

the fund are distributed to those state and local government facilities that are responsible for receiving 911 calls and dispatching public services to appropriate public safety agencies. These facilities are referred to as public safety answering points, or “PSAPs.” While a few counties and cities operate a PSAP alone and some counties have joined together to form regional 911 boards, most PSAPs serve a county and one or more cities.

2006 Amendments. Wireless services are acquired on either a prepaid or postpaid basis. A postpaid customer receives a monthly bill, but a prepaid customer has a cell phone that is programmed with a set number of minutes for which the customer has already paid. The prepaid services are typically sold through third parties at a variety of retail outlets including stores, markets, gas stations, pharmacies, and vending machines. The customer’s phone does not automatically renew those minutes and there is no monthly billing. The providers of prepaid services complained that this lack of a billing relationship created an administrative problem for them, and most providers of prepaid services took the position that the surcharge did not apply to their prepaid subscribers, and they ceased remitting the 911 surcharge to the CMRS Board. As a result, the CMRS Board sued two providers, Virgin Mobile and TracFone, in Jefferson Circuit Court. The TracFone litigation, however, was ultimately removed to U.S. District Court. In both cases, the trial courts ruled that the 1998 legislation required providers of wireless service to collect or remit the 911 surcharge of 70 cents per month with no distinction between prepaid and postpaid subscribers. In the Virgin Mobile case, the Kentucky Supreme Court held that Virgin Mobile and other pre-paid mobile phone providers were not required to collect the service charge owed customers prior to effective date of the 2006 amendments. The duty of cell phone providers to collect the service charge after the 2006 amendments was not contested. In the TracFone case, the U.S. Court of Appeals for the Sixth Circuit upheld the trial court’s finding that TracFone improperly withheld payment of 911 service fees to the CMRS Board. As a result of this ruling, TracFone has paid more than \$4 million, of which \$2.9 million will be distributed to PSAPs across the state.¹

In 2006, the General Assembly amended KRS 65.7635 to provide alternatives to the 911 wireless surcharge for prepaid service providers:

- (a) Deduct the value of the fee from the customer’s account each month if there is a sufficient positive balance, also known as the decrement method.
- (b) Provide payment based on an average revenue per user formula: take the total revenue earned by prepaid subscribers and divide by \$50 and then multiply the quotient by 70 cents. This formula assumes an average subscriber bill to be \$50.
- (c) Permit the CMRS Board to promulgate an alternative by regulation.

The CMRS Board declined to promulgate a regulation to provide the third option. At least one company has refused to remit until the third option is available and is involved

¹ February 26, 2014 and February 6, 2015 meetings with Joe Barrows, Executive Director, Kentucky Commercial Mobile Radio Service (CMRS) Board.

in one of the lawsuits previously mentioned. While AT&T uses the first option, most in the industry have chosen the second option, the average revenue per user option. The CMRS Board indicates they believe the formula in the second option, which is based on an assumption that the average wireless prepaid monthly bill is \$50, is flawed² since the average monthly bill for wireless prepaid subscribers is actually about \$20.³ The result, as noted by the CMRS Board, is that prepaid subscribers are paying less than postpaid subscribers.

It should be noted that providers of prepaid wireless service pay the fee out of their own revenues, and while the cost may be built into a wholesale price, providers generally are not recovering the fee directly from its customers.⁴

Program Review Study. The Legislative Research Commission's Program Review and Investigations Committee adopted a report in December 2011 relating to funding for 911 services. One of the areas reviewed in the study was the 911 surcharge for wireless prepaid and postpaid subscribers and the formula discussed earlier:

Some prepaid providers remit far less than 70 cents for their prepaid subscribers under the average revenue per user option. Based on a widely cited industry figure, providers using this option remit an average of 38.5 cents per prepaid device.⁵

The reason for the average revenue per user formula/option was the assumption that some prepaid providers did not know how many devices are in the state. However, the Program Review and Investigations Committee study noted that method may no longer be needed since prepaid providers have been submitting customer counts to the CMRS Board.⁶

The Program Review and Investigations Committee report did not make specific recommendations on funding changes because of a lack of information available about the full cost of 911 services and the contribution of each revenue source toward that cost. The report includes a recommendation that the CMRS Board compile a complete statewide 911 financial statement showing all costs and revenues applied to 911 services.

