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NO. 2012-SC-000621-D
(2010-CA-001185-MR and 2010-CA-001266-MR)

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VIRGIN MOBILE U.S.A., L.P.

v. ON DISCRETIONARY REVIEW OF
COURT OF APPEALS
NOS. 2010-CA-001185-MR and 2010-CA-001266-MR

COMMONWEALTH OF KENTUCKY
On Behalf of the COMMERCIAL MOBILE
RADIO SERVICE EMERGENCY TELECOMMUNICATIONS BOARD APPELLEE

BRIEF OF *AMICUS CURIAE*, CTIA - THE WIRELESS ASSOCIATION®

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of *Amicus Curiae* was served via first class mail, postage prepaid, upon, Timothy J. Eifler, Douglas F. Brent, and Mark T. Hurst, Stoll Keenon Ogden PLLC, 2000 PNC Plaza, 500 West Jefferson Street, Louisville, KY 40202, and to Charles W. Schwartz, Skadden, Arps, Slate, Meagher & Flom LLP, 1000 Louisiana Street, Suite 6800, Houston, TX 77002, Counsel for Appellant Virgin Mobile U.S.A. L.P.; and to Jonathan D. Goldberg, Esq., Jan M. West, Esq. and Jennifer K. Luhrs, Goldberg Simpson, LLC, 9301 Dayflower Street, Prospect, KY 40059, Counsel for Appellee CMRS Board; and to Sheryl G. Snyder, Thomas P. O'Brien, III, Cory J. Skonick, Frost Brown Todd LLC, 400 West Market Street, 32nd Floor, Louisville, KY 40202; and to Hon. F. Kenneth Conliffe and Hon. James M. Shake, Judge, Jefferson Circuit Court, Judicial Center, 700 West Jefferson Street, Louisville, KY 40202, this 31st day of July, 2013.

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PURPOSE OF THE BRIEF AND PARTICULAR ISSUES ADDRESSED

CTIA - The Wireless Association® (“CTIA”) is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including 700 MHz, cellular, Advanced Wireless Service, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products. The proposed application by the Kentucky Commercial Mobile Radio Service Emergency Telecommunications Board (“CMRS Board”) of the CMRS Service Charge Statutes [KRS 65.7621 to 65.7643] to prepaid wireless service and providers thereof will have industry-wide significance to providers, such as Virgin Mobile and others, as well as their customers.

This Brief’s purpose is to assist this Court in considering the fundamental questions of this appeal: Whether the 1998 CMRS statutes authorized the CMRS Board to require prepaid wireless service providers, such as Virgin Mobile U.S.A., L.P. (“Virgin Mobile”), to pay and collect the CMRS Service Charge on prepaid wireless services prior to July 2006, the effective date of the General Assembly’s amendments that extended the CMRS Service Charge to prepaid wireless services?

Only a negative answer acknowledges that the 2006 General Assembly resolved the issue of whether or not prepaid wireless service should be subject to the CMRS Service Charge by adding KRS 65.7635(1)(a)-(c) to do so, providing methodologies for “CMRS customers who purchase CMRS services on a prepaid basis....” CTIA supports legislation to impose a charge on prepaid wireless service to fund 9-1-1 emergency services, such as KRS 65.7635(1)(a),(b)&(c), tailored to the prepaid mode of delivering wireless service.

ARGUMENT

I. Traditional Monthly Billed Wireless Services Differ from Prepaid Wireless Services, and the Levies the General Assembly Designed to Apply to Each Also Differ.

Virgin Mobile and other members of CTIA provide wireless service across the United States.¹ There are two primary methods of providing and billing wireless service. The first is traditional monthly billing, which was the preponderant method in 1998, when the General Assembly enacted the CMRS Act and authorized the CMRS Service Charge. The second is prepaid wireless service, which emerged in the early to mid-2000's as a result of "technological and business innovation." *TracFone Wireless, Inc. v. Comm'n on State Emergency Communs.*, 397 S.W.3d 173, 176-77 (Tex. 2013).

The traditional monthly billing method of providing and billing wireless service is where the customer "signs-up" with a provider. As a matter of course, the provider sends the customer a bill each month for wireless services used and collects payment via that monthly bill.

