KENTUCKY SUPREME COURT
2012-SC-000621-D

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

v.

ON REVIEW FROM COURT OF APPEALS
NOS. 2010-CA-001185 and 2010-CA-001266

and

JEFFERSON CIRCUIT COURT
NO. 08-CI-10857

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

BRIEF OF APPELLEE
CMRS BOARD

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CERTIFICATE OF SERVICE

It is hereby certified that true and accurate copy of the foregoing was served by U.S. Mail this 13th day of September, 2013 on: Timothy J. Eifler, Douglas F. Brent, Mark T. Hurst, Stoll Keenon Ogden PLLC, 2000 PNC Plaza, 500 West Jefferson Street, Louisville, KY 40202; Charles W. Schwartz, Skadden, Arps, Slate, Meagher & Flom LLP, 1000 Louisiana Street, Suite 6800, Houston, TX 77002; Mark A. Loyd, John K. Bush, Bingham, Greenebaum Doll LLP, 3500 National City Tower, 101 South Fifth Street, Louisville, KY 40202; Sheryl G. Snyder, Thomas P. O'Brien, III, Cory J. Skolnick, Frost Brown Todd LLC, 400 West Market Street, 32nd Floor, Louisville, KY 40202; Hon. James M. Shake and Hon. F. Kenneth Conliffe, Jefferson Circuit Court, Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; and Clerk, Ky. Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

Counsel for Appellee, CMRS Board

STATEMENT CONCERNING ORAL ARGUMENTS

The CMRS Board believes that oral arguments will assist this Court in understanding the purpose and intent of the CMRS Act (KRS 65.7621, *et seq.*) regarding its applicability to prepaid providers prior to the amendments to the CMRS Act in July, 2006. Oral arguments will allow the parties and the Court to fully address the Court of Appeals' finding that the CMRS service charges required by the CMRS Act are applicable to all wireless providers in the Commonwealth, including prepaid providers such as Virgin Mobile, and that Virgin Mobile's chosen business model does not excuse Virgin Mobile from complying with the CMRS Act.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Jefferson Circuit Court awarded summary judgment to the Commonwealth of Kentucky on behalf of the Commercial Mobile Radio Service Emergency Telecommunications Board (hereinafter the "CMRS Board"), in the amount of $547,945.67, plus post-judgment interest and attorney's fees. [R. 184-191; R. 248-253]. This judgment includes CMRS service charges which Virgin Mobile U.S.A., LLP (hereinafter "Virgin Mobile") refused to pay from the period of June, 2005 until January, 2007. The judgment also includes CMRS service charges that Virgin Mobile voluntarily paid to the CMRS Board for a three-year period between 2002 and May, 2005, prior to the prepaid wireless industry adopting a unilateral, unfounded position that CMRS service charges did not apply to prepaid services. Virgin Mobile took back the amounts previously paid, over the objection of the CMRS Board, by imposing a "credit" on future amounts that Virgin Mobile admits it owed beginning in July, 2006.

The Kentucky Court of Appeals upheld the trial court's summary judgment and award of damages in favor of the CMRS Board, plus post-judgment interest, in its Opinion Affirming in Part, Reversing in Part and Remanding, rendered June 29, 2012, attached at Tab "3" to Virgin Mobile's brief.[1] The Kentucky Court of Appeals rejected Virgin Mobile's argument that the CMRS Act only applied to providers who have implemented a monthly billing process and held that the CMRS Act applied to all wireless providers in the Commonwealth. The Court concluded that Virgin Mobile was

[1] The Court of Appeals reversed the trial court's award of statutory attorneys' fees in favor of the CMRS Board. The CMRS Board has addressed the reversal of the attorneys' fee award in its Motion for Discretionary Review and appellate brief filed in that related action No. 2012-SC-000626.

required to collect and to remit CMRS service charges to the CMRS Board on a monthly basis pursuant to the pre-2006 CMRS Act, and that Virgin Mobile was not entitled to a refund for amounts "mistakenly" paid prior to July, 2006.

II. BACKGROUND

A. The Creation of the CMRS Board and the CMRS Fund

This is a case of statutory interpretation. The essential facts are not in dispute. In 1998, the Kentucky legislature enacted KRS 65.7621-65.7643; created 1998 Ky. Acts 535, effective July 15, 1998 (hereinafter the "CMRS Act" or the "1998 statutes"). [The CMRS Act, as enacted by 1998 House Bill 673, is attached hereto at Tab "1" and is Exhibit 19 to the CMRS Board's Memorandum in Support of Summary Judgment, filed under seal on December 23, 2009 (hereinafter "CMRS Board's Sealed Memo")]. The purpose of the CMRS Act is to develop throughout Kentucky a statewide enhanced wireless 911 service ("E911") for wireless telephone users (i.e., cell phones).

Through the CMRS Act, the legislature directed that the E911 system would connect wireless 911 calls "to appropriate public safety answering points ("PSAPs") by selective routing based on the geographical location from which the call originated." KRS 65.7621(19). In addition, the CMRS Act mandates that the E911 system has the capability of allowing the 911 service called to identify the phone from which the call was made and to geographically locate the position of the person making the call. *Id.* Thus, a cell phone user anywhere within the state can make a 911 call that is directed to the appropriate emergency dispatcher within the user's calling area. The identity of the user and the location of the cell phone can be identified immediately, and if the person

making the 911 call is unable to speak, emergency service can be dispatched immediately to that person's location. *Id.*

In order to provide for the infrastructure essential to create the wireless E911 system, the legislature also established the "CMRS Fund." KRS 65.7627, 1998 Ky. Acts 535 §4, effective July 15, 1998. The CMRS Fund is financed by a service charge of 70 cents per month per "CMRS connection" (the "CMRS service charge").[2] The term "CMRS connection" was defined in the 1998 statutes, and is currently still defined, as a "mobile handset telephone number assigned to a CMRS customer." KRS 65.7621(6)[3]. Each "CMRS customer," i.e., cell phone user, is required to pay the CMRS service charge to subsidize the cost of implementing and maintaining the E911 system. *See* KRS 65.7621(6); KRS 65.7621(7); KRS 65.7621(10); KRS 65.7629(3). Most importantly, the CMRS Act mandates that the CMRS service charge "have uniform application within the boundaries of the Commonwealth." KRS 65.7627.

A CMRS "provider" was defined in the 1998 statutes as a "person or entity who provides CMRS to an end user, including resellers."[4] KRS 65.7621(9). Each "CMRS provider," i.e., the wireless provider, such as Appellant, Virgin Mobile, has always been required to act as a "collection agent" for the CMRS Fund. KRS 65.7621(9); KRS

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[2] KRS 65.7629(3), as enacted, stated: "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." Many states refer to this service charge as an "E911 fee."

[3] There has never been a dispute that Virgin Mobile's prepaid customers have a CMRS connection, as defined by KRS 65.7621(6).

[4] There has never been a dispute that Virgin Mobile is a "CMRS provider" as defined by KRS 65.7621(9).

65.7635(1). As enacted, KRS 65.7635(1) directed CMRS providers to collect the service charge as part of their "normal billing process." From the collected service charge, each CMRS provider is entitled to retain 1.5% of the CMRS service charges as reimbursement for the cost of collection. KRS 65.7635(4).

The CMRS Board was established by the legislature pursuant to KRS 65.7623, 1998 Ky. Acts 535 §2. The CMRS Board is charged with administering the CMRS Act and maintaining the CMRS Fund. *See* KRS 65.7629. The CMRS Board is also charged with ensuring that "all carriers have an equal opportunity to participate in the wireless E911 system." KRS 65.7629(14). Since 2001, the CMRS Act has required CMRS providers to "provide a quarterly report to the [CMRS] board of the number of subscribers receiving bills in each zip code serviced by the provider that quarter, if needed." KRS 65.7639.

B. The Prepaid Business Model

Virgin Mobile, a prepaid wireless provider, began doing business in Kentucky in August, 2002. [R. 12-25]. Unlike the postpaid business model, in which the wireless customer signs a service contract and is billed regularly, prepaid wireless service customers do not enter into long-term service contracts with providers, but they purchase wireless service in advance in a predetermined amount of dollars or units (i.e., a "pay as you go" plan). [Wagner Depo.,[5] p. 23; R. 13]. [All excerpts from Mr. Wagner's deposition referenced herein are attached as Exhibit 2 to CMRS Board's Sealed Memo]. The dollars

[5] Gary Wagner is Vice President for Tax and Regulatory Compliance with Virgin Mobile and was designated by Virgin Mobile as its corporate representative to bind the corporation pursuant to Ky. Civ. R. 30.02(6). [Wagner Depo., at p. 9].

or units that a prepaid customer purchases are exhausted in real time as the customer uses the prepaid service. [Wagner Depo. at pp. 23-24, 44; R. 14].

In order to activate the prepaid service, Virgin Mobile collects a zip code from its customer and, in return, gives the customer a wireless number, i.e., a cell phone number, during the activation process. [Wagner Depo., at p. 33]. The customers then must purchase airtime for use by way of a "top-up" card. [Wagner Depo., at p. 30; R. 13]. The customer's phone number is, in essence, the customer's account number through which airtime is added and deducted as the customer uses his/her phone. [Wagner Depo., at pp. 35-36].

