RENDERED: JULY 10, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001614-MR
AND
NO. 2018-CA-001687-MR

KENTUCKY COMMERCIAL MOBILE RADIO SERVICE EMERGENCY TELECOMMUNICATIONS BOARD (n/k/a KENTUCKY 911 SERVICES BOARD) APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NOS. 09-CI-01436 & 15-CI-01124

T-MOBILE SOUTH LLC (d/b/a T-MOBILE USA), SUCCESSOR-IN-INTEREST TO POWERTEL MEMPHIS, INC. APPELLEE/CROSS-APPELLANT

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CALDWELL, JONES, AND TAYLOR, JUDGES.

CALDWELL, JUDGE: In this appeal and cross-appeal, we review a trial court's order concluding that it lacked subject matter jurisdiction to resolve claims for a

refund of "service charges" remitted under the statutory scheme for providing wireless enhanced 911 services. As we disagree with this conclusion, we reverse and remand for further proceedings on the merits before the trial court.

FACTS AND PROCEDURAL BACKGROUND

The underlying facts are largely undisputed. T-Mobile is a provider of cellular phone services. Some of its customers have prepaid for service; others are billed monthly for services already provided. This appeal arises out of T-Mobile's attempt to obtain a refund of funds remitted to the Kentucky Commercial Mobile Radio Service Emergency Telecommunications Board (CMRS Board) from January 2003 to May 2005 for CMRS service charges on its prepaid service.

Starting in 1998, Kentucky imposed upon cellular phone users a monthly CMRS service charge of seventy cents to fund wireless enhanced 911 services under KRS[1] 65.7629. The wireless cellular service providers had a duty to collect such service charges under KRS 65.7635 "as part of the provider's normal monthly billing process."[2] The CMRS service charge was listed as a separate entry on each monthly bill. Within a few years, questions arose about whether cell

[1] Kentucky Revised Statutes.

[2] The pre-2006 version of KRS 65.7635(1) provided in pertinent part: "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."

phone providers were required to remit such monthly charges for prepaid users as prepaid users did not receive monthly bills from CMRS providers:

> Purchasers of pre-paid mobile service received a mobile telephone with a CMRS connection, and a fixed quantity of wireless telephone service. Since pre-paid CMRS service was purchased at a retail outlet, consumers of the service did not deal directly with a CMRS provider, and thereafter had no relationship with a CMRS provider except for the occasional purchase of additional minutes of phone service. Significantly, users of pre-paid mobile telephones never received a monthly bill. Because their mobile phone service was paid for prior to using it, they never had an unpaid balance for prior phone service for which they could be billed. Under the prepaid-CMRS plan, collecting the CMRS service charge in a manner consistent with the mandate of KRS 65.7635(1) was not physically or conceptually possible because prepaid CMRS users and providers had no "normal monthly billing" cycle.

Virgin Mobile U.S.A., L.P. v. Commonwealth, ex rel. Commercial Mobile Radio Service Telecommunications Board, 448 S.W.3d 241, 244 (Ky. 2014). Originally KRS 65.7629(3) required the Board to collect CMRS service charges from "each CMRS connection within the Commonwealth." In 2002, KRS 65.7629(3) was amended "to require the CMRS Board to collect the CMRS service charge from each 'CMRS connection' with 'a place of primary use, as defined in 4 U.S.C.[3] sec. 124, within the Commonwealth'" but "the 2002-amendment made no mention of pre-paid mobile service and it made no change whatsoever to the prescribed

[3] United States Code.

method of collecting the service charge set out in KRS 65.7635." *Virgin Mobile*, 448 S.W.3d at 244.

Like some other providers of prepaid cellular phone services who were unable to collect CMRS service charges through the statutorily prescribed method of direct monthly billing, T-Mobile estimated and remitted what its prepaid users would have owed in CMRS service charges for a few years until it concluded it was not responsible for remitting such charges based on "industry research" in 2005. *See id*. at 244-45 (noting how Virgin Mobile similarly stopped estimating and remitting CMRS service charges on prepaid service in 2005 based on "industry research" concluding that "Kentucky's statutory scheme for collecting the CMRS service charge through the regular monthly billings did not obligate providers of prepaid CMRS to act as a collection agent for the Board"). Despite T-Mobile and other providers concluding that providers were not responsible for remitting CMRS service charges on prepaid services, however, T-Mobile received correspondence dated September 24, 2004, from the CMRS Board Administrator taking a contrary position.

T-Mobile contends that from January 2003 to May 2005, it remitted payment for $612,460.78 in "CMRS service charges" on prepaid wireless telephone services. It asserts that this amount was paid out of its own funds.

In 2006, the CMRS statutes were amended to explicitly state that "prepaid CMRS service connections" were subject to the CMRS service charge[4] and that providers must remit CMRS service charges on prepaid service using one of three alternate methods for collecting such service charges.[5] But questions remained about whether providers had a duty to remit CMRS service charges on prepaid service under the pre-2006 statutes.

T-Mobile attempted to obtain a refund of CMRS service charges remitted on prepaid service from January 2003 to May 2005 through sending

---

[4] Effective July 12, 2006, KRS 65.7629(3) was amended to state that one of the CMRS Board's duties was:

> To collect the CMRS service charge from each CMRS connection:
>
> (a) With a place of primary use, as defined in 4 U.S.C. sec. 124, within the Commonwealth; or
>
> (b) For prepaid CMRS connections:
>
> 1. With a place of primary use, as defined in 4 U.S.C. sec. 124, within the Commonwealth, or
>
> 2. With a geographical location associated with the first six (6) digits, or NPA/NXX, of the mobile telephone number is inside the geographic boundaries of the Commonwealth.

Prior to that amendment, KRS 65.7629(3) provided that one of the CMRS Board's duties was: "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, within the Commonwealth."

