at 11. Throughout its discussion of the original 1998 Act, the district court relied heavily on the decision of a lone Kentucky state trial court, which had construed the Act in a case involving another prepaid wireless provider. *See Commonwealth*

v. Virgin Mobile, U.S.A., L.P., No. 08-CI-10857 (Jefferson Cir. Ct. Mar. 25, 2010). That decision was appealed to the intermediate state appellate court, which as of the filing of this brief had yet to rule. Whatever the outcome, the intermediate appellate court is unlikely to be the last stop for that case.

For post-2006, the district court rejected the Board's claim that TracFone was required to collect fees despite "the absence of a specific ruling from the CMRS Board regarding its election of 'Option C.'" R92, OpI, at 7. The court recognized that TracFone had a right to elect any of the three statutory options and, "[u]nder the unambiguous terms of the statute, the CMRS Board is bound by that selection." *Id*. at 22. In the court's words, "[o]nce Option C is elected, the burden shifts to the CMRS Board to advise TracFone, either by administrative regulation or other appropriate means, of the proper method of collection." *Id*. at 23. Until the Board acts, the court explained, a provider who has elected Option C "cannot know the proper method of collection and has no obligation to guess." *Id*. at 25. The district court also suggested that the Board need not "promulgate an administrative regulation that provides a different method of collection than those offered by Options A and B," but recognized that the question "present[ed] some interpretive difficulties." *Id*. at 24.

The Board Belatedly Decides that TracFone Must Remit Fees Under Option A

The Board ran with the district court's suggestion. In the end, the Board made two critical decisions. First, it rejected TracFone's point-of-sale proposal without a word of explanation. R118-25, Tr. of CMRS Board Meeting, at 28-32; R118-13, Carter Dep., at 136-37; R118-12, Lucas Dep., at 137; R118-3, Barrows Dep., at 208. Second, the Board ultimately decided not to adopt an Option C regulation at all. Instead, it directed TracFone to remit service charges exclusively under Option A. R118-28, Minutes of CMRS Board Meeting, at 2. That meant that the Board was directing TracFone to collect the "service charge" "on a monthly basis … from each active customer whose account balance is equal to or greater than the amount of service charge." KRS § 65.7635(1)(a) (West Supp. 2006). The Board did not explain how TracFone could do that when the end users had no "account[s]" and therefore no "account balance[s]," and when TracFone could not determine the users' airtime status. TracFone sent several letters pleading with the Board to explain how it was supposed to comply. R118-33,118-35, Salzman Letters. The Board said that was TracFone's problem. R118-34, Barrows Letter.

Worse yet, the Board also ordered TracFone to remit all its purported customers' payments retroactive for four years—to July 2006—even though this was the first time it had ever directed TracFone to apply Option A. R118-32,

Lucas Letter. Again, the Board offered no rationale. Unable to comply with Option A, TracFone advised the Board that it would instead elect Option B and attempt to remit fees under that provision. *See* R118-37, Salzman Letter. The Board Administrator responded that the "Board takes exception" to TracFone's new election, R118-12, Lucas Dep., at 217-18, although he never consulted the Board about the matter, *id.* at 214-18.

The District Court Rejects the Board's Attempt to Impose Option A But Upholds the Board's Decision on Retroactivity

On review of the Board's latest action, the district court issued another split decision on July 1, 2011. It agreed with TracFone that the Board was wrong to impose Option A and refuse to allow TracFone to make an alternative election. "The entire thrust of the statute," the court explained, is to "allow[] the provider to elect its method of collecting or remitting the service fee." R130, OpII, at 2. Thus, "[e]ven after the Board promulgates regulations under Option C, three options should remain." *Id*. The court, however, held that the Board was free to abolish Option C and force TracFone to use Option A or B. *Id.*

The court also sustained the Board's position that TracFone must pay the charges out of its own pocket retroactive to 2006. *Id*. at 3.

The district court subsequently concluded that TracFone owed nearly $2,563,000 for the pre-2006 period and over $2,141,000 for the post-2006 period.

See R137, OpIII, at 2.[2] The court also held that the Board was entitled to a discretionary award of attorney's fees and nontaxable costs in the amount of nearly $435,000. *Id*. at 5. The court acknowledged that this litigation "d[id] not arise due to some bad faith or egregious conduct by [TracFone]. Far from it. TracFone had some reasonable grounds for believing that its actions were appropriate." *Id*. at 3. Nevertheless, the court held, fees were warranted because "the Board, at some risk and expense to itself, sought to enforce its view of the statute. The attorney's fee provision is designed to encourage precisely this choice." *Id*.

SUMMARY OF ARGUMENT

I. Pre-2006. At every turn in the 1998 Act, the General Assembly broadcasted its intention to impose collection obligations only on wireless services that shared the two attributes that were common in the wireless industry at the time. First, the General Assembly intended to cover retailers—businesses that had direct contact with customers—not wholesalers, like TracFone, with no direct financial contact with the consumer. For example, the 1998 Act provided that only a "CMRS provider"—not anyone else—"shall act as a collection agent for the CMRS fund," KRS § 65.7635(1) (West 2006)—and defined "CMRS provider" as "a person or entity who provides [service] *to an end user*." *Id.* § 65.7621(9)

[2] Of that post-2006 amount, nearly $140,000 was for unremitted service charges on TracFone's direct phone and internet sales, which TracFone does not contest.

(emphasis added). When TracFone sells airtime cards to Wal-Mart, it does not "provide[] [service] *to an end user*." Beyond that, every single sentence of Section 65.7635(1) underscores the General Assembly's direction that the only wireless services who must collect service charges from end users were the ones who already do collect money from them.

Second, the General Assembly intended to cover only those providers that had a "normal billing" relationship—specifically, "monthly billing." The statute would not have specified that it applies to periodic billing if it applies regardless of billing. If the General Assembly had intended to cover the one-time, in-store purchase characteristic of modern-day prepaid service it would have provided at least a modicum of guidance on how much the end user is expected to pay, who must collect it, and how.

Both the Governor and the General Assembly confirmed what they thought the statute meant in 1998 when they declared that the 1998 Act "*allows* 'prepaid' wireless phone services to not remit the [911] surcharge," R75-3, Fiscal Note, at 2, S.A. 262 (emphasis added), but moved to close that "'loophole,'" R75-3, Press Release, at 2, S.A. 258.

The district court reached the wrong conclusion because it ignored the key indicia of the 1998 Act's meaning. In the end, rather than construe the statute, the district court allowed the Board to rewrite it based on some abstract principle that

the Board should recover some undefined charge for every cell phone in the marketplace, regardless of whether or not the statute directs that. That is not the role of a court.

Even if the Board's reading of the statute were plausible—and, indeed, even if it were the superior reading—the Board would still not prevail. This Court must reject the Board's interpretation unless it is free of ambiguity.

II. Post-2006. With respect to the 2006 amendments, too, the Board cannot prevail unless its reading is unambiguous. But in fact, only one conclusion can be drawn from the language and structure of the 2006 amendments: A prepaid provider who qualifies for Option C cannot be forced to choose Options A or B. When the Board leaves Option C fallow, the qualifying provider has no obligation to pay anything.

The General Assembly carved out Option C to prevent an absurdity. The legislature recognized that compliance with Options A and B would be nonsensical, or downright impossible, for certain prepaid providers—those, like TracFone, "that 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." KRS § 65.7635(1)(c) (West Supp. 2006). That is why the statute provides that the methodology "shall be … *elected by the CMRS provider.*" There is no way to read this language to mean that the Board gets to make the election for the provider.

Even if the district court was correct that the Board has the authority to override an Option C election, the Board's action was invalid. The amended Act authorizes the Board to promulgate "administrative regulations" setting forth the Option C "collection methodology." *Id.* § 65.7635(1)(c). The Board acknowledges that it has never issued a formal Option C regulation. Kentucky law is unequivocal that "[a]ny administrative regulation in violation of this section or the spirit thereof is null, void, and unenforceable." KRS § 13A.120(4); *see also id.* § 13A.130(2).

If nothing else, the district court erred in upholding the Board's decision to compel TracFone to remit fees for the four-year period during which the Board failed to give content to Option C. As the district court initially—and correctly—recognized, "upon its initial election of Option C [in 2006], TracFone ha[d] no legal obligation … to remit fees for its non-direct customers until the CMRS Board advise[d] it of the proper method of collection." R92, OpI, at 23. TracFone did not even know how much the charge would be during those four years. The law abhors such a retroactive burden, particularly with regard to payments that TracFone was never required to make itself, but is required only to collect from customers.

III. Attorneys' Fees. The district court's award of attorney's fees must be vacated if the judgment is reversed as to either period.

STANDARD OF REVIEW

This Court reviews de novo the district court's ruling on summary judgment. *Premo v. United States*, 599 F.3d 540, 544 (6th Cir. 2010).

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT TRACFONE WAS REQUIRED TO COLLECT AND REMIT SERVICE CHARGES BEFORE 2006.

The General Assembly can be excused for drafting a statute in 1998 that did not cover TracFone. Even the most prescient legislatures rarely impose charges on transactions they can't imagine. Of course, it is *possible* for a fee statute to cover a newfangled business that a legislature never imagined, but only if the plain language encompasses it. The plain language of the 1998 Act cannot be stretched to cover TracFone. *See infra* Section I.A. The district court's contrary analysis of the 1998 Act is flawed. *See infra* Section I.B. But even if the statute's language could be stretched to cover TracFone's business, it certainly does not do so *unambiguously*, and any ambiguity must be construed against the Board. *See infra* Section I.C. Consequently, the statute did not require TracFone to pay service charges between 1998 and 2006.

A. The 1998 Act's Plain Language Confirms that TracFone Was Not Required to Collect Charges Directly from Retail Customers with Whom It Had No Financial Relationship and Whom It Did Not Bill.

The parties present two diametrically opposite interpretations of Section 65.7635(1). The Board reads the statute to require TracFone to collect the service charge, even though it sells nothing directly to the end user and even though it issues no monthly bill. Two questions expose the absurdity of the Board's position:

> **Question 1:** When a consumer purchases ten hours of airtime, how much is the user supposed to pay—70 cents (on the assumption that the customer is a chatterbox who eats through the ten hours in a day); $7.00 (on the assumption that the customer is a hermit who will make ten hours of airtime last ten months); or some other amount?
>
> **Question 2:** Since TracFone is not the one selling the airtime to the consumer, how is it supposed to collect from the consumer?

We challenge the Board to answer these two questions clearly and directly. It is not enough for the Board to tell the court what it thinks the answer should be as a matter of policy. Nor can it say that was for TracFone to figure out. The Board has to point to words in the statute the General Assembly passed that answer the questions clearly enough for a business in TracFone's position to know what to do. We predict the Board will not answer these two questions, because they are unanswerable. And the fact that they are unanswerable means that the statute does not cover TracFone.

In contrast, TracFone's reading of the statute—that it does not apply to TracFone's transactions—is supported by the plain language, structure, and origins of the statute. This exercise in statutory construction is not just about the timing of payments. It is about two fundamentally different positions in the stream of commerce and two different types of relationships with the consumer. At every turn in the 1998 Act, the General Assembly accentuated its intention to impose collection obligations on only wireless businesses sharing the two attributes that were prevalent in the wireless industry at the time. First, the General Assembly intended to cover retail providers—wireless services that were already collecting money from end users—not wholesalers, like TracFone, having no direct financial contact with the consumer. Second, it intended to cover those retailer providers that had a particular sort of financial relationship with retail customers—an ongoing "billing" relationship—and not others. The General Assembly was free to impose the charge on other relationships, as it did in 2006, and might well have done so had it anticipated them in 1998. But the bottom line is that the statute the General Assembly drafted in 1998 did not do so and certainly did not do so clearly, as the law requires. And neither the Board nor the district court was free to expand the statute in keeping with what they imagined the legislature would have wanted if only it had had a crystal ball.

Retail relationship. The General Assembly's focus on the first attribute—the direct retail relationship with the customer—infused every sentence of the relevant provisions. To start, in keeping with federal law, *see supra* at 10-11, the service charge is not a charge on the *wireless provider*; it is a charge on the consumer—more specifically on the consumer's wireless "connection." KRS § 65.7629(3).[3] The only obligation the Act ever imposes on a "CMRS provider," is to serve "as a collection agent for the CMRS fund," *id*. § 65.7635(1)—i.e., to collect money from the consumer. No business ever has an obligation to *pay* the service charge, except to the extent that it succeeds in *collecting* the charge from customers. *Id.* § 65.7635(2). Just as a legislature would not ordinarily expect a wholesaler like Panasonic or Microsoft to collect charges from the end user who buys its product at a retail outlet, it would be exceedingly odd for the legislature to direct TracFone to collect charges from Wal-Mart shoppers to whom it never sells anything and whose phone usage it does not (and cannot) track. *Cf. Dep't of Revenue v. Ky. Textbooks, Inc.*, 555 S.W.2d 573, 574 (Ky. 1977) (holding that

[3] Unless otherwise indicated, all references in Section I of the Argument to KRS §§ 65.7621 et seq. refer to the statute as it was originally enacted in 1998 and subsequently amended in 2000, 2001, 2002 and 2005, which can be found in the 2006 West edition. All references in Section II refer to the statute as amended in 2006, which can be found in the West Supp. 2006. The relevant statutory provisions are reproduced in the Statutory Addendum.

wholesaler of textbooks was not subject to the state's sales tax even when it had some direct interactions with the ultimate purchasers of its textbooks).

The statutory definitions confirm that the General Assembly intended no such anomaly. Only a "CMRS provider"—not anyone else—"shall act as a collection agent for the CMRS fund." KRS § 65.7635(1). The 1998 Act defined "CMRS provider" as "a person or entity who provides CMRS *to an end user*, including resellers." KRS § 65.7621(9) (emphasis added). The whole point of this definition is that only the business that sells services to the end user is required to collect from the end user. When the statute was first passed, the business having direct financial contact with the end user was almost always the ultimate provider of wireless service (e.g., AT&T). But sometimes an intermediary would buy services from the provider and "resell[]" them to the consumer at retail. When that occurred, it was the retail seller, not the wireless provider, who had the direct financial relationship with the end user. Accordingly, only the retail seller had an opportunity to collect. Applying this principle here: When TracFone buys airtime from AT&T and resells it in the form of airtime cards to Wal-Mart, which in turn re-resells it to a consumer, TracFone does not "provide[] CMRS *to an end user*," within the meaning of the statute.

Every single sentence of the relevant provision underscores the General Assembly's direction that the only provider who will ever have to "act as a

collection agent" is one who has a direct financial relationship with the end user—and not just any direct financial relationship, but a "billing" relationship. KRS § 65.7635(1). Sentence 1 says that the provider must "collect the CMRS service charges" "as part of the provider's normal monthly *billing process*." Sentence 2 specifies that the obligation to collect applies only to "[e]ach *billing* provider"—meaning a provider who bills the end user. Sentence 3 again refers to a "provider" who "receives a … payment for a monthly bill *from a CMRS customer*" which was defined, once again, as the end user, *id.* § 65.7621(7) ("a person to whom a mobile handset telephone number is assigned"). Even ignoring for a moment the repeated reference to "*monthly* billing," these commands can only be read to mean that a company has no obligation to collect if, like TracFone, it is not a "billing provider"; it does not have any "billing process" in place with the end user, much less a "normal" one; and it never "receives a … payment" of any sort "from a CMRS customer." Short of encasing the point in neon, there was little more the legislature could have done to emphasize that the only wireless providers who must collect service charges from end users were the ones who already were collecting money from them.

