SUPREME COURT OF KENTUCKY
NO. 2012-SC-000621-D
(2010-CA-001185-MR AND 2010-CA-001266-MR)

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

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 EMERGENCY
SERVICE TELECOMMUNICATIONS BOARD,
APPELLEE.

BRIEF FOR APPELLANT

Timothy J. Eifler
Douglas F. Brent
Mark T. Hurst
STOLL KEENON OGDEN PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202
Telephone: (502) 333-6000
Facsimile: (502) 333-6099

Charles W. Schwartz
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1000 Louisiana Street, Suite 6800
Houston, Texas 77002
Telephone: (713) 655-5160
Facsimile: (713) 483-9160

Counsel for Appellant, Virgin Mobile U.S.A., L.P.

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the following Brief for Appellant was served by first class mail, postage prepaid, this 15th day of July, 2013 on: Jonathan D. Goldberg, Jan M. West, Jennifer K. Luhrs, Goldberg Simpson, LLC, 9301 Dayflower Street, Prospect, KY 40059; 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. Skonick, 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 Appellant

ABBREVIATIONS

CMRS	Commercial Mobile Radio Service
CMRS Act	Commercial Mobile Radio Service Emergency Telecommunications Act, KRS 65.7621 to 65.7643.
CMRS Board, the Board	Commercial Mobile Radio Service Emergency Telecommunications Board of the Commonwealth of Kentucky
CMRS Fund	Commercial Mobile Radio Service Emergency Telecommunications Fund
CMRS Service Charge	Commercial Mobile Radio Service Emergency Telephone Service Charge levied under KRS 65.7629(3) and collected under KRS 65.7635
Lucas depo.	Deposition of David Lucas, Chairman, Commercial Mobile Radio Service Telecommunication Board of the Commonwealth of Kentucky
Op.	Opinion by the Court of Appeals below
R.	Record
Virgin Mobile	Virgin Mobile U.S.A., L.P.
Wagner depo.	Deposition of Gary Wagner, Vice President of Tax and Regulatory Compliance for Virgin Mobile U.S.A., L.P.

I. INTRODUCTION

Virgin Mobile is challenging the CMRS Board's attempt to expand the CMRS Act, KRS 65.7621 to 65.7643, and impose 911 taxes on the customers of prepaid wireless services for the period before July 12, 2006, when the statute was amended to include them. Virgin Mobile seeks a declaration that any charges it erroneously paid before the Act's 2006 amendments be refunded or credited against charges due for subsequent periods.

II. STATEMENT CONCERNING ORAL ARGUMENT

Virgin Mobile requests oral argument because it will be helpful to the Court in considering the application of the CMRS Service Charge to prepaid wireless customers before the statutory expansion in July 2006 that extended the CMRS Service Charge to prepaid services without a regular monthly billing process. Oral argument before this Court will allow the parties and the Court to fully explore the Court of Appeals' flawed construction of the relevant statutes and the consequences and confusion that will result if the court's mistakes are upheld. This case is also significant because it presents vital issues concerning the law of taxation that are of general importance to the citizens of the Commonwealth.

III. STATEMENT OF POINTS AND AUTHORITIES

IV. STATEMENT OF THE CASE

The CMRS Board is trying to make Virgin Mobile pay a tax that neither it nor its customers owed. The CMRS Act did not apply to Virgin Mobile's prepaid wireless services until the statute was amended in 2006. Virgin Mobile had mistakenly paid the tax, but it did so from its own revenues rather than by collecting the money from its customers. In 2005 Virgin Mobile realized that it did not owe the tax that only applied to the users of postpaid wireless services. Indeed, in 2006, the General Assembly amended the CMRS Act specifically to make it apply to prepaid wireless services because prepaid had emerged in the Commonwealth, and the still atypical prepaid model was not covered by the existing statutes. Therefore, the CMRS Board seeks to have this Court hold that the General Assembly's extension of the 911 tax to the prepaid model was entirely unnecessary because, under the Board's view, the old statutes covered prepaid services all along.

I. 911 SERVICE CHARGE STATUTES HAVE EVOLVED WITH TELEPHONE TECHNOLOGY AND METHODS OF PAYMENT

For decades, the General Assembly has permitted a charge on telephone services in order to fund 911 emergency services. The taxing mechanism and scope has changed over time to address changes in telephone technology and collection methods. The first generation of 911 service charges in Kentucky was levied by local governments on landline connections. Local ordinances determined the amounts to be collected. *See* Legislative Research Comm'n, *911 Services and Funding: Accountability and Financial Information Should Be Improved* 46, (Research Report No. 383, Dec. 8, 2011) *available at* http://www.lrc.ky.gov/lrcpubs/rr383.pdf; *see also* KRS 65.760 (enacted in 1984). As wireless telephones gained popularity, the General Assembly devised a geographically

uniform, statewide 911 service charge collection process that would apply only to mobile services. *See* KRS 65.7621-65.7643 (enacted in 1998). To avoid the possibility that wireless customers would be billed for both the state-imposed tax of seventy cents per month and the locally-imposed tax permitted by KRS 65.760, the General Assembly preempted the application of local 911 ordinances to wireless services by enacting KRS 65.7627, which stated, in pertinent part:

> The CMRS service charge shall have uniform application within the boundaries of the Commonwealth. No charge other than the CMRS service charge is authorized to be levied by any person or entity for providing wireless 911 service or wireless E911 service.

Id.

Establishment of the CMRS Service Charge provided a geographically uniform tax on customers, but the collection method set forth in the original statute, even as amended in 2002, was written to extend only to wireless providers that used a regular monthly billing process and could collect the state-imposed tax as a line item on their customer bills. By doing so, the General Assembly imposed a 911 tax in a manner consistent with how traditional telephone service providers had collected locally-imposed 911 taxes. Critically, the legislation did not account for the possibility that some wireless providers might offer prepaid services that do not include periodic billing at all. So-called "prepaid" services are used by funding a debit-style account with funds placed into an account and usable at the customer's discretion to purchase wireless services on a "pay-as-you-go" basis. That business model is distinguishable from the more widely utilized and commonly understood wireless services generally sold for a monthly price and billed in arrears, *i.e.* "postpaid." Customers for these postpaid services enter into a contract with a wireless provider, like AT&T Mobility or Sprint, typically for two years.

(Wagner depo. 23). The provider runs a credit check on its customers, verifies their home addresses, and sends them a bill every month at the end of service month for services already provided. The postpaid model was by far the most common wireless model in 1998. (Lucas depo. at 73-74).

The postpaid model, however, has its disadvantages, particularly for lower-income customers. (Wagner depo. 42). People who could not pass a credit check or who could not afford to pay an expensive bill every month were unable to use cell phones until the advent of prepaid wireless services. In order to satisfy this unmet need, companies like Virgin Mobile developed a prepaid model. Prepaid generally means the customer:

(i) places funds into a prepaid account at the customer's discretion;

(ii) draws on the prepaid account to purchase services before using them; and

(ii) is not contractually required to make any future payments or to continue using the service.

(Wagner depo. 23, R. 14). The prepaid business model offers affordability and flexibility that makes wireless service readily accessible to a class of customers who could not otherwise obtain services. A customer need only purchase a handset and add funds to the prepaid account to activate the service. (Wagner depo. 29-30). The handsets are available at large retail stores like Wal-Mart or Target. (*Id.*) To use the phone, the customer buys a top-up card, also available at retail stores, for a certain dollar amount. (*Id.* at 36). The money on the card is credited to an account and can be drawn upon to make phone calls, send text messages, or buy ringtones. (*Id.* at 41). As the customer uses the phone, the charges are debited from the amount of funds available in the customer's account. (*Id.* at 24). The customer may use the full amount of a top-up card

in one day, one week, one month, one year, or never. (*Id.* at 210). The customer may add funds to the account as desired to continue purchasing service with no commitment. After a period of inactivity, the phone number expires.

II. VIRGIN MOBILE IS A PREPAID WIRELESS TELECOMMUNICATIONS SERVICES PROVIDER

Unlike some wireless carriers, Virgin Mobile only provides prepaid wireless telecommunications services in the Commonwealth. (Wagner depo. 22, R. 14). Virgin Mobile's customers accordingly do not receive any bills. (Wagner depo. 23, R. 14). Virgin Mobile does not operate its own retail stores, but its handsets and prepaid cards are sold nationwide at retailers and on Virgin Mobile's Web site. (Wagner depo. 31-32, R. 13). During the period at issue, August 2002 until July 12, 2006, the vast majority of its customers purchased Virgin Mobile's services from independent third party retailers[1]; Web site sales accounted for no more than fifteen percent of Virgin Mobile's business. (Wagner depo. 32). Virgin Mobile, therefore, rarely had direct contact with its customers. (*Id.* at 50).

III. IN 1998, THE GENERAL ASSEMBLY PASSED THE CMRS ACT TO PROVIDE ENHANCED 911 SERVICE TO WIRELESS CALLERS

In 1998, the General Assembly enacted the CMRS Act to provide emergency 911 service to wireless callers. *See* KRS 65.7621-65.7643. The General Assembly also established the CMRS Board (the Appellee) to manage a "CMRS Fund" that assists in the maintenance of wireless 911 service in Kentucky. (R. 3). The CMRS Fund is funded by the levy of a CMRS Service Charge on wireless users under KRS 65.7629. (R. 110).