In contrast, prepaid wireless service, such as that provided by Virgin Mobile and other providers, is an alternative method that enables customers to obtain wireless services as needed or as they can afford. Prepaid wireless services are, as this designation suggests, paid for by customers in advance (often with cash), and the prepayment is consumed by use of wireless services, which can be based on dollars or predetermined units of time. Thus, there is no need for bills; so, providers do not send bills – not in Kentucky or any other state.

¹ See generally KRS 65.7621(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").

Observe several differences between the two models:

<i>Traditional Monthly Billed Wireless Services</i>	<i>Prepaid Wireless Services</i>
Typically no limit on the amount of service that a customer is entitled to receive – any service used beyond the customer’s monthly service plan allotment will be billed to the customer on the next monthly bill	Customer is limited to using service purchased in advance – after the prepaid service is exhausted, calls can be neither made nor received until additional service is purchased*
Provided typically pursuant to a long-term contract between the wireless service provider and customer	No long-term contract; agreement is to provide only services purchased
Primary contact is directly between customer and wireless provider	Primary contact is between customer and a third party (e.g., a big box retailer)
Provided on a monthly basis	Provided based on customer’s need**
Wireless provider sends a bill to customer	No bill sent

The traditional monthly billed wireless services business model is quite different from that of prepaid wireless service – with the primary difference being that the former entails sending a bill to a customer whereas the latter does not. As the former differs

* Other than emergency calls, because enhanced wireless 9-1-1 service is available to all wireless connections – anyone with a wireless handset. This is because federal law requires all emergency calls to be completed if technologically possible. 47 C.F.R. § 20.18(b). *See also* Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286, 1289 § 5(g).

** A prepaid wireless customer may purchase minutes of use at any time, and thus, often at irregular intervals, which can result in purchases being made less than once per month (e.g., once every two months, three months, etc.) or even multiple times per month. In some instances, a prepaid customer may make only one purchase (e.g., a person on vacation from Canada).

from the latter, so does the CMRS Service Charge differ from the prepaid CMRS Service Charge.

<i>CMRS Service Charge (1998)</i>	<i>Prepaid CMRS Service Charge (2006)</i>
70¢ per month for each wireless telecommunications connection [KRS 65.7629(3) & 65.7635(1)]	From each active prepaid customer, their account balance, up to 70¢ per month; or, CMRS Provider's total earned prepaid wireless telephone revenue from Kentucky customers for a month divided by \$50.00 times 70¢; or, some other method [KRS 65.7635(1)(a),(b)&(c)]
CMRS Service Charge stated separately on bill to customer [KRS 65.7635(1)]	N/A

The General Assembly designed the CMRS Service Charge to apply to traditional monthly billed wireless services and not to prepaid wireless services. Conversely, the General Assembly designed the prepaid CMRS Service Charge to apply to prepaid wireless services and not to traditional monthly billed wireless services.

II. The Pre-2006 CMRS Service Charge Statutes Read in their Entirety Disclose the Intent to Impose the CMRS Service Charge Only When a Traditional Monthly Billed Provider Collects It From Its Customers Via Existing Billing/Collection Mechanism and Not on Prepaid Wireless Services.

The CMRS Service Charge provisions are integrated and can only be properly construed by reading them as a whole. *See George v. Scent*, 346 S.W.2d 784, 789 (Ky. 1961) (“The presumption is that the Legislature intends an Act to be effective as an entirety.”). But, the Court of Appeals read them in a piecemeal fashion.

Post-2006, KRS 65.7629(3) now authorizes the Board to collect *two* CMRS

Service Charges:

To collect the CMRS service charge from each CMRS connection:

(a) [**CMRS Service Charge on Traditional Monthly Billing, enacted in the 1998 Act**] With a place of primary use, as defined in 4 U.S.C. sec. 124, within the Commonwealth; *or*

(b) [**Prepaid CMRS Service Charge added in 2006**] *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.*

KRS 65.7629(3) (**bold emphasis and [] supplied; italicized text added by 2006 Ky. Acts, c. 219, § 4).** KRS 65.7629(3) specifically references KRS 65.7635:

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....