Monthly billing. But, of course, one cannot ignore the repeated references to "monthly billing"—which brings us to the second attribute on which the collection obligation depends. This attribute, too, is not just about the timing of a

payment; it is about the very nature of the relationship. When a customer purchases an airtime card at Wal-Mart and walks out of the store with it, one would not call the seller a "billing provider" and the customer most certainly would not receive "monthly billing."

The district court's holding that the statute applies regardless of whether there is a "normal monthly billing process"—and, indeed, regardless of whether there is any billing at all—impermissibly turns all of those references into surplusage. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (noting the Court's "'reluctan[ce] to treat statutory terms as surplusage' in any setting" (citation omitted)); *Kennedy v. Ky. Bd. of Pharmacy*, 799 S.W.2d 58, 60 (Ky. Ct. App. 1990) ("It is basic that in construing a statute the courts must examine and give effect to each word, clause or sentence that allows for reasonableness."). The statute would not have specified that it applies to periodic billing if it applies regardless of billing.

The General Assembly's intention to cover only the conventional monthly billing relationship and not the one-time in-store purchase characteristic of modern-day prepaid service is especially evident when one compares the precision with which the 1998 Act covers the one with its deafening silence on the other. The 1998 Act directs a provider who has a long-term contract with the end user:

- exactly what the user is to pay and when ("seventy cents ($0.70) per month");

- exactly how to collect it (as part of the "normal … billing process");
- exactly how to record it ("list the CMRS service charge as a separate entry on each bill");
- exactly what to do if the customer does not pay the full bill ("the provider shall first apply the payment against the amount the CMRS customer owes the CMRS provider"); and
- exactly what obligation the provider has if the customer stiffs the bill (the "CMRS provider has no obligation to take any legal action to enforce of the collection of the CMRS service charge," KRS § 65.7635(2)).

In contrast, the 1998 version tells a provider exactly nothing about what to do with a retail sale of a prepaid airtime card. Let us return to the end user who purchases ten hours of airtime. We have already demonstrated that the 1998 Act does not answer how much the end user is supposed to pay or how TracFone is supposed to collect it. But there are many more unanswerable questions:

- When should the service charge be paid—upon purchase, upon use, or on each monthly anniversary of the purchase?
- When does the obligation expire—upon purchase, when the card is depleted, or when an average user would have depleted it?
- Who has the primary obligation to collect it—the owner of the wireless system such as AT&T (which is arguably the one that "provides CRMS to the end user"), the middleman, like TracFone (who purchases from the provider and sells it to the retailer); or the retailer (which resells it to the "end user")?
- What is the provider required to do if the retailer fails to collect the charge—negotiate, beg, sue, or wash its hands of the whole ordeal?

The General Assembly's failure to supply even the most basic guidance on how the service charge applies to these sorts of transactions can only mean one thing: The charge does not apply to them.

The "inference that [these] omissions are intentional" is a simple matter of "logic and commonsense." 2A Singer & Singer, *Sutherland Statutes and Statutory Construction* § 47:25 (7th ed. 2009). But it is also a matter of doctrine. "[A] primary rule" of statutory construction—a "basic tenet"—is the maxim *expressio unius est exclusio alterius*: "the enumeration of particular things excludes the idea of something else not mentioned." *Fiscal Court of Jefferson Cnty. v. Brady*, 885 S.W.2d 681, 685 (Ky. 1994). The rule has special force where, as here, "there is a strong, unmistakable contrast between what is expressed and what is omitted." *Fox v. Grayson*, 317 S.W.3d 1, 9 (Ky. 2010); *see also Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.").

The legislature confirmed the point when it amended the statute, in 2006, to apply for the first time to "prepaid" transactions. When it intended to cover those transactions, it explicitly granted the Board a *new* "power[] and dut[y]": "[t]o collect the CMRS service charge" from "*prepaid* CMRS connections" meeting certain specified criteria. KRS § 65.7629(3) (West Supp. 2006) (emphasis added). It proceeded to answer the questions—about who collects how much from whom

and under what circumstances—that the 1998 Act left unanswered. *Id.* § 65.7635(1). And both the Governor and the General Assembly explicitly confirmed what they thought the statute meant in 1998 when they declared that the 1998 Act "*allows* 'prepaid' wireless phone services to not remit the [911] surcharge," but moved to close that "'loophole.'" R75-3, Fiscal Note, at 2, S.A. 262 (emphasis added).

This pronouncement only confirms what would be evident anyway by inference. As the Kentucky Supreme Court has explained, "[i]t is beyond dispute that whenever a statute is amended, 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); *City of Somerset v. Bell*, 156 S.W.3d 321, 326 (Ky. Ct. App. 2005) ("[I]t will be presumed that the language [of a statute] was intentionally changed for the purpose of effecting a change in the law itself." (quoting *Eversole v. Eversole*, 185 S.W. 487, 489 (Ky. 1916))). If the 1998 Act already covered prepaid services, the Legislature did not need to amend it to cover prepaid services.

B. The District Court's Analysis of the 1998 Act Is Flawed.

The district court reached the wrong conclusion because—like the Board—it ignored most of the indicia of the 1998 Act's meaning.[4] The district court

[4] Courts have split over the reach of similar statutes. *Compare TracFone Wireless, Inc. v. Dep't of Treasury*, No. 275065, 2008 WL 2468462 (Mich. Ct.

acknowledged that "[w]ithout doubt, th[e] statutory method of collection does not comport with TracFone's chosen business model. TracFone does not send its customers any 'bills,' much less utilize a 'normal monthly billing process.' Without a bill, there is no document on which TracFone would logically 'list the CMRS service charge as a separate entry.'" R92, OpI, at 11. This should have been the show stopper. If the statutory collection method did not apply to TracFone, TracFone was not required to collect the charges and certainly was not required to pay them out of its own pocket.

Rather than reach this straightforward conclusion, the court adopted a three-step analysis that was flawed at every step. In step one, the court held that TracFone was a "CMRS provider" within the meaning of the statute. *Id.* at 9. But it did not even notice, much less grapple with, the language (discussed above) that

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App. June 19, 2008), *with TracFone Wireless, Inc. v. Wash. Dep't of Revenue*, 242 P.3d 810 (Wash. 2010), *and Comm'n on State Emergency Commc'ns v. TracFone Wireless, Inc.*, 343 S.W.3d 233 (Tex. Ct. App. 2011), *petition for review filed*, No. 11-0473 (Tex. June 20, 2011). Each statute is unique, and most do not have the same indicia of legislative intent as Kentucky's. But to the extent that these courts rule against prepaid providers, their logic exhibits the same flaws as the district court's logic here. That is certainly true of the Kentucky trial court opinion on which the district court relied so heavily in this case. *See Virgin Mobile, U.S.A., L.P.*, No. 08-CI-10857. Should the intermediate state appellate court affirm, one can expect that it will be on the same flawed basis as the district court. Either way, the intermediate appellate court will not be the last stop for that case. And the task before this Court is to predict what *the Kentucky Supreme Court* will hold, not to uncritically accept the ruling of the intermediate court. *See United States v. Simpson*, 520 F.3d 531, 535 (6th Cir. 2008).

limits the definition to those who "provide CMRS *to an end user*." *See supra* at 29-31. The district court also overlooked the statute's overarching edict that even if a general definition seems to cover a situation, the definition should not apply if "the context requires otherwise," KRS § 65.7621, which would surely lead to the opposite conclusion here.

In step two, the court fixated on the introductory clause of Section 65.7635—and indeed the first word—which provided that "*[e]ach* CMRS provider shall act as a collection agent." *See* R92, OpI, at 9-10. This led the court to conclude that "the statute, at its most basic level and in no uncertain terms, requires TracFone to collect the service fees from its Kentucky customers." *Id*. at 10. The fallacy there lies in the district court's assumption that just because a provider qualifies as a "collection agent," it must necessarily collect from everyone who ends up with its product. To the contrary, the collection agent must collect only with respect to those transactions that the statute covers and only under the circumstances that the statute directs.

Imagine a two-part statute that begins with the command that "each toll booth operator shall act as a collection agent and collect a toll of $0.70 from motorists" and then specifies that the "operator shall collect the toll from every car that drives through the operator's lane while he is on duty." Despite the breadth of the opening command, the operator obviously is not supposed to collect tolls from

motorists who drive through *other* lanes—nor from motorists who do not drive on the toll road. And even though "each" operator is a "collection agent," an operator does not violate the law if he does not collect while on vacation. The reason is that the second part delineates the toll booth operator's actual duties. So, too, here. Even if prepaid providers were "collection agents," that does not mean they must collect from everyone no matter what. They need only collect on the transactions covered by the statute and in the manner the statute specifies.

In step three, the district court acknowledged that "the statute's specific guidance on how to collect the fees" was "admittedly in conflict with prepaid providers' chosen business model." *Id*. at 12. But it held that the conflict did not matter because it was based on nothing but TracFone's "chosen business model." *Id.* at 11. Thus, the district court held, TracFone's position was "the equivalent of a request for an exemption from a generally applicable tax." *Id*. at 11-12. That is like saying that the toll booth operator who declines to chase down cars in neighboring lanes is seeking "an exemption" from the "generally applicable" rule that he must be a "collection agent." He is not. He is sensibly reading that direction to act as a collection agent in light of the responsibilities that the statute elsewhere assigns to him. And that is all this Court should do.

In trivializing the issue as being about nothing but a "chosen business model," the district court revealed a fundamental misunderstanding of both the

law, generally, and this statute's reach, in particular. Consider a statute requiring a "radio provider to collect a charge on every radio it provides to an end user at the time it sells the radio to the user." By the district court's logic, Panasonic should collect the charge on radios that *Wal-Mart* sells to end users, and its refusal to do so is some sort of subterfuge enshrouded in a "chosen business model"—i.e., its choice to be a wholesaler not a retailer. But the "chosen business model" *does* matter. That is not because Panasonic (or TracFone) *could have* chosen to be a retailer, but because *the legislature* chose not to impose obligations on wholesalers—and, here, also because the legislature chose not to impose obligations on anyone who does not have an ongoing billing relationship with the end user.

The district court only highlighted its analytical flaw when it offered, ever so tentatively, one possibility for compliance—offering its own answer to Question 2 above: TracFone might have "attempted to work with retailers to collect the fee or determine a best method for doing so." R92, OpI, at 16. The district court made clear that TracFone was free to experiment with other approaches, but the bottom line was that TracFone was under some duty to start the flow of end user funds to the Board. "Just Do It" was the gist of the Board's position and the district court's holding. The problem with the Nike approach to statutory construction is that the results bear no relation to the statute the General Assembly wrote. The statute

enacted into law addresses directly and clearly what a "CMRS provider … *shall*" do and to whom. Nowhere does the statute suggest that a wholesaler "shall work with retailers to collect the fee" or "shall devise a collection formula that 'best' approximates $0.70 per month." And, for reasons discussed above, the omission of any such direction means that the statute cannot be read to require it.

In the end, rather than construe the statute, the district court rewrote it. Like the Board, the district court seemed to view its job as an exercise in legislative extrapolation: to divine how the legislature would have charged prepaid services if only it had imagined them, or perhaps to require TracFone to conjure the hypothetical legislative solution. That is not, of course, the role of a court, and it is certainly not the role of a private enterprise. As the Kentucky courts have put it, "it is the legislature's task to amend the statutes, not this Court's role to rewrite them." *JP Morgan Chase Bank, N.A. v. Longmeyer*, 275 S.W.3d 697, 702 (Ky. 2009). "[W]here a statute on its face is intelligible, the courts are not at liberty to supply words or insert something or make additions which amount, as sometimes stated, to providing for a *casus omissus*, or cure of omission, however just or desirable it might be to supply an omitted provision." *Hatchett v. City of Glasgow*, 340 S.W.2d 248, 251 (Ky. 1960).

This admonition is especially salient where, as here, the scheme the court adopted clashes so starkly with the statute's purpose. The district court held that

because TracFone failed to figure out a way to collect the charges from other people's customers, it must pay the charges out of its own pocket. That result is at war with the FCC's "fundamental" direction that carriers "be able to recover their costs of providing E911 services." *In re Revision of Comm'n Rules*, 11 FCC Rcd. at 18,722. It violates the federal principle that carriers would not have to participate in the upgrade process unless "a mechanism for the recovery of costs … is in place." *Id.* at 18,684.[5] The Act itself acknowledges the point when it directs that a "CRMS provider has no obligation" to chase customers who fail to make the payment, KRS § 65.7635(2), and are certainly not required to pay if the customer does not pay enough, *see id*. § 65.7635(1). The district court turned this principle on its head when it directed that a business that falls outside the statute's explicit language is the only one that must pay the service charge out of its own pocket, whereas those who are explicitly covered by the statute are immune.

C. Any Ambiguity in the Statute Must Be Resolved in TracFone's Favor.

For the reasons discussed so far, the Board's interpretation of the statute is not even plausible, much less the better reading of the statute. But even if it were,

[5] Later, *after* the General Assembly passed the 1998 Act, the FCC retreated from the strict cost-recovery principle it had announced in 1996. *See In re Revision of the Comm'ns Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Sys.*, 14 FCC Rcd. 20,850, 20,853 (1999).

the Board would still not prevail. It cannot prevail unless its interpretation is free of ambiguity, which it obviously is not. The district court recognized that a statute imposing service charges would ordinarily be subject to the "general rule" that "'it is the function of the judiciary to construe … [tax] statute[s] strictly and resolve doubts and ambiguities in favor of the taxpayer and against the taxing powers.'" R92, OpI, at 12 (quoting *George v. Scent*, 346 S.W.2d 784, 789 (Ky. Ct. App. 1961)); *see also LKS Pizza v. Commonwealth*, 169 S.W.3d 46, 47 (Ky. Ct. App. 2005). But it erroneously declined to apply this rule.

The district court reasoned that the rule "does not apply where the legislature has specifically stated that the tax appl[ies] to the party in question and that party is actually seeking an exemption." R92, OpI, at 12. This exception applies only where a party concededly within the scope of a tax or fee provision claims a right not to do what the provision requires. *Cf. Dep't of Revenue v. GTE MobilNet of Tampa, Inc.*, 727 So.2d 1125, 1128 (Fla. Dist. Ct. App. 1999) ("A tax exemption is a statute that carves out a statutory exemption for something that would [otherwise] be within the scope of the taxing statute."). That is not what TracFone seeks. Like most any business disputing an obligation to pay a tax or charge, TracFone is seeking to interpret the statute—one that the district court believed presented "difficult" and "confounding" interpretive problems. R92, OpI, at 5, 11-12. It disagrees with the district court's interpretation of the definition of "CMRS

provider" and with the district court's conclusions as to which transactions are covered. If disputing the agency's statutory construction were the same as seeking an exemption, the exception would swallow the rule and no court would ever construe a tax statute in the taxpayer's favor.