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[1] The period at issue starts in August 2002 when Virgin Mobile started operating in the Commonwealth and ends on July 12, 2006, the effective date of the 2006 CMRS Act.

When the charge applies, wireless carriers are the collection agents for the state. (R. 3). Indeed, as the collection agents, the wireless carriers are allowed to keep 1.5% of the fees they collect in exchange for their efforts. The statute contained the following mandatory collection procedure:

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

KRS 65.7635(1) (as in effect July 15, 1998 to July 11, 2006) (emphasis added).

Critically, the charge is imposed on the wireless user and the collection obligation ties directly to a provider's "normal monthly billing process" which in turn exists only for a "billing provider" of CMRS. Without a "normal monthly billing process" the ability as well as the requirement to serve as a "collection agent" is problematic, if not nonsensical. Indeed, one court, remarking on this language said, "[t]he *defect in the original statute* was that the prescribed method of collection did not comport with prepaid providers' chosen business model." *Commonwealth Commercial Mobile Radio Serv. Emergency Telecomms. Bd. v. TracFone Wireless, Inc.*, 735 F. Supp. 2d 713, 724 (W.D. Ky. 2010) (emphasis added), *aff'd*, 712 F.3d 905 (6th Cir. 2013). But that is precisely why the CMRS Service charge prior to 2006 applied *only* to monthly billed wireless services, and not to all mobile services.

Contrary to the CMRS Board's argument, that outcome is not inequitable. Emergency 911 service is a benefit for all the citizens of the Commonwealth. It is not a service provided only to those who pay the tax. No Kentuckian is ever required to pay the CMRS Service Charge to have access to emergency services. Though the CMRS

Service Charge funds 911 services, paying the charge is never a prerequisite for access to 911 emergency services. Under federal regulations, any functional wireless handset, even one without an assigned phone number or one which is otherwise disconnected, must be permitted to access emergency services by dialing 911. *See* 47 C.F.R § 20.18(b) (2012).[2] Citizens from other states traveling in Kentucky can access emergency services the same way. They do not pay the charge either. The 911 service benefits everyone, not just the owner of a handset. Examples are numerous. Passersby report accidents, and people call 911 on behalf of someone who is needing help.

IV. IN 2002, THE GENERAL ASSEMBLY AMENDED THE CMRS ACT BUT STILL ONLY MADE THE CHARGE APPLICABLE TO POSTPAID, BILLED WIRELESS SERVICES

In July 2002, the General Assembly amended the CMRS Act as part of its adoption of the federal Mobile Telecommunications Sourcing Act ("MTSA"), 4 U.S.C. §§ 116-126. (Lucas depo. 87-91, R. 115). The amendment imposed the CMRS Service Charge on wireless users with a "place of primary use [as defined in the MTSA] within the Commonwealth," KRS 65.7629(3) (as in effect July 15, 2002 to July 11, 2006), authorizing the Board:

> To collect the CMRS service charge from each CMRS connection with a place of primary use, as defined in 4 U.S.C. sec. 124 [the MTSA], within the Commonwealth. The CMRS service charge shall be seventy cents ($0.70) per month per CMRS connection, and shall be collected in accordance with KRS 65.7635 . . . .

Id.

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[2] Because of this FCC rule for CMRS providers, many charitable organizations collect cast-off handsets for emergency use to call 911. Indeed, the FCC has described as "laudable" the various donation programs where "older, unused, and unsubscribed cellular phones are collected by various groups . . . and distributed to at-need individuals, such as victims of domestic violence and other crimes, the elderly, and the infirm." *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, Report and Order, 17 FCC Rcd 8481 (2002). Even though the CMRS Board takes the position that each CMRS connection owes the CMRS Service Charge, no tax is collected by the CMRS Board for these handsets even though they are fully functional in accessing 911 services.

The CMRS Act provision for collection remained unchanged. It continued to mandate that billing providers collect the tax from their customers by adding it to the customers' monthly bills. *See* KRS 65.7635(1) (as in effect July 15, 998 to July 11, 2006).

V. VIRGIN MOBILE REMITTED THE CMRS SERVICE CHARGE ON ITS CUSTOMERS' BEHALF UNTIL IT LEARNED THAT ITS CUSTOMERS DID NOT OWE THE SERVICE CHARGE

Virgin Mobile began remitting the CMRS Service Charge in August 2002 when it started doing business in the Commonwealth. (Wagner depo. 18-19). Because there is no mechanism to collect the charge from customers in the prepaid context, Virgin Mobile remitted the charge from its own revenues. It continued to pay through May 2005, remitting a total of $286,807 on behalf of its customers from its own revenues. (Wagner depo. 49, R. 15). While Virgin Mobile could not actually calculate the amount of tax allegedly due, its tax advisor, Tax Partners, kept a log of the number of active customers with a Kentucky phone number in a given month. (Wagner depo. 39). Using this list, Virgin Mobile calculated the amount it estimated its customers might owe under the CMRS Act by multiplying the number of customers in a month by seventy cents and deducting the 1.5% administrative fee. (*Id.*) Virgin Mobile therefore made a good faith effort to pay under the statute. But it was still not in compliance because no one—neither Virgin Mobile, its tax advisor, nor the CMRS Board—knew how much Virgin Mobile's customers should pay even if the statutes were applicable to prepaid services, because there is no correlation between the amount of money spent to fund future services and the actual monthly usage, if any, for a given customer. For example, a customer could buy several top-up cards at once or add money to her account and use it over the course of one day or several months, etc.

In early 2005, Virgin Mobile's Tax Department learned that the national tax consulting firm CCH had concluded that the CMRS Service Charge did not apply to prepaid services. (Wagner depo. 54, R. 15). Virgin Mobile also independently concluded that the CMRS Service Charge did not apply to prepaid wireless carriers in general and did not apply to the services provided by Virgin Mobile in particular. (Wagner depo 64, R. 15) Accordingly, on June 1, 2005, Virgin Mobile stopped remitting the Kentucky CMRS Service Charge. (R. 16). Virgin Mobile thereafter requested a refund of the $286,807 it had mistakenly submitted. (Wagner depo. 73, R. 16). On December 1, 2005, Mr. Fogel, a staff attorney at the Justice and Public Safety Cabinet, sent a letter to Virgin Mobile denying its request. (Lucas depo. 141, R. 16). There is no evidence that Virgin Mobile's refund request was ever brought to the attention of or put to a vote by the CMRS Board. (Lucas depo. 136-41).

VI. IN JULY 2006, THE GENERAL ASSEMBLY AMENDED THE CMRS ACT TO IMPOSE THE CMRS SERVICE CHARGE ON PREPAID WIRELESS CUSTOMERS

Only after being sued by the CMRS Board did Virgin Mobile discover how uneasy the Board had been with the language of the statute. As early as 1999, CMRS Board members had considered "which [prepaid] collection methodology comes closest to supporting the intent of the Kentucky E911 legislation," and noted the "numerous impediments" to "collecting fees" in the prepaid context including what was a "billing period, as intended by the statute." (Lucas depo. 58, Exs. 6, 9 at 4). The Board even twice considered seeking the opinion of the Attorney General as to the applicability of the CMRS Service Charge to prepaid. The Board was twice advised *not* to seek the opinion of the Attorney General and followed such advice, presumably because the CMRS Board feared an adverse opinion. (Lucas depo. at 98, 109, 116-21, Ex. 15 at 2 and Ex. 23 at 3).

In early 2006, Governor Ernie Fletcher proposed that the General Assembly amend the CMRS Act to "clos[e]" the "tax loophole on prepaid cell phones." Press Release, Governor Ernie Fletcher's Communication Office, Governor Ernie Fletcher Honors Kentucky's Emergency Workers During First Responders' Day (Feb. 9, 2006), *available at* http://bit.ly/924aOi. (R. 16). The Legislative Research Commission then issued a State Fiscal Note Statement on March 15, 2006. (R. 16); Commonwealth State Fiscal Note Statement (Mar. 15, 2006), (hereinafter, the "Fiscal Note") 2006 BR No. 1158, HB Bill No. 656/GA, *available at* http://www.lrc.ky.gov/record/06rs/HB656/FN.doc. The Fiscal Note, which is based on representations from the CMRS Board, concluded that the proposed amendments to the CMRS Act were for the purpose of "clos[ing] a loophole by requiring 'prepaid' wireless phone services to pay the [CMRS] surcharge *as well*." (Fiscal Note at 1. (emphasis added)). According to the Legislative Research Commission, the prepaid "loophole" allowed prepaid wireless phone services "to not remit the [CMRS] surcharge." (*Id.* at 2.)