[5] Effective July 12, 2016, KRS 65.7635(1) was amended to add a provision that "[f]or CMRS customers who purchase CMRS services on a prepaid basis, the CMRS service charge shall be determined according to one (1) of the following methodologies as elected by the CMRS provider" and then set forth three possible methodologies. The prior version of KRS 65.7635(1) simply provided for collecting CMRS service charges "as part of the provider's normal monthly billing process . . . ."

"amended E911 filings claiming refunds" to the CMRS Board in correspondence dated November 22, 2006. It also sent a refund claim to the Kentucky State Treasurer. Following local counsel's email inquiries concerning refund procedures, an email was received from a Kentucky Department of Revenue official stating that the Department did not administer those fees.

T-Mobile also received a letter about CMRS service charges dated February 15, 2007, stating that "the Commonwealth" took the position that the service charges had always applied to prepaid service, that T-Mobile was not entitled to a refund or credit, and that T-Mobile should pay all service charges due (including past due charges) or "legal action will be initiated to enforce these obligations." As T-Mobile points out, this letter was not on CMRS Board letterhead but on that of the Justice and Public Safety Cabinet, Office of Legal Services. It was signed by an attorney as "Deputy General Counsel." Following the receipt of this correspondence in early 2007, there were apparently no further developments on T-Mobile's attempt to obtain a refund for about two years.

Meanwhile, in October 2008, the Commonwealth of Kentucky filed collection actions to recover CMRS service charges on prepaid service from providers Virgin Mobile and TracFone.[6] *Virgin Mobile*, 448 S.W.3d at 245;

[6] Both actions were originally filed in Jefferson Circuit Court, but the *TracFone* action was soon removed to federal court.

Kentucky Commercial Mobile Radio Serv. Emergency Telecomm. Bd. v. TracFone Wireless, Inc., 712 F.3d 905, 911 (6th Cir. 2013). To resolve these cases, courts would have to determine whether CMRS service providers had a duty to remit CMRS service charges on prepaid service prior to the July 2006 statutory amendments. TracFone had quit remitting CMRS service charges on prepaid service after November 2003 and continued not to remit service charges even after the amendments taking effect in July 2006 until suit was filed. *Id.* at 909-11.[7] Virgin Mobile stopped paying CMRS service charges on prepaid service in May 2005. After the statutory amendments took effect in July 2006, it also engaged in "self-help" by "claiming credits for the 'overpayment' by applying its post-July 2006 service charge collections to the claimed overpayment" so that it effectively "made no CMRS payment to the Board for nearly two years after July 2006, until it had recaptured from post-July 2006 collections the $286,807.20 it had paid before May 2005." *Virgin Mobile*, 448 S.W.3d at 245.

In July 2009, T-Mobile's counsel sent a letter addressed to the CMRS Board chairman stating that T-Mobile had filed a refund claim with the CMRS Board on November 22, 2006, but still had not received any final ruling regarding the refund claim from the CMRS Board. This letter further asked if additional

[7] Even after suit was filed, TracFone remitted CMRS service charges for prepaid customers who purchased service directly from TracFone but not for prepaid customers who purchased service through third-party retailers. *TracFone*, 712 F.3d at 911.

information was necessary to resolve its claim and that "[i]f the Board has decided to deny the refund claim, please send T-Mobile a final ruling so that T-Mobile can pursue an appeal." Lastly, the letter stated that if the CMRS Board did not respond within 45 days, T-Mobile would pursue litigation, including seeking interest on the refund amount.

Shortly thereafter, T-Mobile's counsel received correspondence dated July 24, 2009, signed by the same attorney as the February 2007 letter—but this time as "Counsel, Kentucky CMRS Board" and on CMRS Board letterhead. This letter stated: "It is the position of the Commonwealth in this matter that KRS 65.7635 has always designated CMRS providers as collection agents for CMRS funds regardless of whether the service is provided by a pre-paid calling card or through monthly billing" and so "the refund request from T-Mobile is respectfully denied."

In August 2009, T-Mobile filed both a Complaint for Declaratory Relief and Refund in Franklin Circuit Court and a Petition of Appeal in the then-existing Kentucky Board of Tax Appeals (Tax Board) seeking a refund of $612,460.78 paid from 2003 to 2005 and all other appropriate relief such as interest and attorney fees. The CMRS Board filed an answer[8] in the circuit court

[8] As individual members of the Board had also been named in the complaint, an answer and then an amended answer were both filed on behalf of all defendants. However, the individual board members were later dismissed from the action by agreed order.

action, asserting affirmative defenses including statute of limitations, collateral estoppel, res judicata, laches, waiver, estoppel, voluntary payment, and failure to state a claim upon which relief can be granted.

The CMRS Board also filed a motion to dismiss in the Tax Board appeal, claiming that the appeal was untimely and that the Tax Board was not the proper forum to adjudicate the dispute. The motion to dismiss further claimed that the Tax Board lacked jurisdiction to hear this request for a refund of a "service charge" which "is simply not a tax" and is "imposed by 'an independent entity within state government'" rather than a state agency. After T-Mobile filed its response to the motion to dismiss, the Tax Board chairman issued an order summarily stating that the motion to dismiss was denied in December 2009.

In 2010, both the administrative appeal and the circuit court action were held in abeyance pending resolution of similar legal issues in the *Virgin Mobile* and *TracFone* cases then pending in Kentucky federal and state courts. Over the next few years, it appeared unlikely that T-Mobile would ever prevail on the merits of its refund claim as both trial courts and intermediate appellate courts in the Kentucky state and federal systems concluded that providers had a duty to remit CMRS service charges on prepaid cellular phone service under the pre-2006 statutes. *See Commonwealth of Ky. Commercial Mobile Radio Service Emergency Telecomm. Bd. v. TracFone Wireless, Inc*., 735 F.Supp.2d 713, 723-24 (W.D. Ky.