² February 26, 2014 meeting with Joe Barrows.

³ Federal Communications Commission, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, March 21, 2013, p. 283.

⁴ Kentucky Program Review and Investigations Committee report, "911 Services and Funding: Accountability and Financial Information Should be Improved," adopted December 8, 2011, pp. 55, 130.

⁵ Kentucky Program Review and Investigations Committee report, p. 34.

⁶ Kentucky Program Review and Investigations Committee report, p. 56.

Part III: Fiscal Explanation, Bill Provisions, and Estimated Cost

The fiscal impact of HB 190 is expected to be positive.⁷ While the extent of this positive impact could be substantial⁸, one stakeholder does not have enough data to measure the impact.⁹ Since HB 190 focuses solely on local governments and their ability to collect and use revenue for 911 services, the bill will have no impact on the CMRS Board.¹⁰

According to the CMRS Board, of the three main sources of 911 revenue (landline fees, cell phone fees, and local government appropriations), **revenue from cell phones accounts for less than 25 percent of total 911 revenues.**¹¹ The prevalence of cell phones is problematic in two ways. First, many Kentuckians are abandoning landline phones in favor of cell phones. Secondly, the fastest growing segment of cell phone users are those who use prepaid phones. As previously stated, the 2006 Amendments have created a disparity between prepaid and postpaid phones as prepaid phone usage has produced less revenue than postpaid phones. Although HB 190 does not specifically address the pre- and post-paid dichotomy, this background information is relevant to the overall context of local revenues generated by cell phone usage. This is because, **according to KLC, local governments have lost approximately \$21 million in prepaid wireless revenue. All total, based on data available from 2014, KLC estimates that local governments have lost \$42 million in revenue since the enactment of the 2006 amendments.**¹² **Further, the decline in landline usage is expected to continue and, accordingly, local 911 revenues are likewise expected to continually fall.**¹³

Relevant Provisions. Section 1 of HB 190 amends the definition of “911 emergency telephone service” by deleting the word “telephone” from the term and changing the substantive definition to include other methods of contacting 911 besides traditional landline telephones. Further, other definitions added to KRS 65.750 include “commercial mobile radio service (CMRS),” “service connection,” “telematics,” and “Voice over Internet Protocol (VoIP).”

The main purpose of HB 190 is to increase local government revenue for 911

⁷ February 21, 2014 telephone conversation with Kentucky Association of Counties (KACo); February 6, 2015 email from KACo; February 21, 2014 email from Kentucky League of Cities (KLC); February 10, 2015 email from KLC.

⁸ February 21, 2014 telephone conversation with KACo; February 6, 2015 email from KACo.

⁹ February 21, 2014 email from KLC; February 10, 2015 email from KLC.

¹⁰ February 20, 2014 telephone conversation with CMRS Board; February 6, 2015 meeting with Joe Barrows.

¹¹ March 3, 2014 email from CMRS Board; February 6, 2015 meeting with Joe Barrows.

¹² Informational Bulletin prepared by Kentucky League of Cities, Kentucky Association of Counties, and Kentucky Emergency Number Association/Association of Public Communication Officers (KENA/APCO); February 10, 2015 email.

¹³ KLC internet bulletin, “Contact Your Legislator to Support 911 Funding,” <http://www.klc.org/news/2275/Contact_Your_Legislator_to_Support_911_Funding>, accessed February 21, 2014; February 10, 2015 email.

emergency services. Section 2 seeks to accomplish this by amending KRS 65.760 to add “CMRS service connections; telematics service connections; and VoIP service connections” to the list of 911-capable telephony services that can be taxed. Subsection 3 of Section 2 further requires that all revenues from such taxes are to be placed in a separate fund and prohibits those revenues from being used for any purpose other than the provision of 911 emergency services. Paragraph (c) of subsection 3 fleshes out the restricted uses of the revenues by limiting them to the operational, maintenance, capital expense, and personnel needs of local 911 emergency systems.

It is noteworthy that HB 190 does not alter or repeal the three aforementioned surcharge options spelled out in KRS 65.7635.

Data Source(s): LRC Staff; Kentucky League of Cities; Kentucky Association of Counties; Commercial Mobile Radio Service Board; Program Review and Investigations Committee Study, adopted December 8, 2011; Federal Communications Commission Annual Report on Mobile Wireless Services, March 21, 2013.

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