The Court of Appeals accurately described the legislative history:

> Consistent with Governor Fletcher's proposal . . . [t]he legislation *expressly extended* the CMRS service charge to services that *had not been included* either in the original statute enacted in 1998, or as amended to conform to the MTSA in 2002. Specifically, the General Assembly *enlarged the CMRS service charge statutes* to expressly subject even prepaid CMRS connections without a place of primary use, as defined in 4 U.S.C. § 124, to the CMRS service charge. Among other changes, KRS 65.7629(3)(b) was added to extend the CMRS service charge to "prepaid CMRS connections," and more than one hundred words were added to . . . create a formula for calculating the *newly expanded* CMRS service charge for CMRS customers who purchase CMRS service on a prepaid basis. KRS 65.7635 was also amended to reach CMRS connections without monthly billing services, *which had not been taxed* under the original version of KRS 65.7635(1).

(Op. at 7 (emphasis added)).

If the CMRS Act had always applied to prepaid services as the CMRS Board contends in this appeal, there obviously would have been no "loophole" to close with respect to prepaid. The CMRS Board's position in this case is that the 2006 amendments to the CMRS Act were entirely unnecessary because the old statutes covered prepaid services all along.

VII. AFTER THE GENERAL ASSEMBLY EXTENDED THE CMRS SERVICE CHARGE TO PREPAID, VIRGIN MOBILE AGAIN REQUESTED A REFUND, AND THE CMRS BOARD RESPONDED WITH A LAWSUIT

On October 17, 2006, Virgin Mobile again asked the CMRS Board to apply the erroneously remitted $286,807 as a credit against the newly applicable CMRS Service Charge. (Lucas depo. 180-81, Ex. 36; R. 18). On January 23, 2007, when the CMRS Board still had not responded to Virgin Mobile's letter, Virgin Mobile sent a second letter enclosing tax returns applying a portion of the $286,807 credit in satisfaction of its liability under the new prepaid CMRS Service Charge. (Wagner depo. Ex. 26).

The CMRS Board then formally denied Virgin Mobile's requests for a refund for the first time and sued. (R. 18).

In November 2008, Virgin Mobile exhausted the $286,807 credit it applied. (Wagner depo. 93, R. 19). Virgin Mobile remitted $4,203.88 to the CMRS Board in December 2008 for the balance of the November 2008 CMRS Service Charge and has continued to remit CMRS Service Charges since then. (R. 19). Accordingly, this case presents the issues: (1) whether Virgin Mobile is entitled to a refund or credit for the $286,807 it erroneously paid from August 2002 to June 2005,[3] and (2) whether Virgin

[3] Because the Circuit Court held against Virgin Mobile on the merits, it held that Virgin Mobile had correctly remitted CMRS Service Charges for the period August 2002 to June 2005. The Circuit Court *(cont'd)*

Mobile is entitled to a reversal of the judgment of $261,138.47 for tax that it does not owe from the period June 1, 2005, to July 12, 2006, the effective date of the new 911 tax on prepaid wireless services.[4] (Together these items account for the $547,945.67 judgment entered in the Circuit Court). There is no issue in this case as to the applicability of the 2006 version of the CMRS Act. Virgin Mobile readily agrees that the CMRS Act, as in effect July 12, 2006, requires it to collect the tax from its customers or pay it on their behalf.

VIII. THE CIRCUIT COURT RULED IN FAVOR OF THE CMRS BOARD

On March 24, 2010, the Jefferson Circuit Court, Honorable F. Kenneth Conliffe, held that the CMRS Service Charge was owed from the time Virgin Mobile offered its prepaid service in the Commonwealth through July 12, 2006. The Circuit Court found that the tax was imposed on users and not on providers, but that the prepaid versus postpaid distinction was "irrelevant." (R. 187). Therefore, the Circuit Court said Virgin Mobile should have collected the Service Charge even though it was "not a 'billing provider'" under the statute and "there [was] no rational way to correlate the levy and collection statutes." (R. 187, 190). The Circuit Court entered an order awarding the CMRS Board $547,945.67 in disputed CMRS Service Charges. (R. 191). The Circuit Court awarded postjudgment interest, but denied the CMRS Board's request for prejudgment interest. (R. 190-91). Erroneously considering this as an exemption case,

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accordingly reversed the credit Virgin Mobile had taken and entered an award of $286,807 against Virgin Mobile.

[4] Because the Circuit Court held that Virgin Mobile should have paid the 911 tax for the period June 2005 to July 12, 2006, the Circuit Court awarded the CMRS Board $261,138.47 for that period.

the Circuit Court construed ambiguities (and the lack of a statutory collection mechanism) against Virgin Mobile. (R. 190).

The CMRS Board moved to alter the March 24 Order, requesting that the Circuit Court award prejudgment interest and attorneys' fees. (R. 193). On June 8, 2010, the Circuit Court, Honorable James M. Shake, awarded the CMRS Board $137,869.03 in attorneys' fees, but again denied the CMRS Board's request for prejudgment interest. (R. 253). Both Virgin Mobile and the CMRS Board appealed. (R. 255, 276).

IX. THE COURT OF APPEALS AFFIRMED THE JUDGMENT BUT REVERSED THE ATTORNEYS' FEES AWARD

The Court of Appeals offered a conflicted analysis of the CMRS Act's application to prepaid wireless services before the 2006 amendments. The Court of Appeals described how the 2006 amendments had "expressly extended the CMRS service charge to services that had not been included either in the original statute enacted in 1998, or as amended to conform to the MTSA in 2002." (Op. at 7). It noted that the General Assembly had created a formula for calculating the "newly expanded CMRS service charge for CMRS customers who purchase CMRS service on a prepaid basis." (*Id.*) It explained how the statute was changed "to reach CMRS connections without monthly billing services, which had not been taxed under the original version of KRS 65.7635(1)." (*Id.*)

Despite its clear detailing of the purpose of the 2006 amendments to make the CMRS Service Charge apply to prepaid services for the first time, the Court of Appeals nonetheless held that because Virgin Mobile is a "CMRS provider" to "CMRS customers" (Op. at 22), it must collect and remit the service charge even though it does not use a "monthly billing process" described by the plain language of the statute. (Op. at

23-24). Recognizing the apparent discrepancy in its analysis, the Court of Appeals in a footnote conceded that it "is tempting to premise payment based on the wording of the statute to those cellular phone carriers that bill monthly." (Op. at 23 n.13). But the court disregarded the plain language, musing that if the General Assembly had meant for monthly billing to be a condition precedent, any carrier could have simply changed its billing frequency to avoid the tax. (*Id.*)

The court failed to appreciate and respect, however, that the prepaid model is not a tax evasion scheme but rather inherent to the unique, valuable attributes of the service itself. Virgin Mobile offered prepaid services in the Commonwealth as a means for low-income customers who could not get a contract for traditional services to instead have an alternative: no-contract, prepaid telecommunications service. Prepaid service is also an attractive option for consumers who want a usage-based price without the risk of overage charges, with flexibility to determine how much service to use and to pay only for that service, and without the shackles of a long-term contract for monthly-billed wireless service. Virgin Mobile did not develop this model of service in an effort to evade a tax on its customers.[5] Customers did not purchase prepaid services in order to evade the CMRS Service Charge. Nonetheless, using the fear of a non-existent tax evasion scheme instead of applying the statute as written, the Court of Appeals found that Virgin Mobile was seeking an exemption to an otherwise applicable tax and therefore was not entitled to have statutory ambiguities in its favor. (Op. at 24).

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[5] Indeed, Virgin Mobile supported and embraced the 2006 CMRS Act, which provided a collection mechanism for prepaid customers to pay the 911 tax.

The Court of Appeals reversed the attorneys' fees award, holding that Virgin Mobile disputed payment of the fees in good faith, which obviated penalization. (Op. at 31). Finally, the Court of Appeals affirmed the trial court's denial of prejudgment interest. (Op. at 34-35).

On July 19, 2012, Virgin Mobile filed a Petition for Modification or Extension of Opinion with the Court of Appeals. Virgin Mobile requested that the Court of Appeals modify or extend the opinion so that it applied prospectively from the effective date of the CMRS Act's 2006 amendments specifically referencing prepaid services. The Court of Appeals denied Virgin Mobile's petition on August 23, 2012, without issuing an opinion. This Court granted Virgin Mobile's Motion for Discretionary Review.

IV. ARGUMENT

I. THE COURT OF APPEALS ERRONEOUSLY HELD THAT THE CMRS SERVICE CHARGE APPLIED TO VIRGIN MOBILE BEFORE THE JULY 2006 AMENDMENTS

A. THE CMRS SERVICE CHARGE DID NOT APPLY TO VIRGIN MOBILE'S SERVICES BECAUSE THERE WAS "NO RATIONAL WAY" TO RECONCILE THE MANDATORY COLLECTION SCHEME AND PREPAID SERVICES

The lower courts erred in concluding that this is an exemption case requiring construction in favor of the taxing authority. This is not an exemption case. The question is whether the pre-2006 statutes ever applied to prepaid wireless services in the first place, not whether some provision of law exempts Virgin Mobile from an otherwise applicable tax. Until the July 2006 amendments, the CMRS Service Charges only applied to postpaid, billed wireless services:

> Each CMRS provider shall act as a collection agent for the CMRS fund . . . [and] shall, as part of the provider's *normal monthly billing process*, collect the CMRS service charges levied upon CMRS connections under KRS 65.7629(3) from *each CMRS connection to whom the billing provider provides CMRS.* Each *billing provider* shall list the

> CMRS service charge as a separate entry on each *bill* which includes a CMRS service charge.