Once the customer has depleted his/her original "top-up" card, the customer must purchase additional "top-up" cards to continue using the handset. In order to add dollars to the prepaid account, the customer must provide Virgin Mobile with his/her telephone number. [Wagner Depo., at pp. 45-46]. Therefore, Virgin Mobile is capable of tracking how many customers it has assigned a Kentucky telephone number with activity each month. [Wagner Depo., at pp. 86-87; *See also,* Exhibit 1 to the CMRS Board's Sealed Memo, a table produced by Virgin Mobile which provides the number of Virgin Mobile customers assigned a Kentucky telephone number in each month between June, 2002 and March, 2009].

C. Virgin Mobile's Remittance and Communications with the CMRS Board Prior to June, 2005

The CMRS Board had always considered prepaid wireless services subject to the CMRS Act. [Lucas Depo.[6] attached as Exhibit 4 to CMRS Board's Sealed Memo, at pp.

[6] David Lucas was the chairman of the CMRS Board at the time of his deposition and was designated by the CMRS Board to testify as its corporate representative. (Lucas Depo, p. 9, 9-11; p. 14, 16-23).

35, 39, 59, 71, 84]. Virgin Mobile began voluntarily remitting the service charge to the CMRS Board when it began doing business in Kentucky, without question or protest. [Wagner Depo., at pp. 18-19, 49, 51-52; R.15). Virgin Mobile also voluntarily made quarterly reports to the CMRS Board pursuant to KRS 65.7639 with respect to "the number of subscribers receiving bills in each zip code served by the provider during that quarter." [Wagner Depo., at p. 39; See also Exhibit 3 to CMRS Board's Sealed Memo, subscriber count report based on zip code].[7]

In September, 2004, the CMRS Board issued a letter to all wireless providers in the Commonwealth indicating that the CMRS Act did apply to prepaid services. [Exhibit 5 to CMRS Board's Sealed Memo]. Virgin Mobile did not respond to this letter. [Wagner Depo., at pp. 100-101]. Virgin Mobile ceased paying the service charge in June, 2005, and did not begin remitting the service charge again until January, 2007. [Wagner Depo., at pp. 75-76]. Virgin Mobile had voluntarily remitted approximately $286,807.20 in service charges to the CMRS Board from August, 2002 to May, 2005.

D. Virgin Mobile's Request For a Refund

On October 6, 2005, Virgin Mobile sent a letter to the CMRS Board requesting a refund in the amount of $286,807.20 for past amounts remitted. [Exhibit 9 to CMRS Board's Sealed Memo]. Virgin Mobile claimed that the CMRS service charge was not applicable to prepaid services because prepaid providers did not send their customers "bills." *See* KRS 65.7635(1). The CMRS Board denied Virgin Mobile's request for a

[7] Virgin Mobile made these quarterly reports during the time period that Virgin Mobile ceased remitting the service charge. [See also Exhibit 22 to CMRS Board's Sealed Memo, Affidavit of Tandy Hubbard, Policy Advisor, Kentucky Office of the 911 Coordinator/CMRS Board].

refund by letter dated December 1, 2005, maintaining that the CMRS Act applied to all wireless service, without regard to payment methodology. [Exhibit 11 to CMRS Board's Sealed Memo]. Virgin Mobile did not sue the Commonwealth of Kentucky for the refund amount. [Wagner Depo., at p. 147].

E. The 2006 Amendments to the CMRS Act

As discussed more fully *infra*, the 2006 Kentucky General Assembly passed HB 656 amending the CMRS Act (the "2006 amendments"). The purpose of the 2006 amendments, in part, was to reinforce its application to prepaid services. *See* KRS 65.7635(1)(a-c). In addition to providing three new collection methodologies for prepaid providers, the 2006 amendments also created a grant fund and changed the distribution formula for PSAPs. *See* 2006 Ky. Acts 219 (effective July 12, 2006).

Importantly, the 2006 amendments did not change the definitions of a "CMRS connection" or a "CMRS customer," and only minimally amended the definition of a "CMRS provider." *See* KRS 65.7627(6), (7) and (10). The 2006 amendments did not add a definition for "prepaid CMRS connection," "prepaid CMRS customer," or "prepaid CMRS provider." The 2006 amendments did not change or enlarge the uniform application of the CMRS service charge to all CMRS connections. *See* KRS 65.7627.

F. Virgin Mobile Develops a Credit Strategy

The CMRS Board sent a letter to Virgin Mobile on May 2, 2006, informing Virgin Mobile of the 2006 amendments. [Exhibit 12 to CMRS Board's Sealed Memo]. On October 4, 2006, the CMRS Board sent a letter to Virgin Mobile demanding that Virgin Mobile again begin remitting the service charges. [Exhibit 13 to CMRS Board's Sealed Memo]. In response, Virgin Mobile sent the CMRS Board a letter on October 17,

2006, proposing that Virgin Mobile would take a credit in the amount of the allegedly erroneously-paid service charges ($286,807.20) applied towards future service charges owed to the CMRS Board. [Exhibit 14 to CMRS Board's Sealed Memo].

On January 23, 2007, Virgin Mobile sent another letter to the CMRS Board indicating that it would begin remitting service charges as of January 1, 2007, but that it would be unilaterally taking a credit for amounts it previously paid. [Exhibit 16 to CMRS Board's Sealed Memo]. On February 15, 2007, the CMRS Board responded to Virgin Mobile's letter and reiterated that Virgin Mobile was not entitled to take a credit since the CMRS Act had always applied to prepaid services. [Exhibit 17 to CMRS Board's Sealed Memo].

Virgin Mobile implemented this credit strategy over the CMRS Board's objections. [Wagner Depo., at pp. 183-184]. This credit was not exhausted until November, 2008, and therefore Virgin Mobile did not begin to remit CMRS service charges in Kentucky until November, 2008. [Wagner Depo., at pp. 86-93; *See also* Exhibit 1 to CMRS Board's Sealed Memo, a table created by Virgin Mobile showing how the credit was calculated and applied].

G. The CMRS Board's suit against Virgin Mobile and TracFone

As a result of the parties' dispute, the CMRS Board filed this action against Virgin Mobile, and a sister action against TracFone Wireless, Inc. (hereinafter "TracFone" - another large prepaid wireless provider), in the Jefferson Circuit Court, seeking a declaration that the CMRS Act has been applicable to all wireless services, both postpaid or prepaid, since its enactment in 1998. [R. 1-8]. TracFone removed its

action to the U.S. District Court for the Western District of Kentucky, Louisville Division, before the Honorable Judge John G. Heyburn, II ("Judge Heyburn").

H. The Jefferson Circuit Court, the Kentucky Court of Appeals, the U.S. District Court and the Sixth Circuit Rule in Favor of the CMRS Board

On March 25, 2010, the Jefferson Circuit Court entered summary judgment in favor of the CMRS Board, awarding a judgment in the amount of $547,945.67, plus post-judgment interest. [R. 184-191]. This judgment represents the amount that Virgin Mobile voluntarily paid, but then took back by imposing its credit strategy (the refund amount), and additional amounts that Virgin Mobile refused to remit between June, 2005 and January, 2007, prior to the 2006 amendments. The Jefferson Circuit Court concluded that the 1998 statutes levied the CMRS service charge on *all* CMRS connections (whether the service was paid for on a postpaid or a prepaid basis) and that the language in KRS 65.7635 regarding collection of the fee on a "monthly" and "billing" basis did not obviate prepaid providers' obligations to collect and to remit the CMRS service charge. *Id.* On a motion to alter, amend or vacate, the Circuit Court granted the CMRS Board's motion for attorney's fees as permitted by KRS 65.7635(5) and denied its motion for prejudgment interest. [R. 248-253].

Likewise, the Kentucky Court of Appeals upheld the Jefferson Circuit Court's judgment against Virgin Mobile (See Opinion, at Tab "3" to Virgin Mobile's brief). The Court found that a plain reading of the CMRS Act leaves no question that the statute applies to CMRS providers, and that Virgin Mobile is a CMRS provider because it provides mobile phone service to its customers, regardless of whether they are purchased directly from Virgin Mobile or through a third-party retailer. *Id.* at 24. Moreover, the

CMRS Act clearly states that "each CMRS provider shall act as a collection agent for the CMRS fund" *Id.* at 24 (citing KRS 65.7635(1)). Although the Court noted that the method of collection set forth in the 1998 CMRS Act did not "comport with Virgin Mobile's chosen business model," the statute did not exclude prepaid providers from the requirement of collecting the CMRS service charges. *Id.* at 25.