The point of the "general rule" of strict construction is that "[t]axing laws should be plain and precise, for they impose a burden upon the people. That imposition should be explicitly and distinctly revealed." *George*, 346 S.W.2d at 789. The application of the 1998 Act to prepaid providers like TracFone that have no relationship with the consumer is neither "plain" nor "precise" and any such "imposition" is not "explicitly and distinctly revealed." For that reason, alone, the judgment as to pre-2006 charges should be reversed.

II. THE DISTRICT COURT ERRED IN HOLDING THAT TRACFONE OWES FEES UNDER THE 2006 VERSION OF THE STATUTE DESPITE THE BOARD'S FAILURE TO PROMULGATE A VALID IMPLEMENTING REGULATION.

The General Assembly's 2006 amendments to the 1998 Act added the statute's first reference to "prepaid" and set forth collection mechanisms that, for the first time, were relevant to prepaid providers. (For the Court's convenience, the first page of the Statutory Addendum shows the changes in redline.) There is no dispute that TracFone falls within the subset of prepaid providers that satisfies the two conditions set forth in Option C, which is limited to "providers that [1] do not have the ability to access or debit end user accounts, and [2] do not have retail

contact with the end-user or purchaser." KRS §65.7635(1); *see* R92, OpI, at 20-21. Here, too, the parties' dispute—about whether Option C must be different from Options A or B—presents a question of statutory construction. And here, too, the question is not which side has the better reading, but whether the Board's reading is unambiguously correct—an important rule that the district court acknowledged in interpreting the 1998 version of the Act and then seemed to forget when it came to the 2006 version. *See supra* at 41-43.

That is not a hard question here, because the Board's reading is unambiguously wrong. The plain language of the amended statute confirms that the Board was not permitted to substitute Option A or B for Option C. *See infra* Section II.A. Even if the district court's construction of the amended Act was correct, the Board's declaration that Option C is the same as Option A was void because the Board never undertook the formal rulemaking that it would have had to undertake to give effect to its decision. *See infra* Section II.B. Finally, even if the Board was allowed to eliminate Option C, the district court erred in requiring TracFone to remit fees for the four-year period in which the Board sat on its hands refusing to define Option C. *See infra* Section II.C.

A. Option C Grants Qualified Prepaid Providers an Alternative to Options A and B.

Only one conclusion can be drawn from the language and structure of the 2006 amendments: A seller of prepaid services who qualifies for Option C cannot

be forced to choose Options A or B. If the Board lets Option C lie fallow, it has to accept the consequences: (1) the qualifying provider has no obligation to collect or pay *anything*; and (2) the Board loses the charges from the specific population of end users who qualify for Option C. Even if it were possible to read the statute otherwise, the Board's alternative reading is hardly unambiguous.

The General Assembly carved out Option C to prevent an absurdity. The legislature recognized that compliance with Options A and B will be either nonsensical or downright impossible, for certain prepaid providers—those, like TracFone, "that 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." KRS § 65.7635(1)(c). Option A calls upon the provider to access the "account" of any "active customer" and deduct the service charge from the "account balance." There are, however, no "active customers" with "accounts" for TracFone to access. And "[t]he parties agree[d]," and the district court found, that TracFone does not "have the ability to access or debit end user accounts." R92, OpI, at 21. As to Option B, since the retailer is the one that is selling directly to the consumer, it is the only party able to charge the consumer and is therefore much better situated than TracFone to implement the statutory objective of having the end users shoulder the costs. R75-3, Salzman Dep., at 76-77, S.A. 131. The whole point of Option C is to assure businesses like TracFone that they will never have to attempt

to collect and remit under either of these approaches if they occupy a particular position in the stream of commerce.

As was true of the 1998 version, the General Assembly infused every sentence of the new Section 65.7635(1) with evidence of this assurance. Sentence 1 starts—as it did in 1998—with the command, "Each *CMRS provider* shall act as a collection agent for the CMRS fund." As before, the definition of "CMRS provider" (discussed above) still limits this collection command only to "a person or entity that provides CMRS to an *end user*." KRS §§ 65.7621(9), 65.7635(1); *see supra* at 29-30.[6] Thus, the directive is no more applicable to TracFone now than it was in 1998. In sentence 2, the amendment emphasizes the same point: "*From its customers*, the provider shall … collect." Despite its Yoda-inspired locution, the new (italicized) language is clear: No business is obliged to collect money from anyone other than *its own customers*; no one has to collect from *other people's customers*. Sentence 3 is where the statute offers the three options to cover "prepaid" services. The key language provides that the methodology "shall be … *elected by the CMRS provider*." There is no way to read this language to mean that the Board gets to make the election for the provider.

[6] The 2006 amendment revised the definition, but only in a way that has no effect on the present inquiry. The new language clarifies that the obligation applies not just generically to "resellers," but to all categories of "resellers."

Next, in articulating the three options, the statute draws a stark—and telling—structural distinction between the first two options and the third. The first two direct the "*CMRS provider*" to undertake specified actions. Option A directs that "[t]he CMRS provider *shall collect*." Option B directs that "[t]he CMRS provider *shall*" *calculate* a number "and *pay* the resulting amount." *Id*. § 7635(1)(b). In contrast, Option C is not couched as a command to *the provider*. It conspicuously shifts to passive voice: It provides that the Board must direct *someone* (not necessarily the provider) to collect some amount (to be determined) pursuant to *some* "collection methodology."

Section 65.7635(1) remains faithful to this dominant theme through to its final words. Once the Board decides who must "collect the service charge," the last clause of Option C emphasizes, as every other sentence does, that the collector must collect "from [the] end users."

Putting all this together, the language and structure of the 2006 amendments impose no fewer than four constraints on the Board with regard to Option C:

> ***Constraint 1:*** A business that qualifies for Option C will never be required to proceed under Option A or B.
>
> ***Constraint 2:*** That means Option C must present a *different* method of collection from Options A or B.
>
> ***Constraint 3:*** Precisely because the whole premise of Option C is that a business in TracFone's position could not collect from the end user, the General Assembly intended that someone *other than TracFone* would be making the collection "from … end users" and remitting to

the Board.

Constraint 4: Neither TracFone nor any other business is required to pay the charge out of its own pocket.

How could a regulation possibly meet all four requirements? Easy. The General Assembly almost certainly envisioned the approach that 21 jurisdictions have adopted and that TracFone urged the Board to adopt: the point-of-sale approach, requiring retailers to collect the charge from prepaid customers at the cash register and remit it directly to the Board. *See* R118-14, Salzman Email (explaining the point-of-sale approach and listing states that had adopted the approach by 2010). The legislature left the Board the latitude to devise some other option, so long as it deftly negotiates all the statutory hurdles. Instead, the Board has adopted an approach that is more Jacques Clouseau than Jesse Owens. It plows through every one of the hurdles, opting for an approach that (1) prohibits a qualifying company from electing Option C; (2) allows Option C to be converted into Option A or B; (3) forces TracFone to collect from other people's customers; *and* (4) forces TracFone to pay out of its own pocket.

The district court's justification for savaging the statutory language was a study in contradiction. On the one hand, the court acknowledged that, "[u]nder the unambiguous terms of the statute," TracFone was entitled to select Option C, and "the CMRS Board [was] bound by that selection." R92, OpI, at 22. On the other hand, it held that the Board could "simply inform[] the provider that either Option

A or B must be utilized." *Id*. at 24. The key to the contradiction, the court believed, was that Option C is permissive: It provides that "the CMRS service charge and collection methodology *may* be determined by administrative regulations promulgated by the board." KRS § 65.7625(1)(c) (emphasis added). Thus, the court reasoned, "[t]he Board … 'may' choose not to issue a new regulation." R92, OpI, at 24.

That is wrong. As the district court acknowledged in the very same breath, "the use of 'may'" does not "permit[] [the Board] simply to ignore the provider's clear election of Option C." *Id*. at 24. Assuming that the Board is free to shirk its responsibility to give content to Option C, that does not somehow invalidate the election. It just means that the Board has relinquished the opportunity to collect funds from the customers of services (like TracFone) that qualify for Option C.

The whole point of Option C is to give an alternative to providers who would have difficulty using the other two options. It makes no sense to read the statute as authorizing the Board to nullify the very choice the legislature granted by statute. The legislature is free to repeal Option C. An administrative agency and a district court are not. Their job is statutory *con*struction, not statutory *de*struction.

B. The Board's Actions Are Void Because It Was Authorized to Act Only by Formal Rulemaking.

Even if the district court was correct that the Board has the authority to override an Option C election, the Board's action was invalid. The amended Act

authorizes the Board to promulgate "administrative regulations" setting forth the Option C "collection methodology." KRS § 65.7635(1)(c). Another provision of the Act underscores that the Board has no other law-making option: "The CMRS Board *shall* implement the provisions of KRS 65.7621 to 65.7643 through the promulgation of administrative regulations in accordance with the provisions of KRS Chapter 13A [Kentucky's Administrative Procedure Act]." *Id*. § 65.7633(1) (emphasis added).

The Board acknowledges that it has never issued a formal Option C regulation "in accordance with the provisions of KRS Chapter 13A." *See* R119-1, Board's Mem. ISO SJ, at 1-9, S.A. 395-403. Instead, after declining to adopt TracFone's proposed point-of-sale regulation, the Board simply directed TracFone to remit fees pursuant to Option A. *Id.* at 9, S.A. 403; R118-32, Lucas Letter; *see also supra* at 20-21. The Board did not even attempt to comply with the publication, public notice, comment period, and hearing requirements of Kentucky law. *See, e.g.*, KRS §§ 13A.255, .270, .280; *see also Baker v. Commonwealth*, No. 2005-CA-001588-MR, 2007 WL 3037718, at *35 (Ky. Ct. App. 2007) ("These statutes … were designed to prevent administrative agencies from abusing their authority."); *see* R118-3, Barrows Dep., at 99, 153-54.

Kentucky law is unequivocal that "[n]o 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." KRS § 13A.120(6); *see also id*. § 13A.130(1) ("An administrative body shall not by internal policy, memorandum, or other form of action: (a) Modify a statute or administrative regulation; [or] (b) Expand upon or limit statute or administrative regulation."). "Any administrative regulation in violation of this section or the spirit thereof is null, void, and unenforceable." *Id*. § 13A.120(4); *see also id*. § 13A.130(2); *Ky. Educ. & Humanities Cabinet Dep't v. Gobert*, 979 S.W.2d 922, 926 (Ky. Ct. App. 1998).

The Kentucky courts have repeatedly rejected similar attempts by regulators to act without first undertaking formal rulemaking. The Kentucky Supreme Court recently emphasized the point. *See Bowling v. Ky. Dep't of Corr.*, 301 S.W.3d 478, 481-92 (Ky. 2010) (holding that Kentucky's lethal injection protocol was "unenforceable because it was not properly adopted as an administrative regulation" and the state's APA "must be complied with in all respects"); *see also Vincent v. Conn*, 593 S.W.2d 99, 101 (Ky. Ct. App. 1979) (holding that regulator's denial of benefits pursuant to internal guideline was improper because the guideline "was not promulgated as required" and thus "ha[d] no effect").

So, too, here. Having failed to adopt regulations, the Board cannot simply decree that Option C means Option A (or, now, Options A or B) and that TracFone must remit fees accordingly. The legislature delegated to the Board limited law-

making powers. The Board is not free to rewrite the statute in this respect either. The order is a nullity and the judgment must be reversed for that reason alone.

C. At a Minimum, TracFone Cannot Be Required to Remit Fees Retroactive to 2006.

If nothing else, it was grievous error for the district court to uphold the Board's decision to compel TracFone to remit fees retroactive five years back to the effective date of the 2006 amendments. As the district court initially—and correctly—recognized, "upon its initial election of Option C [in 2006], TracFone ha[d] no legal obligation … to remit fees for its non-direct customers until the CMRS Board advise[d] it of the proper method of collection." R92, OpI, at 23. "There is simply no statutory support for the Board's position 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." *Id*. at 23. The district court never explained why it abandoned this sound principle once the Board officially abandoned Option C.

To see why the district court was right the first time, just think about the status quo for the four years during which TracFone had validly elected Option C and the Board allowed that election to stand. All TracFone knew was that the Board would be defining Option C. There were no answers to any of those fundamental questions (described above, *see supra* at 33) as to who would collect how much from whom, when, and through what mechanism. First and foremost,

Option C said that the Board would "determine" "*the CMRS service charge*" in addition to the "collection methodology." KRS § 65.7635(1)(c) (emphasis added). But it did not say *how much* the charge would be, and TracFone had no way of knowing.

Similarly, Option C said that the "service charge" would be collected "from such end users," but it did not say *who* would collect it. There was a reasonable probability that the Board would direct the *retailers* to collect it, which TracFone suggested and which is now the most prevalent approach in other states. Was it *conceivable* that TracFone might end up having some collection obligations under the regulation? Perhaps. But TracFone had no way of knowing what the mechanism would be (e.g., collecting from retailers what the retailers collect from end users). As important, without a regulation in place, TracFone had no legal way to extract money from the end user—at least so long as laws against robbery, pickpocketing, and stalking remained on the books.

Within this vacuum of information, there was one proposition that the statute did settle with unmistakable certainty: No matter what the Board did—or did not do—with Option C, there was no way the Board could ever make TracFone pay out of its own pocket a fee that it could not collect directly from the end users. The statute is explicit about that much. *See, e.g., id.* § 65.7635(2); *supra* at 16, 44-48. So in a world where TracFone cannot—and cannot be expected to—chase after

consumers that bought airtime cards years earlier, TracFone was entitled to feel secure in the knowledge that it would never have to remit charges that it did not collect.

The district court missed all of these points when it observed that "TracFone was aware of its obligation [under the 2006 amendments] to collect or remit the service fees, even if it was uncertain about the permitted method of collection." R130, OpII, at 3. TracFone's ability to speculate that it might conceivably have some future role in collection is a far cry from knowing what that obligation will be—and *how much* was to be collected. The district court's logic would work only in a world where TracFone could persuade hundreds of thousands of end users with whom it has no financial relationship to make voluntary contributions to a proverbial collection plate, with the pitch, "You'll have to pay something eventually, so whaddaya say, you throw 2% in the kitty, and we'll settle up later?"

Ordering TracFone to remit past charges when it had never been told how much to collect, from whom, or by what methodology, is the very sort of "retroactive effect" that the law prohibits: The Board "increase[d] … liability for past conduct" and "impose[d] new duties with respect to transactions already completed." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). The Board acknowledged as much when it characterized its order as "apply[ing] its decision retroactively from July 12, 2006." R118-32, Lucas Letter.

It is black-letter law that "[r]etroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). As the Supreme Court has explained, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf*, 511 U.S. at 265; *see See Bowen*, 488 U.S. at 206-07 (rejecting agency regulation limiting Medicare reimbursement rates retroactive three years back). In Kentucky, the General Assembly has expressly directed that "[n]o statute shall be construed to be retroactive, *unless expressly so declared*." KRS § 446.080(3) (emphasis added); *see also Moore v. Stills*, 307 S.W.3d 71, 80 (Ky. 2010) ("[O]ur Courts indulge a strong presumption, embodied in KRS 446.080, against the retroactive application of substantive changes to the law."). Section 65.7635 contains no such express authorization.