KRS 65.7635(1) (as in effect July 15, 1998 to July 11, 2006 (emphasis added)).

The Court of Appeals cited the first clause of this language ("[e]ach CMRS provider shall act as a collection agent for the CMRS fund") to conclude that Virgin Mobile sought to exempt prepaid wireless services from an otherwise applicable tax. (Op. at 24-25). It opined that "to interpret the statute to apply only to postpaid providers would, in fact, create an exemption for prepaid providers." (Op. at 25). That is not the law.

The courts below should have read the statute in its entirety, looking beyond the first clause. *See, e.g., Petitioner F. v. Brown*, 306 S.W.3d 80, 85-86 (Ky. 2010); *Democratic Party v. Graham*, 976 S.W.2d 423, 429 (Ky. 1998). A complete reading reveals that the CMRS Service Charge was to be collected from billed customers by "billing provider[s]" as a part of a "provider's normal monthly billing process." KRS 65.7635(1) (as in effect July 15, 1998 to July 11, 2006). But Virgin Mobile "is not a 'billing provider,'" and it does not have a "normal monthly billing process." (Op. at 9, 16). Accordingly, as the Circuit Court observed, "there is no statutory collection method" for Virgin Mobile's services and "no rational way" to apply the statute to Virgin Mobile's prepaid customers. (March 25, 2010, Jefferson Circuit Court Order at 5; R. 190).

Though the Court of Appeals acknowledged that "the circuit court was correct in stating that the statute, as written, left much to be desired in terms of elucidating the manner in which the charge was to be collected," the court nonetheless refused to be "tempt[ed]" by the "wording of the statute." (Op. at 23 & n.13). The court mused, "[I]f

the legislature had meant for [monthly billing] to truly be a condition precedent to the imposition of the service charge, then any particular cellular carrier could avoid the statutory service charge by merely billing in a manner other than monthly. Consider bimonthly billing, quarterly billing, and semiannual billing as only a few examples of many." (Op. at 23 n.13). But the court confused a distinct and legitimate business model with blatant tax evasion. Virgin Mobile developed and marketed prepaid wireless service to serve low-income customers who could not afford postpaid services or pass the requisite credit check. Customers purchase prepaid wireless service because of the nature of the service, not out of a desire to avoid taxation. Were the postpaid wireless providers to change their billing procedure specifically in an effort to help their customers evade taxation (by using the Court of Appeals' examples of adopting bimonthly, quarterly, or semiannual billing), the Court could easily condemn this subterfuge under well-settled Kentucky law:

> It is familiar law that it is the duty of courts to look to the substance rather than to the form of a transaction, and the rule applies with equal force to matters of taxation. It is also true that there is no legal prohibition against a taxpayer using legitimate methods to avoid taxation. But any attempt at evasion of taxes will be closely scrutinized, and if the taxpayer's ingenuity fails at any point the courts should not resolve the doubt in his favor.

Collins v. Kentucky Tax Comm'n, 261 S.W.2d 303, 306 (Ky. App. 1953) (citations omitted).

The Court of Appeals strained to read the words "normal monthly billing process" out of the pre-2006 version of KRS 65.7635(1). Indeed, in stating the legal issue presented by Virgin Mobile, the Court of Appeals quoted the wrong (2006) version of the statute (lacking the key "normal monthly billing" language at issue). (Op. at 16). This misapprehension is critical because – contrary to the Court of Appeals' characterization – "normal monthly billing process" was the limiting language contained in KRS 65.7635(1)

prior to 2006. The point is that it was not until the 2006 amendments that the General Assembly removed the words "normal monthly" from KRS 65.7635(1).

As this Court has recognized, removal of a modifying prepositional phrase by the General Assembly must be viewed as purposeful legislative action. *See Jefferson County Bd. of Educ. v. Fell*, 391 S.W.3d 713, 724-25 (Ky. 2012) (removal of phrase "for attendance" from statute concerning school enrollment changed its meaning). Here, removal of the words "normal monthly" as a modifier of "billing provider" has to mean that only "normal monthly billing" was subject to the tax before July 12, 2006. The "billing" language reveals exactly what services were in the Kentucky General Assembly's collective mind's eye when it adopted the statutes at issue—traditional postpaid cell phone plans, which are regularly billed monthly. And, the 2006 amendment reveals exactly what the General Assembly intended to change in the new Act.

In *TracFone Wireless, Inc. v. Commission on State Emergency Communications*, 397 S.W.3d 173 (Tex. 2013), the Texas Supreme Court rejected a similar misinterpretation of a 911 statute. The emergency communications agency in Texas claimed that the service charge had always applied to prepaid wireless services because the statute broadly stated that "'the commission shall impose on *each* wireless telecommunications connection a 9-1-1 emergency service fee.'" *Id.* at 178 & n. 12 (quoting Tex. Health & Safety Code § 771.0711(a)). But the Texas Supreme Court found that the requirement that the fee be imposed on "each" wireless connection could not be reconciled with the "no less mandatory" charge and collection provisions. *Id.* Like in Kentucky, the original, pre-amendment Texas statutes required providers to add a charge to their customers' monthly bills. Where the service providers issued no monthly bills

because their customers paid up front, there was "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." *Id.* This same analytical conundrum confronts the interpretation of the courts below: "there is no rational way to correlate the levy and collection statutes." (March 25, 2010, Jefferson Circuit Court Order at 5, R. 190).

There is simply no reason why the Court of Appeals should give one sentence of the statute controlling effect and ignore the remainder of the statute. Indeed, this Court has made clear that a "statute must be read as a whole" and "[a]ll parts of the statute must be given equal effect so that no part of the statute will become meaningless or ineffectual." *Lewis v. Jackson Energy Coop. Corp.*, 189 S.W.3d 87, 92 (Ky. 2005); *see also Maynes v. Commonwealth of Kentucky*, 361 S.W.3d 922, 924 (Ky. 2012) ("We presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes.") (citations omitted). The Court of Appeals ignored this well-established rule in construing the pre-July 12, 2006 statutes, rendering meaningless the clause plainly limiting its scope to postpaid services.

B. The CMRS Board Cannot Calculate the Service Charge for Prepaid Services under the Pre-2006 Version of the Act Because it was Designed for Monthly "Billing Providers" Rather than Prepaid Wireless Services

A burden cannot be imposed on a taxpayer "except by clear and explicit language." *Reeves v. Brown-Forman Distillers Corp.*, 288 Ky. 677, 684, 157 S.W.2d 297, 301 (1941). The CMRS Board, however, has never been able to determine how a prepaid provider would calculate or collect the service charge under the pre-2006

statutes. (Lucas depo. at 103-08). According to the 2002 version of KRS 65.7629(3), the fee was "seventy cents ($0.70) per month per CMRS connection, and shall be collected in accordance with KRS 65.7635." KRS 65.7629(3) (as in effect July 15, 2002 to July 11, 2006). This fee posed no mathematical challenge for a postpaid provider issuing monthly bills. But, because the value of a prepaid phone card can be used in one hour or over several months, (Wagner depo. at 54), it was anybody's guess as to how the CMRS Service Charge would be calculated:

> Q: [H]ow about [CMRS Board member] Mr. Patterson's questions[:] "Someone who buys two cards during one calendar month, good for 30 minutes over the next 30 days, which is common, are they billed 70 cents or $1.00 [sic] or a $1.40" Do you see that?
> A: Uh-huh.
> Q: I'm going to say that's a good question. What's the answer?
> A: Oh, it's a good question, and that answer has been debated for years. I don't know the answer.
> Q: Okay. Fair enough, if you don't. Does the Board have a position on that?
> A: Not really.

(Lucas depo. at 46-47 (emphasis added)).

These questions were not new to the CMRS Board. As early as 1999, CMRS Board members considered "which [prepaid] collection methodology comes closest to supporting the intent of the Kentucky E911 legislation," and noted the "numerous impediments" to "collecting fees" in the prepaid context including what was a "billing period, as intended by the statute." (Lucas depo. Exs. 6, 9 at 4).[6] If even the CMRS

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[6] In an email dated July 22, 1999, from the then executive director of the CMRS Board, Mr. Patterson, he writes regarding prepaid wireless services, "Everyone agrees that there are potential problems in trying to tap this revenue. Does it require new legislation? Can we require compliance with current legislation by issuing regulations? How would vendors be able to comply? Someone who buys two cards during one calendar month, good for 30 minutes over the next 30 days, which is common, are they billed 70 cents or $1.40?" (Lucas depo. 41).

(cont'd)

Board responsible for administering the CMRS Act had doubts about which collection method would be the closest to legislative intent, that is a sure sign the pre-2006 statute was ambiguous and should have been interpreted in favor of the taxpayer. *See Reeves*, 288 Ky. at 684, 157 S.W.2d at 301. Moreover, it was fundamentally unfair for the CMRS Board to attempt to apply the CMRS Service Charge to Virgin Mobile and its customers where the Board itself could not calculate the fee. Calculation of a tax should not be a matter of years of debate and especially should not be assessed where, as here, the taxing authority could not reach a position on how to calculate it for prepaid wireless services. As the Texas Supreme Court astutely noted: "Judicial construction of tax statutes eschews fuzzy math. Legislators must speak clearly, agencies heed assiduously, and courts review exactingly." *TracFone Wireless*, 397 S.W.3d at 183.

