

State of Florida
E911 Board

Division of Telecommunications
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Prepaid Fee rule 60FF-5.004 –)
Requirements for Fee Remittance)
Submitted by or on Behalf of Wireless)
and Non-wireless Service Providers)

Joint Comments of AT&T Mobility, T-Mobile, TracFone Wireless, Verizon Wireless, Virgin Mobile and CTIA and Request for Public Hearing

AT&T Mobility, T-Mobile, TracFone Wireless, Verizon Wireless, Virgin Mobile and CTIA (hereinafter collectively referred to as "Wireless Providers"), hereby respectfully request that the Florida E911 Board (hereinafter "the Board") schedule a public hearing in this matter pursuant to section 120.54(3)(c), Florida Statutes, in order to facilitate further testimony from the industry, the Board staff and other interested parties regarding a more equitable approach to the collection of such fees from Florida prepaid wireless customers. In addition, the Wireless Providers hereby submit joint comments¹ in opposition to the above referenced proposed rule included in the Notice of Proposed Rulemaking published on July 17, 2009 in the *Florida Administrative Weekly*. The Wireless Providers request that the Board delay the implementation of the proposed rule in order to accommodate the further consideration of the point of sale collection methodology advanced by the Wireless Providers and other stakeholders across the country.

¹ These joint comments are intended to supplement prior Wireless Providers and CTIA testimony offered in various Board sponsored technical workshops on this matter including correspondence sent to the Board, which we believe is already in the record of this proceeding.

The Wireless Providers appreciate the efforts of the Board to discharge its statutory obligation to study the feasibility of assessing E911 fees on prepaid wireless services, the various methodologies to accomplish that end, as well as, the drafting of the proposed rule for the collection of E911 fees on prepaid wireless customers. However, as discussed in more detail below, the Wireless Providers remain concerned that the Board has failed to act in conformity with the prescribed legal requirements for the collection of such fees directly from prepaid wireless customers.

The Wireless Providers believe that the Board has not appropriately weighed the benefits provided under the point of sale collection methodology as they relate to the requirements provided under Florida Law. In addition, the Wireless Providers believe it is more important for the Board to ensure that any rule adopted provides the most equitable and efficient approach, regardless of the additional weeks required to effectuate a final rule. As a result of the Board not appropriately considering the point of sale collection methodology thus far, the Board has set forth a proposed rule that is in direct contravention with subsections 365.172 (8)(a)2.c. and d, Florida Statutes. Therefore, the Wireless Providers are opposed to the adoption of the current rule.

Specifically, the Wireless Providers oppose the adoption of the proposed rule for the following reasons:

- (1) The menu of collection methods included in the rule, by its very nature of offering various options, cannot be collected from consumers of prepaid wireless service *on a competitively neutral, and nondiscriminatory basis* as required under subsection 365.172 (8)(a)2.c, Florida Statutes;
- (2) The Board failed to give appropriate consideration to the more *equitable* point of sale collection methodology recently adopted by other jurisdictions across the country;

- (3) The proposed rule unnecessarily and inappropriately imposes an overwhelming administrative burden for the collection of E911 fee exclusively on individual Wireless Providers and is not efficient.
- (4) The menu options prescribed by the Board apparently contemplate that, instead of a separately stated E911 fee, such fees will be embedded in the retail price of the product. This is inconsistent with subsection 365.172(8)(j), Florida Statutes, which states that "State and local taxes do not apply to the fee."

The Wireless Providers therefore urge the Board to delay the final adoption of the current proposed rule in order to fully consider the more equitable, competitively neutral, nondiscriminatory and efficient point of sale methodology for the collection of prepaid wireless fees as contemplated under subsection 365.172 (8)(a)2.c. and d, Florida Statutes. Such action by the Board will serve the public interest; provide a meaningful opportunity to implement a rule that is consistent with the Florida Law, while simplifying the accounting for and the capture of maximum revenue by the Board; minimize consumer and carrier confusion with the implementation of the current proposed rule; and mitigate the risk of litigation.

Background

In 2007, the State of Florida adopted amendments to section 365.172, Florida Statutes, which generally required the Board to determine the feasibility of collecting E911 fees under Florida law and to study various methodologies presently available to collect such E911 fees from the sale of prepaid wireless service. In an effort to discharge a portion of its statutory duty, in 2008 the Board contracted for the preparation of the requisite feasibility study. In December of 2008, the Board adopted a final report entitled the *E911 Prepaid Wireless Fee Collection and E911 Fee Exemptions: A Feasibility Analysis* (hereinafter "*Prepaid Report*").