Id. (flush text). This reference to KRS 65.7635 – which from 1998 to 2006 exclusively required collection via the “provider’s normal monthly billing process” [KRS 65.7639(1)] – must be given its full effect. *See Cromwell Louisville Assocs., L.P. v. Commonwealth*, 323 S.W.3d 1, 5 (Ky. 2010).² KRS 65.7639(1) provides:

Each CMRS provider shall act as a collection agent for the CMRS fund. ~~and~~ [**CMRS Service Charge on Traditional Monthly Billing, enacted in the 1998 Act**] *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*

² “A simple reading of KRS 133.120(1)(a)’s *explicit reference* to KRS 133.045 *reveals the plain language* requiring....” *Cromwell*, 323 S.W.3d at 5 (emphasis supplied).

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. [**Prepaid CMRS Service Charge added by 2006 Act**] *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.*

KRS 65.7635(1) (**bold** and underline emphasis and [] supplied; *italicized* text added or *deleted* by 2006 Ky. Acts, c. 219, § 4).

The General Assembly designed the above-described pre-2006 statutory methodology to fit with traditional monthly billed wireless services like a well-tailored suit. “In ascertaining the legislative intent,...the prevailing rules of construction...look to...the historical setting surrounding its enactment...[including] prevailing economic conditions. Such Legislative intent must be neither disregarded nor overlooked.” *Grieb v. National Bank of Kentucky's Receiver*, 252 Ky. 753, 68 S.W.2d 21, 23 Ky. (1933). Thus, the preponderance of the traditional monthly billed wireless model in 1998 must be

considered in construing the pre-2006 CMRS Service Charge to not apply to prepaid wireless services.

In contrast, as to prepaid wireless services, the pre-2006 statutes are not even like an ill-fitted suit but are rather more akin to providing no clothes whatsoever. This is because – prior to the enactment of KRS 67.7635(1)(a),(b)&(c) – there was no statutory collection mechanism for prepaid wireless services.

“No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that significance and effect shall, if possible, be accorded to every part of the Act.” *George v. Scent*, 346 S.W.2d at 789. But, the rationale of the Court of Appeals effectively writes out key parts of the CMRS Act, particularly the mandatory monthly billing collection mechanism of KRS 65.7635(1):

A plain reading of the statute leaves no question as to the fact that it applies only to “CMRS providers,” a term which the statute defines as “a person or entity who provides CMRS to an end user, including resellers.” KRS 65.7621(9)(1999). ...Further, it is clear that the service charge applies to “each CMRS connection...within the Commonwealth.” KRS 65.7629(3). A “CMRS connection” is defined as “a mobile handset telephone number assigned to a CMRS customer.” KRS 65.7621(6). ...KRS 65.7629(3) provides that the service charge is to be collected from each customer within the Commonwealth regardless of his or her method of purchasing the service. Moreover, the statute clearly states that “each CMRS provider shall act as a collection agent for the CMRS fund....” KRS 65.7635(1). Thus, we believe that the statute was clear in its requirement that all CMRS providers act as collection agents for their customers.

Op. at 24-25. Observe the uncanny similarity of the Kentucky Court of Appeals’ rationale to the rationale *rejected* by the Texas Supreme Court:

On the one hand, Section 771.0711(a) seems to cover all wireless providers, including prepaid, stating broadly that “the commission shall impose on each wireless telecommunications connection a 9-1-1 emergency service fee.” Moreover, Section 771.001(13) states, “‘Wireless telecommunications connection’ means any wireless communication mobile station assigned a number containing an area code assigned to Texas....”

TracFone Wireless, 397 S.W.3d at 178. The Kentucky Court of Appeals lost its way, cut short its analysis, and judicially wrote out explicitly referenced statutory text (*i.e.*, the mandatory normal monthly billing requirement, which the 2006 General Assembly deleted to establish a prepaid CMRS Service Charge) [Op. at 25 n. 13] in contravention of *Cromwell, supra*. But, the Texas Supreme Court found the right path:

On the other hand, the mandatory mechanics of the pre-2010 statute seem nearly impossible to apply coherently to prepaid service. For one thing, it requires providers to collect the fee from customers on a monthly basis, even though prepaid is not sold in monthly increments, and customers use an unpredictable number of months of prepaid service. Similarly, the pre-2010 statute requires that the fee be billed “in the same manner” a service provider otherwise bills its customers, even though prepaid customers are not billed on a recurring basis.