C. Before July 2006, the CMRS Service Charge Did Not Apply to Virgin Mobile's Customers Because They Did Not Have a "Primary Place of Use" in Kentucky

Before July 2006, the CMRS Service Charge applied by its own terms only to "CMRS connection[s] with a place of primary use, as defined in 4 U.S.C. sec. 124, within the Commonwealth." KRS 65.7629(3) (as in effect from July 15, 2002 to July 11, 2006). But 4 U.S.C. § 124 does not apply to prepaid wireless: "This section [4 U.S.C. § 116] through 126 of this title – (1) do not apply to the determination of the taxing situs of prepaid telephone calling services . . . ." 4 U.S.C. § 116(c). And the CMRS Act adopts and incorporates by reference the provisions of 4 U.S.C. §§ 116 to 126. *See* KRS 65.7640(1) (as in effect July 15, 2002 to present). No one disputes that Virgin Mobile

(cont'd from previous page)

Notably, despite the recognized ambiguities in the statutes, the CMRS Board never issued an administrative rule or regulation seeking to apply the statutes to prepaid wireless services. (Lucas depo. 44, 122). The CMRS Board took no direct action, in fact, until filing suit. (R. 18).

offers "prepaid telephone calling services." Therefore, none of its customers has "a CMRS connection with a place of primary use, *as defined in 4 U.S.C. sec. 124*, within the Commonwealth" of Kentucky. KRS 65.7629(3) (as in effect from July 15, 2002 to July 11, 2006) (emphasis added). Accordingly, the CMRS Service Charge simply did not apply before the 2006 amendments extended the charge to prepaid.

Indeed, the CMRS Board knew this and spent years lobbying the General Assembly to expand the statute to cover prepaid. In particular, the Board specifically desired to "[a]mend KRS 65.7629(3) by removing the words 'as defined in U.S.C. sec. 124' . . . ." (Lucas depo. 78, Ex. 10 at 6; *see also id.* at 156-57, Ex. 31, KENA/APCO Legislative Changes ("The main points are: 1) *Eliminate the prepaid gap within the current legislation.*" (emphasis added))).

The courts below effectively rewrote the statute to remove the words "as defined in 4 U.S.C. sec. 124." But this was clear error: Kentucky courts are generally without authority to ignore the words of duly enacted statutes. *See Smith v. Vest*, 265 S.W.3d 246, 252 (Ky. Ct. App. 2007) (citing *Golightly v. Bailey*, 218 Ky. 794, 797, 292 S.W. 320, 321 (1927)). By doing so, the courts below usurped the General Assembly's role. *See Scheer v. Zeigler*, 21 S.W.3d 807, 813 (Ky. App. 2000) ("'[C]ourts cannot substitute their judgment for the legislative enactment for to do so would be to usurp the power reserved for the legislative authority.'") (quoting *Puryear v. City of Greenville*, 432 S.W.2d 437, 442 (Ky. 1968)).

D. Before 2006, the Legislation Covered Familiar Wireless Plans With Regular Monthly Billing, But Not Nascent Services Without Monthly Billing That Were Unfamiliar To The General Assembly

The CMRS Board admitted that when the CMRS Service Charge legislation was crafted, "monthly bills were the only method that was notable at the time." (Lucas depo. at 19). Virgin Mobile is a CMRS provider, but not a billing provider. Until the law changed, only a billing provider could act as an agent and collect the tax levied on customers by the Board. Therefore, the Court of Appeals erred, glaringly, when it refused to be "tempt[ed]" by the "wording of the statute." (Op. at 23 n.13). It is not a temptation but an obligation to follow the words of the statute. Courts must assume the General Assembly "'meant exactly what it said, and said exactly what it meant.'" *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005) (citation omitted); *see also Gateway Constr. Co. v. Wallbaum*, 356 S.W.2d 247, 249 (Ky. 1962) ("The primary rule is to ascertain the intention from the words employed in enacting the statute and not to guess what the Legislature may have intended but did not express."). Here, only billing providers with a "normal monthly billing process" could collect the tax for the Board. *See* KRS 65.7635(1) (as in effect July 15, 1998 to July 11, 2006).

The statute was written to reach only postpaid services because those were the only services with which the General Assembly was familiar. "A well-known rule for the interpretation of statutes is that the terms employed may be given meaning and application in the light of the circumstances and conditions existing at the time of their enactment, and the purpose that the legislature had in view in enacting them." *Erlanger Kennel Club v. Daugherty*, 213 Ky. 648, 655, 281 S.W. 826, 829 (1926), *aff'd per curiam sub nom. Smith v. Kentucky*, 275 U.S. 509 (1927); *see also id.* at 656, 213 S.W. at 830

(recognizing the holding of *Grinstead v. Kirby*, 33 Ky. L. Rep. 287, 110 S.W. 247 (1908), to be that the exemption in question could only apply to horse races because "that was the only kind then in existence and was necessarily the only one in the mind of the legislature"); *Frank v. South*, 175 Ky. 416, 426, 194 S.W. 375, 379 (1917) (finding that the language in the statute had to be interpreted in accordance with practices "at the time of the enactment of the statute and as understood at that time"). Accordingly, the CMRS Act before 2006 was intended to apply only to postpaid billed wireless, and the language cannot be stretched to apply to nascent services and customers that were not in the mind of the General Assembly when it adopted the language of the taxing statute.

Even though the courts below believed—with the benefit of hindsight—that the General Assembly should have enacted a statute that taxed all wireless services prior to 2006, these courts were nonetheless required to interpret the language as written. Only the legislature can rewrite a statute to account for changed circumstances. *See America Online Inc. v. United States*, 64 Fed. Cl. 571, 578 (2005) ("'[I]f the statutory language no longer fits the infrastructure of the industry, the IRS needs to ask for congressional action to bring the statute in line with today's reality. It cannot . . . misinterpret the plain meaning of statutory language to bend an old law toward a new direction.'") (quoting *Nat'l R.R. Passenger Corp. v. United States*, 338 F. Supp. 2d 22, 27-28 (D.D.C. 2004), *aff'd*, 431 F.3d 374 (D.C. Cir. 2005)). As this Court recognized in *City of Franklin v. St. Mary's Roman Catholic Church*, 188 Ky. 161, 221 S.W. 503 (1920), the courts are confined to the General Assembly's chosen words:

> [B]ut the makers of the statute used the word "easement," and the meaning of this word . . . was so well known that we must assume the legislature used it advisedly and intended by its use to limit the application of the statute to streets, alleys and public easements. . .

. . . .

> [I]ts meaning cannot be extended . . . without upsetting all recognized definitions of the word . . . and this we cannot do. It is, perhaps, unfortunate that the legislature did not employ some other word in place of "easement," or some other word or words in addition to the word "easement," but this is a matter over which we have no control.

Id. at 169-70, 221 S.W. at 506.

The courts cannot "stretch [a statute] beyond its textual reach" or update its language out of a belief that an alternate wording would be more logical. *TracFone Wireless*, 397 S.W.3d at 184. For example, in 1965 Congress wrote a taxing statute for telephone services that specifically addressed the charging scheme (distance and duration) used by one long distance company at the time, AT&T. *See Am. Bankers Ins. Grp. v. United States*, 408 F.3d 1328, 1334 (11th Cir. 2005). When telephone competition led to new billing methodologies, and new entrants to the long distance industry began implementing creative and desired toll rate plans that, coincidentally, were not covered by the statute, the court found that, while Congress's 1965 wording was "'short-sighted,'" the court could not "'rescue Congress from its drafting errors.'" *Id.* (quoting *Honeywell Int'l, Inc. v. United States*, 64 Fed. Cl. 188, 199 (2005)).

The Sixth Circuit reached the same result in *OfficeMax, Inc. v. United States*, 428 F.3d 583 (6th Cir. 2005), noting that as much as nine billion dollars in refund claims was at stake. *See id.* at 584, 588-600. To address the issue, Congress needed to rewrite the statute so that it applied to the new charging systems in place. As the Sixth Circuit put it: "It makes one wonder why Congress would not eliminate the definition of toll telephone service altogether and apply the tax to all telephone services of any kind." *Id.* at 600. The Kentucky General Assembly similarly needed to rewrite the CMRS Act to make it applicable to new prepaid services, and it did exactly that in 2006. The charge did not

apply before then, and it was error for the Court of Appeals to attempt to "'rescue [the legislature] from its drafting errors.'" *Am. Bankers*, 408 F.3d at 1334 (citation omitted). Or, as may be more accurate to say in this case, rescue the General Assembly from its failure to use language that would capture future technological changes.