On August 18, 2010, in the CMRS Board's litigation with TracFone, Judge Heyburn also entered summary judgment in favor of the CMRS Board on the issue of the CMRS Act's application to prepaid services. *CMRS Board v. TracFone Wireless, Inc.*, 735 F.Supp.2d 713 (W.D. Ky. 2010). Although Judge Heyburn looked to the opinion of the Jefferson Circuit Court for guidance, and concluded that "Judge Conliffe undertakes this difficult analysis in a convincing, well-reasoned and most thorough manner," the Court undertook its own exhaustive analysis of the statutes, of Kentucky law, and of the criticisms raised by TracFone against Judge Conliffe's opinion. Judge Heyburn came to the same conclusion as the Jefferson Circuit Court. He found that the CMRS Act clearly provides that the CMRS service charge applies to "each CMRS connection within the Commonwealth" and that "[e]ach CMRS provider shall act as a collection agent for the CMRS fund ..." *Id.* at 722. (citing KRS§65.7635(1); KRS §65.7621(6)). Judge Heyburn concluded "[t]he [1998] statute[s], at its most basic level and in no uncertain terms, requires [prepaid CMRS providers] to collect the service fees from [their] Kentucky customers." *Id.* Judge Heyburn rejected TracFone's argument that the CMRS Act excluded prepaid providers in its reference to the provider's collection of the CMRS service charge as part of a "normal monthly billing process." *Id.* Although the Court noted that prepaid providers such as TracFone do not send monthly bills, Judge Heyburn

agreed with the Jefferson Circuit Court's analysis that the CMRS Act's specific guidance on how to collect the fees, i.e., the monthly billing process, did not create an exemption to the general duty of all CMRS providers to collect the service fee. *Id.* at 723.

The Sixth Circuit upheld Judge Heyburn's opinion in *TracFone Wireless, Inc. v. CMRS Board*, 712 F.3d 905 (6th Cir. 2013). The Court agreed that TracFone is "unquestionably" a CMRS provider, as it is a person or entity who provides CMRS to an end user, including resellers, pursuant to KRS 65.7621(9). *Id.* at 913. The Sixth Circuit similarly rejected TracFone's argument that the reference to the providers' "normal monthly billing process" excluded prepaid providers from the responsibility to collect and remit service charges. The Court found that the language does not have a limiting effect or indicate that the legislature intended to treat prepaid providers differently than postpaid providers, stating that:

> It is not the responsibility of the legislature to contemplate all of the possible billing methods of CMRS providers to collect the fee when it has made a clear directive that the statute applies to all providers equally. *Id.* at 914.

Therefore, TracFone was required to collect and to remit CMRS service charges to the CMRS Board pursuant to the 1998 CMRS Act.

ARGUMENT

I. The Kentucky Court of Appeals Correctly Held that the 1998 Statutes Applied to All Wireless Providers, Regardless of Their Chosen Business Model.

A. The Plain and Unambiguous Language of the 1998 Statutes Levy the CMRS Service Charge on all Wireless Connections Without Regard to Payment or Collection Methodology.

The Kentucky Court of Appeals, the U.S. District Court, and the U.S. Court of Appeals for the Sixth Circuit correctly concluded that, by the plain and unambiguous

language of the CMRS Act, the CMRS service charge was levied on all CMRS connections, without regard to whether the service was paid for on a prepaid or a postpaid basis, and was required to be collected by all CMRS providers. KRS 65.7629(3). The clear legislative intent and purpose behind the CMRS Act (i.e., to support an E911 infrastructure and to enable all wireless providers and customers to participate in that infrastructure) supports interpreting the 1998 statutes to levy the CMRS service charge universally and equally upon all cell phone connections, without regard to payment methodology.

Virgin Mobile claims that a portion of the language in KRS 65.7635(1), in effect from July, 1998 through July, 2006, indicates that the statute only applies to postpaid wireless service. Specifically, Virgin Mobile cites the portion of the statute which states that each CMRS provider "as part of the provider's normal monthly billing process" shall collect the CMRS service charges, and also cites the portion of the statute that states the "billing provider" shall indicate the service charge as a separate entry on each bill. Virgin Mobile argues that since it is not a billing provider with a normal monthly billing process, the statute is not applicable to Virgin Mobile.

When engaging in statutory construction, the most basic rule is that the plain meaning of the statute controls. *Wheeler & Clevenger Oil Co., Inc. v. Washburn*, 127 S.W.3d 609, 614 (Ky. 2004). Furthermore, "an act is to be read as a whole, i.e., any language in the act is to be read in light of the whole act, not just a portion of it." *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 465-466 (Ky. 2004) (internal citations and quotations omitted). Therefore, "[courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the

whole and to its object and policy." *Democratic Party of Kentucky v. Graham*, 976 S.W.2d 423, 429, 430 (Ky. 1998) (internal citations and quotations omitted). *See also Oates v. Simpson*, 295 Ky. 433, 174 S.W.2d 505, 507 (Ky. App. 1943). Another "cardinal rule" of statutory construction is "to ascertain and give effect to the intent of the legislature." *Ky. Ins. Guar. Ass'n v. Jeffers ex rel. Jeffers*, 13 S.W.3d 606, 610-611 (Ky. 2000); KRS 446.080.

Thus, in ascertaining the intent of the legislature, the Court is required to look at the CMRS Act as a whole rather than simply interpreting a portion of one statute in the CMRS Act which addresses a method of collection. The "CMRS service charge" was defined in the 1998 statutes, and is still today defined as, "the CMRS emergency telephone service charge levied under KRS 65.7629(3) and collected under KRS 65.7635." *See* KRS 65.7621(10), (emphasis added). The plain language of the 1998 statutes imposed the CMRS service charge "per CMRS connection" KRS 65.7629(3). A "CMRS connection" is, and has always been, defined as "a mobile handset telephone number assigned to a CMRS customer" (i.e., a cell phone number). KRS 65.7621(6). A "CMRS customer" is and always has been defined as a person [or end user] "to whom a mobile handset telephone number is assigned and to whom CMRS is provided in return for compensation." KRS 65.7621(7). In other words, every person who has an active cell phone number assigned to him each month in return for compensation is subject to the CMRS service charge. Prepaid customers, just like postpaid customers, are assigned a cell phone number in return for compensation, and, therefore have been subject to the CMRS service charge since the enactment of the 1998 statutes.

Furthermore, the plain and unambiguous terms of the 1998 CMRS Act required *all* CMRS providers to collect and to remit the CMRS service charge to the CMRS Board. The 1998 statutes expressly stated that *every* CMRS 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." KRS 65.7635(1) (emphasis added), Ky. Acts Ch. 535 §8, effective July 15, 1998. The "billing" language merely modifies the mandate that all CMRS providers be a collection agent and collect the universal service charge from their customers. As correctly held by Judge Heyburn, "in light of the definitions examined, the statute, at its most basic level and in no uncertain terms, requires [prepaid providers] to collect the service fee from [their] Kentucky customers." *CMRS Board v. TracFone, supra,* 735 F.Supp. 2d at 722.

Virgin Mobile points to the references to "bills" in KRS 65.7635(1) as enacted in 1998 to suggest that the 1998 statutes only imposed the CMRS service charge on postpaid (billed) wireless services. However, KRS 65.7635(1) directs how the service charge is to be collected, and more particularly, how the service charge is to be communicated to the CMRS customer on any bill. Focusing on the term "bill" to suggest that a provider's choice of payment methodology obviates the duty to pay, collect and remit an otherwise uniform service charge subverts the plain intent that the CMRS service charge be levied on all CMRS connections and be collected by all CMRS providers.

As the prior courts correctly determined, Virgin Mobile is essentially seeking an implied exemption from an otherwise universal service charge based on its chosen

collection methodology. The CMRS Act, itself, mandates that the CMRS service charge "shall have uniform application within the boundaries of the Commonwealth." KRS 65.7627. Moreover, Kentucky courts hold that the "power to tax should always be exercised so as to produce as nearly as possible equality and uniformity in burdens imposed." *City of Harrodsburg v. Devine*, 418 S.W.2d 426, 428 (Ky. App. 1967). From a tax perspective, "taxation of all is the rule and exemption is the exception." *See George v. Scent*, 346 S.W.2d 784, 789 (Ky. 1961). More importantly, exemptions will not be implied and they will be construed against the taxpayer. *Id.; See also Martin v. High Splint Coal Co.*, 268 Ky. 11, 103 S.W.2d 711, 714 (1937); *See also Dept. of Revenue v. To Your Door Pizza, Inc.*, 670 S.W.2d 482 (Ky. App. 1983)(finding no vagueness that a carry-out pizza was a "meal" for the purpose of sales tax and relevant exemptions for "food").

The CMRS Act has never been ambiguous regarding who is required to pay the service charge. The "subject to be taxed" (i.e. every CMRS connection) has always been clear and unambiguous, and no "strained construction" is necessary to arrive at this result. *George*, 346 S.W.2d at 789. Virgin Mobile maintains that the "billing" language clearly indicated that only postpaid wireless customers and providers were subject to the CMRS Act, and that Virgin Mobile is not seeking an implied exemption. However, notably, Virgin Mobile has remitted reports to the CMRS Board pursuant to KRS 65.7639 since its enactment in 2001, which requires CMRS providers to report to the Board "the number of subscribers receiving bills in each zip code served by the provider..." (emphasis added). As maintained by Virgin Mobile in this appeal, its customers do not receive "bills." Nevertheless, Virgin Mobile has complied with this

statute. This inconsistency illustrates why focusing on the term "bill" to such an extent leads to an absurd and illogical result, contrary to the clear intent of the CMRS Act.

The Circuit Court, the Kentucky Court of Appeals, the U.S. District Court and the Sixth Circuit Court of Appeals correctly held that the reference to "bills" and "normal monthly billing process" in KRS 65.7635(1) (the 1998 statutes) does not show a legislative intent to levy the service charge on only postpaid (billed) wireless service. The Sixth Circuit stated that while the billing language offers one possible billing method, there was no indication that the billing language "has a limiting effect in applicability to CMRS providers." *CMRS Board v. TracFone Wireless, supra,* 712 F.3d at 914.