2010) (federal district court sitting in diversity relying on opinion of Jefferson Circuit Court in *Virgin Mobile* case as "this Court concludes that the Kentucky Supreme Court would quite likely follow Judge Conliffe's convincing analysis" to determine that providers were obligated to remit CMRS service charges under the pre-2006 statutes); *TracFone*, 712 F.3d at 912-13 (federal appellate court sitting in diversity relying on Kentucky Court of Appeals opinion in *Virgin Mobile* in determining that providers did have a duty to remit CMRS service charges on prepaid plans under pre-2006 statutes). In 2014, however, T-Mobile's hopes for a possible refund were revived when the Kentucky Supreme Court issued its opinion in the *Virgin Mobile* case and determined that providers did *not* have a duty to remit CMRS service charges on prepaid cellular services under the pre-2006 statutes, *Virgin Mobile*, 448 S.W.3d at 249, contrary to the earlier holdings of Kentucky state and federal courts.

Following the Kentucky Supreme Court's rendition of a final opinion in the *Virgin Mobile* case in late 2014, proceedings before the Tax Board recommenced. The Tax Board issued an order requesting supplemental briefing on the jurisdictional issues raised in the 2009 motion to dismiss and stated it would not address the merits until jurisdictional issues had been resolved. Following supplemental briefing and oral argument, the Tax Board entered a final order in 2015 dismissing T-Mobile's appeal due to lack of subject matter jurisdiction. The

Tax Board did not address other possible jurisdictional issues, such as whether the CMRS Board was a "state agency," as it concluded on page 7 of its final order that it lacked subject matter jurisdiction due to its conclusion that the service charge was "not a tax over which this Board has jurisdiction."

T-Mobile then appealed the Tax Board order of dismissal to the Franklin Circuit Court, and the appeal of the Tax Board dismissal was consolidated with the extant Franklin Circuit Court action by agreed order. Both parties filed motions for partial summary judgment[9] in the consolidated case, and the trial court heard oral arguments on these motions in December 2016. From our review of the record, it appears that each party was then arguing that it was entitled to prevail on the merits on the refund dispute without seemingly raising any issues as to the trial court's subject matter jurisdiction. Nonetheless, the trial court ultimately did not reach the merits of either motion for partial summary judgment as it concluded that the CMRS service charge was a tax and that the Kentucky Claims Commission (Claims Commission), successor to the Tax Board, had exclusive subject matter

[9] Both motions asked for summary judgment on Count II of the complaint. Count II of the complaint requested a declaration that the CMRS service charge did not apply to prepaid service during the relevant time period (January 2003 through May 2005) and that T-Mobile receive a refund of $612,460.78 under the Declaratory Judgment Act and under principles of common law refund. Counts I and III of the complaint also asked for a refund of the same dollar amount, with Count I of the complaint asking for relief under the Administrative Procedures Act and Count III of the complaint also asking for a declaration that application of the CMRS service charges to prepaid service during the relevant time would violate the Commerce Clause of the United States Constitution.

jurisdiction over the dispute. It thus reversed the Tax Board's order of dismissal and remanded for further proceedings in the Claims Commission,[10] while dismissing without prejudice T-Mobile's court claims for declaratory judgment and common law refund in a final and appealable order entered in October 2018.

The CMRS Board appealed, arguing that the trial court erred in 1) reversing the Tax Board's dismissal on subject matter jurisdiction grounds and remanding for further proceedings before the Claims Commission, and 2) in dismissing the court claims without prejudice instead of with prejudice. The CMRS Board asserts that the Claims Commission lacked subject matter jurisdiction to resolve the refund dispute, and that the trial court should have determined that T-Mobile was not entitled to a refund as a matter of law. It contends that the trial court should be reversed and the case remanded with instructions to dismiss all of T-Mobile's claims with prejudice.

T-Mobile filed a cross-appeal, arguing that the trial court should have awarded it a refund of $612,460.78 plus interest rather than remanding the case to the Claims Commission. Its brief does not address whether the service charge was really a tax or a fee; instead, it asserts that whether the service charge was a tax or

[10] As the trial court noted, the Tax Board "no longer exists as an entity; an October 2016 Executive Order consolidated the functions of the former KBTA [Tax Board], the Crime Victim's [sic] Compensation Board, and the Kentucky Board of Claims into the Kentucky Claims Commission . . . ."

a fee, it is entitled to a common law refund. In its brief, T-Mobile stated that for purposes of the appeal and cross-appeal, "T-Mobile submits that this Court should consider the CMRS service charge to be a fee and apply the case law for a common law refund cited in *Virgin Mobile* . . . ."[11] If this Court should hold the CMRS service charge to be a tax and thus affirm the trial court order remanding to the Claims Commission, it contends that it is entitled to a statutory refund under KRS 134.580.[12]

ISSUE BEFORE THE COURT

Despite the parties' understandable desire to obtain judgment in their favor and put this long-pending litigation to an end, we cannot reach the merits of the refund claim as there has been no determination of the merits for us to review. *See Klein v. Flanery*, 439 S.W.3d 107, 122 (Ky. 2014) ("As an appellate court, we review judgments; we do not make them."). Rather, as both the Tax Board and the

[11] T-Mobile apparently construes case law as more easily allowing for common law refunds of fees than taxes. We express no opinion on this matter.

[12] KRS 134.580(2) presently provides that: "When money has been paid into the State Treasury in payment of any state taxes, except ad valorem taxes, whether payment was made voluntarily or involuntarily, the appropriate agency shall authorize refunds to the person who paid the tax, or to his heirs, personal representatives or assigns, of any overpayment of tax and any payment where no tax was due. When a bona fide controversy exists between the agency and the taxpayer as to the liability of the taxpayer for the payment of tax claimed to be due by the agency, the taxpayer may pay the amount claimed by the agency to be due, and if an appeal is taken by the taxpayer from the ruling of the agency within the time provided by KRS 49.220 and it is finally adjudged that the taxpayer was not liable for the payment of the tax or any part thereof, the agency shall authorize the refund or credit as the Kentucky Claims Commission or courts may direct."

trial court dismissed the case before them for lack of subject matter jurisdiction, we must resolve the issue of subject matter jurisdiction so that the dispute may be remanded to a proper forum for resolution on the merits. As we determine that the trial court erred in determining that it lacked subject matter jurisdiction to resolve the refund dispute, we reverse and remand to the trial court for further proceedings.