The district court acknowledged the presumption against retroactivity. But it once again held the general rule inapplicable, this time on the ground that the Board's action was merely "remedial" and "do[es] not affect substantive rights." R130, OpII, at 3 (quoting *Moore*, 307 S.W.3d at 80-81). The district court's analysis never tried to reconcile this view with its own previous conclusion that TracFone was under "no obligation" to collect and remit fees during that time. R92, OpI, at 25. More importantly, the Board's action, which placed such an

obligation on TracFone for the first time, cannot be deemed merely "remedial." "'Remedial' enactments," Kentucky courts have explained, "*clarify* existing law" or "*codify* judicial precedent." *Moore*, 307 S.W.3d at 81 (emphasis added). They may "*not* impair rights a party possessed when he or she acted or give past conduct or transactions new substantive legal consequences," *id*. (emphasis added), which is exactly what the Board did here.

In short, TracFone did everything the existing law required it to do. TracFone also stood ready to implement any collection methodology the Board might choose and practically begged the Board to issue a regulation defining its obligations. TracFone did everything it could do—short of occupying the Board—to unleash the flow of funds from end users to the Board. The Board's decision to place TracFone in the shoes of the end users and pay out of its own pocket retroactively for charges that it had no way of calculating and no way of collecting is unfair, unprincipled, and unlawful.

III. THE AWARD OF ATTORNEYS' FEES SHOULD BE VACATED.

If this Court were to reverse the judgment as to both the pre- and post-2006 periods, obviously the attorneys' fees award cannot stand. But the award must be vacated even if this Court reverses as to one period and affirms as to the other. The relevant statute provides that costs and fees "*may* be awarded by the court to the prevailing party," not that they must be awarded. KRS § 65.7635(5) (emphasis

added). So in that scenario, this Court should give the district court the opportunity to reassess whether any fees are appropriate, and also to ensure that any award is proportionate to the "degree of success." *Meyers v. Chapman Printing Co.*, 840 S.W.2d 814, 825-26 (Ky. 1992).

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed.

Dated: February 13, 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 13,983 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: February 13, 2012 ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ E. Joshua Rosenkranz
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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 February 13, 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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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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1	Notice of Removal	
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63	First Amended Answer and Counterclaim	
68	Stip.	
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	Ex. 4, Plaintiff's Amended Responses to Defendant's First Set of Interrogatories, First Requests for Production of Documents and Things, and First Set of Requests for Admission dated July 13, 2009	84
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118-3	Deposition of J. Barrows dated January 21, 2011	
118-12	Deposition of D. Lucas dated March 15, 2011	
118-13	Deposition of M. Carter dated March 10, 2011	
118-14	Email from R. Salzman to J. Barrows dated September 3, 2010	
118-15	Deposition of J. Gould dated January 28, 2011	
118-18	Email from R. Salzman to J. Barrows dated September 29, 2010	
118-19	Email from J. Barrows to J. Gould dated October 5, 2010	
118-20	Emails between J. Gould and J. Barrows dated October 12 and 13, 2010	
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118-22	Staff Report	

Note: Where applicable we list the page number in the Appendix of Sealed Documents ("S.A. ") in the right column		
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118-25	Transcript of October 18, 2010 Board Meeting of the Commercial Mobile Radio Service Board	
118-27	Letter from R. Salzman to J. Barrows dated October 26, 2010	
118-28	Kentucky CMRS Board Meeting Minutes dated November 1, 2010	
118-29	Memorandum from J. Barrows to CMRS Board Members dated October 28, 2010	
118-30	Transcript of November 1, 2010 Kentucky CMRS Board Meeting	
118-31	Email from J. Goldberg to T. O'Brien dated November 4, 2010	
118-32	Letter from D. Lucas to R. Salzman dated November 4, 2010	
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118-34	Letter from J. Barrows to R. Salzman dated November 19, 2010	
118-35	Letter from R. Salzman to J. Barrows dated November 22, 2010	
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STATUTORY ADDENDUM

1. Key excerpts of the 2006 Amendments showing changes to KRS §§ 65.7635 and 65.7621 in redline are found at pages B2-4.

2. The 1998 Act as amended through 2005, KRS §§ 65.7621-65.7643 (West 2006), is found at pages B5-18.

3. The 2006 Act enacting the amendments to the 1998 Act, 2006 Ky. Rev. Stat. & R. Serv. 694-699 (West), is found at pages B19-32.

4. The 2006 Amendments as codified, KRS §§ 65.7621-65.7625 & 65.7629-65.7635 (West Supp. 2006), are found at page B33-45.

Key Excerpts of 2006 Amendments, Showing Changes in Redline

Key Excerpts of 2006 Amendments

KRS 65.7635 is amended to read as follows:

(1) Each CMRS provider shall act as a collection agent for the CMRS fund**.** ~~**and**~~ ***From its customers, the provider*** shall, as part of the provider's ~~**normal monthly**~~ billing process, collect the CMRS service charges levied upon CMRS connections under KRS 65.7629(3) from each CMRS connection to whom the billing provider provides CMRS. Each billing provider shall list the CMRS service charge as a separate entry on each bill which includes a CMRS service charge. If a CMRS provider receives a partial payment for a monthly bill from a CMRS customer, the provider shall first apply the payment against the amount the CMRS customer owes the CMRS provider. ***For CMRS customers who purchase CMRS service on a prepaid basis, the CMRS service charge shall be determined according to one (1) of the following methodologies as elected by the CMRS provider:***

(a) The CMRS provider shall collect, on a monthly basis, the CMRS service charge specified in KRS 65.7629(3) from each active customer whose account balance is equal to or greater than the amount of service charge; or

(b) The CMRS provider shall divide its total earned prepaid wireless telephone revenue received with respect to its prepaid customers in the Commonwealth within the monthly 911 emergency telephone service reporting period by fifty dollars ($50), multiply the quotient by the service charge amount, and pay the resulting amount to the board; or

(c) In the case of CMRS providers that 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, the CMRS service charge and collection methodology may be determined by administrative regulations promulgated by the board to collect the service charge from such end users.

(2) A CMRS provider has no obligation to take any legal action to enforce the collection of the CMRS service charges for which any CMRS customer is billed. Collection actions to enforce the collection of the CMRS service charge against any CMRS customer may, however, be initiated by the state, on behalf of the board, in the Circuit Court of the county where the bill for CMRS service is regularly delivered, and the reasonable costs and attorneys'

fees which are incurred in connection with any such collection action may be awarded by the court to the prevailing party in the action.

KRS 65.7621 is amended to read as follows:

* * *

(7) "CMRS customer" means ***an end user*** ~~**a person**~~ to whom a mobile handset telephone number is assigned and to whom CMRS is provided in return for compensation;

* * *

(9) "CMRS provider" means a person or entity who provides CMRS to an end user**.** ***The term includes both facilities-based and nonfacilities-based resellers***~~**, including resellers**~~;

The 1998 Act: KRS §§ 65.7621-65.7643 (West 2006)

WIRELESS ENHANCED EMERGENCY 911 SYSTEMS

65.7621 Definitions for KRS 65.7621 to 65.7643

As used in KRS 65.7621 to 65.7643, unless the context requires otherwise:

(1) "Administrator" means the executive director of the Office of the 911 Coordinator within the Commonwealth Office of Technology functioning as the state administrator of CMRS emergency telecommunications under KRS 11.505;

(2) "Automatic location identification", or "ALI" means an enhanced 911 service capability that enables the automatic display of information defining the approximate geographic location of the wireless telephone used to place a 911 call and includes the term "pseudo-automatic number identification;"

(3) "Automatic number identification", or "ANI" means an enhanced 911 service capability that enables the automatic display on an ALI screen of the ten-digit, or equivalent, wireless telephone number used to place a 911 call;

(4) "CMRS" means commercial mobile radio service under Sections 3(27) and 332(d) of the Federal Telecommunications Act of 1996, 47 U.S.C. secs. 151 et seq., and the Omnibus Budget Reconciliation Act of 1993, as it existed on August 10, 1993. The term includes the term "wireless" and service provided by any wireless real time two-way voice communication device, including radio-telephone communications used in cellular telephone service, personal communications service, and the functional or competitive equivalent of a radio-telephone communications line used in cellular telephone service, a personal communications service, or a network radio access line;

(5) "CMRS Board" or "board" means the Commercial Mobile Radio Service Emergency Telecommunications Board of Kentucky;

(6) "CMRS connection" means a mobile handset telephone number assigned to a CMRS customer;

(7) "CMRS customer" means a person to whom a mobile handset telephone number is assigned and to whom CMRS is provided in return for compensation;

(8) "CMRS Fund" means the commercial mobile radio service emergency telecommunications fund;

(9) "CMRS provider" means a person or entity who provides CMRS to an end user, including resellers;

(10) "CMRS service charge" means the CMRS emergency telephone service charge levied under KRS 65.7629(3) and collected under KRS 65.7635;

(11) "FCC order" means the Order of the Federal Communications Commission, FCC Docket No. 94-102, adopted effective October 1, 1996, including any subsequent amendments or modifications thereof;

(12) "Local exchange carrier" or "LEC" means any person or entity who is authorized to provide telephone exchange service or exchange access in the Commonwealth;

(13) "Local government" means any city, county, charter county, or urban-county government of the Commonwealth, or any other governmental entity maintaining a PSAP;

(14) "Mobile telephone handset telephone number" means the ten (10) digit number assigned to a CMRS connection;

(15) "Proprietary information" means information held as private property, including customer lists and other related information, technology descriptions, technical information, or trade secrets;

(16) "Pseudo-automatic number identification" means a wireless enhanced 911 service capability that enables the automatic display of the number of the cell site or cell face;

(17) "Public safety answering point" or "PSAP" means a communications facility that is assigned the responsibility to receive 911 calls originating in a given area and, as appropriate, to dispatch public safety services or to extend, transfer, or relay 911 calls to appropriate public safety agencies;

(18) "Service supplier" means a person or entity who provides local exchange telephone service to a telephone subscriber; and

(19) "Wireless enhanced 911 system," "wireless E911 system," "wireless enhanced 911 service," or "wireless E911 service" means an emergency telephone system that provides the user of the CMRS connection with wireless 911 service and, in addition, directs 911 calls to appropriate public safety answering points by selective routing based on the geographical location from which the call originated and provides the capability for automatic number identification and automatic location identification features in accordance with the requirements of the FCC order.

65.7623 Commercial Mobile Radio Service Emergency Telecommunications Board of Kentucky

(1) There is hereby created the Commercial Mobile Radio Service Emergency Telecommunications Board of Kentucky, the "CMRS Board," consisting of eight (8) members, appointed by the Governor as follows: three (3) members

shall be employed by or representative of the interest of CMRS providers; one (1) member shall be a mayor of a city of the first or second class or urban-county government or his or her designee containing a public safety answering point; one (1) nonvoting member shall be appointed from a list of local exchange landline telephone companies' representatives submitted by the Kentucky Telephone Association; and one (1) member shall be appointed from lists of candidates submitted to the Governor by the Kentucky Emergency Number Association and the Association of Public Communications Officials. The commissioner of the State Police, or the commissioner's designee, and the CMRS emergency telecommunications administrator also shall be members of the board. Any vacancy on the board shall be filled in the same manner as the original appointment.

(2) The commissioner and administrator shall serve by virtue of their office. The other members shall be appointed no later than August 15, 1998, for a term of four (4) years and until their successors are appointed and qualified, except that of the first appointments, one (1) shall be for a term of one (1) year, one (1) shall be for a term of two (2) years, one (1) for a term of three (3) years, and two (2) shall be for a term of four (4) years.

(3) In addition to the administrator, the Finance and Administration Cabinet shall provide staff services and carry out administrative duties and functions as directed by the board. The board shall be attached to the Commonwealth Office of Technology for administrative purposes only and shall operate as an independent entity within state government.

(4) The board members shall serve without compensation but shall be reimbursed in accordance with KRS 45.101 for expenses incurred in connection with their official duties as members of the board.

(5) All administrative costs and expenses incurred in the operation of the board, including payments under subsection (4) of this section, shall be paid from that portion of the CMRS fund that is authorized under KRS 65.7631 to be used by the board for administrative purposes.

65.7625 Appointment and duties of state administrator of commercial mobile radio service emergency telecommunications

(1) The executive director of the Office of the 911 Coordinator shall be the state administrator of commercial mobile radio service emergency telecommunications. The CMRS Board shall set the administrator's compensation, which shall be paid from that portion of the CMRS fund that is authorized under KRS 65.7631(1) to be used by the board for administrative purposes.

(2) The administrator of CMRS emergency telecommunications shall serve as a member of the CMRS Board and, as the coordinator and administrative head of the board, shall conduct the day-to-day operations of the board.

(3) The administrator shall, with the advice of the board, coordinate and direct a statewide effort to expand and improve wireless enhanced emergency telecommunications capabilities and responses throughout the state, including but not limited to the implementation of wireless E911 service requirements of the FCC order and rules and regulations adopted in carrying out that order. In this regard, the administrator shall:

(a) Obtain, maintain, and disseminate information relating to emergency telecommunications technology, advances, capabilities, and techniques;

(b) Coordinate and assist in the implementation of advancements and new technology in the operation of emergency telecommunications in the state; and

(c) Implement compliance throughout the state with the wireless E911 service requirements established by the FCC order and any rules or regulations which are or may be adopted by the Federal Communications Commission in carrying out the FCC order.

65.7627 Commercial mobile radio service emergency telecommunications fund

There is established the commercial mobile radio service emergency telecommunications fund, the "CMRS fund," an insured, interest-bearing account to be administered and maintained by the CMRS Board. The CMRS service charge shall have uniform application within the boundaries of the Commonwealth. No charge other than the CMRS service charge is authorized to be levied by any person or entity for providing wireless 911 service or wireless E911 service. The board shall deposit all revenues derived under KRS 65.7635 into the fund, and shall direct disbursements from the fund according to the provisions of KRS 65.7631. Moneys in the CMRS fund shall not be the property of the Commonwealth and shall not be subject to appropriation by the General Assembly. Moneys deposited or to be deposited into the CMRS fund shall not:

(1) Be loaned to the Commonwealth or to any instrumentality or agency thereof;

(2) Be subject to transfer to the Commonwealth or any agency or instrumentality thereof, except for purposes specifically authorized by KRS 65.7621 to 65.7643; or

(3) Be expended for any purpose other than a purpose authorized by KRS 65.7621 to 65.7643.