But, the CMRS Act does not use general language that captures all payment methods. The General Assembly, understandably, wrote a specific statute to tax customers using a specific wireless provider model well known in the Commonwealth. That specific statute simply did not reach or apply to prepaids. When the prepaid model developed and the General Assembly realized that the existing statute did not apply to that model, it responded appropriately by amending the CMRS Act to extend the tax to prepaid users. It is simply not the province of the judicial office to re-write a statute to cover something not covered because the court thinks the legislature would have or should have used different, more expansive, language if it had been thinking about changes in technology. While this case directly involves the 911 tax, the case actually involves fundamental principles of taxation. Kentucky law is stout-hearted in its recognition that a tax taxes what the statute says it taxes and nothing more.

E. The 2006 Amendments Changed the CMRS Service Charge Statutes to Make Them Apply to Prepaid Wireless Services for the First Time

As this Court emphasized in *Fell*, it is a well-established axiom of statutory construction that when the General Assembly amends a statute, it means to change it. *See Fell*, 391 S.W.3d at 724; *accord Whitley County Bd. of Educ. v. Meadors*, 444 S.W.2d 890, 891 (Ky. 1969). "Where a statute is amended or re-enacted in different language, it will not be presumed that the difference between the two statutes was due to

oversight or inadvertence on the part of the legislature. On the contrary, it will be presumed that the language was intentionally changed for the purpose of effecting a change in the law itself." *Eversole v. Eversole*, 169 Ky. 793, 797, 185 S.W. 487, 489 (1916); *see also e.g.*, *Meadors*, 444 S.W.2d at 891; *Blackburn v. Maxwell Co.*, 305 S.W.2d 112, 115 (Ky. 1957); *City of Somerset v. Bell*, 156 S.W.3d 321, 326 (Ky. App. 2005). Indeed, the leading treatise on statutory construction recognizes this Kentucky rule:

> A number of cases have held that where an act is amended or changed so that *doubtful meaning* is resolved such action constitutes evidence that the previous statute meant the contrary. This theory is based on the fact that the legislature is not presumed to perform a useless act.

2B Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 49:11, at 149 (7th ed. 2008) (emphasis added); (footnote omitted). The substantial amendments in 2006 to the CMRS service fee statutes are presumed to change them. *See Bell*, 156 S.W.3d at 326. Neither the 2006 Act nor its history contains any statement overcoming that presumption. *Compare*, *e.g.*, Preamble to 2005 Ky. Acts Ch. 112 (stating legislature's intent to "clarify" the statute), *with* 2002 Ky. Acts Ch. 69 (containing no statement of intent to clarify).

"A fundamental rule of statutory construction is to determine the intent of the legislature, considering the evil the law was intended to remedy." *Beach v. Commonwealth*, 927 S.W.2d 826, 828 (Ky. 1996). To examine the legislature's intent, the court "may look beyond [the act] to legislative history." *Princess Mfg. Co. v. Jarrell*, 465 S.W.2d 45, 48 (Ky. 1971). Here, the Legislative Research Commission's Fiscal Note shows the purpose of the 2006 amendments: to extend the CMRS Service Charge to

prepaid wireless services because the existing law did not tax them. (*See* Fiscal Note, *supra*, at 2).

The Legislative Research Commission, established in 1948, is a statutorily created agent of the General Assembly composed of a sixteen-member panel of Democrat and Republican leaders from the House of Representatives and the Senate. *See* KRS 7.090(1), (2); *see also Legislative Research Comm'n ex rel. Prather v. Brown*, 664 S.W.2d 907, 910-11, 916-17 (Ky. 1984). It is an oversight and service organization of and for the General Assembly and is responsible for conducting investigations "as will aid the General Assembly in performing its duties." KRS 7.100(2). Pursuant to KRS 6.955, the Legislative Research Commission is required to prepare a Fiscal Note for each "bill or resolution which relates to any aspect of local government or any service provided thereby" unless waived. KRS 6.955(1); *see also* 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." KRS 6.950(1).

The Fiscal Note prepared by the Legislative Research Commission before the vote on the proposed 2006 amendments was meant to inform the General Assembly of the financial impact of the amendments. It projected the additional revenue the Commonwealth would receive "by requiring 'prepaid' wireless phone services to pay the surcharge *as well*." (Fiscal Note, *supra*, at 1 (emphasis added). Notably, it reports an added revenue stream of $1.2 million per year for the 2006-2007 and 2007-2008 fiscal years. *Id.* No mention is made of taxes owed and not paid for the 2005-2006 fiscal year, though it is listed. *See id.* The Fiscal Note only accounts for revenue from future taxes.

But if the legislation were meant to clarify a tax that had applied before 2006, the Fiscal Note would contain an estimate as to the revenue the Commonwealth would receive from collecting taxes owed from all prepaid service providers that had not paid prior to the amendments.

The Governor's pronouncement on the need to change the statute to make prepaid wireless services subject to the tax further shows the purpose of the amendment. "The [Executive], after all, has a part in the legislative process, too, . . . and his intent must be considered relevant to determining the meaning of a law in close cases." *United States v. Tharp*, 892 F.2d 691, 695 (8th Cir. 1989).[7] Where the legislature knows of the Governor's intent in advocating for a law, as here because Governor Fletcher made his purpose clear, their lack of disagreement can show that they agree with his interpretation. *See Pike v. United States*, 340 F.2d 487, 488 (9th Cir. 1965) ("And Congress, though presumably aware of the presidential interpretation reflected in these officially published orders, evidenced no disagreement with it, thus affording 'at least some evidence of Congressional approval.'") (quoting *Laycock v. Kenney*, 270 F.2d 580, 589 (9th Cir. 1959)). Here, the Governor, in speaking about the legislation, recognized that the existing law did not apply to prepaid services, and he proposed to fix this situation by amending the law to make the tax apply to prepaid wireless services. The subsequent amendment passed by the General Assembly in 2006 achieved precisely that goal.

Finally, the General Assembly expanded the CMRS Service Charge to prepaid wireless only prospectively. The general rule is that "unless the legislature clearly

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[7] *See, e.g., Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 223-24 (1979) (quoting president Franklin Roosevelt's explanation of the purposes of an exemption from the antitrust law); *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 637-38 (1973) (noting President's statement regarding the purpose of a federal statute was to preempt local control of air traffic noise).

indicates otherwise, legislation is not intended to affect the legal consequences of events which occurred before its enactment." *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 94 (Ky. 2000). The 2006 legislation contains no statement that it was intended merely to "clarify" the statute or that it was to be applied retroactively. *See* 2006 Ky. Acts Ch. 219; *see also* KRS 446.080(3). If the General Assembly had intended to make the tax apply retroactively, it certainly knew how to do so, yet there is no evidence that the General Assembly intended retroactivity. *See Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 402-03 (Ky. 2009) (upholding an act that retroactively denied combined income tax returns as a "[properly enacted retroactive statute]."

II. ADDITIONALLY, THE ORIGINAL CMRS SERVICE CHARGE STATUTE'S APPLICATION TO PREPAID WIRELESS SERVICES IS AMBIGUOUS AND MUST BE RESOLVED IN FAVOR OF THE TAXPAYER

As this Court explained in *Fell*, "'[w]hen the undefined words or terms in a statute give rise to two mutually exclusive, yet reasonable constructions, the statute is ambiguous.'" *Fell*, 391 S.W.3d at 719-720; *accord MPM Fin. Grp. v. Morton*, 289 S.W.3d 193, 198 (Ky. 2009). Because a burden cannot be levied on a taxpayer absent clear and explicit language, all ambiguities in a taxing statute must be resolved in favor of the taxpayer and against the taxing authority. *See Indep. Loose Leaf Warehouse, Inc. v. Howard*, 305 Ky. 500, 503-04, 204 S.W.2d 810, 812-13 (1947). This rule of construction is "long standing and [of] universal application." *Reeves v. Fid. & Columbia Trust Co.*, 293 Ky. 544, 549, 169 S.W.2d 621, 623 (1943), *overruled on other grounds by Kentucky Bd. of Tax Appeals v. Citizens Fid. Bank & Trust Co.*, 525 S.W.2d 68 (Ky. 1975). It comes from an old English canon that "'the sovereign is bound to express its intention to tax in clear and unambiguous language.'" *TracFone Wireless*, 397 S.W.3d at 182 & n.42

(quoting *Eidman v. Martinez*, 184 U.S. 578, 583 (1902)). Indeed, the Circuit Court below recognized this widely endorsed rule:

> If the Legislature fails to so express its intention and meaning, 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. This is particularly so in the matter of pointing out the subjects to be taxed.

(R. 189 (quoting *George v. Scent*, 346 S.W.2d 784, 789 (Ky. 1961))). *See also Esbeco Distilling Co. v. Shannon*, 278 Ky. 689, 694, 129 S.W.2d 172, 175 (1939) (noting in distillery annual permit fee case that ambiguities and doubts are to be resolved in favor of the taxpayers).

The pre-amendment CMRS Service Charge statutes are, at the very least, ambiguous. The CMRS Board has even admitted as much. (Lucas depo. 161). The courts below interpreted the statutes as applying to prepaid wireless services, but it is equally reasonable to interpret the statutes as having taxed only customers using postpaid wireless services. The Texas Supreme Court, for example, found not only that it was reasonable to believe that the service charge did not apply to prepaid services pre-amendment, but that it was *unreasonable* to find otherwise because the taxing agency could not "explain how the [P]roviders . . . were supposed to comply with the statute's mandatory calculation and collection procedure." *TracFone Wireless, Inc.*, 397 S.W.3d at 183.