TracFone Wireless, 397 S.W.3d at 178. As did the *George v. Scent* Court and so should this Court, the Texas Supreme Court rejected a construction that failed to give effect to all parts of the relevant Act; here, as it was in the Texas *TracFone Wireless* case, the key provision is the mandatory monthly billing collection mechanism of KRS 65.7635(1):

These...charge-and-collection provisions are no less mandatory than the catch-all language regarding “each” wireless connection and “any” wireless station. Safe to say, there is a square-peg-round-hole mismatch between the unique characteristics of prepaid wireless and the ill-fitting billing/collection/remittance methods mandated almost 16 years ago in the original wireless e911 statute.

TracFone Wireless, 397 S.W.3d at 178. “Where a statute prescribes the only method [here, the monthly billing collection mechanism of KRS 65.7635(1)]..., its requirements must be observed.” *Wood v. First American Bank*, 278 Ky. 526, 128 S.W.2d 971, 973 (Ky. 1939) ([] supplied).

This Court should also adopt the Texas Supreme Court’s rationale, as Kentucky jurisprudence likewise dictates. See *George v. Scent, supra*.

III. The General Assembly Resolved the Issue of Whether or Not Prepaid Wireless Service Should Be Subject to a CMRS Service Charge by Enacting the 2006 CMRS Act to Fill the Gap, Tailoring a Levy on Prepaid Wireless.

Kentucky's Highest Court was prominently quoted by the Texas Supreme Court in *TracFone Wireless, supra*, which opined, "In this case, the government seeks not judicial construction of a tax law so much as enlargement of it. We decline. Tax policy gap-filling – specifically, deciding *who* is taxed – is best left to legislators, not courts or agencies." *Id.* at 175-76 (footnote omitted; emphasis in original). Well stated in that case, and equally applicable here.

A. The General Assembly Holds the Taxing Power; So, Neither the Executive Nor Judiciary Branch Can Extend a Tax by Implication.

Here, as in *TracFone Wireless*, 397 S.W.3d at 183 (emphasis supplied), "[T]he heart of the Prepaid Providers' claim is that *they are excluded from the tax in the first instance*, not that they are entitled to an exemption from a tax that would otherwise cover them."

"[U]nder Ky. Const. § 47, the Legislature is the only branch that has the constitutional authority to tax. This power cannot be exercised by either the executive or judicial branches." *St. Ledger v. Revenue Cabinet*, 942 S.W.2d 893, 898 (Ky. 1997).

Echoing Section 2 of the Kentucky Constitution, the Texas Supreme Court opined, "Government overreaching imperils liberty, and...citizens must have clear notice that they are subject to a tax." *TracFone*, 397 S.W.3d at 183. *See* Ky. Const. § 2 ("Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.").

Accordingly, "Taxing laws should be plain and precise, for they impose a burden upon the people. That imposition should be explicitly and distinctly revealed." *George v.*

Scant, 346 S.W.2d at 789.³ However, as demonstrated above, the pre-2006 CMRS Service Charge did not explicitly nor distinctly apply to prepaid wireless service.

Further, the pre-2006 CMRS Service Charge should not be extended to prepaid wireless services by implication as the CMRS Board and lower Courts have attempted to do. Kentucky appellate courts have repeatedly refused to extend statutes creating tax obligations by implication. *See, e.g., LKS Pizza, Inc. v. Commonwealth, ex rel., Rudolph*, 169 S.W.3d 46 (Ky. App. 2005) (reversing the circuit court in refusing to extend statutes imposing liability on a purchaser of a tax delinquent's assets to a secured creditor that repossessed assets); *Woodward, Hobson & Fulton, LLP, v. Revenue Cabinet*, 69 S.W.3d 476 (Ky. App. 2002) (reversing the Jefferson Circuit Court in holding that "[t]he sales and use tax scheme set forth in KRS Chapter 139" which is "not primarily designed to tax services" did not extend to copies of patient records furnished by medical providers).