65.7629 Powers and duties of board

The board shall administer the provisions of KRS 65.7621 to 65.7643, and shall have the following powers and duties:

(1) To review, evaluate, and approve or disapprove the plans or plan modifications that are submitted to the board for complying with the wireless E911 service requirements established by the FCC order and by any rules or regulations which are or may be adopted by the Federal Communications Commission in carrying out the FCC order;

(2) To develop standards to be followed by the board in reviewing, evaluating, approving, or disapproving the plans or plan modifications that are submitted to the board;

(3) To 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. The CMRS service charge shall be seventy cents ($0.70) per month per CMRS connection, and shall be collected in accordance with KRS 65.7635 beginning August 15, 1998. The amount of the CMRS service charge shall not be increased except by act of the General Assembly;

(4) To review the rate of the CMRS service charge at least once every twenty-four (24) months and, at its discretion, to decrease the rate or recommend that the General Assembly increase the rate if the board determines that changing the rate is necessary to achieve the purposes of KRS 65.7621 to 65.7643. The first cost study shall be completed on or before July 1, 1999, and shall be submitted to the Governor, the President of the Senate, and the Speaker of the House of Representatives, and the board shall recommend, on the basis of the cost study, whether legislation to increase the CMRS service charge should be proposed during the 2000 Regular Session of the General Assembly;

(5) To administer and maintain the CMRS fund according to the provisions of KRS 65.7627, and promptly to deposit all revenues from the CMRS service charge into the CMRS fund;

(6) To make disbursements from the CMRS fund, according to the allocations and requirements established in KRS 65.7631;

(7) To establish procedures and guidelines to be followed by the board in reviewing, evaluating, and approving or disapproving disbursements from the CMRS fund and requests for disbursements made in accordance with KRS 65.7631;

(8) To resolve conflicts regarding reimbursable costs and expenses under KRS 65.7631(2) and (3);

(9) To submit annual reports to the Auditor of Public Accounts no later than sixty (60) days after the close of each fiscal year, which shall provide an accounting for all CMRS service charges deposited into the CMRS fund during the preceding fiscal year and all disbursements to CMRS providers and PSAPs during the preceding fiscal year;

(10) To employ consultants, engineers, and other persons and employees as may be, in the judgment of the board, essential to the board's operations, functions, and responsibilities, and to fix and pay their compensation from funds available to the CMRS board;

(11) To acquire, by gift, purchase, installment purchase, or lease, any equipment necessary to carry out the board's purposes and duties;

(12) To retain any and all information, including all proprietary information, that is submitted to the board by CMRS providers and PSAPs, for the purposes of maintaining it and verifying its accuracy;

(13) To retain, with approval by the Auditor of Public Accounts, an independent certified public accountant who shall audit, once every twenty-four (24) months, the books of the board, CMRS providers, and PSAPs eligible to request or receive disbursements from the CMRS fund under KRS 65.7631 for the following purposes:

(a) To verify the accuracy of collection, receipts, and disbursements of all revenues derived from the CMRS service charge and the number of wireless E911 calls received by each PSAP eligible to request or receive disbursements from the CMRS fund;

(b) To determine whether the revenues generated by the CMRS service charge equal, exceed, or are less than the costs incurred in order to comply with the FCC order; and

(c) To determine the sufficiency of the funds currently being withheld for administrative purposes under KRS 65.7631(1).

The independent certified public accountant shall make a report of the audits to the board and to the appropriate chief executive officer or officers of the CMRS providers and PSAPs. The board shall incorporate the auditor's findings in its studies of the CMRS service charge required by subsection (4) of this section. All information with respect to the audits shall be released to the public or published only in aggregate amounts which do not identify or allow identification of numbers of subscribers or revenues attributable to individual CMRS providers;

(14) To ensure that all carriers have an equal opportunity to participate in the wireless E911 system;

(15) To ensure that wireless E911 systems are compatible with wireline E911 systems; and

(16) To determine the appropriate method for disbursing funds to PSAP's based on wireless workload under KRS 65.7631(2)(b).

65.7631 Apportionment of money in fund

The moneys in the CMRS fund shall be apportioned among the approved uses of the fund as specified in this section. The board shall make individual disbursements from the fund upon such terms and conditions necessary in view of the amount of revenues on deposit at the time each request for disbursement is reviewed and approved.

(1) Not more than two and one-half percent (2.5%) of the total monthly revenues deposited into the CMRS fund shall be disbursed or reserved for disbursement by the board to pay the administrative costs and expenses incurred in the operation of the board, including the compensation of the administrator and expenses incurred pursuant to KRS 65.7629(10), (11), (13), and (16). An additional sum, not to exceed two hundred fifty thousand dollars ($250,000), shall be available to the board from the fund to implement the wireless workload formula under subsection (2)(b) of this section.

(2) From the balance of the total monthly revenues deposited into the CMRS fund after the amounts disbursed or reserved for disbursement under subsection (1) of this section have been subtracted, fifty percent (50%) shall be distributed to PSAPs eligible to receive disbursement from the CMRS fund under subsection (4) of this section who actually request disbursement, as follows:

(a) Twenty-five percent (25%) shall be distributed according to the "PSAP pro rata formula," whereby each receives a percentage determined by dividing one (1) by the total number of PSAPs eligible to request and actually requesting disbursements under subsection (4) of this section. Any PSAPs that choose to consolidate their operations after July 15, 1998, shall have a twenty-four (24) month period in which they shall continue to receive pro-rata shares as if they remained separate and distinct entities. The twenty-four (24) month period shall run from a date set by the board. The consolidated entity must be certified to receive funds under subsection (4) of this section; and

(b) Twenty-five percent (25%) shall be distributed according to a method chosen by the board and based on the wireless workload of the PSAP.

Methods to be considered may be based on the number of wireless 911 calls answered by each PSAP, the number of wireless phone users served by each PSAP, or any other method deemed by the board to be reasonable and equitable. The method chosen shall be promulgated as a regulation under KRS 65.7633.

All amounts distributed to PSAPs under this subsection shall be used by the PSAPs solely for the purposes of answering, routing, and properly disposing of CMRS 911 calls, training PSAP staff, public education concerning appropriate use of 911, and of complying with the wireless E911 service requirements established by the FCC order and any rules and regulations which are or may be adopted by the Federal Communications Commission pursuant to the FCC order, including the payment of costs and expenses incurred in designing, upgrading, purchasing, leasing, programming, testing, installing, or maintaining all necessary data, hardware, and software required in order to provide wireless E911 service.

(3) The balance of the total monthly revenues deposited into the CMRS fund which remains after the disbursements or disbursement reservations prescribed by subsections (1) and (2) of this section have been made shall be distributed to CMRS providers licensed to do business in the Commonwealth solely for the purpose of reimbursing the actual expenses incurred by the CMRS providers in complying with the wireless E911 service requirements established by the FCC order and any rules and regulations which are or may be adopted by the Federal Communications Commission in carrying out the FCC order, including, but not limited to, costs and expenses incurred for designing, upgrading, purchasing, leasing, programming, testing, installing, or maintaining all necessary data, hardware, and software required in order to provide wireless E911 service. Sworn invoices shall be presented to the board in connection with any request for reimbursement under this subsection, and approval by a majority vote of the board shall be required prior to any disbursement, which approval shall not be withheld unreasonably. No payment shall be made to any provider who is not in compliance with all requirements of this chapter and the FCC order. In no event shall any invoice for reimbursement be approved for payment of costs that are not related to compliance with requirements established by the FCC order, or for payment of any costs incurred by a CMRS provider exceeding one hundred twenty-five percent (125%) of the CMRS emergency service charges remitted by that CMRS provider, unless prior approval for the expenditures was given by the CMRS Board. If the total amount of invoices submitted to the CMRS Board

and approved for payment exceeds the amount in the CMRS fund in any month, CMRS providers that have invoices approved for payment shall receive a pro rata share of the fund available that month, based on approved invoices, and the balance of the payments shall be carried over to the following months until all of the approved payments are made.

(4) Notwithstanding any other provision of the law, no PSAP shall be eligible to request or receive a disbursement from the CMRS fund under subsection (2) of this section unless and until the PSAP:

(a) Is expressly certified as a PSAP by the CMRS Board, upon written application to the CMRS Board;

(b) Demonstrates that the PSAP is providing 911 services to a local government that has adopted an ordinance either imposing a special tax, license, or fee as authorized by KRS 65.760(3) or has established other means of funding wireline 911 emergency telephone service;

(c) Demonstrates that the administrator of the PSAP sent a request for wireless, E911 service to a CMRS provider, and that the infrastructure of the local exchange carrier will support wireless E911 service;

(d) Provides an accounting of the number of wireless E911 calls received by the PSAP during the prior calendar year if requested by the board; and

(e) Either demonstrates that the PSAP has made the investment which is necessary to allow the PSAP to receive and utilize the data elements associated with wireless E911 service, or provides to the board a binding resolution, duly adopted by the governing authority of the PSAP, committing the PSAP to expend funds to lease or purchase emergency telephone equipment, including necessary computer hardware and software, for database provisioning, for addressing, and for the other nonrecurring costs of establishing wireless E911 service.

65.7633 Promulgation of administrative regulations by board

(1) The CMRS Board shall implement the provisions of KRS 65.7621 to 65.7643 through the promulgation of administrative regulations in accordance with the provisions of KRS Chapter 13A.

(2) As soon as practicable after its creation, the board shall promulgate regulations:

(a) Establishing procedures for the submission of plans or modifications of plans to the board, for its review and approval or disapproval, for complying with the wireless E911 service requirements established by the FCC order and any rules and regulations which are or may be

adopted by the Federal Communications Commission in carrying out the FCC order, including, but not limited to, projections of anticipated costs and expenses necessary for designing, upgrading, purchasing, leasing, programming, testing, installing, or maintaining on an ongoing basis all necessary data, hardware, and software required in order to provide this service;

(b) Establishing procedures and guidelines to be followed by the board in reviewing, evaluating, and approving or disapproving the plans or modifications of plans that are submitted to it in accordance with the procedures promulgated under paragraph (a) of this subsection;

(c) Establishing procedures and guidelines to be followed by the board in reviewing, evaluating, and approving or disapproving disbursements from the CMRS fund and requests for disbursements under KRS 65.7631(2) and (3); and

(d) Establishing procedures and guidelines for resolving disputes regarding reimbursable costs and expenses under KRS 65.7631(2) and (3).

65.7635 Duty of commercial mobile radio service providers to act as collection agents for fund; procedure for collection of service charges

(1) Each CMRS provider shall act as a collection agent for the CMRS fund and shall, as part of the provider's normal monthly billing process, collect the CMRS service charges levied upon CMRS connections under KRS 65.7629(3) from each CMRS connection to whom the billing provider provides CMRS. Each billing provider shall list the CMRS service charge as a separate entry on each bill which includes a CMRS service charge. If a CMRS provider receives a partial payment for a monthly bill from a CMRS customer, the provider shall first apply the payment against the amount the CMRS customer owes the CMRS provider.

(2) A CMRS provider has no obligation to take any legal action to enforce the collection of the CMRS service charges for which any CMRS customer is billed. Collection actions to enforce the collection of the CMRS service charge against any CMRS customer may, however, be initiated by the state, on behalf of the board, in the Circuit Court of the county where the bill for CMRS service is regularly delivered, and the reasonable costs and attorneys' fees which are incurred in connection with any such collection action may be awarded by the court to the prevailing party in the action.

(3) State and local taxes shall not apply to CMRS service charges.

(4) To reimburse itself for the cost of collecting and remitting the CMRS service

charge, each CMRS provider may deduct and retain from the CMRS service charges it collects during each calendar month an amount not to exceed one and one-half percent (1.5%) of the gross aggregate amount of CMRS service charges it collected that month.

(5) All CMRS service charges imposed under KRS 65.7621 to 65.7643 collected by each CMRS provider, less the administrative fee described in subsection (4) of this section, are due and payable to the board monthly and shall be remitted on or before sixty (60) days after the end of the calendar month. Collection actions may be initiated by the state, on behalf of the board, in the Franklin Circuit Court or any other court of competent jurisdiction, and the reasonable costs and attorneys' fees which are incurred in connection with any such collection action may be awarded by the court to the prevailing party in the action.

65.7637 Limitations of liability for CMRS providers and service suppliers

Notwithstanding any other provision of law, no CMRS provider or service supplier, nor their employees, directors, officers, or agents, except in cases of negligence, or wanton or willful misconduct, or bad faith, shall be liable for any damages in a civil action or subject to criminal prosecution resulting from death or injury to any person or from damage to property incurred by any person in connection with developing, adopting, establishing, participating in, implementing, maintaining, or providing access to a CMRS system for the purposes of providing wireless 911 service or E911 service in compliance with the wireless E911 service requirements established by the FCC order and any rules and regulations which are or may be adopted by the Federal Communications Commission in carrying out the FCC orders: in connection with the quality of the service; in connection with ensuring that any 911 call goes through properly; or in connection with providing access to CMRS service in connection with providing wireless 911 service or E911 service.

65.7639 Information to be given to board by CMRS providers; confidentiality of information

Each CMRS provider shall provide customer mobile handset telephone numbers and names to PSAPs when required by the board. Each CMRS provider may be required to provide a quarterly report to the board of the number of subscribers receiving bills in each zip code served by the provider during that quarter if needed. Funds from the CMRS fund may be used to pay for the costs associated with providing this information. Although customer mobile handset telephone numbers and names shall be available to PSAPs, and to the board, this information shall remain the property of the disclosing CMRS provider and shall be used only

in providing emergency response services to 911 calls and in collecting the service charge from subscribers. Mobile handset telephone numbers and names which are required to be provided under this section constitute confidential proprietary information and shall not be released to any person for purposes other than for including the numbers and names in the emergency telephone system database, for purposes related to the collection of the service charge, and for providing the numbers and names to permit a response to police, fire, medical, or other emergency situations. Notwithstanding any other provision of the law, no information provided to PSAPs under this section shall be disclosed other than to the submitting CMRS provider, the administrator, the board, and the independent certified public accountant retained by the board under KRS 65.7629(13) without the express permission of the submitting CMRS provider unless ordered by a court of competent jurisdiction. General information collected by the independent certified public accountant shall only be released or published in aggregate amounts which do not identify or allow identification of numbers of subscribers or revenues attributable to an individual CMRS provider.

65.7640 Mobile telecommunications services; adoption of federal provisions; notification of service provider about errors; correction and refund; exhaustion of remedies

As it relates, under KRS 65.7621 to 65.7643, to mobile telecommunications services as defined in 4 U.S.C. sec. 124:

(1) The provisions of 4 U.S.C. secs. 116 to 126 are hereby adopted and incorporated by reference.

(2) If a customer believes that a tax, charge, fee, or assignment of place of primary use or taxing jurisdiction on a bill is incorrect, the customer shall notify the service provider about the alleged error in writing. This notification shall include the street address for the customer's place of primary use, the account name and number for which the customer seeks a correction, a description of the alleged error, and any other information that the service provider reasonably requires. Within sixty (60) days of receiving the customer's notification, the service provider shall either correct the error and refund or credit all taxes, charges, and fees incorrectly charged to the customer within four (4) years of the customer's notification, or explain to the customer in writing how the bill was correct and why a refund or credit will not be made.

(3) A customer shall not have a cause of action against a service provider for any erroneously collected taxes, charges, or fees until the customer has exhausted the procedure set forth in subsection (2) of this section.

65.7641 Illegal use of wireless emergency telephone service; penalties

Wireless emergency telephone service shall not be used for personal use but shall be used solely for the purpose of communications by the public in emergency situations. Any person who knowingly uses or attempts to use wireless emergency telephone service for a purpose other than obtaining public safety assistance or who knowingly uses or attempts to use wireless emergency telephone service in an effort to avoid any CMRS charges shall be guilty of a Class A misdemeanor. If the value of the wireless emergency telephone service obtained in a manner prohibited by this section or the value of the CMRS charges exceeds one hundred dollars ($100), the offense may be prosecuted as a Class D felony.

65.7643 Construction of KRS 65.7621 to 65.7643 with respect to Communications Act of 1934

KRS 65.7621 to 65.7643 shall not be construed as enabling the Commonwealth of Kentucky, including the Public Service Commission of Kentucky, to regulate CMRS in contravention of Section 332(c)(3) of the Communications Act of 1934, as amended, 47 U.S.C. sec. 332(c)(3).