The *Prepaid Report* summarily concluded that it is feasible to collect E911 fees from the sale of prepaid wireless service “on an equitable, competitively neutral, and non-discriminatory basis” and provided tentative conclusions of feasibility for several collection methodologies.² On an independent basis, the Board subsequently adopted a conclusion that it was feasible to collect such E911 fees and thereby began the process via several technical workshops to develop a proposed rule. In June 2009, the Board adopted the proposed rule included in the instant matter, which provides for a menu of collection methods exclusively for wireless providers to collect and remit on behalf of its prepaid customers. Those methodologies include: (1) a flat fee active account collection method; (2) a flat fee aggregate collection method; (3) point of sale flat fee collection method; and (4) any other collection method to be mutually agreed upon by the Board and the wireless provider.

The Wireless Providers have been actively engaged in the Board’s activities over the past two years. At several stages, the Wireless Providers have expressed their support for the new more equitable point of sale collection methodology and their overall concerns with the inequitable menu of collection methods approach included in the proposed rule.

I. The Proposed Rule Cannot Be Applied On an Equitable, Efficient, Competitively Neutral, and Nondiscriminatory Basis as Required under Florida Law

Developing a system that ensures that prepaid consumers pay into the Florida Emergency Communications Number E911 System Fund (hereinafter “E911 Fund”) to the same extent as post-paid consumers is incredibly complex. The Florida Legislature

² See *Prepaid Report* at Page 3.

understood this complexity and thereby deferred the adoption of a specific prepaid wireless E911 rule to the Board only upon a thorough evaluation of *all* methods, including point of sale. In pertinent part, section 365.172, Florida Statutes, provides:

(II) "Prepaid wireless service providers" includes those persons who sell prepaid wireless service regardless of its form, either as a retailer or reseller.

c. The study must include an evaluation of methods by which E911 fees may be collected from end users and purchasers of prepaid wireless service on an equitable, efficient, competitively neutral, and nondiscriminatory basis and must consider whether the collection of fees on prepaid wireless service would constitute an efficient use of public funds given the technological and practical considerations of collecting the fee based on the varying methodologies prepaid wireless service providers and their agents use in marketing prepaid wireless service.

d. The study must include a review and evaluation of the collection of E911 fees on prepaid wireless service at the point of sale within the state. This evaluation must be consistent with the collection principles of end user charges such as those in s. 212.05(1)(e).

The current proposed rule, which includes a menu of collection methodologies, employs three (3) express collection approaches and the opportunity for a multitude of other additional methodologies based on the "other methodology" category. The very nature of this menu approach has been known to lead to different amounts being collected from different customers (or not being collected at all) and can also lead to expensive and protracted disputes with administrative agencies, such as this Board, regarding the equity in application of the fees. Therefore it is not the most equitable, efficient, competitively neutral, and nondiscriminatory approach.

The Wireless Providers believe that the intent of the Florida Legislature is quite clear in that it provided the Board with the necessary flexibility and appropriate direction to promulgate such regulations. The Wireless Providers are concerned that without a

delay to fully consider the more equitable and efficient point of sale collection methodology, prepaid wireless consumers could be whip-sawed with different E911 collection methods. For example, on one day a customer might have his account decremented or the rates of his prepaid service potentially increased to cover the cost of the E911 fee; and on the next day he might be surprised with an E911 surcharge appearing on his receipt when he purchases prepaid wireless service at a retail location. Based on this example, the potential for Wireless Provider and consumer confusion should not be underestimated.

The Board should therefore act in conformity with Florida Law and implement a rule that is equitable, efficient, competitively neutral, and applicable to the consumers of all Wireless Providers and other providers of prepaid services on a nondiscriminatory basis.

II. The Board Failed to Appropriately Consider An Equitable Point of Sale Collection Methodology Recently Adopted in Other Jurisdictions

The Wireless Providers believe that the Board has not fully considered the new more equitable point of sale collection methodology recently adopted in Texas, Maine and Louisiana³ and recommended by the National Conference of State Legislatures (hereinafter "NCSL") at its July 20, 2009, meeting in Philadelphia.⁴

³ See Maine P.L. No.400, adopted June 15, 2009; Louisiana Act No. 531, adopted July 10, 2009; and Texas Health & Safety Code, § 771.0712, adopted June 19, 2009.

⁴ See BNA Daily Tax Report, July 21, 2009 "NCSL Panel Adopts Model for Collection of E-911 Fees, Urges States' Enactment" (attached).

These states and now NCSL have realized that the new point of sale methodology levies the E911 surcharge directly on end users, which is consistent with how other telecommunications customers are assessed; is transparent to the consumer; accurately situates the transaction to the state; and is a more efficient methodology for the collection of the surcharge. Also, like the monthly surcharge applicable to other telecommunications customers, the new point of sale methodology is a fee per transaction that can work with the majority of retail collection systems. In addition, because the new methodology is designed to work consistently with the sales tax collection systems, the new system will be much easier for retailers to administer, the very conclusion that was reached in the Prepaid Report. Finally, given the greater clarity and national trend toward the new methodology, the E911 revenues captured by the State are likely to become more predictable over time.

In sum, the benefits of the new point of sale collection method should be fully considered by the Board. Such action by the Board will be consistent with Florida Law; as well as, the actions of other jurisdictions which also appreciated the need to implement an equitable and efficient process for the collection of the prepaid wireless E911 surcharge.