Until amended in 2006, the CMRS Service Charge statutes were not designed to tax prepaid wireless services. So, this Court should reverse the lower Courts' erroneous extension of the pre-2006 CMRS Service Charge to prepaid wireless services.

B. Kentucky Adopted the Majority Approach to the Public Policy Concern of Whether or Not and If So, How to Impose a Charge on Prepaid Wireless to Fund 9-1-1 Service, i.e., the State Legislature Addressed the Issue.

Wireless service is available nationwide. Many other states' legislatures have enacted statutes similar to Kentucky's CMRS Service Charge statute. The resulting fees sometimes are referred to as "CMRS Charges" or "9-1-1 Charges."

³ Thus, "it is the function of the judiciary to construe the statute strictly and resolve doubts and ambiguities in favor of the taxpayer and against the taxing powers." *George v. Scant*, 346 S.W.2d at 789.

In Kentucky, as in other states, “Shaping public policy is the exclusive domain of the General Assembly.” *Caneyville Volunteer Fire Dep’t v. Green’s Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 807 (Ky. 2009). “By enacting the statute[s] [here, the 1998 CMRS Act], the legislature has proclaimed the public policy of this state, and this Court is bound to interpret the statute to effectuate that policy.” *Benningfield v. Zinsmeister*, 367 S.W.3d 561, 566 (Ky. 2012) ([] supplied); *see also St. Ledger*, 942 S.W.2d at 897. “It is beyond the power of a court to vitiate an act of the legislature on the grounds that public policy promulgated therein is contrary to what the court considers to be in the public interest.” *Caneyville*, 286 S.W.3d at 807. But, this is exactly what the Court of Appeals did by extending the 1998 CMRS Service Charge to prepaid wireless services, particularly in light of the 2006 CMRS Act.

“A distinction for taxation may be made...between essentially different methods of conducting the same trade or business....” *Commonwealth v. Payne Medicine Co.*, 138 Ky. 164, 127 S.W. 760, 763 (1910). That is what the 1998 General Assembly did with regard to traditional monthly billed wireless and prepaid wireless services.

In 1998, the Kentucky General Assembly made an affirmative policy choice when it enacted the involved statutes, and in doing so, decided how to impose and structure the CMRS Service Charge. *See* 1998 Ky. Acts, c. 535. The Legislature considered how to most effectively collect the CMRS Service Charge, without imposing undue costs or burdens on the wireless service providers, which were already obligated to complete 911 emergency calls *gratis* (see footnote, *supra*, at 3). The Legislature purposefully left potential charges to fund 9-1-1 emergency service on the table, *i.e.*, uncollected, and decided to impose and collect only those CMRS Service Charges that could be efficiently

collected from the preponderant existing billing and collection mechanism that is characteristic of the traditional monthly billed wireless service model. *See Id.*⁴

Almost a decade later, in 2006, to address the inapplicability of the existing CMRS Service Charge to prepaid wireless services by enacting a new statute to remedy the existing statutes' short comings, the General Assembly enacted H.B. 656, 2006 Ky. Acts, c. 219. *See* 2006 H.B. 656 (2006 B.R. No. 1158), State Fiscal Note Statement ("This provision closes a "loophole" that allows "prepaid" wireless phone services to not remit the surcharge.")⁵ The 2006 Act amended KRS 65.7629 (to levy the CMRS Service Charge on prepaid wireless services) and KRS 65.7635 (to authorize the CMRS Board to require CMRS Providers to collect the CMRS Service Charge on prepaid wireless service under certain elective methodologies). *See* 2006 Ky. Acts, c. 219. The 2006 CMRS Act reinforced the General Assembly's intent as to the reach of the 1998 CMRS Act, *i.e.*, that it did not extend to prepaid wireless services.⁶

The majority of states have addressed the inapplicability of their CMRS Charge Statutes to prepaid wireless via legislation.⁷ An example can be found in the preamble

⁴ The 1998 General Assembly did not intend to authorize the CMRS Board to impose the CMRS Service Charge on all CMRS connections or to require all providers of wireless service to pay and collect the CMRS Services Charge when it enacted the CMRS Service Charge Statutes, including KRS 65.7635(1). So, the Court of Appeals proceeded from a faulty premise.