In addition, the Washington Supreme Court addressed this issue regarding similar statutory language in a lawsuit brought by TracFone against the Washington Department of Revenue challenging a 911 excise tax required to be collected from subscribers and paid to the Washington Department of Revenue. In *TracFone Wireless, Inc. v. Washington Department of Revenue,* 170 Wash.2d 273, 242 P.3d 810 (2010), TracFone claimed that it could not collect the 911 excise tax from its subscribers as directed by a Washington statute [RCW 82.14B040], therefore it should not be required to remit the tax. The Court found that, although the statutes contemplate collection of the fee from the subscriber, "any difficulty in collecting the tax from the subscriber is due to TracFone's choice of business model." *Id.* at 818. *See also, Virgin Mobile USA, LP v. Arizona Dept. of Revenue,* 230 Ariz. 261, 282 P.3d 1281 (Ariz. App. 2012)("even if [Virgin Mobile] does not have customers whom it bills monthly, it is required, as a wireless provider, to calculate and remit the 911 tax monthly") and *T Mobile South, LLC*

v. Bonet, 85 So.3d 963 (Ala. 2011)(the legislature did not create an ambiguity in the Alabama CMRS Act when it used the term "billing provider" - the statute applied to prepaid providers even though these providers do not send monthly bills to customers).

The Washington Supreme Court also rejected TracFone's argument that language in the statute stating that the amount of tax was to be "stated separately on the billing statement sent to the subscriber" excluded prepaid providers. In this regard, the Court stated:

> While this language shows legislative intent that the tax is to be stated separately in a billing statement, neither statute requires that a statement must be sent. If a monthly statement is sent the tax must be stated separately, but if a company does not send monthly billing statements, the directive has no further significance. ...The fact that TracFone does not send monthly billing statements is a consequence of the way in which it chooses to conduct business. It does not relieve TracFone of its obligations under the taxing statutes nor does it convert a plainly taxable event into a nontaxable event. *TracFone*, 242 P.3d at 819.

Similarly, the language in the 1998 CMRS Act simply required prepaid providers to list the CMRS service charge as a separate charge on monthly bills if the providers chose to send monthly bills.

There is no exclusion or exemption in the CMRS Act for wireless providers whose chosen method of conducting business is prepaid, rather than monthly billing, and Virgin Mobile should not be permitted to seek an implied exemption where there is none. The 1998 statutes imposed the CMRS service charge on all CMRS connections without exception, and required that all CMRS providers collect the charges. The previous courts correctly held that Virgin Mobile was seeking an implied exemption, based on its own chosen business model, from an otherwise universal tax, and that Virgin Mobile failed to meet its burden to show a clear exemption.

B. Virgin Mobile Can Calculate the Service Charge for Prepaid Services Under the 1998 CMRS Act.

Virgin Mobile claims that the CMRS Board has never been able to determine how a prepaid provider would calculate or collect the service charge under the 1998 CMRS Act. However, the CMRS Board is not responsible for calculating the service charge as the providers have always been "self-reporting." The providers make their own calculations of the service charges and remit these to the CMRS Board. For Virgin Mobile to claim that it is unable to calculate the service charge for prepaid providers under the 1998 statute is disingenuous, as KRS 65.7629(3) clearly stated that the service charge was seventy cents per month per CMRS connection. Virgin Mobile clearly was able to calculate the service charge when it voluntarily remitted from August, 2002 through May, 2005.[8] Virgin Mobile's Vice-President for Tax and Regulatory Compliance, Gary Wagner, was familiar with the calculation of CMRS service charges paid by Virgin Mobile to the CMRS Board from August, 2002 through May, 2005. Mr. Wagner testified that the CMRS service charge, prior to 2006, was calculated by multiplying the Virgin Mobile subscriber count by $.70 and excluding the 1.5% administrative fee [Wagner depo., at pp. 39, 49].

Nevertheless, Virgin Mobile cites to deposition testimony from former CMRS Board chair David Lucas to support its position that the CMRS Board allegedly does not know how to calculate CMRS service charges for prepaid providers. The colloquy in the deposition related to whether a customer who buys two prepaid cards during one calendar

[8] The Sixth Circuit rejected a similar argument made by TracFone, stating that "to the extent that TracFone argues difficulty in collecting the fees, we are unpersuaded considering the fact that TracFone had collected and paid the fees until 2003." *CMRS Board v. TracFone*, 712 F.3d at 914.

month would be billed seventy cents ($.70) or $1.40 for that month. Virgin Mobile emphasizes that Mr. Lucas did not know how the CMRS fee would be assessed in that situation (Lucas depo., at pp. 46-47). The same argument made by TracFone was addressed in *TracFone v. Washington Dep't of Revenue, supra.* The Washington Supreme court held that the 911 tax was not based on the number of minutes or cards used by a customer but was a monthly rate assessed to a particular number (or "connection" as the term is used in the CMRS Act). The number of minutes or number of cards purchased by a subscriber is irrelevant, as the tax is imposed on a particular phone number on a monthly basis as explicitly stated in the statute. *Id.* at 818. The Court found that the Washington Department of Revenue was not required to "explain to TracFone how to conduct its business in order to comply with the tax collection obligation." *Id.* at 819.

The CMRS Act's clear intention is that all CMRS connections in Kentucky be assessed the service charge. Undoubtedly, the reference to "bills" created practical problems for Virgin Mobile as applied to a prepaid business model. However, it is not the CMRS Board's duty to tell prepaid providers how to collect or calculate the fee. As noted by the Washington Supreme Court, "the manner in which a clearly taxable event (an assigned cell phone number) is marketed can[not] negate a tax that is otherwise clearly payable. Any difficulty in collecting the tax from the subscriber is due to [Virgin Mobile's] choice of business model." *TracFone*, 242 P.3d at 818.

The 1998 statutes imposed the CMRS service charge on all CMRS connections without exception.. As stated by Judge Heyburn in the TracFone case, "a grant of exemption from taxation is never presumed" and in all cases of doubt, the burden is on

the claimant to clearly establish its right to an exemption. *CMRS Board v. TracFone*, 735 F. Supp.2d at 723.

C. Incorporating the Terms of the MTSA into the CMRS Act in 2001 Did Not Exempt Prepaid Services from the CMRS Act.

Virgin Mobile and the CTIA – The Wireless Association® (hereinafter the "CTIA"), in its *amicus* brief, claim that the CMRS service charge did not apply to prepaid wireless service prior to the 2006 amendments because the CMRS Act, as amended in 2002, incorporates provisions from the Mobile Telecommunications Sourcing Act ("MTSA"), 4 U.S.C. §116, *et seq*. A complete understanding of the MTSA and its purpose is important to understanding why the incorporation of the MTSA has no bearing on whether the CMRS Act, prior to the 2006 amendments, applied to prepaid services.

i. The MTSA is Simply a Tax Sourcing Statute.

Pursuant to the 1998 statutes, the CMRS Board was charged with collecting the CMRS service charge "from *each CMRS connection* within the Commonwealth." *See* KRS 65.7629(3) (emphasis added), 1998 Ky. Acts 535 §5. In 2002, the CMRS Act was amended to incorporate provisions from the MTSA. *See* KRS 65.7629(2), Amended 2002 Ky. Acts 69 §3, effective July 15, 2002; KRS 65.7640, Created 2002 Ky. Acts 69, §4, effective July 15, 2002. As amended in 2002, the CMRS Board was charged with collecting the CMRS service charge "from each CMRS connection with a place of primary use, as defined in 4 U.S.C. sec. 124 [the "MTSA"], within the Commonwealth." KRS 65.7629(3) (effective as amended on July 16, 2002).

The MTSA is a federal act which attempted to address the problems of determining the appropriate taxing jurisdiction for wireless calls (i.e., "sourcing," or

which states, counties and/or cities can impose taxes, fees or charges on wireless services). The MTSA merely determines which jurisdiction can tax a wireless call. *See* 4 U.S.C. §116, *et. seq.* Essentially, the MTSA provides that the jurisdiction encompassing the cell phone customer's "place of primary use" is the jurisdiction that can tax that cell phone transaction, no matter from where a cell phone call may originate or terminate, or where the customer may travel during a cell phone call. *See* 4 U.S.C. §117(b); 4 U.S.C. §124(8). A "place of primary use," as defined in the MTSA, is simply a cell phone user's residential or business address. *See* 4 U.S.C §124(8).

The MTSA, by its terms, "(1) do[es] not apply to the determination of the taxing situs of prepaid telephone calling services..." *See* 4 U.S.C. §116(c)(1). However, the MTSA does not prohibit states from assessing fees or taxes on prepaid wireless services. Furthermore, the MTSA does not state that prepaid customers utilizing a prepaid service have no "place of primary use," as that term is defined in 4 U.S.C. §124(8). 4 U.S.C. §116(c) merely states that the MTSA does not mandate how to determine the taxing situs of prepaid services. Moreover, the MTSA does not prohibit a taxing jurisdiction from basing the appropriate taxing situs for prepaid services on the prepaid customer's "place of primary use," as that term is defined in the MTSA.