STANDARD OF REVIEW

Although we ultimately disagree with the trial court's conclusion that it lacked subject matter jurisdiction, it was entirely proper for the trial court to confront this issue before resolving the summary judgment motions even though the parties did not actively dispute its jurisdiction at that time. Subject matter jurisdiction cannot be granted by waiver or consent, *Nordike v. Nordike*, 231 S.W.3d 733, 738 (Ky. 2007), and can be raised at any time since a judgment rendered in the absence of subject matter jurisdiction is void. *Goodlett v. Brittain*, 544 S.W.3d 656, 660 (Ky. App. 2018).

In reviewing a circuit court's determination that it lacks subject matter jurisdiction, we apply a *de novo* standard of review. *Davis v. Davis*, 563 S.W.3d 105, 108 (Ky. App. 2018).

ANALYSIS

As the dispute concerns whether T-Mobile may be entitled to a refund of KRS 65.7629 service charges which it remitted from 2003 to 2005 to the CMRS

Board, we must resolve whether the trial court properly determined that CMRS service charges under the then-existing statutory framework were taxes rather than fees. We cite to the statutes then in effect from 2003 to 2005. We express no opinion on whether CMRS service charges under later statutory amendments would be taxes or fees. We likewise express no opinions on such matters as whether T-Mobile has a meritorious common law refund claim or whether the CMRS Board should prevail based upon any defense it has asserted such as voluntary payment, lack of misrepresentation, laches, or statute of limitations.

Although T-Mobile's case was stayed pending the resolution of the *Virgin Mobile* and *TracFone* cases, those cases involved collection actions filed by the Commonwealth against providers under KRS 65.7635(5)[13] and thus provide no guidance on subject matter jurisdiction over a provider's action to obtain a refund of CMRS charges. And despite any reference to the CMRS service charge as being a "tax" or "fee" in *Virgin Mobile* and *TracFone*, whether the service charge was a tax or fee was not really at issue in those cases. In fact, the Kentucky Supreme Court explicitly declined to decide whether the CMRS Board was correct in arguing that the CMRS service charge was not a tax in *Virgin Mobile*, 448

[13] KRS 65.7635(5) establishes that a CMRS provider must remit CMRS service charges to the CMRS Board monthly and provides that "[c]ollection actions may be initiated by the state, on behalf of the [CMRS] board, in the Franklin Circuit Court or any other court of competent jurisdiction . . . ."

S.W.3d at 250; instead, it rejected Virgin Mobile's argument that it was due a refund or a credit against future payments under the tax refund provision of KRS 134.580(2) because "Virgin's contribution to the CMRS fund was not money paid into the State Treasury." *Id*. at 251.

Given the lack of specific statutory provisions establishing procedures for providers to seek refunds of CMRS service charges,[14] both the Tax Board and the trial court questioned whether they had subject matter jurisdiction to resolve such a dispute and inquired into the details of how CMRS service charges and the CMRS fund worked. We likewise review the statutes in place during the relevant time period to ascertain the true nature of the service charge and how it was utilized.

[14] We note that under current versions of the statutes, CMRS service charges on prepaid service after January 1, 2017, are no longer collected by CMRS providers under KRS 65.7635. Instead, under KRS 65.7634(4), CMRS service charges on prepaid service are collected by retailers and "remitted to the Department of Revenue as provided in KRS 142.100 to 142.135." KRS 142.115 requires that retailers file returns concerning these CMRS service charges on prepaid services. Under KRS 142.120, the Department of Revenue reviews such returns to determine if additional amounts must be assessed and retailers have a right to request review of the Department's actions and to protest and appeal from such assessments under KRS 131.110. After the Department of Revenue has ruled on any protest of an assessment, KRS 131.110(5) states that "the taxpayer may appeal to the Kentucky Claims Commission pursuant to the provisions of KRS 49.220." KRS 142.130(5) provides that such CMRS service charges on prepaid services may be refunded under KRS 134.580 "in the case of over payment or payment when no fee was due."

In contrast, CMRS service charges on postpaid service are still to be collected monthly from providers and remitted to the CMRS Board under the present version of KRS 65.7635. KRS 65.7635 still contains provisions allowing the Commonwealth to file suit to collect CMRS service charges, but has no provisions governing how a provider might seek to obtain a refund of any CMRS service charges paid.

Nature of Service Charge During Relevant Time Period (2003 to 2005)

During the relevant time frame from 2003 to 2005, KRS 65.7621(10) provided that "CMRS service charge" means "the CMRS emergency telephone service charge levied under KRS 65.7629(3) and collected under KRS 65.7635." KRS 65.7627 stated in pertinent part that "[t]he CMRS service charge shall have uniform application within the boundaries of the Commonwealth" and that no other charge "is authorized to be levied by any person or entity for providing wireless 911 service or wireless E911 service." KRS 65.7629(3) stated in pertinent part: "The CMRS service charge shall be seventy cents ($0.70) per month per CMRS connection, and shall be collected in accordance with KRS 65.7635 beginning August 15, 1998. The amount of the CMRS service charge shall not be increased except by act of the General Assembly[.]" KRS 65.7629(4) stated that the CMRS Board had a duty to review the CMRS service charge rate periodically, and "at its discretion, to decrease the rate or recommend that the General Assembly increase the rate if the board determines that changing the rate is necessary to achieve the purposes of KRS 65.7621 to KRS 65.7643." Notwithstanding any questions as to its application to prepaid services which were later resolved by *Virgin Mobile*, KRS 65.7635 at that time basically called for CMRS providers to act as "collection agent[s] for the CMRS fund" and to collect CMRS service

charges from customers and remit CMRS service charges to the CMRS Board monthly.[15]

In short, during the relevant time period, the CMRS service charge was a statewide monthly CMRS emergency telephone service charge. Although the CMRS service charge was initially set at seventy cents per month per connection by statute, the CMRS Board had a duty to review the rate periodically to see if it was appropriate to accomplish statutory purposes and discretion to decrease the rate or to recommend that the General Assembly increase it.