⁵ Available at <http://www.lrc.ky.gov/record/06rs/HB656/FN.doc> (last visited July 31, 2013).

⁶ *See Commonwealth v. Fox*, 48 S.W.3d 24, 27 (Ky. 2001) ("It is a long standing rule that the legislature is presumed to know the consequences of its previous action when it enacts any amendments.").

⁷ *See, e.g.*, 2003 Pa. Legis. Serv. Act 2003-56 (H.B. 1018) (revising 35 Pa. Stat. §§ 7012, 7021.4(b)(4)) ("In the case of prepaid wireless telephone service, the monthly wireless 911 surcharge imposed by this section shall be remitted based upon each prepaid wireless account in any manner consistent with the provider's existing operating or technological abilities..."); Tenn. Pub. Acts ch. 205 (H.B. 1473 (adding Tenn. Code Ann. § 7-86-108(a)(1)(B)(iv)) ("The service charge shall also be imposed upon customers who pay for service prospectively, known as prepaid customers."); 2006 Neb. Laws L.B. 1222 (amending Neb. Rev. Stat. Ann. § 86-457(3)) ("Beginning on July 1, 2007, each wireless carrier who has a prepaid customer shall remit a surcharge from each prepaid customer in the amount established in subsection (1) of this section."); 2007 Ark. Laws Act 582 (S.B. 236) (amending Ark. Code Ann. § 12-10-303, *et seq.*, to

setting forth the intent of the statute enacted by the Louisiana legislature to address prepaid wireless:

Unlike traditional telecommunication services, prepaid wireless telecommunications services are not sold or used pursuant to term contracts or subscriptions, and monthly bills are not sent to consumers by prepaid wireless telecommunication service providers or retail vendors.

Prepaid wireless consumers have the same access to emergency 911 services from their wireless devices as wireless consumers on term contracts, and prepaid wireless consumers benefit from the ability to access the 911 system by dialing 911. Therefore, prepaid wireless consumers should *begin contributing* to funding of the 911 emergency communications system.

La. Rev. Stat. Ann. § 33:9109.1(A)(3)-(5) (subsections omitted for readability and emphasis supplied). Significantly, the Louisiana legislature recognized that going forward, prepaid wireless consumers should “begin contributing.” *Id.*

These new CMRS Charge statutes, like the Kentucky CMRS Service Charge statutes, generally provide not only for the imposition of a charge but also a method of collection – designed specifically for prepaid wireless service.

provide for a CMRS service charge specific to prepaid wireless [Ark. Code Ann. § 12-10-318(b)(1)(B)(i)] and recognizing that there may be instances where “direct billing is not feasible” [Ark. Code Ann. § 12-10-318(b)(1)(B)(iii)(c)(1)]; 2007 Conn. Legis. Serv. P.A. 07-106 (S.H.B. 7270) (amending Conn. Gen. Stat. § 16-256g(b)) (“Each telephone or telecommunications company providing local telephone service, each provider of commercial mobile radio service, each provider of prepaid wireless telephone service and each provider of voice over Internet protocol service shall assess against each subscriber, the fee established by the department”); 2007 Ga. Laws Act 211 (H.B. 394) (amending Ga. Code Ann. §§ 46-5-122 and adding 46-5-134.2(a)) (“A 9-1-1 charge shall be imposed on all prepaid wireless service subscribed to by telephone subscribers...”); 2008 Mass. Legis. Serv. Ch. 223 (H.B. 5051) (amending Mass. Gen. Laws ch. 6A, § 18H to specify that its CMRS charges would apply to prepaid service); 2009 La. Sess. Law. Serv. 531 (H.B. 782) (adding La. Rev. Stat. Ann. ch. 33, § 9109.1 *et seq.*) (adding new provisions “to provide for collection and remittance of prepaid wireless telecommunications service charge[s]”). There are many other examples.

A select few states have addressed the issue via litigation.⁸ Other state courts have either endorsed or come to the conclusion that the therein involved 9-1-1/CMRS Charge statutes did not apply to prepaid wireless services. *See TracFone Wireless, supra*.