The 2006 Act: 2006 Ky. Rev. Stat. & R. Serv. 694-699 (West)

2006 Act

WIRELESS SERVICE—ENHANCED 911 SYSTEMS

CHAPTER 219

HB 656

AN ACT relating to wireless enhanced 911 systems.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. KRS 65.7621 is amended to read as follows:

65.7621

As used in KRS 65.7621 to 65.7643, unless the context requires otherwise:

(1) "Administrator" means the executive director of the Office of the 911 Coordinator within the Commonwealth Office of Technology functioning as the state administrator of CMRS emergency telecommunications under KRS 11.505;

(2) "Automatic location identification", or "ALI" means an enhanced 911 service capability that enables the automatic display of information defining the approximate geographic location of the wireless telephone used to place a 911 call and includes the term "pseudo-automatic number identification;"

(3) "Automatic number identification", or "ANI" means an enhanced 911 service capability that enables the automatic display on an ALI screen of the ten-digit, or equivalent, wireless telephone number used to place a 911 call;

(4) "CMRS" means commercial mobile radio service under Sections 3(27) and 332(d) of the Federal Telecommunications Act of 1996, 47 U.S.C. secs. 151 et seq., and the Omnibus Budget Reconciliation Act of 1993, as it existed on August 10, 1993. The term includes the term "wireless" and service provided by any wireless real time two-way voice communication device, including radio-telephone communications used in cellular telephone service, personal communications service, and the functional or competitive equivalent of a radio-telephone communications line used in cellular telephone service, a personal communications service, or a network radio access line;

(5) "CMRS Board" or "board" means the Commercial Mobile Radio Service Emergency Telecommunications Board of Kentucky;

(6) "CMRS connection" means a mobile handset telephone number assigned to a CMRS customer;

2006 Act

(7) "CMRS customer" means ***an end user*** ~~a person~~ to whom a mobile handset telephone number is assigned and to whom CMRS is provided in return for compensation;

(8) "CMRS Fund" means the commercial mobile radio service emergency telecommunications fund;

(9) "CMRS provider" means a person or entity who provides CMRS to an end user. ***The term includes both facilities-based resellers and nonfacilities-based resellers***~~, including resellers~~;

(10) "CMRS service charge" means the CMRS emergency telephone service charge levied under KRS 65.7629(3) and collected under KRS 65.7635;

(11) "FCC order" means the Order of the Federal Communications Commission, FCC Docket No. 94–102, adopted effective October 1, 1996, including any subsequent amendments or modifications thereof;

(12) "Local exchange carrier" or "LEC" means any person or entity who is authorized to provide telephone exchange service or exchange access in the Commonwealth;

(13) "Local government" means any city, county, charter county, or urban-county government of the Commonwealth, or any other governmental entity maintaining a PSAP;

(14) "Mobile telephone handset telephone number" means the ten (10) digit number assigned to a CMRS connection;

(15) "Proprietary information" means information held as private property, including customer lists and other related information, technology descriptions, technical information, or trade secrets;

(16) "Pseudo–automatic number identification" means a wireless enhanced 911 service capability that enables the automatic display of the number of the cell site or cell face;

(17) "Public safety answering point" or "PSAP" means a communications facility that is assigned the responsibility to receive 911 calls originating in a given area and, as appropriate, to dispatch public safety services or to extend, transfer, or relay 911 calls to appropriate public safety agencies;

(18) "Service supplier" means a person or entity who provides local exchange telephone service to a telephone subscriber;~~ and~~

(19) "Wireless enhanced 911 system," "wireless E911 system," "wireless enhanced 911 service," or "wireless E911 service" means an emergency telephone system that provides the ***end*** user of the CMRS connection with wireless 911 service and, in addition, directs 911 calls to appropriate public safety answering points~~ by selective routing~~ based on the geographical

location from which the call originated and provides the capability for automatic number identification and automatic location identification features in accordance with the requirements of the FCC order***; and***

(20) "Tier III CMRS provider" means a non-nationwide Commercial ***Mobile Radio Service provider with no more than five hundred thousand (500,000) subscribers as of December 31, 2001***.

Section 2. KRS 65.7623 is amended to read as follows:

65.7623

(1) There is hereby created the Commercial Mobile Radio Service Emergency Telecommunications Board of Kentucky, the "CMRS Board," consisting of ***ten (10)***~~eight (8)~~ members, appointed by the Governor as follows: ***two (2)***~~three (3)~~ members shall be employed by or representative of the interest of CMRS providers***, of which, one (1) shall be a representative of a Tier III CMRS provider***; one (1) member shall be a mayor of a city of the first or second class or urban-county government or his or her designee containing a public safety answering point; one (1)~~ nonvoting~~ member shall be appointed from a list of local exchange landline telephone companies' representatives submitted by the Kentucky Telephone Association; ***one (1) member shall be a director of a certified public safety answering point operated by a local governmental entity or a consolidated group of local governmental entities appointed from lists of candidates submitted to the Governor by the Kentucky Firefighters Association, the State Association of Chiefs of Police, and the Kentucky Ambulance Providers Association; two (2) members***~~and one (1) member~~ shall be appointed from lists of candidates submitted to the Governor by the Kentucky Emergency Number Association and the Association of Public Communications Officials***; and one (1) member shall be a director of a certified public safety answering point operated by a local government entity or a consolidated group of local governmental entities***. The commissioner of the State Police, or the commissioner's designee, and the CMRS emergency telecommunications administrator also shall be members of the board. Any vacancy on the board shall be filled in the same manner as the original appointment.

(2) The commissioner and administrator shall serve by virtue of their office. The other members shall be appointed no later than August 15, 1998, for a term of four (4) years and until their successors are appointed and qualified, except that of the first appointments, one (1) shall be for a term of one (1) year, one (1) shall be for a term of two (2) years, one (1) for a term of three (3) years, and two (2) shall be for a term of four (4) years. ***Any member***

missing three (3) consecutive meetings may be removed by a majority vote of the remaining voting members.

(3) In addition to the administrator, the ***Office for Security Coordination*** ~~Finance and Administration Cabinet~~ shall provide staff services and carry out administrative duties and functions as directed by the board. The board shall be attached to the ***Office for Security Coordination***~~Commonwealth Office of Technology~~ for administrative purposes only and shall operate as an independent entity within state government.

(4) The board members shall serve without compensation but shall be reimbursed in accordance with KRS 45.101 for expenses incurred in connection with their official duties as members of the board.

(5) All administrative costs and expenses incurred in the operation of the board, including payments under subsection (4) of this section, shall be paid from that portion of the CMRS fund that is authorized under KRS 65.7631 to be used by the board for administrative purposes.

Section 3. KRS 65.7625 is amended to read as follows:

65.7625

(1) The executive director of the Office of the 911 Coordinator shall be the state administrator of commercial mobile radio service emergency telecommunications. The CMRS Board shall set the administrator's compensation, which shall be paid from that portion of the CMRS fund that is authorized under KRS 65.7631(1) to be used by the board for administrative purposes.

(2) The administrator of CMRS emergency telecommunications shall serve as a member of the CMRS Board and, as the coordinator and administrative head of the board, shall conduct the day-to-day operations of the board.

(3) The administrator shall, with the advice of the board, coordinate and direct a statewide effort to expand and improve ~~wireless~~ enhanced emergency telecommunications capabilities and responses throughout the state, including but not limited to the implementation of wireless E911 service requirements of the FCC order and rules and regulations adopted in carrying out that order. In this regard, the administrator shall:

(a) Obtain, maintain, and disseminate information relating to emergency telecommunications technology, advances, capabilities, and techniques;

(b) Coordinate and assist in the implementation of advancements and new technology in the operation of emergency telecommunications in the state; and

(c) Implement compliance throughout the state with the wireless E911 service requirements established by the FCC order and any rules or regulations which are or may be adopted by the Federal Communications Commission in carrying out the FCC order.

Section 4. KRS 65.7629 is amended to read as follows:

65.7629

The board shall administer the provisions of KRS 65.7621 to 65.7643, and shall have the following powers and duties:

(1) To review, evaluate, and approve or disapprove the plans or plan modifications that are submitted to the board for complying with the wireless E911 service requirements established by the FCC order and by any rules or regulations which are or may be adopted by the Federal Communications Commission in carrying out the FCC order;

(2) To develop standards to be followed by the board in reviewing, evaluating, approving, or disapproving the plans or plan modifications that are submitted to the board;

(3) To collect the CMRS service charge from each CMRS connection***:***

(a) With a place of primary use, as defined in 4 U.S.C. sec. 124, within the Commonwealth***; or***

(b) For prepaid CMRS connections:

1. With a place of primary use, as defined in 4 U.S.C. sec. 124, within the Commonwealth, or

2. With a geographical location associated with the first six (6) digits, or NPA/NXX, of the mobile telephone number is inside the geographic boundaries of the Commonwealth.

The CMRS service charge shall be seventy cents ($0.70) per month per CMRS connection, and shall be collected in accordance with KRS 65.7635 beginning August 15, 1998. The amount of the CMRS service charge shall not be increased except by act of the General Assembly;

(4) To review the rate of the CMRS service charge at least once every twenty-four (24) months and, at its discretion, to decrease the rate or recommend that the General Assembly increase the rate if the board determines that changing the rate is necessary to achieve the purposes of KRS 65.7621 to 65.7643. The first cost study shall be completed on or before July 1, 1999,

and shall be submitted to the Governor, the President of the Senate, and the Speaker of the House of Representatives, and the board shall recommend, on the basis of the cost study, whether legislation to increase the CMRS service charge should be proposed during the 2000 Regular Session of the General Assembly;

(5) To administer and maintain the CMRS fund according to the provisions of KRS 65.7627, and promptly to deposit all revenues from the CMRS service charge into the CMRS fund;

(6) To make disbursements from the CMRS fund, according to the allocations and requirements established in KRS 65.7631;

(7) To establish procedures and guidelines to be followed by the board in reviewing, evaluating, and approving or disapproving disbursements from the CMRS fund and requests for disbursements made in accordance with KRS 65.7631;

(8) To resolve conflicts regarding reimbursable costs and expenses under KRS 65.7631~~(2) and~~ (3) ***and (4)***;

(9) To submit annual reports to the Auditor of Public Accounts no later than sixty (60) days after the close of each fiscal year, which shall provide an accounting for all CMRS service charges deposited into the CMRS fund during the preceding fiscal year and all disbursements to CMRS providers and PSAPs during the preceding fiscal year;

(10) To employ consultants, engineers, and other persons and employees as may be, in the judgment of the board, essential to the board's operations, functions, and responsibilities, and to fix and pay their compensation from funds available to the CMRS board;

(11) To acquire, by gift, purchase, installment purchase, or lease, any equipment necessary to carry out the board's purposes and duties;

(12) To retain any and all information, including all proprietary information, that is submitted to the board by CMRS providers and PSAPs, for the purposes of maintaining it and verifying its accuracy;

(13) To retain, with approval by the Auditor of Public Accounts, an independent certified public accountant who shall audit, once every twenty-four (24) months, the books of the board, CMRS providers, and PSAPs eligible to request or receive disbursements from the CMRS fund under KRS 65.7631 for the following purposes:

(a) To verify the accuracy of collection, receipts, and disbursements of all revenues derived from the CMRS service charge and the number of

wireless E911 calls received by each PSAP eligible to request or receive disbursements from the CMRS fund;

(b) To determine whether the revenues generated by the CMRS service charge equal, exceed, or are less than the costs incurred in order to comply with the FCC order; and

(c) To determine the sufficiency of the funds currently being withheld for administrative purposes under KRS 65.7631(1).

The independent certified public accountant shall make a report of the audits to the board and to the appropriate chief executive officer or officers of the CMRS providers and PSAPs. The board shall incorporate the auditor's findings in its studies of the CMRS service charge required by subsection (4) of this section. All information with respect to the audits shall be released to the public or published only in aggregate amounts which do not identify or allow identification of numbers of subscribers or revenues attributable to individual CMRS providers;

(14) To ensure that all carriers have an equal opportunity to participate in the wireless E911 system;

(15) To ensure that wireless E911 systems are compatible with wireline E911 systems; ~~and~~

(16) To determine the appropriate method for disbursing funds to PSAP's based on wireless workload under KRS 65.7631***(3)***~~(2)~~(b)***;***

(17) To develop standards and protocols for the improvement and increased efficiency of 911 services in Kentucky; and

(18) To provide direct grants or state matches for federal, state, or private grants for the establishment or improvement of the 911 emergency telecommunications system in the Commonwealth.

Section 5. KRS 65.7631 is amended to read as follows:

65.7631

The moneys in the CMRS fund shall be apportioned among the approved uses of the fund as specified in this section. The board shall make individual disbursements from the fund upon such terms and conditions necessary in view of the amount of revenues on deposit at the time each request for disbursement is reviewed and approved.

(1) Not more than two and one-half percent (2.5%) of the total monthly revenues deposited into the CMRS fund shall be disbursed or reserved for disbursement by the board to pay the administrative costs and expenses incurred in the operation of the board, including the compensation of the

administrator and expenses incurred pursuant to KRS ***11.512,*** 65.7629(10), (11), (13),~~ and~~ (16)***, (17), and (18)***. An additional sum, not to exceed two hundred fifty thousand dollars ($250,000), shall be available to the board from the fund to implement the wireless workload formula under subsection ***(3)***~~(2)~~(b) of this section.

(2) ***(a) Not more than ten percent (10%) of the total monthly revenues deposited into the CMRS Fund shall be disbursed or reserved for disbursement by the board to provide direct grants or matching money.***

1. For the establishment and improvement of E911 services in the Commonwealth;

2. For incentives to create more efficient delivery of E911 services by local governments receiving funding under subsection (3) of this section;

3. For improvement of 911 infrastructure by wireless carriers receiving funding under subsection (4) of this section; and

4. For consolidation reimbursement of one hundred thousand dollars ($100,000) per PSAP, not to exceed two hundred thousand dollars ($200,000) per county, to any PSAP that consolidates with a CMRS-certified PSAP, or creates a newly consolidated Phase II compliant PSAP. Funds shall be applied toward the cost of consolidating. If a PSAP consolidates and receives reimbursement, the CMRS Board shall not certify a new PSAP within the same county for a period of ten (10) years.

(b) When the balance of money collected under paragraph (a) of this subsection and not yet disbursed for direct grants or matching moneys exceeds two million dollars ($2,000,000), the excess amount shall be allocated under the provisions of subsections (3) and (4) of this section.