Prescribed Use of CMRS Service Charges Under Statutes (2003-2005)

KRS 65.7629(5) stated that the CMRS Board had a duty "[t]o administer and maintain the CMRS fund according to the provisions of KRS 65.7627, and promptly to deposit all revenues from the CMRS service charge into the CMRS fund[.]" KRS 65.7627 established the CMRS fund as "an insured, interest-bearing account to be administered and maintained by the CMRS Board" and further provided that the CMRS Board must "deposit all revenues derived

[15] The relevant version of KRS 65.7635 (in effect from 1998 until July 11, 2006) provided in pertinent part: "(1) 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 . . . (5) All CMRS service charges imposed under KRS 65.7621 to 65.7643 collected by each CMRS provider, less the administrative fee described in subsection (4) of this section, are due and payable to the board monthly and shall be remitted on or before sixty (60) days after the end of the calendar month."

under KRS 65.7635" into the fund.[16] KRS 65.7625(3) identified the ultimate purpose of the CMRS statutory scheme as "a statewide effort to expand and improve wireless enhanced emergency telecommunications capabilities and responses throughout the state, including but not limited to the implementation of wireless E911 service requirements . . . ."[17] And KRS 65.7627 further directed that the CMRS Board must "direct disbursements" from the CMRS fund according to KRS 65.7631, and that:

> Moneys in the CMRS fund shall not be the property of the Commonwealth and shall not be subject to appropriation by the General Assembly. Moneys deposited or to be deposited into the CMRS fund shall not:

[16] Although we quote from the pre-2016 version of KRS 65.7627, we note that KRS 65.7627 was amended in 2016 to require that "[a]ll revenues collected under KRS 65.7635" and other statutory provisions for CMRS service charges "shall be deposited *directly* into the [CMRS] fund." (Emphasis added.)

[17] KRS 65.7625(3) at that time stated: "The administrator shall, with the advice of the board, coordinate and direct a statewide effort to expand and improve wireless enhanced emergency telecommunications capabilities and responses throughout the state, including but not limited to the implementation of wireless E911 service requirements of the FCC order and rules and regulations adopted in carrying out that order. In this regard, the administrator shall:

(a) Obtain, maintain, and disseminate information relating to emergency telecommunications technology, advances, capabilities, and techniques;

(b) Coordinate and assist in the implementation of advancements and new technology in the operation of emergency telecommunications in the state; and

(c) Implement compliance throughout the state with the wireless E911 service requirements established by the FCC order and any rules or regulations which are or may be adopted by the Federal Communications Commission in carrying out the FCC order."

> (1) Be loaned to the Commonwealth or to any instrumentality or agency thereof;
>
> (2) Be subject to transfer to the Commonwealth or any agency or instrumentality thereof, except for purposes specifically authorized by KRS 65.7621 to 65.7643; or
>
> (3) Be expended for any purpose other than a purpose authorized by KRS 65.7621 to 65.7643.

KRS 65.7631 put detailed limits on how money in the CMRS fund could be spent: 1) first, up to 2.5% to cover the CMRS Board's administrative costs and up to $250,000.00 for the CMRS Board to implement a wireless workload formula to apportion some funds among PSAPs[18] (Public Service Answering Points); 2) then fifty percent of the remaining balance to eligible PSAPs for certain specified purposes relating to providing wireless 911 service;[19] and 3) then the remaining balance after that to CMRS providers to reimburse them for the costs of complying

[18] KRS 65.7631(1) stated in pertinent part: "Not more than two and one-half percent (2.5%) of the total monthly revenues deposited into the CMRS fund shall be disbursed or reserved for disbursement by the board to pay the administrative costs and expenses incurred in the operation of the board, including the compensation of the administrator . . . . An additional sum, not to exceed two hundred fifty thousand dollars ($250,000), shall be available to the board from the fund to implement the wireless workload formula under subsection (2)(b) of this section."

[19] KRS 65.7631(2) provided in pertinent part that: "All amounts distributed to PSAPs under this subsection shall be used by the PSAPs solely for the purposes of answering, routing, and properly disposing of CMRS 911 calls, training PSAP staff, public education concerning appropriate use of 911, and of complying with the wireless E911 service requirements established by the FCC order and any rules and regulations which are or may be adopted by the Federal Communications Commission pursuant to the FCC order, including the payment of costs and expenses incurred in designing, upgrading, purchasing, leasing, programming, testing, installing, or maintaining all necessary data, hardware, and software required in order to provide wireless E911 service."

with wireless enhanced 911 service requirements.[20] KRS 65.7631(4) established requirements for eligibility for receiving money from the CMRS fund for PSAPs (communications facilities which received 911 calls).[21]

Ultimately, the trial court disagreed with the Tax Board's apparent characterization of the CMRS service charge as a fee rather than a tax and reversed the Tax Board's order of dismissal. Before addressing the fee versus tax issue, however, we must note that perhaps the Tax Board was not necessarily stating the CMRS service charge was not a tax at all in concluding that it was "not a tax over which this Board has jurisdiction" at page 7 of its final order. The Tax Board appeared to construe its subject matter jurisdiction somewhat narrowly, looking for a specific statutory grant of subject matter jurisdiction to consider the "service charge" refund dispute and expressing doubt about whether the CMRS Board was

[20] KRS 65.7631(3) provided in pertinent part: "The balance of the total monthly revenues deposited into the CMRS fund which remains after the disbursements or disbursement reservations prescribed by subsections (1) and (2) of this section have been made shall be distributed to CMRS providers licensed to do business in the Commonwealth solely for the purpose of reimbursing the actual expenses incurred by the CMRS providers in complying with the wireless E911 service requirements established by the FCC order and any rules and regulations which are or may be adopted by the Federal Communications Commission in carrying out the FCC order, including, but not limited to, costs and expenses incurred for designing, upgrading, purchasing, leasing, programming, testing, installing, or maintaining all necessary data, hardware, and software required in order to provide wireless E911 service."