Another example can be found in the Georgia 9-1-1 service charge statute. The pre-amendment version of the Georgia 9-1-1 charge statute, amended in 2007 [Ga. Code Ann. § 46-5-134(a)(2)(C) (amended by 2007 Ga. Laws Act 211, § 2)], was strikingly similar to the Kentucky CMRS Service Charge statutes. The Georgia statute stated:

Each wireless service supplier shall, on behalf of the local government, collect the wireless enhanced 9-1-1 charge from those telephone subscribers.... As part of its normal billing process, the wireless service supplier shall collect the wireless enhanced 9-1-1 charge for each month a wireless telecommunications connection is in service, and it shall list the wireless enhanced 9-1-1 charge as a separate entry on each bill. If a wireless service supplier receives partial payment for a bill from a telephone subscriber, the wireless service supplier shall apply the payment against the amount the telephone subscriber owes the wireless service supplier first.

Ga. Code Ann. § 46-5-134(a)(2)(C) (pre-2007 amendment). Compare it with the involved Kentucky statutes, set forth *supra*, particularly as to the normal billing process.

Regarding the pre-amendment version of the Georgia statute, it was clear that “[t]he Act did not impose 9-1-1 charges with respect to...prepaid customers during the [pre-2007 amendment] [p]eriod....” *Fulton County v. T-Mobile, S., LLC*, 699 S.E.2d 802, 805 (2010) ([] supplied in context). It should be highlighted that in the *T-Mobile* case, there was no question as to whether the Act imposed 9-1-1 charges on prepaid wireless; all parties involved had determined that it did not. Thus, the 2007 Georgia

⁸ For example, in a close 5 to 4 decision, the Washington Supreme Court held that Washington’s E-911 excise tax applied to prepaid. *See TracFone Wireless, Inc. v. Dep’t of Revenue*, 242 P.3d 810 (Wash. Oct. 28, 2010). However, Washington’s legislature had not addressed the prepaid wireless issue as the Kentucky General Assembly has done, and the dissent in that case would have held that Washington’s E-911 excise tax did not apply to prepaid wireless services. *Id.* at 823-24 (Chambers, J., dissenting).

General Assembly, as noted, addressed the statute's scope by enacting legislation specifically to impose a 9-1-1 fee on prepaid wireless service.⁹

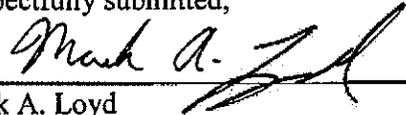
The Kentucky General Assembly, following the trend across the nation, legislatively resolved the issue of the inapplicability of the existing CMRS Service Charge to prepaid wireless services via the 2006 Act, as discussed *supra*.

CONCLUSION

Regarding tax statutes, "Legislators must speak clearly, agencies heed assiduously, and courts review exactingly." *TracFone*, 397 S.W.3d at 183.

For the foregoing reasons, as the mode of providing and obtaining prepaid wireless service does not fit into the legislatively designed model for collecting the CMRS Service Charge prior to July 2006, this Court should hold that wireless service providers, such as Virgin Mobile, are not obligated to pay or collect it. In doing so, the Court would be aligning Kentucky with the majority of its Sister States in the practice of making changes to the scope of CMRS and 9-1-1 Charge Statutes via prospective legislation. Accordingly, CTIA respectfully requests that the Court hold that prior to July 2006, the CMRS Service Charge does not apply to prepaid wireless service.

Respectfully submitted,



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⁹ See also, e.g., *TracFone Wireless, Inc. v. County of Los Angeles*, 78 Cal. Rptr. 3d 466, 471-72 (Cal. Ct. App. 2008), (holding that the prepaid wireless provider's allegedly involuntary payment of a tax on prepaid wireless services conferred standing; so, the case could be read for the proposition that the tax on prepaid wireless services would have been an "illegal" tax under the rule for a refund); *TracFone Wireless, Inc. v. Dep't of Treasury*, Nos. 275605, 275942, 2008 WL 2468462 at *6 (Mich. Ct. App. 2008) ("We affirm the trial court's holding that providers of prepaid wireless communications services like plaintiff are not required to collect or remit the 9-1-1 fees under the ETSEA.").