The Arizona Court of Appeals found against Virgin Mobile when it addressed the issue of whether the MTSA prohibited the state from assessing taxes on prepaid wireless services in a lawsuit brought by Virgin Mobile against the Arizona Department of Revenue seeking a refund of taxes paid pursuant to a statute similar to the 1998 CMRS Act. *Virgin Mobile, supra,* 230 Ariz. at 265. The Court acknowledged that the MTSA expressed that the jurisdiction or situs for charges for mobile telecommunications

services was the customer's "place of primary use." However, the purpose of the MTSA was to prevent wireless phone calls from being subject to multiple tax applications. *Id.* at 264-265. Virgin Mobile argued that the Arizona 911 statutes provide that taxes can only be levied and collected if Arizona is a taxing situs as defined by the MTSA, and because the MTSA specifically excludes prepaid wireless services, then prepaid was not subject to Arizona's 911 tax. The Court again disagreed with Virgin Mobile, finding that the incorporation of the MTSA in the Arizona statutes only meant that "Arizona's tax jurisdiction over those prepaid services rests on some legal basis other than the MTSA." *Id.* at 265. The Arizona court concluded that the MTSA did not make the 911 tax inapplicable to providers of prepaid wireless services. *Id. See also, T Mobile South, LLC, supra*, 85 So.3d at 981, 982 ("The legislature incorporated into the [CMRS] Act only the MTSA definition of 'place of primary use' and did not incorporate other provisions of the MTSA for the obvious reason that the MTSA is a tax-sourcing legislation and not intended to fund emergency 911 service"). This Court should also reject Virgin Mobile's argument that the MTSA prohibits Kentucky from assessing fees on prepaid wireless services.

ii. Virgin Mobile's Kentucky Customers have a "Place of Primary Use" in Kentucky.

Virgin Mobile claims that because the CMRS Act was amended in 2002 to refer to the MTSA, and its customers have no "place of primary use" as that term is used in KRS 65.7629(3), then its prepaid customers were not the intended subject of the CMRS service fee. A "place of primary use," as defined by the MTSA, is simply a person's residential or business address. *See* 4 U.S.C. §124(8). Wireless service, regardless of whether it is paid for on a prepaid or postpaid basis, is by its very nature, a *mobile* service

(not a landline tied to a physical address). However, prepaid customers, just like postpaid customers, have primary residential or business addresses. The fact that a prepaid customer pays for his/her cell phone service in advance, instead of receiving a bill, does not mean that customer has no primary address (residential or business). The MTSA does not state prepaid customers *ipso facto* have no "place of primary use" – it merely leaves open the question of the appropriate taxing situs for prepaid wireless services.

In order to activate its prepaid service, Virgin Mobile admittedly collects a zip code from its customer and, in return, gives the customer a cell phone number. [Wagner Depo., at p. 33]. Virgin Mobile was remitting the service charge to the CMRS Board for three years based on the number of active prepaid customers with a Kentucky zip code each month. [Wagner Depo., at pp. 37, 39, 86-87; See also Exhibit 1 to the CMRS Board's Sealed Memo]. Furthermore, Virgin Mobile has consistently provided quarterly reports to the CMRS Board of the number of prepaid subscribers in Kentucky by zip code. [Wagner Depo., at p. 39]. Certainly, Virgin Mobile could always track how many active prepaid wireless customers it had with a Kentucky zip code. *See, TracFone Wireless v. Washington Dep't of Revenue, supra,* 242 P.3d at 816 (the court found that where a Washington zip code was provided to TracFone, the customer's "place of primary use" was sufficiently shown to be within Washington state).

Likewise, Virgin Mobile could determine its customer's "place of primary use" by asking for the customer's residential or business address prior to activating the customer's prepaid wireless service – it simply chooses not to do so. As the Washington Supreme Court aptly stated in rejecting this same argument raised by TracFone, "[t]he requirement that the tax is due on radio access lines whose place of primary use is located

within Washington is satisfied. We acknowledge, as does the Department, that TracFone does not obtain the street address representative where the subscriber's use of the cell phone primarily occurs. But while TracFone has not required much in the way of personal information for its prepaid wireless service, it does require, at a minimum, the zip code of the place where the phone will be primarily used. For those cell phones for which a Washington State zip code is provided, the place of primary use is sufficiently shown to be within Washington State." *See TracFone*, 242 P.3d at 816.

Therefore, Virgin Mobile's customers with a Kentucky zip code have a "place of primary use" in Kentucky, regardless of whether Virgin Mobile chooses not to collect a street address prior to activating the phone.

iii. The 2006 Amendments Continue to Incorporate the MTSA, Specifically With Respect to Prepaid Services.

To be sure, even the 2006 amendments belie Virgin Mobile's claim that incorporating the MTSA into the CMRS Act made the CMRS service charge inapplicable to prepaid services.[9] As amended in 2006, the CMRS Act *still fully incorporates* the terms of the MTSA into the CMRS Act. *See* KRS 65.7640. More importantly, KRS 65.7629(3) still uses the term "place of primary use" with respect to prepaid services.

Pursuant to the 2006 amendments, KRS 65.7629(3) now states that the CMRS Board is required to collect the service charge from *prepaid connections* either "*With a place of primary use, as defined in 4 U.S.C. sec. 124, within the Commonwealth;*" or "with a geographical location associated with the first six (6) digits... of the mobile

[9] Virgin Mobile argues that the CMRS Board desired to amend KRS 65.7629(3) by removing the words "as defined in U.S.C. sec. 124" from the statute (Virgin Mobile brief, p. 21). It is no surprise that the CMRS Board supported amending the statutes given that several of the largest prepaid providers were refusing to remit the CMRS service charge.

telephone number is inside the geographic boundaries of the Commonwealth." *See* KRS 65.7629(3), Amended 2006 Ky. Acts 219, §4, effective July 12, 2006. (emphasis added). If the legislature believed the term "place of primary use," as defined by the MTSA, to be completely inapplicable to prepaid connections, it would have eliminated that term with the 2006 amendments. Instead, KRS 65.7629(3), as amended, retains the term "place of primary use," and *specifically applies that term* to "prepaid connections."

The fact that the amended version of the statute continues to use the term "place of primary use" with respect to prepaid connections contradicts Virgin Mobile's and CTIA's argument that by using that term prior to the 2006 amendments, the CMRS Act was never intended to apply to prepaid services. *See Inland Steel Co. v. Hall*, 245 S.W.2d 437, 438 (Ky. App. 1952) (in amending a statute, the legislature is presumed to know the existing law, and construing *an omission* from a previous statute to effectuate a change in the law).

D. The Legislature Was Not Required to Anticipate All Methods of Providing Wireless Services When It Enacted the 1998 CMRS Act

Virgin Mobile next argues that when the CMRS Act was enacted in 1998, postpaid providers were the only known providers; therefore, presumably, the legislature could not have enacted a statute that applied to prepaid services. This issue was succinctly addressed by Judge Heyburn in *CMRS Board v. TracFone*, wherein the Court noted that:

> The facts that the word prepaid is not in the statute and that its sponsors had never heard of prepaid cell phones are irrelevant. The statute defines "CMRS provider" without reference to any method of payment or business model. *CMRS Board v. TracFone, supra,* 735 F.Supp.2d at 721, n. 6.

Likewise, the Sixth Circuit found that it is not the responsibility of the legislature to contemplate all possible billing methods of providers when the statute clearly states that it applied to all providers equally. *CMRS Board v. TracFone, supra,* 712 F.3d at 914.

In support of its argument that the legislature could not have intended the CMRS Act to apply to prepaid services when prepaid was allegedly not in existence when the statute was enacted, Virgin Mobile cites *American Bankers Insurance Group v. U.S.*, 408 F.3d 1328 (11th Cir. 2005). The case is inapposite as it addresses a statute relating to taxation of long distance telephone services which has no similarity or relevance to the CMRS Act at issue herein. The issue in *American Bankers* was the interpretation of an IRS statute assessing taxes for toll telephone services; specifically, whether the term "and" in the phrase "distance and elapsed transmission time" was to be used conjunctively or disjunctively. The Court found that toll telephone services were to be based upon distance and time as stated in the unambiguous terms of the statute. *Id.* at 1333. The statute and interpretation thereof by the Court has no applicability to this Court's interpretation of the CMRS Act.

Likewise, Virgin Mobile's reliance on *Officemax, Inc. v. U.S.*, 428 F.3d 583 (6th Cir. 2006) is misplaced. This case also addressed the definition of "toll telephone service" and whether the legislature intended "and" to be used conjunctively in the phrase "distance and elapsed transmission time." The Court found that the term "and" should be given its ordinary conjunctive meaning, and long-distance service which charges were based on elapsed time, but not distance, were not to be taxed under the definition of "toll telephone service." Again, it is unclear how this Court should apply the Court's ruling in *Officemax*

to the CMRS Act which has no similarity to the IRS statute requiring an excise tax on toll telephone services.

However, in contrast to the tax statute interpreted in *OfficeMax*, the CMRS Act does not levy the CMRS service charge on the basis of how the wireless customer purchases his/her wireless service, and the General Assembly did not draft a statute that expressly covers a specific business model. The CMRS Act states that the CMRS service charge shall be collected from "each CMRS connection." Therefore, the CMRS Act is akin to "[a] statute enacted in 1890 that imposed an excise tax on sales, say, of 'any vehicle of transportation'" which the Sixth Circuit opined "would cover airplanes, even though they were not invented until several years after 1890." *OfficeMax*, 428 F.3d at 593.