While recognizing the ambiguity rule of construction, the Court of Appeals did not apply that rule because it erroneously construed the legal issue as whether Virgin Mobile's services were *exempt* from an applicable tax, in which case the rule of construction would not apply. (Op. at 24). A tax exemption excuses a particular entity from a duty imposed on the general class. *See Black's Law Dictionary* 653 (9th ed. 2009)

(definition of "exempt"). The legislature must write tax exemption provisions explicitly. *See United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939); *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988).

Virgin Mobile does not assert that some legal provision exempts it from otherwise applicable tax, but rather that prepaid wireless was not subject to the tax in the first instance because the "general class" sought to be taxed in the 1998 statute was postpaid wireless customers. The class sought to be made collection agents are postpaid wireless providers. Therefore, the statutes never applied to prepaid services or their providers in the first place. The Texas Supreme Court recognized this distinction and rejected the "exemption" argument adopted by the Court of Appeals where, as here, "the 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. The Prepaid providers are claiming an exclusion rather than an exemption, making the presumption favoring government inapplicable." *Tracfone Wireless*, 397 S.W.3d at 183 (citations omitted). Likewise, Virgin Mobile does not rely upon any provision of the CMRS Act as exempting it from an otherwise applicable tax. The Court of Appeals could reach a contrary conclusion only by erroneously giving controlling effect to one sentence of the statute rather than considering the entire statute, as it was required to do: "The statute must be read as a whole and in context with other parts of the law. All parts of the statute must be given equal effect so that no part of the statute will become meaningless or ineffectual." *Lewis*, 189 S.W.3d at 92.

Though the plain language of the statutes and their legislative history show that the CMRS Service Charge did not apply to prepaid wireless services before 2006 and did

not impose a collection obligation on prepaid providers, the language is, at the very least, ambiguous; in no way does it expressly mandate a tax on prepaid services. Therefore, the Court must resolve that ambiguity in favor of the taxpayer and against the taxing authority. *See Indep. Loose Leaf Warehouse*, 305 Ky. at 504, 204 S.W.2d at 813.

III. THE COURT OF APPEALS' OPINION IS INCONSISTENT WITH THE OUTCOMES IN OTHER STATES

Several state supreme courts and state agencies considering similar statutes have found that they did not intend to tax prepaid wireless services. In four states that chose to litigate the matter, their courts ruled in favor of the wireless companies and their customers. *See, e.g.*, *TracFone Wireless*, 397 S.W.3d at 184; *Alltel Commc'ns, LLC v. Montana Dep't of Revenue*, No. CDV-2010-981, 2012 Mont. Dist. LEXIS 28, at *5-11 (Mont. Dist. Ct. Feb. 22, 2012); *Fulton Cnty. v. T-Mobile, South, LLC*, 699 S.E.2d 802, 809-10 (Ga. Ct. App. 2010); *TracFone Wireless, Inc. v. Dep't of Treasury*, No. 275065, 2008 WL 2468462, at *4 (Mich. Ct. App. June 19, 2008). Florida, New Mexico, New York, and North Carolina all chose not to litigate the issue and concluded that their outdated statutes did not apply to prepaid services until they were amended. Accordingly, they authorized refunds of erroneously remitted charges.[8] These courts and agencies correctly concluded that their states' pre-amendment statutes could not be interpreted as imposing a tax on prepaid wireless customers.

While courts of three states have found in favor of their tax-collecting boards, these cases involve statutes that are easily distinguishable from those at issue here. In

[8] Third Brief of Tracfone Wireless, Inc., *Commonwealth of Kentucky Commercial Mobile Radio Serv. Emergency Telecomms. Bd. v. TracFone Wireless, Inc.*, 712 F.3d 905 (6th Cir. 2013) (Nos. 11-6215, 11-6300), 2012 WL 1850532 at 19-20.

Washington, the section imposing the collection obligation did not mention billing, and the court still split 5-4. *See TracFone Wireless, Inc. v. Wash. Dep't of Revenue*, 242 P.3d 810, 814 (Wash. 2010) (citing Wash. Rev. Code Ann. § 82.14B.030(4) (West 2013)). In Alabama, shortly after the passage of the statute in dispute, the state's CMRS board adopted an administrative rule that expressly included prepaid services, levying a charge on "each CMRS connection . . . *including prepaid connections*." *T-Mobile South, LLC v. Bonet*, 85 So. 3d 963, 968 (Ala. 2011) (quoting Ala. Admin. Code (CMRS Board), r.225-1-3-.01) (alteration in original). The court gave "great weight" to the agency's construction of the statute and found in their favor. *Id.* at 977 (quoting *QCC, Inc. v. Hall*, 757 So. 2d 1115, 1119 (Ala. 2000) (internal quotation marks omitted)). But this principle of agency deference is inapplicable here because the Board never issued a rule interpreting the statute. It has done nothing more than adopt an ad hoc opinion of the statutes in litigation. In Arizona, the state enacted a statute fundamentally different from the Commonwealth's because it imposed the tax on the wireless provider rather than the customer and did not mandate that the company collect a charge through a normal monthly billing process. *See Virgin Mobile USA, LP v. Ariz. Dep't of Revenue*, 282 P.3d 1281 (Ariz. Ct. App. 2012). *Compare* Ariz. Rev. Stat. Ann. § 42-5252(A) (2013) ("A tax is levied *on every provider* [of] thirty-seven cents per month for each activated . . . wireless service account . . . .") (emphasis added) *with* KRS 65.7635(1) ("Each CMRS provider . . . shall, as part of the provider's *normal monthly billing process, collect the . . . charges* . . . from each CMRS connection to whom the billing provider provides CMRS.") (as in effect July 15, 1998 to July 11, 1998) (emphasis added). None of these cases should be influential on this Court.

This Court also owes no deference to the decision of the United States Court of Appeals for the Sixth Circuit in *Commonwealth of Kentucky Commercial Mobile Radio Service Emergency Telecommunications Board v. TracFone Wireless, Inc.*, 712 F.3d 905 (6th Cir. 2013), because "[w]hen and how state law applies to a particular case is a matter on which the state supreme court has the last word." *Houston v. Dutton*, 50 F.3d 381, 385 (6th Cir. 1995). Absent authority from this Court, the Sixth Circuit did nothing more than follow the basic rule of federal court deference to state lower court opinions in areas of unsettled state law, adopting the reasoning of the Court of Appeals below as it tried to make an *Erie* guess as to how this Court might rule because that opinion provided the "best predictive insight." *TracFone*, 712 F.3d at 913. Under Sixth Circuit precedent, the *TracFone* court was bound by the decision of the Court of Appeals unless it was "convinced" that this Court would decide the matter differently, even if it thought the Court of Appeals' opinion was "unsound." *Taylor Steel, Inc. v. Keeton*, 417 F.3d 598, 608 (6th Cir. 2005); *Kurczi v. Eli Lilly & Co.*, 113 F.3d 1426, 1429 (6th Cir. 1997).[9]

Moreover, this Court should not be influenced by the Sixth Circuit's decision because it failed to apply the well-settled rule in the Commonwealth that ambiguous tax statutes must be resolved against the taxing authority and "in favor of the taxpayer." *See Scent*, 346 S.W.2d at 789; *Indep. Loose Leaf Warehouse*, 305 Ky. at 504, 204 S.W.2d at 813. Instead, though the Sixth Circuit conceded that the original version of the CMRS Service Charge statutes "provided no useful guidance as to how to collect the service

[9] There is one significant difference between this case and the TracFone case in the Sixth Circuit. This case concerns only the application of the pre-2006 CMRS Act, while the TracFone case concerned both the application of the 1998 CMRS Act and the 2006 CMRS Act. Virgin Mobile has never contested the applicability of the 2006 CMRS Act to prepaid providers and has remitted CMRS service charges pursuant to the 2006 CMRS Act since it was enacted.

fees," it found that the statute was not ambiguous and applied to prepaid wireless providers. *TracFone*, 712 F.3d at 916. The court rejected TracFone's argument that it could not collect the fees under the old language demanding collection through monthly billing, noting that it was "unpersuaded considering the fact that TracFone had *collected* and paid the fees until 2003." *Id.* at 914 (emphasis added).[10] But the fact that TracFone remitted some amount of money does not mean that the tax was calculable for prepaid services or that TracFone submitted the correct amount. Surely the federal court's analysis would not have changed had TracFone never paid at all. Accordingly, this Court should not consider the Sixth Circuit's flawed analysis as persuasive authority.

IV. VIRGIN MOBILE IS ENTITLED TO A REFUND OR A CREDIT

Because of its erroneous holding that Virgin Mobile was subject to the CMRS Service Charge prior to July 2006, the lower courts did not address Virgin Mobile's request for a refund or credit of charges paid prior to July 2006. (R. 190, Op. at 26). It is clear, however, that a refund or credit of such amounts is mandated by both KRS 134.580 and longstanding principles of common law.