[21] KRS 65.7621(17) provided: "'Public safety answering point' or 'PSAP' means a communications facility that is assigned the responsibility to receive 911 calls originating in a given area and, as appropriate, to dispatch public safety services or to extend, transfer, or relay 911 calls to appropriate public safety agencies[.]"

a "state agency" so that the Tax Board would have jurisdiction over the dispute under its jurisdictional statute:

> This Board is limited under its jurisdictional statute, KRS 131.340 to hear final rulings of "any agency of state government affecting revenue and taxation." The statute provides further that any party aggrieved by a ruling, order, or determination of any state or county agency charged with the administration of any "taxing or licensing measure," may prosecute an appeal to this Board.
>
> The CMRS Board is attached administratively to the Kentucky Office of Homeland Security "for administrative purposes only and shall operate as an independent entity within state government." KRS 65.7623. The purpose of the CMRS Board is to implement and maintain an enhanced 911 service for mobile phone users. KRS 65.7625(3). The CMRS Board is authorized to "collect a CMRS service charge from each CMRS connection." KRS 65.7629(3). The service charge that it collects is used to implement, improve, and maintain the enhanced 911 service. The CMRS service charge goes into the CMRS fund and the monies in the fund do not become the property of the Commonwealth, and cannot be expended for any purpose other than the purposes authorized by the statute. KRS 65.7627.
>
> The threshold question before this Board is whether the final ruling of the CMRS Board is a final ruling of "any agency of state government affecting revenue and taxation." If the agency is not an "agency of the state," or if the service charge is not considered to be a tax, this Board has no jurisdiction over the refund claim and cannot hear the case.

After noting CMRS Board arguments that it did not administer any tax or licensing measures, the Tax Board then discussed the parties' arguments and case law concerning whether the service charge should be construed as a tax or a fee, before ultimately determining that it lacked subject matter jurisdiction at page 7 of its final order:

> This Board need not address the more difficult question of whether the CMRS Board is considered to be a "state agency" within the Board's jurisdictional statute, because this Board has concluded that the CMRS service charge is not a tax over which this Board has jurisdiction. As the Courts have noted, this Board's review is primarily limited to "the administration of taxes such as the state ad valorem tax, the income tax, the corporations' license tax, the sales and use tax, and selective excise taxes. These are the subject matter of KRS Chapter 131-143 A, codified as Title XI: Revenue and Taxation." See Light v. City of Louisville, 93 S.W.3d 696 (Ky. App. 2002). There are other statutory provisions that expressly require the Board of Tax Appeals to be the final administrative adjudicator (See e.g., KRS 134.551(2)(d) (denial of refund claim by county clerk); KRS 342.1231(5) (appeal from final ruling of the Workers Compensation Funding Commission), however, there is no such express jurisdictional provision in the CMRS statute.
>
> Accordingly, the motion to dismiss is granted, and this appeal is dismissed for lack of subject-matter jurisdiction.

Essentially, it appears that the Tax Board may have determined that it did not always have jurisdiction to resolve every dispute about taxes, but instead had jurisdiction only to hear appeals about "revenue and taxation" covered by KRS

Chapters 131 through 143A (codified as Title XI, Revenue and Taxation) or those other appeals specifically provided for by statute. We note that it cited to *Light v. City of Louisville*, which quotes authority recognizing that the Tax Board's jurisdiction was only over "taxes imposed by the central state government and administered by the Department of Revenue."[22] Possibly, the Tax Board may have also been alluding to the fact that the service charges were not administered by Kentucky's Department of Revenue[23] as well as to its doubts over whether the CMRS Board was a state agency in determining that it lacked subject matter jurisdiction.

While the Tax Board perhaps took a narrow view of its subject matter jurisdiction, a broader view might be taken of its subject matter jurisdiction (or that of its successor agency, the Claims Commission). KRS 49.220(1) provides that the Claims Commission "is vested with exclusive jurisdiction to hear and determine appeals from final rulings, orders, and determinations of any agency of state or county government affecting revenue and taxation." (The Tax Board was vested with the same exclusive jurisdiction under former KRS 131.340(1).) "[A]ffecting

---

[22] *Light*, 93 S.W.3d at 697, quoting *Board of Education of Russellville Independent Schools v. Logan Aluminum, Inc.*, 764 S.W.2d 75, 78 (Ky. 1989)).

[23] *See Light*, 93 S.W.3d at 698 (citation omitted) ("Simply put, it is clear that the city is not an agency 'serviced by the Department of Revenue' for purposes of local ad valorem real property taxes, and that such taxes do not come within the ambit of 'the subject matter of KRS Chapter 131-143.'").

revenue and taxation" might be broadly construed as including any sort of "revenue," or income so that the distinction between a tax and a fee is not so significant—a fee might also be "revenue" to the government. On the other hand, perhaps "revenue," especially in the context of "revenue and taxation," refers to the Kentucky Department of Revenue. *See* KRS 446.080(4) (statutory construction) ("All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning."). However, the parties have not raised these arguments and we thus decline to review them at length *sua sponte*. Moreover, we believe precedent compels a conclusion that the charge here is a fee.

The Tax Board and the trial court both discussed cases concerning whether certain charges were taxes or fees. These cases did not directly involve questions of whether subject matter jurisdiction was vested in the Tax Board or in a court of general jurisdiction; rather, they addressed whether a certain charge was an improper or surreptitious tax. Nonetheless, we will assume that the analysis in these cases concerning whether a particular charge was a tax or a fee to have some bearing on determining whether the Tax Board/Claims Commission or the trial court had subject matter jurisdiction over this CMRS service charge refund dispute. Although the issue is complex and good arguments can be made both

ways, we believe that the Tax Board's determination that the CMRS service charge was a fee was more in conformity with controlling precedent than the trial court's determination that the CMRS service charge was a tax.