Whether or not prepaid telephone services were in existence at the time the CMRS Act was enacted in 1998 is irrelevant to the analysis of the Act's applicability to prepaid providers. The statutes clearly required each CMRS provider to collect and remit CMRS service charges [KRS 65.7635(1)]. It is undisputed that Virgin Mobile is a "CMRS provider" as defined by KRS 65.7621(9) and that the CMRS Act was required to be uniform in its application. The legislature was not required to anticipate every type of CMRS provider when it enacted the statute, nor was it required to anticipate every billing method that would be utilized by providers. The fact is that all CMRS providers, including Virgin Mobile, were encompassed by the 1998 CMRS Act and required to remit CMRS service charges to the CMRS Board.

E. The 2006 Amendments to the CMRS Act Clarified How the CMRS Service Charge Could Be Collected by Prepaid Providers, but Did Not Amend Who Owed the Service Charge.

Virgin Mobile asserts that the CMRS Act was substantially amended in 2006, and therefore, those substantial amendments necessarily indicate a change in the law. First, amendments do not necessarily indicate intent to change the law, but can be utilized to clarify the original intent when such intent has come into question. *See 2B Norman J. Singer, Sutherland Statutory Construction* § 49:11, at 120-21 (6th ed. 2000); *See also King v. Campbell County*, 217 S.W.3d 862, 870 (Ky. App. 2006); *Meshew v. Whitlock*, 9 S.W.3d 581, 583-584 (Ky. App. 1999); *Democratic Party of Kentucky v. Graham,* 976 S.W.2d 423, 428 (Ky. 1998); *Britt v. Com.*, 965 S.W.2d 147 (Ky. 1998); *Com., Cent. State Hosp. v. Gray*, 880 S.W.2d 557 (Ky. 1994) (all finding that amendments to statutes were intended to clarify the original intent of and not to change the law). Second, although the 2006 amendments quite clearly changed the law with regard to the collection methodology for prepaid wireless services, the amendments did not alter the taxable event (i.e., "per CMRS connection").[10]

The 2006 amendments changed how the CMRS service charge could be collected from prepaid customers. *See* KRS 65.7635(1)(a-c) which added three collection

[10] It is true that when KRS 65.7629(3) was amended in 2006, 2006 Ky. Acts. 219, §4, the term "prepaid" was explicitly added, but that term is superfluous considering that no one disputes that a prepaid connection has always been a "CMRS connection" under any version of the statute. Under KRS 65.7621, the legislature did not add a definition of "prepaid" or "prepaid connections" and clearly believed that the term "CMRS connection" always encompassed prepaid connections. In addition, the 2006 amendment to the statutes kept the term "CMRS connection with a place of primary use…within the Commonwealth," even with respect to prepaid connections. (see discussion *supra*). The only real change to KRS 65.7629(3) was the addition of the option for the CMRS Board to levy the service charge on prepaid connections with cell phone numbers within the boundaries of the Commonwealth.

methodologies "[f]or CMRS customers who purchase CMRS services on a prepaid basis." As Judge Heyburn noted, "TracFone [and Virgin Mobile] make too much of the change and the presumption [that an amendment equates to a change in the law]. A closer examination of the amendments reveals that they only changed the method of collection, not the general collection obligation of cell phone providers." 735 F.Supp.2d 713 at 725. [T]he "billing" collection methodology was a "defect in the original statute" because it did "not comport with prepaid providers' chosen business model," and, therefore, was amended. *Id.* If the legislature had intended to change the "subject to be taxed" it undoubtedly would have added a definition for "prepaid" CMRS connections, "prepaid" CMRS customers, and "prepaid" CMRS providers and shown an intent to levy a new CMRS service fee on prepaid services.

The Kentucky Court of Appeals' decision rejected Virgin Mobile's argument that the 2006 changes to the CMRS Act indicated that prepaid providers were not covered by the 1998 statute. The Court pointed to the first sentence of the 2006 version of KRS 65.7635 which was identical to the 1998 version and required each CMRS provider to act as a collection agent for the CMRS Fund, and noted that the 2006 statute left the definition of "CMRS provider" largely unchanged. *Id.* at pp. 27-28. Thus, the 2006 amendments changed "only the permissible methods of collection and not the duty to collect." *Id.*

Contrary to Virgin Mobile's, CTIA's and TracFone's assertions, the fact that the legislature did not make the 2006 amendments retroactive or expressly indicate a legislative intent to "clarify prospectively" is no indication that the CMRS service charge was not imposed on prepaid services prior to the 2006 amendments. The amendments

regarding how the service charge could be collected from prepaid customers resulted directly from certain prepaid providers' refusal to remit the service charge because of their claim that they did not "bill" their customers. The added collection methodologies for prepaid providers made with the 2006 amendments were certainly new and were applied on a prospective basis. However, the "subject to be taxed," (i.e., every CMRS connection), was not amended; therefore, the legislature had no need to make the amendments retroactive or to clarify their intent prospectively.

In support of their argument that the 1998 statutes are ambiguous, Virgin Mobile and CTIA focus on public commentary and press releases surrounding the proposed legislation to amend the CMRS Act in 2006. It is a basic rule of statutory construction that parol evidence, other than the legislative history of the statute, is not considered when a Court is interpreting a statute. *Board of Trustees of the Judicial Form Retirement System v. Commonwealth of Kentucky*, 132 S.W.3d 770, 786 (2003); *See also, Light v. City of Louisville*, 248 S.W.3d 559, 562 (Ky. 2008). As set forth, *supra*, the 1998 statutes clearly levy the CMRS service charge on all CMRS connections, without exception, and resort to parol evidence is unnecessary.

Nevertheless, the only "legislative history" cited in support by Virgin Mobile is a Fiscal Note Statement for HB 656, which states that the amendment "closes a loophole by requiring 'prepaid' wireless phone services to pay the surcharge as well." [See Appendix C to Virgin Mobile's Sealed Memorandum in Support of Summary Judgment filed on January 22, 2010]. The purpose of a Fiscal Note is to estimate the financial

impact of a statute, not to indicate the legislative purpose of the statute.[11] Clearly, the 2006 amendments to the CMRS Act had a significant fiscal impact considering certain prepaid providers refused to remit the service charge unless the statutes were amended. The plain language of the CMRS Act prior to the 2006 amendments, as well as the purpose of the CMRS Act, should control – not reliance on the public's view of the CMRS Act or a mandatory "Fiscal Note Statement" prepared by the LRC. The Circuit Court and Judge Heyburn correctly refused to assign any weight to this parol evidence in light of the CMRS Act's clear mandate to impose a universal service fee on all cell phone connections.

This Court should affirm the Court of Appeals' decision that the 1998 statutes applied to prepaid wireless service and the judgment in favor of the CMRS Board.

II. The Court of Appeals' Opinion is Supported by the Outcomes in Other States, as well as the U.S. District Court for the Western District of Kentucky and the Sixth Circuit Court of Appeals.

Virgin Mobile argues that "several" state supreme courts and state agencies considering similar statutes have held that the legislature did not intend to tax prepaid wireless services, and cites cases from courts in Georgia, Michigan, and Montana. Virgin Mobile then misinterprets the decisions cited previously herein of the Washington Supreme Court, the Alabama Supreme Court and the Arizona Court of Appeals, wherein

[11] Pursuant to KRS 6.955, a fiscal note is required for each "bill or resolution which relates to any aspect of local government or any service provided thereby" unless waived. Generally, the Legislative Research Commission prepares the Fiscal Note Statement. KRS 6.960(1). The Fiscal Note is "a realistic statement of the estimated effect on expenditures or revenue of local government in implementing or complying with any proposed act of the General Assembly whether filed in regular session or prefiled during the interim, order, or administrative law." KRS 6.950(1).

these courts found that prepaid providers were required to pay 911 service charges based on statutes which were substantially similar to the CMRS Act.

Virgin Mobile erroneously argues that the collection statute at issue in *TracFone Wireless, Inc. v. Washington Dep't of Revenue,* 242 P.3d at 810 did not mention billing and is therefore not applicable herein. In fact, the Washington statute, like the CMRS Act, provided that the amount of the tax was to be "stated separately on the **billing** statement which is sent to the subscriber" [RCW 82.14B.040]. TracFone argued that the reference to a **billing** statement excluded prepaid providers; therefore, the legislature intended to exclude those providers from the statute. The Washington Supreme Court found that if a bill was sent by a provider, then the tax should be separately stated in the billing statement, but if a company did not send monthly billing statements as a consequence of its chosen business model, the directive "has no further significance." *Id.* at 819.

The Washington statute was very similar to the CMRS Act at issue herein, in that the Washington statute stated that the tax "shall be collected from the subscriber" by the provider. TracFone argued that since it did not collect taxes from its subscribers, the tax was not due. The Court did not agree with TracFone's position and stated that "the manner in which a clearly taxable event (an assigned cell phone number) is marketed cannot negate a tax that is otherwise clearly payable." *Id.* at 818.