(3) From the balance of the total monthly revenues deposited into the CMRS fund after the amounts disbursed or reserved for disbursement under ***subsections***~~subsection~~ (1) ***and (2)*** of this section have been subtracted, ***eighty percent (80%)***~~fifty percent (50%)~~ shall be distributed to PSAPs eligible to receive disbursement from the CMRS fund under subsection ***(5)***~~(4)~~ of this section who actually request disbursement, as follows:

(a) ***Forty percent (40%)***~~Twenty five percent (25%)~~ shall be distributed according to the "PSAP pro rata formula," ***whereby*** each receives a percentage determined by dividing one (1) by the total number of PSAPs eligible to request and actually requesting disbursements under

subsection ***(5)***~~(4)~~ of this section. Any PSAPs ***certified before January 1, 2004, or for more than three (3) years,*** that choose to consolidate their operations ~~after July 15, 1998, shall have a twenty-four (24) month period in which they~~ shall continue to receive pro-rata shares as if they remained separate and distinct entities. ~~The twenty-four (24) month period shall run from a date set by the board.~~ The consolidated entity must be certified to receive funds under subsection ***(5)***~~(4)~~ of this section; and

(b) ***Forty (40%)***~~Twenty-five percent (25%)~~ shall be distributed according to a method chosen by the board and based on the wireless workload of the PSAP. Methods to be considered may be based on the number of wireless 911 calls answered by each PSAP, the number of wireless phone users served by each PSAP, or any other method deemed by the board to be reasonable and equitable. The method chosen shall be promulgated as a regulation under KRS 65.7633.

All amounts distributed to PSAPs under this subsection shall be used by the PSAPs solely for the purposes of answering, routing, and properly disposing of CMRS 911 calls, training PSAP staff, public education concerning appropriate use of 911, and of complying with the wireless E911 service requirements established by the FCC order and any rules and regulations which are or may be adopted by the Federal Communications Commission pursuant to the FCC order, including the payment of costs and expenses incurred in designing, upgrading, purchasing, leasing, programming, testing, installing, or maintaining all necessary data, hardware, and software required in order to provide wireless E911 service.

(4)~~(3)~~ The balance of the total monthly revenues deposited into the CMRS fund which remains after the disbursements or disbursement reservations prescribed by subsections (1)~~, and~~ (2)***, and (3)*** of this section have been made shall be distributed to CMRS providers licensed to do business in the Commonwealth solely for the purpose of reimbursing the actual expenses incurred by the CMRS providers in complying with the wireless E911 service requirements established by the FCC order and any rules and regulations which are or may be adopted by the Federal Communications Commission in carrying out the FCC order, including, but not limited to, costs and expenses incurred for designing, upgrading, purchasing, leasing, programming, testing, installing, or maintaining all necessary data, hardware, and software required in order to provide wireless E911 service. Sworn invoices shall be presented to the board in connection with any request for reimbursement under this subsection, and approval by a

majority vote of the board shall be required prior to any disbursement, which approval shall not be withheld unreasonably. No payment shall be made to any provider who is not in compliance with all requirements of this chapter and the FCC order. In no event shall any invoice for reimbursement be approved for payment of costs that are not related to compliance with requirements established by the FCC order~~, or for payment of any costs incurred by a CMRS provider exceeding one hundred twenty-five percent (125%) of the CMRS emergency service charges remitted by that CMRS provider, unless prior approval for the expenditures was given by the CMRS Board~~. If the total amount of invoices submitted to the CMRS Board and approved for payment exceeds the amount in the CMRS fund in any month, CMRS providers that have invoices approved for payment shall receive a pro rata share of the fund available that month, based on approved invoices, and the balance of the payments shall be carried over to the following months until all of the approved payments are made.

(5)~~(4)~~ Notwithstanding any other provision of the law, no PSAP shall be eligible to request or receive a disbursement from the CMRS fund under subsection ***(3)***~~(2)~~ of this section unless and until the PSAP:

(a) Is expressly certified as a PSAP by the CMRS Board, upon written application to the CMRS Board;

(b) Demonstrates that the PSAP is providing ***E911***~~911~~ services to a local government that has adopted an ordinance either imposing a special tax, license, or fee as authorized by KRS 65.760(3) or has established other means of funding wireline 911 emergency telephone service;

(c) Demonstrates that the administrator of the PSAP sent a request for wireless, E911 service to a CMRS provider, and that the infrastructure of the local exchange carrier will support wireless E911 service;

(d) Provides an accounting of the number of wireless E911 calls received by the PSAP during the prior calendar year if requested by the board; and

(e) ~~Either~~ Demonstrates that the PSAP has made the investment which is necessary to allow the PSAP to receive and utilize the data elements associated with wireless E911 service~~, or provides to the board a binding resolution, duly adopted by the governing authority of the PSAP, committing the PSAP to expend funds to lease or purchase emergency telephone equipment, including necessary computer hardware and software, for database provisioning, for addressing, and for the other nonrecurring costs of establishing wireless E911 service~~.

Section 6. KRS 65.7633 is amended to read as follows:

65.7633

(1) The CMRS Board shall implement the provisions of KRS 65.7621 to 65.7643 through the promulgation of administrative regulations in accordance with the provisions of KRS Chapter 13A.

(2) As soon as practicable after its creation, the board shall promulgate regulations:

(a) Establishing procedures for the submission of plans or modifications of plans to the board, for its review and approval or disapproval, for complying with the wireless E911 service requirements established by the FCC order and any rules and regulations which are or may be adopted by the Federal Communications Commission in carrying out the FCC order, including, but not limited to, projections of anticipated costs and expenses necessary for designing, upgrading, purchasing, leasing, programming, testing, installing, or maintaining on an ongoing basis all necessary data, hardware, and software required in order to provide this service;

(b) Establishing procedures and guidelines to be followed by the board in reviewing, evaluating, and approving or disapproving the plans or modifications of plans that are submitted to it in accordance with the procedures promulgated under paragraph (a) of this subsection;

(c) Establishing procedures and guidelines to be followed by the board in reviewing, evaluating, and approving or disapproving disbursements from the CMRS fund and requests for disbursements under KRS 65.7631(2)~~, and~~ (3)***, and (4)***; and

(d) Establishing procedures and guidelines for resolving disputes regarding reimbursable costs and expenses under KRS 65.7631(2)~~, and~~ (3)***, and (4)***.

Section 7. KRS 65.7635 is amended to read as follows:

65.7635

(1) Each CMRS provider shall act as a collection agent for the CMRS fund~~. and~~ ***From its customers, the provider*** shall, as part of the provider's ~~normal monthly~~ billing process, collect the CMRS service charges levied upon CMRS connections under KRS 65.7629(3) from each CMRS connection to whom the billing provider provides CMRS. Each billing provider shall list the CMRS service charge as a separate entry on each bill which includes a

CMRS service charge. If a CMRS provider receives a partial payment for a monthly bill from a CMRS customer, the provider shall first apply the payment against the amount the CMRS customer owes the CMRS provider. ***For CMRS customers who purchase CMRS services on a prepaid basis, the CMRS service charge shall be determined according to one (1) of the following methodologies as elected by the CMRS provider:***

(***a) The CMRS provider shall collect, on a monthly basis, the CMRS service charge specified in KRS 65.7629(3) from each active customer whose account balance is equal to or greater than the amount of service charge; or***

(b) The CMRS provider shall divide its total earned prepaid wireless telephone revenue received with respect to its prepaid customers in the Commonwealth within the monthly 911 emergency telephone service reporting period by fifty dollars ($50), multiply the quotient by the service charge amount, and pay the resulting amount to the board; or

(c) In the case of CMRS providers that 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 pre-paid wireless airtime, the CMRS service charge and collection methodology may be determined by administrative regulations promulgated by the board to collect the service charge from such end users.

(2) A CMRS provider has no obligation to take any legal action to enforce the collection of the CMRS service charges for which any CMRS customer is billed. Collection actions to enforce the collection of the CMRS service charge against any CMRS customer may, however, be initiated by the state, on behalf of the board, in the Circuit Court of the county where the bill for CMRS service is regularly delivered, and the reasonable costs and attorneys' fees which are incurred in connection with any such collection action may be awarded by the court to the prevailing party in the action.

(3) State and local taxes shall not apply to CMRS service charges.

(4) To reimburse itself for the cost of collecting and remitting the CMRS service charge, each CMRS provider may deduct and retain from the CMRS service charges it collects during each calendar month an amount not to exceed one and one-half percent (1.5%) of the gross aggregate amount of CMRS service charges it collected that month.

(5) All CMRS service charges imposed under KRS 65.7621 to 65.7643 collected by each CMRS provider, less the administrative fee described in

subsection ***(3)***~~(4)~~ of this section, are due and payable to the board monthly and shall be remitted on or before sixty (60) days after the end of the calendar month. Collection actions may be initiated by the state, on behalf of the board, in the Franklin Circuit Court or any other court of competent jurisdiction, and the reasonable costs and attorneys' fees which are incurred in connection with any such collection action may be awarded by the court to the prevailing party in the action.

Section 8. KRS 11.512 is amended to read as follows:

11.512

The Office of the 911 Coordinator shall have the following duties and responsibilities:

(1) Assist state and local government agencies in their efforts to improve and enhance 911 systems in Kentucky, including:

(a) Providing consultation to local elected officials, 911 coordinators, and board members; and

(b) Providing consultation to communities with basic 911 systems that are updating their facilities, equipment, or operations;

(2) Develop and provide educational forums and seminars for the public safety community;

(3) ***Recommend***~~Develop~~ standards and protocols for the improvement and increased efficiency of 911 services in Kentucky; and

(4) Administer the provisions of KRS 65.7621 to 65.7643 relating to commercial mobile radio service emergency telecommunications.

Approved April 22, 2006.

The 2006 Amendments As Codified: KRS §§ 65.7621-65.7625, 65.7629-65.7635 (West. Supp. 2006)

WIRELESS ENHANCED EMERGENCY 911 SYSTEMS

65.7621 Definitions for KRS 65.7621 to 65.7643

As used in KRS 65.7621 to 65.7643, unless the context requires otherwise:

(1) "Administrator" means the executive director of the Office of the 911 Coordinator within the Kentucky Office of Homeland Security functioning as the state administrator of CMRS emergency telecommunications under KRS 11.505;

(2) "Automatic location identification", or "ALI" means an enhanced 911 service capability that enables the automatic display of information defining the approximate geographic location of the wireless telephone used to place a 911 call and includes the term "pseudo-automatic number identification;"

(3) "Automatic number identification", or "ANI" means an enhanced 911 service capability that enables the automatic display on an ALI screen of the ten-digit, or equivalent, wireless telephone number used to place a 911 call;

(4) "CMRS" means commercial mobile radio service under Sections 3(27) and 332(d) of the Federal Telecommunications Act of 1996, 47 U.S.C. secs. 151 et seq., and the Omnibus Budget Reconciliation Act of 1993, as it existed on August 10, 1993. The term includes the term "wireless" and service provided by any wireless real time two-way voice communication device, including radio-telephone communications used in cellular telephone service, personal communications service, and the functional or competitive equivalent of a radio-telephone communications line used in cellular telephone service, a personal communications service, or a network radio access line;

(5) "CMRS Board" or "board" means the Commercial Mobile Radio Service Emergency Telecommunications Board of Kentucky;

(6) "CMRS connection" means a mobile handset telephone number assigned to a CMRS customer;

(7) "CMRS customer" means an end user to whom a mobile handset telephone number is assigned and to whom CMRS is provided in return for compensation;

(8) "CMRS Fund" means the commercial mobile radio service emergency telecommunications fund;

(9) "CMRS provider" means a person or entity who provides CMRS to an end user. The term includes both facilities-based resellers and nonfacilities-based resellers;

(10) "CMRS service charge" means the CMRS emergency telephone service charge levied under KRS 65.7629(3) and collected under KRS 65.7635;

(11) "FCC order" means the Order of the Federal Communications Commission, FCC Docket No. 94-102, adopted effective October 1, 1996, including any subsequent amendments or modifications thereof;

(12) "Local exchange carrier" or "LEC" means any person or entity who is authorized to provide telephone exchange service or exchange access in the Commonwealth;

(13) "Local government" means any city, county, charter county, or urban-county government of the Commonwealth, or any other governmental entity maintaining a PSAP;

(14) "Mobile telephone handset telephone number" means the ten (10) digit number assigned to a CMRS connection;

(15) "Proprietary information" means information held as private property, including customer lists and other related information, technology descriptions, technical information, or trade secrets;

(16) "Pseudo-automatic number identification" means a wireless enhanced 911 service capability that enables the automatic display of the number of the cell site or cell face;

(17) "Public safety answering point" or "PSAP" means a communications facility that is assigned the responsibility to receive 911 calls originating in a given area and, as appropriate, to dispatch public safety services or to extend, transfer, or relay 911 calls to appropriate public safety agencies;

(18) "Service supplier" means a person or entity who provides local exchange telephone service to a telephone subscriber;

(19) "Wireless enhanced 911 system," "wireless E911 system," "wireless enhanced 911 service," or "wireless E911 service" means an emergency telephone system that provides the end user of the CMRS connection with wireless 911 service and, in addition, directs 911 calls to appropriate public safety answering points based on the geographical location from which the call originated and provides the capability for automatic number identification and automatic location identification features in accordance with the requirements of the FCC order; and

(20) "Tier III CMRS provider" means a non-nationwide Commercial Mobile Radio Service provider with no more than five hundred thousand (500,000) subscribers as of December 31, 2001.

65.7623 Commercial Mobile Radio Service Emergency Telecommunications Board of Kentucky

(1) There is hereby created the Commercial Mobile Radio Service Emergency Telecommunications Board of Kentucky, the "CMRS Board," consisting of ten (10) members, appointed by the Governor as follows: two (2) members shall be employed by or representative of the interest of CMRS providers, of which, one (1) shall be a representative of a Tier III CMRS provider; one (1) member shall be a mayor of a city of the first or second class or urban-county government or his or her designee containing a public safety answering point; one (1) member shall be appointed from a list of local exchange landline telephone companies' representatives submitted by the Kentucky Telephone Association; one (1) member shall be a director of a certified public safety answering point operated by a local governmental entity or a consolidated group of local governmental entities appointed from lists of candidates submitted to the Governor by the Kentucky Firefighters Association, the State Association of Chiefs of Police, and the Kentucky Ambulance Providers Association; two (2) members shall be appointed from lists of candidates submitted to the Governor by the Kentucky Emergency Number Association and the Association of Public Communications Officials; and one (1) member shall be a director of a certified public safety answering point operated by a local government entity or a consolidated group of local governmental entities. The commissioner of the State Police, or the commissioner's designee, and the CMRS emergency telecommunications administrator also shall be members of the board. Any vacancy on the board shall be filled in the same manner as the original appointment.

(2) The commissioner and administrator shall serve by virtue of their office. The other members shall be appointed no later than August 15, 1998, for a term of four (4) years and until their successors are appointed and qualified, except that of the first appointments, one (1) shall be for a term of one (1) year, one (1) shall be for a term of two (2) years, one (1) for a term of three (3) years, and two (2) shall be for a term of four (4) years. Any member missing three (3) consecutive meetings may be removed by a majority vote of the remaining voting members.

(3) In addition to the administrator, the Kentucky Office of Homeland Security shall provide staff services and carry out administrative duties and functions as directed by the board. The board shall be attached to the Kentucky Office of Homeland Security for administrative purposes only and shall operate as an independent entity within state government.

(4) The board members shall serve without compensation but shall be reimbursed in accordance with KRS 45.101 for expenses incurred in connection with their official duties as members of the board.

(5) All administrative costs and expenses incurred in the operation of the board, including payments under subsection (4) of this section, shall be paid from that portion of the CMRS fund that is authorized under KRS 65.7631 to be used by the board for administrative purposes.