The Tax Board noted in pages 4-5 of its final order of dismissal that T-Mobile argued that under the statutes, the vast majority of moneys in the CMRS fund was "used for '911 improvement, distribution to 911 communications facilities and that these distributions are not regulatory and that the CMRS Board provides none of these services—it merely collects the money and distributes it to other entities that provide 911 services, which [T-Mobile] says is like a classic tax." However, despite this statutory scheme in some ways giving the CMRS service charge the appearance of a tax, we agree with the Tax Board that the CMRS service charge functioned as a fee under controlling precedent.

Both the Tax Board and the trial court took note that the CMRS service charges at issue here were originally remitted to the State Treasurer but were then transferred to the CMRS fund. Neither found any initial deposit into the State Treasury determinative, instead focusing on function rather than form.

The Tax Board concluded that the CMRS service charge resembled other charges held not to be taxes in *Long Run Baptist Association, Inc. v. Louisville and Jefferson County Metropolitan Sewer District*, 775 S.W.2d 520 (Ky. App. 1989) and *Commonwealth v. Louisville Atlantis Community/Adapt, Inc*., 971

S.W.2d 810 (Ky. App. 1997) and ultimately held the CMRS service charge not to be a tax over which the Tax Board had jurisdiction. The trial court came to the opposite conclusion.

The trial court disagreed with any contention that the CMRS service charge was a "regulatory fee" like the charitable gaming fee upheld as a "charge primarily imposed for the purpose of regulation" in *Louisville Atlantis*. It found "the CMRS service charge is unquestionably not imposed for the purpose of regulation; it is meant to provide funding for emergency services that benefit all Kentucky citizens." However, despite the CMRS service charge perhaps not closely resembling the charitable gaming fee in other respects, we note each charge would be placed in a statutorily specified fund for a specific purpose and was not to be deposited into the "general fund" for general government purposes.

The trial court distinguished the CMRS service charge from the "drainage service charge" held to be a fee in *Long Run Baptist*:

> The emergency 911 service is not a county-wide program directed at a specific service as in *Long Run Baptist* but is rather an expansive state-wide enhanced wireless 911 service for wireless phone users. The emergency 911 service is not a service financed by a service charge that is computed based on the individualities of a specific district or region; it is a service for all Kentuckians that is designed to provide a general public benefit through an enforced contribution.

There are some distinctions between the drainage "service charge" imposed by the Metropolitan Sewer District (MSD) in *Long Run Baptist* and the CMRS service charge, with one being more local and the other applied statewide. Yet we conclude that the two service charges are fundamentally similar.

The drainage "service charge" at issue in *Long Run Baptist* was a $1.75 monthly charge per residence or equivalent commercial/industrial property imposed by the Metropolitan Sewer District of Louisville and Jefferson County to fund its storm water drainage program. 775 S.W.2d at 521. Similarly, the CMRS service charge at issue here was a monthly charge of seventy cents per cell phone. MSD was charged with maintaining and improving both sewer and drainage systems and had statutory authority to set "rates, rentals and charges, to be collected from all the real property within the district area *served by the facilities of the district* . . . ." *Id*. at 522 (emphasis in original) (quoting KRS 76.090(1)). However, it did not have the authority to levy taxes. *Id*. Similarly, the CMRS Board was charged with leading efforts to expand and improve emergency telecommunications in the state, especially implementing the wireless E911 system, and it had discretion to decrease the CMRS service charge or recommend that the General Assembly increase it after periodically reviewing whether the charge was set appropriately to achieve the statutory objectives. Possibly there is a distinction if the Metropolitan Sewer District actually built storm water drainage

facilities and thus directly provided drainage services itself, whereas the CMRS Board did not provide CMRS emergency telephone service itself but collected funds to be distributed to local communications facilities and CMRS providers to furnish the CMRS emergency telecommunications services. We believe that distinction does not change the ultimate determination of whether the charge is a fee or a tax.

Noting there was not really any way of measuring use of drainage systems (unlike sewers), some property owners contended that the monthly "service charge" for drainage in *Long Run Baptist* was not a legitimate fee or service charge but was a surreptitious tax because any benefit from the drainage system was indirect, "similar to the indirect benefit citizens receive from fire protection . . . ." *Id*. They also argued that some property owners might not benefit from storm water drainage facilities at all depending on such factors as the elevation of their property, but the Court of Appeals noted that such arguments were rejected in prior precedent based on general improvement in conditions in the area and resultant enhancement in property values. *Id*. The Court further found no basis in the record for the property owners' argument that the drainage service charges were "used for general government functions, not to benefit the land sustaining the burden." *Id*. at 523. And the Court took note that the amounts expended on drainage services in one year were about the same as the fees

collected that year. *Id*. at 524. Ultimately, the Court concluded that the drainage service charge was "not a 'method of general revenue'" and thus not a tax, and further stated it was "convinced" that all property owners in the district benefitted from MSD's storm water drainage facilities. *Id*. Similarly, the CMRS service charge here would have a direct benefit on those responsible for paying the service charge (CMRS users): having available wireless enhanced 911 telecommunications services when they needed it—being able to access 911 from a cell phone (with the caller's location and telephone number being made available to provide emergency services).

Essentially, both the countywide service charge for drainage in *Long Run Baptist* and the statewide CMRS service charge at issue here are not necessarily collected each time one uses a service. Instead, both charges enable a desirable service (storm water drainage or wireless enhanced 911 telecommunications service) to be available when needed. And both these "service charges" generate funding for infrastructure: the building, maintenance or improvement of storm water drainage facilities versus the infrastructure for providing wireless enhanced 911 telecommunications services.