Virgin Mobile also misinterprets the Alabama Supreme Court's decision in *T-Mobile South, LLC v. Bonet*, 85 So.3d 963, 968 (Ala. 2011) claiming that the Court only found in favor of the Alabama CMRS Board because it was giving great weight to the agency's own construction of the CMRS statutes. The 1998 Alabama CMRS statutes,

ALA Code §11-98-8, stated that the CMRS providers were to "act as a collection agent for the CMRS fund" and to collect the service charges "as part of the provider's normal monthly billing process." *Id.* at 976. Thus, the Alabama statute was identical to the 1998 version of KRS 65.7635(1). The Alabama court found the decision of Judge Heyburn in the *TracFone* case to be very persuasive and cited extensively to that decision. *Id.* at 979-981. The Alabama Supreme Court concluded that its statute applied to prepaid providers despite the "normal monthly billing process language" stating:

> We conclude that the 1998 amendment to the Act did not exclude prepaid customers from the emergency 911 service charge. We agree with the trial court that it would lead to an absurd result to conclude that although both prepaid and postpaid wireless customers have equal access to emergency 911 services, only postpaid wireless customers must pay the service charge to fund the emergency 911 system. *Id.* at 981.

The Court further noted that the legislature's broad definition of a "CMRS provider" indicated a clear intent to include all providers regardless of the method by which they charge or bill for their services. *Id.*

Finally, Virgin Mobile attempts to distinguish an Arizona case brought by Virgin Mobile seeking a refund of 911 taxes paid to the Arizona Department of Revenue. In *Virgin Mobile USA, LP v. Arizona Dep't of Revenue,* 230 Ariz. 261, 282 P.3d 1281 (2012), Virgin Mobile argued that the Arizona statute in question imposed a tax only on wireless services that are billed monthly and claimed that since it did not bill each month for prepaid, the statute was not applicable to it. Virgin Mobile relied on language in the statutes which defined a "customer" of wireless providers as those who receive "bills regularly issued." *Id.* at 264 (citing A.R.S. §42-5251(1)). The Court disagreed and found that the language was a reasonable way of defining who is a customer but did not exclude

providers who did not send monthly bills from the obligation to collect and remit 911 taxes. *Id.*

Virgin Mobile also argued that this Court owes no deference to the decision of the Sixth Circuit in *CMRS Board v. TracFone Wireless, supra.* Although this Court is not legally bound by the decisions of the U.S. District Court and the Sixth Circuit Court of Appeals in the *TracFone* case based on virtually identical facts and legal arguments, the CMRS Board asserts that the federal court cases present well-reasoned and instructive analyses of the statutes at issue, and followed the Jefferson Circuit Court's interpretation of the CMRS Act. Virgin Mobile's misguided attempts to distinguish the cases cited above, including the Arizona case in which Virgin Mobile was a party and made the same arguments asserted in this Kentucky case, must be rejected. The Kentucky federal courts, as well as the Arizona, Washington and Alabama state courts, correctly interpreted the CMRS statutes to apply to all wireless providers including prepaid providers like Virgin Mobile.

III. Virgin Mobile is not Entitled to a Refund or a Credit of CMRS Service Charges it Voluntarily Remitted.

As opposed to seeking a determination regarding whether the 1998 statutes applied to prepaid providers and seeking a refund in a court of competent jurisdiction, Virgin Mobile unilaterally decided to take a credit in the amount of $286,807.20 for service charges it had allegedly "erroneously" paid between August, 2002 and May, 2005. Virgin Mobile filed a Counterclaim with the trial court maintaining that it was entitled to a refund and its unilateral credit. [R. 12-25]. The CMRS Board maintained that even if the 1998 statutes did not apply to Virgin Mobile, that Virgin Mobile,

nevertheless, was not entitled to a refund by statute or at common law for amounts it voluntarily overpaid.

Because the trial court and the Kentucky Court of Appeals determined that the CMRS Act always applied to prepaid services, it was unnecessary for these courts to determine whether Virgin Mobile was entitled to a refund or to take a credit for amounts remitted prior to the 2006 amendments (R. 190; Opinion, at p. 28, Tab "3" to Virgin Mobile's brief). Nevertheless, this Court is permitted to affirm the lower courts' decisions on any grounds supported in the record. *See Richmond v. Louisville and Jefferson County Metropolitan Sewer District*, 572 S.W.2d 601, 602 (Ky. App. 1977) ("It is the duty of the reviewing court to consider all the grounds raised, and to affirm the judgment if it should properly have been entered on any of the grounds raised.").[12]

A. The CMRS Service Charge is not a Tax; therefore, KRS 134.580 is not Applicable.

The CMRS Act, itself, provides no means or method for a CMRS provider to request or receive a refund of service charges remitted. Virgin Mobile claims that it is entitled to a tax refund (and thus to take a unilateral credit) pursuant to KRS 134.580 which authorizes a refund "of any overpayment of tax where no tax is due." The statute requires the taxpayer to claim the refund within four years of payment [KRS 134.580(3)].

KRS 134.580 only applies to an overpayment of state *taxes*. The CMRS Board disputes that the CMRS service charge is a tax. A "tax is universally defined as an enforced contribution to provide for the support of government, whereas a fee is a charge for a particular service." *Long Run Baptist Ass'n, Inc. v. Louisville and Jefferson County*

[12] These arguments were raised in the CMRS Board's Sealed Memorandum at pp. 26-29; See also CMRS Board's Response to Virgin Mobile's Cross Motion for Summary Judgment; R. 110-145.

Metropolitan Sewer District, 775 S.W.2d 520, 522 (Ky. App. 1989); *See also Kentucky River Authority v. City of Danville*, 932 S.W.2d 374, 375 (Ky. App. 1996).

In *Long Run Baptist*, property owners were assessed a sewer and drainage fee in order to fund a storm water drainage program. The storm water drainage system in *Long Run Baptist* was for the benefit of all residents in Jefferson County, even though some areas and individuals may not have seen the direct benefit from the improvements as they were utilizing other improvements on their own. *Id.* The property owners argued the fee was, in fact, an impermissible "tax" because there was no rational relationship between the fee and the benefit received from the fee. *Id.* The Court held that the charges "for sewer service are not taxes anymore than are bridge tolls or water rents." *Id.*

The CMRS service charge is analogous to the fees referenced in *Long Run Baptist*. The CMRS service charge is not imposed against Virgin Mobile, but on the end users of the cell phones in order to provide a readily accessible and reliable 911 system. The service is provided to everyone who has a cell phone in the Commonwealth of Kentucky. If one does not have a cell phone, they do not pay the fee since they have no need to access the 911 system. Although all persons with cell phones may not actually utilize the system, they have the ability to access a reliable E911 system and thus benefit from the service charge. Furthermore, although CMRS providers remit to the "State Treasury," the CMRS service charges are collected and kept in a separate account solely for the administration of the CMRS Act. KRS 65.7627. *See also Kentucky v. Louisville Atlantis Community/Adapt, Inc.*, 971 S.W.2d 810 (Ky. App. 1997) (finding no tax, and noting that the funds generated from the statute are kept in a separate account and are

used by the Charitable Gaming Division only in the administration and enforcement of the applicable gaming act).

Therefore, the CMRS service charge is not a tax, and KRS 134.580 is inapplicable.

B. Even if KRS 134.580 is Applicable to a Refund of CMRS Service Charges, Virgin Mobile Failed to Comply with the Statute.

Virgin Mobile alleges KRS 134.580 is applicable *to authorize* its unilateral refund and credit, but that Virgin Mobile does not have to comply with the administrative requirements contained in the very same statute. However, if the CMRS service charge is a state tax, paid to a state agency, as argued by Virgin Mobile, then Virgin Mobile must comply with the administrative remedies provided in KRS 134.580. Virgin Mobile did not comply with the statute, and thus cannot claim a right to a refund pursuant to KRS 134.580.

KRS 134.580 states in relevant part:

> (2) When money has been paid into the State Treasury in payment of any state taxes, except ad valorem taxes, whether payment was made voluntarily or involuntarily, the appropriate agency shall authorize refunds to the person who paid the tax, or to his heirs, personal representatives or assigns, of any overpayment of tax and any payment where no tax was due. When a bona fide controversy exists between the agency and the taxpayer as to the liability of the taxpayer for the payment of tax claimed to be due by the agency, the taxpayer may pay the amount claimed by the agency to be due, **and if an appeal is taken by the taxpayer from the ruling of the agency within the time provided by KRS 131.340 and it is finally adjudged that the taxpayer was not liable for the payment of the tax or any part thereof, the agency shall authorize the refund or credit as the Kentucky Board of Tax Appeals or courts may direct.**

> (3) No refund shall be made unless each taxpayer individually files an application or claim for the refund within four (4) years from the date payment was made....Denials of refund claims or applications may be protested and appealed in accordance with KRS 131.110 and 131.340. (emphasis added).

The statute makes several things clear. A state agency is authorized to pay refunds of state taxes to taxpayers who make a claim for a refund within four years of the overpayment, when there is no bona fide dispute regarding the overpayment. *Id.* If there is a bona fide dispute, the state agency may deny the refund. In order to preserve a claim for a refund pursuant to KRS 134.580, the taxpayer must appeal the state agency's denial pursuant to KRS 131.340 ("if an appeal is taken...within the time provided by KRS 131.340"). *Id.* Only after a final determination by the Board of Tax Appeals or a court upon judicial review that the tax was not owed, can the Board of Tax Appeals or the court "direct" the state agency to authorize the refund or to allow a credit. *Id.* The statute does not authorize an aggrieved taxpayer to simply unilaterally take a credit toward future payments any time the taxpayer believes it has made an overpayment. *See e.g., Am. Life & Accident Ins. Co. of Ky. v. Commonwealth*, 173 S.W.3d 910 (Ky. App. 2004) (which rejected the taxpayer's right to claim a set-off or credit for taxes erroneously paid as applied toward future taxes.)

