

**Local Mandate Fiscal Impact Estimate
Kentucky Legislative Research Commission
2015 Regular Session
SB 202
Part I: Measure Information**

Bill Request #: 1442

Bill #: SB 202

Bill Subject/Title: AN ACT relating to 911 emergency services.

Sponsor: Sen. Higdon

Unit of Government: City County Urban-County
 Charter County Consolidated Local Unified Local
Government

Office(s) Impacted: Local government public safety answering points/911 emergency systems for wireless phone customers.

Requirement: Mandatory Optional

Effect on Powers & Duties: Modifies Existing Adds New Eliminates Existing

Part II: Purpose and Mechanics

SB 202 amends sections of KRS Chapter 65 and creates new sections in KRS Chapter 142 to change the current system for collecting a surcharge on prepaid wireless phone customers to help fund 911 emergency services. Currently, the surcharge is paid by the provider of the service even if the service is sold for resale to retailers. **Under the changes proposed in SB 202, the surcharge for prepaid wireless phone service would instead be collected at the point of sale by the retailer and remitted to the Department of Revenue, similar to a sales tax.**

1998 Legislation. In 1998, the Kentucky General Assembly established the Commercial Mobile Radio Service (CMRS) Board to develop an emergency 911 system for wireless customers in response to a mandate from the Federal Communications Commission. The legislation is codified at KRS 65.7621 to 65.7643.

The 1998 legislation established a monthly surcharge of 70 cents for wireless subscribers. Wireless phone providers are required to collect a monthly 911 service fee of 70 cents per month from their customers on behalf of the Commonwealth. The providers are allowed to retain 1.5% of the fee as an administrative cost. The fees collected are deposited to the

Commercial Mobile Radio Service Emergency Telecommunications Fund. Moneys in 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

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

least one company has refused to remit until the third option is available and is involved 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 monthly expenditure for prepaid subscribers is \$50, is flawed² since the average monthly cost for prepaid phones is actually about \$20.³ The result, as noted by the CMRS Board, is that prepaid phones are generating less financial support for 911 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; February 17, 2015 telephone conversation 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

SB 202 does not require PSAPs and the local governments that operate PSAPs to make any changes in the way they provide 911 services, but it does affect a major source of PSAP funding—the CMRS Fund.

The fiscal impact of SB 202 is expected to have a moderately positive benefit to local governments who operate PSAPs.⁷ Stakeholders generally agree that more revenue will be generated by SB 202, but that it would still collect less revenue than would be the case if each prepaid customer paid the full current amount of 70 cents per month.⁸ Under current law, the CMRS Board estimates that it collected \$2.685 million from prepaid cellular phone service in FY 2014.⁹ The changes proposed in SB 202 are expected to result in an additional \$1 million collected annually (from both prepaid and postpaid phones), but the under-collection of the 911 fee on prepaid phones would still reach approximately \$3 million a year.¹⁰

Relevant provision. Among SB 202’s sections related to the impact on local government are the following:

Section 2 amends KRS 65.7627, which establishes the CMRS fund, by requiring revenues derived from the “prepaid wireless service charge” to be deposited into the fund. These revenues are to be *in addition to* the current deposits derived from the existing surcharge. The “prepaid wireless service charge” is established in Section 5.

Section 3 complements Section 2 by flatly stating that the current CMRS service charge shall not apply to prepaid wireless telecommunication services. Instead, prepaid wireless services will be subject to the new prepaid wireless service charge.

Section 4 amends KRS 65.7635 to remove the three alternative collection procedures described above.

Section 5, as mentioned, imposes the new prepaid wireless service charge. The rate of the service charge shall be 2% of the sales price and would be applied at the point of sale. Also, Section 5 requires the amount of the prepaid service charge to be stated on the bill or receipt. An exception is made, however, for circumstances in which a “minimal amount” of prepaid wireless telecommunication service is sold with a prepaid wireless device for a single, non-itemized price. A “minimal amount” of service is 10 minutes or less, or \$5 or less.

⁷March 12, 2014 and February 23, 2015 telephone conversations with CMRS Executive Director.

⁸ March 13, 2014 email from and February 23, 2015 telephone conversation with the CMRS Executive Director; March 14, 2014 and February 23, 2015 emails from Kentucky League of Cities.

⁹ February 24, 2015 telephone conversation with CMRS Executive Director.

¹⁰ CMRS Board, SB 202 analysis sheet received February 24, 2015.

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

Preparer: Josh W. Nacey **Reviewer:** MCY **Date:** 2/24/15