We note that the trial court also considered Kentucky Supreme Court authority cited by the CMRS Board which was rendered after the Board granted its motion to dismiss—*Greater Cincinnati/Northern Kentucky Apartment Association*,

Inc. v. Campbell County Fiscal Court, 479 S.W.3d 603 (Ky. 2015). That case involved the Campbell County Fiscal Court's imposing a flat fee of $45 per residence or commercial unit to fund wireline 911 emergency telephone services under KRS 65.760 because traditional subscriber fees per landline no longer raised enough money due to the decreasing number of landline phones used. *Id*. at 604. Although this somewhat similar charge was upheld despite arguments that it was not permitted by statute or the Kentucky constitution, the trial court found this authority unpersuasive as "it was undisputed in *Greater Cincinnati* that the service charge at issue was a fee instead of a special tax or license because it was described in its progenitor ordinance as a fee." The majority in *Greater Cincinnati* does state: "It is undisputed that the funds collected by the County are not a form of special tax or license; rather, the Ordinance clearly provides that the charge is a service fee." *Id.* at 605.

We also note that the governing statute, KRS 65.760, would have allowed the locality to impose an otherwise constitutional special tax to fund emergency 911 telephone services. *Id.* at 604-05. However, despite the dissent's conclusion that the "service fee" at issue was not a fee but instead a tax which had been improperly imposed, *see id*. at 608-09 (Venters, J., dissenting), the majority in *Greater Cincinnati* upheld the imposition of the "service fee" as a legitimate fee. Given factual similarities between the "fee" at issue in *Greater Cincinnati* and the

CMRS service charge at issue here, we believe *Greater Cincinnati* weighs in favor of concluding that the CMRS service charge is a fee. Particularly apt is the majority's recognition that valid fees may not always present as typical "user" or regulatory fees, *id*. at 605, and recognition that those resident citizens and businesses paying the charge to fund emergency 911 telephone services would create demand for the services. *Id*. at 606. Similarly, without CMRS users, there would be no demand for wireless enhanced 911 service.

Perhaps the most succinct test of how to distinguish a tax versus a fee is set forth in *Long Run Baptist*, 775 S.W.2d at 522: "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." Applying that test, this Court judged a functionally similar "service charge" (for drainage) to be a fee rather than a tax. Similarly, in a broad sense, the CMRS service charge at issue here was a charge for a particular service (wireless enhanced 911 emergency telecommunications service) made available to the party responsible for paying the fee (cell phone users) and, thus, a fee under the test stated in *Long Run Baptist*.

We also believe the CMRS service charge is a fee in light of the more recent Kentucky Supreme Court case of *Klein v. Flanery*, 439 S.W.3d 107. The Kentucky Supreme Court was faced with determining whether transfers of funds from various state agency accounts (where regulatory fees had been deposited) to

the state's general fund were constitutional and whether the fund transfers amounted to surreptitious taxes. Although not necessarily faced with the issue of whether certain charges had originally been imposed as taxes or fees, the Kentucky Supreme Court recognized that various charges may fall somewhere on a spectrum between clear taxes imposed on all and placed into general funds for general government expenses and more "particularized extractions" which might include "infrastructure assessments" as well as regulatory fees. *See id*. at 114 n.6. It also stated a definition for a "classic tax" which was quoted by the trial court herein in finding the CMRS service charge to be a tax: "The classic 'tax' is 'imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community[.]'" *Id*. (citation omitted).

We reach a different conclusion than the trial court in applying the definition of a tax contained in *Klein v. Flanery* to the CMRS service charge. The CMRS service charge was not imposed on all citizens; it was imposed on CMRS users to be collected by CMRS providers and the CMRS Board during the relevant time period. CMRS charges were not ultimately deposited into the "general fund" but into the CMRS fund, which was subject to strict requirements about disbursing moneys to fund wireless enhanced 911 telecommunications services. Although the money collected from CMRS service charges might have a general benefit to the entire community in expanding and improving wireless enhanced 911 service, it

would particularly have an impact on those using cellular phones instead of landlines. We thus conclude that the trial court erred in finding the CMRS service charge to be a tax under the *Klein v. Flanery* test.

The CMRS service charge does help fund a traditional governmental function of protecting citizens in emergencies as the trial court notes. And as T-Mobile argued to the Tax Board, the Board does not actually provide the wireless enhanced 911 emergency telecommunications services itself but funnels the money to local communications facilities and to CMRS providers for improving and maintaining wireless enhanced 911/emergency phone services—an arrangement which may appear to mimic a tax. Nonetheless, the CMRS service charges were not destined to go into the "general fund" but were to be deposited in a specific fund (the CMRS fund) for very specific purposes. As noted by the Tax Board on page 5 of its final order, "KRS 65.7631 is very specific" in providing "where the funds are to be directed" and "[a]ll of these charges are used to establish and improve E911 services in the Commonwealth." Thus, like the charitable gaming fee in the *Louisville Atlantis* case, all funds generated by the "fee" go into a separate account for a very specific purpose. And like the "service charge" in *Long Run Baptist*, the "service charge" is not used as a method of raising "general revenue" but instead is clearly restricted by statute to providing funding for

improving and maintaining wireless enhanced 911 emergency telecommunications services.

Based on precedent including *Long Run Baptist*, *Greater Cincinnati*, and *Klein v. Flanery*, we must conclude that the CMRS service charge was a fee rather than a tax. Therefore, the trial court erred in reversing the Tax Board's order of dismissal and remanding for further proceedings in the Claims Commission and in dismissing as moot T-Mobile's direct action for a refund based on the trial court's determination that the CMRS service charge was a tax. However, we express no opinion on the merits of T-Mobile's refund claim or any possible defenses thereto.

CONCLUSION

For the reasons stated herein, we reverse the trial court's order and remand to the trial court for further proceedings in conformity with this Opinion.

TAYLOR, JUDGE, CONCURS.

JONES, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT/CROSS-APPELLEE:	BRIEFS FOR APPELLEE/CROSS-APPELLANT:
Shawn D. Chapman Lexington, Kentucky	Mark A. Loyd Brent R. Baughman Bailey Roese Louisville, Kentucky
M. Stephen Pitt Matthew F. Kuhn Frankfort, Kentucky	