65.7625 Appointment and duties of state administrator of commercial mobile radio service emergency telecommunications

(1) The executive director of the Office of the 911 Coordinator shall be the state administrator of commercial mobile radio service emergency telecommunications. The CMRS Board shall set the administrator's compensation, which shall be paid from that portion of the CMRS fund that is authorized under KRS 65.7631(1) to be used by the board for administrative purposes.

(2) The administrator of CMRS emergency telecommunications shall serve as a member of the CMRS Board and, as the coordinator and administrative head of the board, shall conduct the day-to-day operations of the board.

(3) The administrator shall, with the advice of the board, coordinate and direct a statewide effort to expand and improve enhanced emergency telecommunications capabilities and responses throughout the state, including but not limited to the implementation of wireless E911 service requirements of the FCC order and rules and regulations adopted in carrying out that order. In this regard, the administrator shall:

(a) Obtain, maintain, and disseminate information relating to emergency telecommunications technology, advances, capabilities, and techniques;

(b) Coordinate and assist in the implementation of advancements and new technology in the operation of emergency telecommunications in the state; and

(c) Implement compliance throughout the state with the wireless E911 service requirements established by the FCC order and any rules or

regulations which are or may be adopted by the Federal Communications Commission in carrying out the FCC order.

65.7629 Powers and duties of board

The board shall administer the provisions of KRS 65.7621 to 65.7643, and shall have the following powers and duties:

(1) To review, evaluate, and approve or disapprove the plans or plan modifications that are submitted to the board for complying with the wireless E911 service requirements established by the FCC order and by any rules or regulations which are or may be adopted by the Federal Communications Commission in carrying out the FCC order;

(2) To develop standards to be followed by the board in reviewing, evaluating, approving, or disapproving the plans or plan modifications that are submitted to the board;

(3) To collect the CMRS service charge from each CMRS connection:

(a) With a place of primary use, as defined in 4 U.S.C. sec. 124, within the Commonwealth; or

(b) For prepaid CMRS connections:

1. With a place of primary use, as defined in 4 U.S.C. sec. 124, within the Commonwealth; or

2. With a geographical location associated with the first six (6) digits, or NPA/NXX, of the mobile telephone number is inside the geographic boundaries of the Commonwealth.

The CMRS service charge shall be seventy cents ($0.70) per month per CMRS connection, and shall be collected in accordance with KRS 65.7635 beginning August 15, 1998. The amount of the CMRS service charge shall not be increased except by act of the General Assembly;

(4) To review the rate of the CMRS service charge at least once every twenty-four (24) months and, at its discretion, to decrease the rate or recommend that the General Assembly increase the rate if the board determines that changing the rate is necessary to achieve the purposes of KRS 65.7621 to 65.7643. The first cost study shall be completed on or before July 1, 1999, and shall be submitted to the Governor, the President of the Senate, and the Speaker of the House of Representatives, and the board shall recommend, on the basis of the cost study, whether legislation to increase the CMRS service charge should be proposed during the 2000 Regular Session of the General Assembly;

(5) To administer and maintain the CMRS fund according to the provisions of KRS 65.7627, and promptly to deposit all revenues from the CMRS service charge into the CMRS fund;

(6) To make disbursements from the CMRS fund, according to the allocations and requirements established in KRS 65.7631;

(7) To establish procedures and guidelines to be followed by the board in reviewing, evaluating, and approving or disapproving disbursements from the CMRS fund and requests for disbursements made in accordance with KRS 65.7631;

(8) To resolve conflicts regarding reimbursable costs and expenses under KRS 65.7631 (3) and (4);

(9) To submit annual reports to the Auditor of Public Accounts no later than sixty (60) days after the close of each fiscal year, which shall provide an accounting for all CMRS service charges deposited into the CMRS fund during the preceding fiscal year and all disbursements to CMRS providers and PSAPs during the preceding fiscal year;

(10) To employ consultants, engineers, and other persons and employees as may be, in the judgment of the board, essential to the board's operations, functions, and responsibilities, and to fix and pay their compensation from funds available to the CMRS board;

(11) To acquire, by gift, purchase, installment purchase, or lease, any equipment necessary to carry out the board's purposes and duties;

(12) To retain any and all information, including all proprietary information, that is submitted to the board by CMRS providers and PSAPs, for the purposes of maintaining it and verifying its accuracy;

(13) To retain, with approval by the Auditor of Public Accounts, an independent certified public accountant who shall audit, once every twenty-four (24) months, the books of the board, CMRS providers, and PSAPs eligible to request or receive disbursements from the CMRS fund under KRS 65.7631 for the following purposes:

(a) To verify the accuracy of collection, receipts, and disbursements of all revenues derived from the CMRS service charge and the number of wireless E911 calls received by each PSAP eligible to request or receive disbursements from the CMRS fund;

(b) To determine whether the revenues generated by the CMRS service charge equal, exceed, or are less than the costs incurred in order to comply with the FCC order; and

(c) To determine the sufficiency of the funds currently being withheld for administrative purposes under KRS 65.7631(1).

The independent certified public accountant shall make a report of the audits to the board and to the appropriate chief executive officer or officers of the CMRS providers and PSAPs. The board shall incorporate the auditor's findings in its studies of the CMRS service charge required by subsection (4) of this section. All information with respect to the audits shall be released to the public or published only in aggregate amounts which do not identify or allow identification of numbers of subscribers or revenues attributable to individual CMRS providers;

(14) To ensure that all carriers have an equal opportunity to participate in the wireless E911 system;

(15) To ensure that wireless E911 systems are compatible with wireline E911 systems;

(16) To determine the appropriate method for disbursing funds to PSAP's based on wireless workload under KRS 65.7631(3)(b);

(17) To develop standards and protocols for the improvement and increased efficiency of 911 services in Kentucky; and

(18) To provide direct grants or state matches for federal, state, or private grants for the establishment or improvement of the 911 emergency telecommunications system in the Commonwealth.

65.7631 Apportionment of money in CMRS fund

The moneys in the CMRS fund shall be apportioned among the approved uses of the fund as specified in this section. The board shall make individual disbursements from the fund upon such terms and conditions necessary in view of the amount of revenues on deposit at the time each request for disbursement is reviewed and approved.

(1) Not more than two and one-half percent (2.5%) of the total monthly revenues deposited into the CMRS fund shall be disbursed or reserved for disbursement by the board to pay the administrative costs and expenses incurred in the operation of the board, including the compensation of the administrator and expenses incurred pursuant to KRS 11.512 and 65.7629(10), (11), (13), (16), (17), and (18). An additional sum, not to exceed two hundred fifty thousand dollars ($250,000), shall be available to the board from the fund to implement the wireless workload formula under subsection (3)(b) of this section.

(2) (a) Not more than ten percent (10%) of the total monthly revenues deposited into the CMRS fund shall be disbursed or reserved for disbursement by the board to provide direct grants or matching money.

1. For the establishment and improvement of E911 services in the Commonwealth;
2. For incentives to create more efficient delivery of E911 services by local governments receiving funding under subsection (3) of this section;
3. For improvement of 911 infrastructure by wireless carriers receiving funding under subsection (4) of this section; and
4. For consolidation reimbursement of one hundred thousand dollars ($100,000) per PSAP, not to exceed two hundred thousand dollars ($200,000) per county, to any PSAP that consolidates with a CMRS-certified PSAP, or creates a newly consolidated Phase II compliant PSAP. Funds shall be applied toward the cost of consolidating. If a PSAP consolidates and receives reimbursement, the CMRS Board shall not certify a new PSAP within the same county for a period of ten (10) years.

(b) When the balance of money collected under paragraph (a) of this subsection and not yet disbursed for direct grants or matching moneys exceeds two million dollars ($2,000,000), the excess amount shall be allocated under the provisions of subsections (3) and (4) of this section.

(3) From the balance of the total monthly revenues deposited into the CMRS fund after the amounts disbursed or reserved for disbursement under subsections (1) and (2) of this section have been subtracted, eighty percent (80%) shall be distributed to PSAPs eligible to receive disbursement from the CMRS fund under subsection (5) of this section who actually request disbursement, as follows:

(a) Forty percent (40%) shall be distributed according to the "PSAP pro rata formula," whereby each receives a percentage determined by dividing one (1) by the total number of PSAPs eligible to request and actually requesting disbursements under subsection (5) of this section. Any PSAPs certified before January 1, 2004, or for more than three (3) years, that choose to consolidate their operations shall continue to receive pro-rata shares as if they remained separate and distinct entities. The consolidated entity must be certified to receive funds under subsection (5) of this section; and

(b) Forty (40%) shall be distributed according to a method chosen by the board and based on the wireless workload of the PSAP. Methods to be considered may be based on the number of wireless 911 calls answered

by each PSAP, the number of wireless phone users served by each PSAP, or any other method deemed by the board to be reasonable and equitable. The method chosen shall be promulgated as a regulation under KRS 65.7633.

All amounts distributed to PSAPs under this subsection shall be used by the PSAPs solely for the purposes of answering, routing, and properly disposing of CMRS 911 calls, training PSAP staff, public education concerning appropriate use of 911, and of complying with the wireless E911 service requirements established by the FCC order and any rules and regulations which are or may be adopted by the Federal Communications Commission pursuant to the FCC order, including the payment of costs and expenses incurred in designing, upgrading, purchasing, leasing, programming, testing, installing, or maintaining all necessary data, hardware, and software required in order to provide wireless E911 service.

(4) The balance of the total monthly revenues deposited into the CMRS fund which remains after the disbursements or disbursement reservations prescribed by subsections (1), (2), and (3) of this section have been made shall be distributed to CMRS providers licensed to do business in the Commonwealth solely for the purpose of reimbursing the actual expenses incurred by the CMRS providers in complying with the wireless E911 service requirements established by the FCC order and any rules and regulations which are or may be adopted by the Federal Communications Commission in carrying out the FCC order, including but not limited to costs and expenses incurred for designing, upgrading, purchasing, leasing, programming, testing, installing, or maintaining all necessary data, hardware, and software required in order to provide wireless E911 service. Sworn invoices shall be presented to the board in connection with any request for reimbursement under this subsection, and approval by a majority vote of the board shall be required prior to any disbursement, which approval shall not be withheld unreasonably. No payment shall be made to any provider who is not in compliance with all requirements of this chapter and the FCC order. In no event shall any invoice for reimbursement be approved for payment of costs that are not related to compliance with requirements established by the FCC order. If the total amount of invoices submitted to the CMRS Board and approved for payment exceeds the amount in the CMRS fund in any month, CMRS providers that have invoices approved for payment shall receive a pro rata share of the fund available that month, based on approved invoices, and the balance of the payments shall be carried over to the following months until all of the approved payments are made.

(5) Notwithstanding any other provision of the law, no PSAP shall be eligible to request or receive a disbursement from the CMRS fund under subsection (3) of this section unless and until the PSAP:

(a) Is expressly certified as a PSAP by the CMRS Board, upon written application to the CMRS Board;

(b) Demonstrates that the PSAP is providing E911 services to a local government that has adopted an ordinance either imposing a special tax, license, or fee as authorized by KRS 65.760(3) or has established other means of funding wireline 911 emergency telephone service;

(c) Demonstrates that the administrator of the PSAP sent a request for wireless, E911 service to a CMRS provider, and that the infrastructure of the local exchange carrier will support wireless E911 service;

(d) Provides an accounting of the number of wireless E911 calls received by the PSAP during the prior calendar year if requested by the board; and

(e) Demonstrates that the PSAP has made the investment which is necessary to allow the PSAP to receive and utilize the data elements associated with wireless E911 service.

65.7633 Promulgation of administrative regulations by board

(1) The CMRS Board shall implement the provisions of KRS 65.7621 to 65.7643 through the promulgation of administrative regulations in accordance with the provisions of KRS Chapter 13A.

(2) As soon as practicable after its creation, the board shall promulgate regulations:

(a) Establishing procedures for the submission of plans or modifications of plans to the board, for its review and approval or disapproval, for complying with the wireless E911 service requirements established by the FCC order and any rules and regulations which are or may be adopted by the Federal Communications Commission in carrying out the FCC order, including but not limited to projections of anticipated costs and expenses necessary for designing, upgrading, purchasing, leasing, programming, testing, installing, or maintaining on an ongoing basis all necessary data, hardware, and software required in order to provide this service;

(b) Establishing procedures and guidelines to be followed by the board in reviewing, evaluating, and approving or disapproving the plans or modifications of plans that are submitted to it in accordance with the procedures promulgated under paragraph (a) of this subsection;

(c) Establishing procedures and guidelines to be followed by the board in reviewing, evaluating, and approving or disapproving disbursements from the CMRS fund and requests for disbursements under KRS 65.7631(2), (3), and (4); and

(d) Establishing procedures and guidelines for resolving disputes regarding reimbursable costs and expenses under KRS 65.7631(2), (3), and (4).

65.7635 Duty of commercial mobile radio service providers to act as collection agents for fund; procedure for collection of service and prepaid service charges

(1) Each CMRS provider shall act as a collection agent for the CMRS fund. From its customers, the provider shall, as part of the provider's billing process, collect the CMRS service charges levied upon CMRS connections under KRS 65.7629(3) from each CMRS connection to whom the billing provider provides CMRS. Each billing provider shall list the CMRS service charge as a separate entry on each bill which includes a CMRS service charge. If a CMRS provider receives a partial payment for a monthly bill from a CMRS customer, the provider shall first apply the payment against the amount the CMRS customer owes the CMRS provider. For CMRS customers who purchase CMRS services on a prepaid basis, the CMRS service charge shall be determined according to one (1) of the following methodologies as elected by the CMRS provider:

(a) The CMRS provider shall collect, on a monthly basis, the CMRS service charge specified in KRS 65.7629(3) from each active customer whose account balance is equal to or greater than the amount of service charge; or

(b) The CMRS provider shall divide its total earned prepaid wireless telephone revenue received with respect to its prepaid customers in the Commonwealth within the monthly 911 emergency telephone service reporting period by fifty dollars ($50), multiply the quotient by the service charge amount, and pay the resulting amount to the board; or

(c) In the case of CMRS providers that 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, the CMRS service charge and collection methodology may be determined by administrative regulations promulgated by the board to collect the service charge from such end users.

(2) A CMRS provider has no obligation to take any legal action to enforce the collection of the CMRS service charges for which any CMRS customer is

billed. Collection actions to enforce the collection of the CMRS service charge against any CMRS customer may, however, be initiated by the state, on behalf of the board, in the Circuit Court of the county where the bill for CMRS service is regularly delivered, and the reasonable costs and attorneys' fees which are incurred in connection with any such collection action may be awarded by the court to the prevailing party in the action.

(3) State and local taxes shall not apply to CMRS service charges.

(4) To reimburse itself for the cost of collecting and remitting the CMRS service charge, each CMRS provider may deduct and retain from the CMRS service charges it collects during each calendar month an amount not to exceed one and one-half percent (1.5%) of the gross aggregate amount of CMRS service charges it collected that month.

(5) All CMRS service charges imposed under KRS 65.7621 to 65.7643 collected by each CMRS provider, less the administrative fee described in subsection (4) of this section, are due and payable to the board monthly and shall be remitted on or before sixty (60) days after the end of the calendar month. Collection actions may be initiated by the state, on behalf of the board, in the Franklin Circuit Court or any other court of competent jurisdiction, and the reasonable costs and attorneys' fees which are incurred in connection with any such collection action may be awarded by the court to the prevailing party in the action.