Kentucky law requires taxpayers to pursue state tax refund cases through their statutory remedies. *See Dept. of Conservation v. Co-De Coal Co.*, 388 S.W.2d 614 (Ky. 1964). Virgin Mobile did not file any appeal with the Board of Tax Appeals after the denial of its claim for a refund.[13] Instead, Virgin Mobile unilaterally took a "credit"

[13] *See* KRS 131.340(3) which provides that the aggrieved taxpayer shall have thirty (30) days to file an appeal with the Board of Tax Appeals. *See also* KRS 131.340(1) which

against future payments it owed to the CMRS Board. Any claim for a refund or entitlement to a credit (as authorized by KRS 134.580) is barred for failure to exhaust the administrative remedies contained within KRS 134.580 and KRS 131.340. *See Revenue Cabinet v. JRS Data Systems, Inc.*, 738 S.W.2d 828 (Ky. App. 1987).

C. Virgin Mobile's Claim for a Refund of Service Charges it Paid Voluntarily is Barred Pursuant to Common Law.

In the alternative, if KRS 134.580 is inapplicable to this dispute, then Virgin Mobile's claim for a refund is governed by the common law. At common law, a taxpayer is not entitled to a refund of taxes that it voluntarily paid. *See Inland Container Corp. v. Mason County*, 6 S.W.3d 374, 377 (Ky. 1999); *See also, Maximum Mach. Co. v. City of Shepherdsville*, 17 S.W.3d 890, 892 (Ky. 2000). Pursuant to *Inland Container*, "there are two general situations in which the common law authorizes a tax refund: (1) when the taxing statute or regulation is invalid and the tax payments were submitted involuntarily, and (2) when the taxing authority has engaged in misrepresentation." *Id.* The term "involuntary" has been defined as when "a burdensome penalty may be exacted for failure to pay." *City of Louisville v. Louisville Taxicab and Transfer Co.*, 238 S.W.2d 121, 124 (Ky. 1951). Neither of these exceptions to the general rule barring tax refunds at the common law applies to the instant dispute.

The statutes levying the CMRS service charge are not "invalid" and the CMRS service charge, itself, is not "invalid." This dispute concerns statutory *interpretation* only. Furthermore, Virgin Mobile did not pay the CMRS service charges involuntarily. The

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provides, "the Kentucky Board of Tax Appeals is hereby vested with *exclusive* jurisdiction to hear and determine appeals from final rulings, orders, and determinations of any agency of state or county government affecting revenue and taxation." (emphasis added)

CMRS Act contains no burdensome penalty for CMRS providers that fail to remit the service charge. CMRS providers are entirely "self-reporting" pursuant to the Act, and the CMRS Board's only recourse for a non-complying provider is to file suit for non-payment in Circuit Court, as it did here. *See* KRS 65.7635(5). Therefore, Virgin Mobile does not fit within the first exception in *Inland Container* (i.e., invalid statute and involuntary payment).

Virgin Mobile also argues that it is entitled to a common law refund under the "misrepresentation" exception set forth in *Inland Container*, 6 S.W.3d at 377. Virgin Mobile claims that the CMRS Board "misrepresented" the CMRS service charge's application to prepaid services. The CMRS Board did not misrepresent anything. The Board has consistently maintained that the service charge applies equally to prepaid services, as is evidenced by the current litigation.[14] Five state courts and two federal courts have agreed with the CMRS Board's position. Even if this Court should reverse the decision of the Kentucky Court of Appeals as a matter of statutory interpretation, it will not mean the CMRS Board made any "misrepresentations" to Virgin Mobile.[15]

Furthermore, *Barnes v. Stearns Coal & Lumber Co.*, 295 Ky. 812, 175 S.W.2d 498 (Ky. App. 1943), does not provide Virgin Mobile with any relief. Virgin Mobile

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[14] The fact that Board members have discussed and disagreed about the collection of the service charges from prepaid customers is entirely reasonable and does not negate the CMRS Board's official position. Certainly, members of a state agency are allowed to discuss the application and interpretation of the statutes they are charged with enforcing.

[15] Moreover, Virgin Mobile cannot seriously claim that it remitted the service charge in reliance upon some "misrepresentation" by the CMRS Board. Virgin Mobile began remitting the service charge in August, 2002, more than two years before the CMRS Board ever announced an official position on the application of the CMRS service charge to prepaid services, and under no duress or threat of a fine/penalty. Virgin Mobile was not relying on any representation from the CMRS Board in remitting the service charges.

asserts that pursuant to *Barnes*, taxes paid to a "restricted fund" can be refunded regardless of whether they were voluntarily paid. *Barnes* addressed an overpayment of unemployment insurance contributions based on a mistake of fact. *Id.* at 499. In *Barnes*, the employer made a voluntarily payment to his reserve account in order to bring down his rate. *Id.* It was later determined that the voluntarily contribution was not necessary to bring down the employer's rate (i.e., the employer was mistaken that he needed to increase his reserve in order to have a lower tax rate). *Id.* The Court noted that the unemployment fund maintained "three separate accounts, one of which is 'a clearing account'" from which refunds were payable. KRS 331.340. *Id.* at 500. Furthermore, the Court noted that the unemployment reserve account "lies dormant to be used when necessity arises." *Id.* at 501. In equity, and based upon the intent behind the unemployment fund statutes, the Court ordered the refund.

The facts in this case are clearly distinguishable from *Barnes*. Virgin Mobile did not make a voluntary overpayment based on a mistake of fact. Virgin Mobile voluntarily remitted CMRS service charges for almost three years, before suddenly deciding based on a new industry interpretation of the law that the CMRS Act did not apply to the prepaid services. Although the CMRS Fund is maintained separately from the general fund, unlike the unemployment fund at issue in *Barnes*, the CMRS Fund does not maintain a separate account for refunds, is not "dormant," and does not contemplate refunds. *See* KRS 65.7627 and KRS 65.7631.

Virgin Mobile did not involuntarily pay an invalid tax, and thus is not entitled to a common law refund.

D. Virgin Mobile had Five Years from the Date of Payment to File Suit for a Refund and any Claim for a Refund of Service Charges Paid Prior to January 15, 2004 is Barred.

Should the Court nevertheless find that Virgin Mobile is entitled to a "refund" under the common law, Virgin Mobile will simply retain the service charges it already took back by way of credit. However, part of the refund claim made by Virgin Mobile is barred by the statute of limitations.

KRS 413.120 provides for a five-year statute of limitations for common law tax refunds. The statute of limitations for a refund of an alleged tax overpayment accrues when the alleged overpayment was made (in this case, between August, 2002 until June, 2005), not when the alleged overpayment was "discovered." *Ironton & Russell Bridge Co. v. City of Russell*, 262 Ky. 778, 91 S.W.2d 1, 4 (Ky. App. 1935) (holding that claim for a refund of taxes accrued on the date of payment). *See also, Am. Life*, 173 S.W.3d 910 (denying claim of recoupment for taxes erroneously paid more than two years prior to the request for refund pursuant to KRS 134.590, even though the taxes were not owed).

Likewise, Virgin Mobile's common law claim for a tax refund accrued when the payments of CMRS service charges were made (between August, 2002 and May, 2005). Therefore, any payments made before January 15, 2004 (five years prior to Virgin Mobile's counterclaim against the CMRS Board) are barred by the statute of limitations.

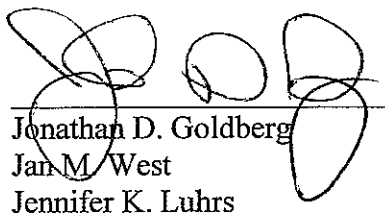
CONCLUSION

A review of the CMRS Act, in its entirety, illustrates that the CMRS service charge was to be collected from every CMRS connection and was to be collected by every CMRS provider, with no exception for prepaid services. To be sure, there is no real distinction between a wireless phone purchased via the "prepaid" method versus a

wireless phone purchased via the "post-paid" method. The CMRS Board is obligated to ensure that both of these phones can reach 911. As correctly held by the Jefferson Circuit Court and the Kentucky Court of Appeals, prepaid CMRS providers are not absolved from their obligation to the CMRS Board simply because they have chosen a business model that makes collecting the CMRS service charge from their customers difficult. To do so clearly gives it an unfair advantage over postpaid providers and conveys a benefit to its customers for which it is not paying.

Therefore, the CMRS Board respectfully requests that this Court affirm the decision of the Kentucky Court of Appeals awarding the CMRS Board $547,945.67 in damages for amounts owed by Virgin Mobile for CMRS service charges pursuant to the 1998 CMRS Act.

Respectfully Submitted,



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APPENDIX

	RECORD	TAB
The CMRS Act, as enacted by 1998 House Bill 673 (the "1998 statutes")	Exhibit 19 to the CMRS Board's Memorandum in Support of Summary Judgment, filed under seal on December 23, 2009 ("CMRS Board's Sealed Memo")	1