A. VIRGIN MOBILE IS ENTITLED TO A REFUND OR CREDIT PURSUANT TO KRS 134.580 BECAUSE THE CMRS SERVICE CHARGE IS A TAX

KRS 134.580 authorizes "the appropriate agency" to authorize refunds or credits "of any overpayment of tax or payment where no tax was due" provided the refund is claimed within four years of payment. KRS 134.580(2), (3). This authorization applies to "money . . . paid into the State Treasury in payment of any state taxes" and regardless

[10] The Sixth Circuit was incorrect in stating that TracFone had collected the CMRS Service Charge from its customers. Like Virgin Mobile, TracFone remitted the charge from its own revenues, as the District Court found. *Commonwealth of Kentucky Commerical Radio Serv. Emergency Telecomms. Bd. v. TracFone Wireless, Inc.*, 735 F. Supp. 2d 713, 718 n.1 (W.D. Ky. 2010), *aff'd*, 712 F. 3d 905 (6th Cir. 2013).

of "whether payment was made voluntarily or involuntarily." KRS 134.580(2) . Importantly, "agency" is defined to mean "the agency of state government which administers the tax to be refunded or credited," and, if the refund or credit is disputed, the "agency shall authorize the refund or credit as the . . . courts may direct." KRS 134.580(1)(a), (2).

"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 Assoc. v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 775 S.W.2d 520, 522 (Ky. App. 1989). Taxes are a means for the government to raise general revenue without regard to direct benefits which may inure to the payer. *See Krumpelman v. Louisville & Jefferson County Metro. Sewer District*, 314 S.W.2d 557, 561 (Ky. 1958).

For example, Kentucky courts have held that charges for sewage and water drainage systems are fees rather than taxes because the money is paid for the use of the sewage facilities by the resident being charged. *See Louisville & Jefferson County Metro. Sewer Dist. v. Barker*, 307 Ky. 655, 657-58, 212 S.W.2d 122, 124 (1948); *Sanitation District No. 1 v. Campbell*, 249 S.W.2d 767 (Ky. 1952); *see also* KRS 91A.510 (authorizing user fees). A fee, therefore, is a discrete charge paid in exchange for the use or receipt of a particular service. The example of public schools also shows the distinction between a tax and a fee: every resident pays taxes that fund public schools, yet only the parents of children enrolled pay the various fees the school requires (activity fees, yearbook fees, etc.).

The enhanced 911 charge, however, is not a fee. It is a tax.[11] The Circuit Court below held that "the 'service fee' imposed in Chapter 65 is a tax, since its purpose is to support enhanced 911 by apportioning its costs among the users."[12] (R. 251). While the CMRS Board argued that the charge is a fee under the mistaken assumption that cell phones users pay the charge "in order to fund *their* ability to dial 911 from *their* cell phone," the fact is that under federal law, people who have not paid the charge nonetheless have the right to call 911 from their phones. (Reply Brief of Cross-Appellant the CMRS Board, 4/19/11, p. 1, emphasis added). Any cell phone, regardless of whether it has any minutes on it or whether a bill has ever been paid, can be used to call 911. Moreover, even payers of the CMRS Service Charge are not remitting the charge in exchange for a personal benefit. Passersby report accidents, neighbors call in fires spotted in the neighborhood, and friends call 911 for people in distress. The tax is used to provide effective emergency services to the community, not just to the individual customers.

Virgin Mobile was not subject to the CMRS Service Charge prior to July 12, 2006, and paid the charge where none was due. Because the CMRS Service Charge is in fact a tax paid into the state treasury, Virgin Mobile timely perfected its rights to a refund or credit under KRS 134.580 on October 6, 2005, when it filed a claim for taxes paid for

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[11] The CMRS Board concedes that even if the CMRS Service Charge were not a tax, "case law construing tax statutes are the most analogous and have been cited by both parties, given the absence of cases interpreting statutory fees." (R. 123).

[12] Parallel litigation in federal courts concerning the same statutes has characterized the CMRS Service Charge as a tax. *See T-Mobile South, LLC v. Bonet*, 85 So. 3d at 980-81 ("We note that there was no disagreement among the parties in *TracFone* that the Kentucky statute should be analyzed as a tax statute.").

the August 2002 to May 2005 taxable periods.[13] KRS 134.580(3); (Wagner depo., Ex 14). Accordingly, this statute requires the CMRS Board to issue the requested refunds or credit those amounts against Virgin Mobile's post-July 11, 2006, liabilities.

B. Virgin Mobile Is Equally Entitled to a Refund under Common Law Principles

A common law action will lie for the recovery of money "not due and payable" and mistakenly paid to one to whom it does not in good conscience belong. Courts have applied this principle to governments for over 150 years. *City of Covington v. Powell*, 59 Ky. 226, 228 (1859); *Inland Container Corp. v. Mason County*, 6 S.W.3d 374, 377-78 (Ky. 1999) ("Only very compelling reasons of public policy relieve the state and its subdivisions from being required to live up to the same moral standards demanded of individuals and to repay taxes collected without authority of a valid law.") (quoting *Great Atl. & Pac. Tea Co. v. City of Lexington*, 256 Ky. 595, 76 S.W.2d 894, 895 (1934)).

This result also is compelled by *Barnes v. Stearns Coal & Lumber Co.*, which holds that special charges generating restricted revenues, such as the CMRS Service Charge, must be refunded under common law principles whether paid voluntarily or involuntarily. 295 Ky. 812, 175 S.W.2d 498, 500 (1943) (ordering refund of an employer's voluntary overpayment of unemployment insurance contributions). The CMRS Board's misrepresentation to Virgin Mobile that the charge applied when it did not equally compels a refund under common law. *Maximum Mach. Co. v. City of Shepherdsville*, 17 S.W.3d 890, 892 (Ky. 2000) ("[T]he common law authorizes a tax refund when . . . the taxing authority has engaged in misrepresentation.").

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[13] Again, it should be emphasized that there is no evidence that the CMRS Board itself took any final action to reject Virgin Mobile's refund request until it authorized its counsel to file this action.

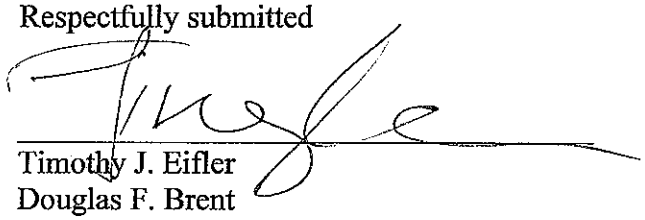
Last, even if this Court should determine that Virgin Mobile is not entitled to a refund or credit for its erroneous $286,807.00 payment, Virgin Mobile is still cast in judgment for $261,138.47 for the amount allegedly owed by Virgin Mobile between June 2005, and July 12, 2006, the date the 2006 CMRS Act became effective. This judgment must be reversed.

V. CONCLUSION

In the final analysis, this Court is called upon to interpret a tax statute. In so doing, the Court well knows that the words of the statute have meaning and a taxpayer can only be called upon to render to the state what the state has clearly required of him. As recognized by the courts below, the statute plainly did not require Virgin Mobile to collect and pay the CMRS Service Charge prior to July 2006 when the General Assembly legislated a different result. This Court should enforce the 2002 statute as written and not assume the mantle of the legislature to fashion a different result desired by the Board.

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals, hold that Virgin Mobile and its prepaid wireless services were not subject to the CMRS Service Charge prior to July 12, 2006, and require that any such charges paid prior to that date be refunded or credited against charges due for subsequent periods. Accordingly, this Court should reverse the judgment of $547,945.67 entered against Virgin Mobile. Alternatively, and in the event that Virgin Mobile is not entitled to a credit or refund of the $286,807 erroneously paid by Virgin Mobile, this Court should reverse $261,138.47 of the judgment entered in the Circuit Court for the 911 tax allegedly due for the period June 2005 to July 12, 2006.

Respectfully submitted



Timothy J. Eifler
Douglas F. Brent
Mark T. Hurst
STOLL KEENON OGDEN PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202
Telephone: (502) 333-6000
Facsimile: (502) 333-6099
timothy.eifler@skofirm.com
douglas.brent@skofirm.com
mark.hurst@skofirm.com

Charles W. Schwartz
(*admitted pro hac vice*)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1000 Louisiana Street, Suite 6800
Houston, Texas 77002
Telephone: (713) 665-5160
Facsimile: (713) 483-9160
charles.schwartz@skadden.com

APPENDIX

	RECORD	TAB
March 25, 2010, Opinion and Order of Jefferson Circuit Court	184-191	1
June 8, 2010, Opinion and Order of Jefferson Circuit Court	248-253	2
June 29, 2012, Opinion of Kentucky Court of Appeals	Appeal record	3
2002 Ky. Acts Ch. 69	Sealed record (Defendant's Sealed Memorandum (1) in Opposition to CMRS Board's Motion for Summary Judgment and (2) In Support of its Cross Motion for Summary Judgment, Exhibit E	4
2005 Ky. Acts Ch. 112	Sealed record (*id.* at Exhibit L)	5
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