III. The Proposed Rule Unnecessarily and Inappropriately Imposes The Overwhelming Administrative Burden on Wireless Providers

The Wireless Providers have a number of serious concerns with the current proposed rule in that it imposes the overwhelming administrative burden of implementing and complying with this rule on Wireless Providers. As detailed above, the implementation of the menu collections methodology is inefficient and inequitable in its application to all

Wireless Providers and other providers of prepaid services -- and therefore provides more questions for carriers than answers.

The Wireless Providers do not believe the Legislature intended to place the overwhelming administrative burden on individual wireless carriers and their customers. As the Board is aware, the menu collections methodology provided in the proposed rule places an overwhelming burden on Wireless Providers in that each of the expressly provided options directly hit the Wireless Providers' bottom line. There is no practical way for the Wireless Providers to assess the E911 fee in real time on the end user under the options delineated in the rule.

In addition, the current menu collection methodology will also create an unnecessary regulatory paradigm which will require Wireless Providers to expend time and resources to comply with requirements for the collection and remittance of the E911 fee. Since the rule provides no uniform process for the Wireless Providers or the Board, the Wireless Providers will likely be subject to numerous inquiries from the Board in its effort to ensure proper reporting among the various collection methods and that the appropriate revenues are being received by the Board. Finally, there is no statutory support for imposing the entire E911 fee collection obligation on "the provider named on the prepaid wireless card." The statute clearly envisioned that the E911 fee collection obligation would be imposed on the broader class of "prepaid calling arrangement providers" which would include both retailers and resellers.

IV. The Menu Options Raise Other Tax Compliance Issues

Section 365.172(8)(j) states that "State and local taxes do not apply to the [E911] fee." When a customer purchases prepaid wireless airtime or a "prepaid calling

arrangement” at retail, the customer may not be charged sales tax on E911 fees, whether or not the fees are separately stated from the retail price. The Board has a duty to observe this statutory requirement and not to impose collection or remittance methods that would result in a potential violation and overpayment of sales taxes by customers.

To ensure an equitable and efficient process for the implementation of any new rule, the Board should also immediately clarify the effective date of the collection and remittance requirements of the rule and a specific process for the initial remittance of the fee. Typically, Wireless Providers need a minimum of sixty (60) days to effectuate the necessary operations to comply with the assessment, collection and remittance requirements for the E911 fee. The Board should therefore be cognizant of such requirements and avoid adopting any rule without such clarifications. In sum, the Board should delay the implementation of the current rule in order to fully appreciate the benefits of the point of sale collection methodology and avoid the overwhelming burden placed on the Wireless Providers with the current proposed rule. It is inequitable for Wireless Providers to be obligated to remit the E911 Fee before there is specific administrative guidance regarding the remittance process.

Conclusion

As discussed herein, the Wireless Providers are concerned that the Board’s proposed rule does not establish an equitable, efficient, or competitively neutral process for the assessment of the prepaid E911 fee on a nondiscriminatory basis from prepaid wireless customers as required under section 365.172, Florida Statutes. The Wireless

Providers welcome the opportunity to continue to work with the Board to achieve an equitable resolution of these issues.

The Wireless Providers take very seriously their obligation to ensure adequate, efficient and equitable collection of an E911 surcharge on prepaid wireless telephone service. As a result, the Wireless Providers believe a point of sale collection methodology approach is the most prudent methodology to ensure conformity with Florida Law, is consistent with the approach recently taken by other jurisdictions, and eliminates the overwhelming burden imposed on the Wireless Providers. Therefore, the Wireless Providers respectfully urge the Board to delay further consideration of the proposed rule until a public hearing can be held and the Board can more fully consider the benefits of the point of sale collection methodology. Such a decision would be in the public interest and inevitably minimize consumer and carrier confusion.

State Taxes**NCSL Panel Adopts Model for Collection Of E-911 Fees, Urges States' Enactment**

PHILADELPHIA—A task force of the National Conference of State Legislatures (NCSL) July 20 voted to adopt model legislation that would create a uniform method for states to collect E-911 fees from users of prepaid wireless telecommunication services.

Under the model bill adopted by the Executive Committee Task Force on State and Local Taxation of Telecommunications and Electronic Commerce at the NCSL annual legislative summit in Philadelphia, retailers would collect the fee at the time they sell a prepaid wireless phone or card.

As amended by the committee, the model legislation gives states a choice between imposing a flat fee on each retail sale or a fee that is a percentage of the sale amount. The percentage cannot result in a fee greater than half the monthly charge assessed on postpaid wireless customers.

Providers of prepaid wireless service strongly support the concept of collecting the E-911 fee at the point of sale because of the problems inherent in trying to embed the fee into the price of service.

Stacey Sprinkle, representing Verizon, told the task force that prepaid wireless cards and handsets are sold in bulk to national retailers such as Wal-Mart and Target, which in turn distribute to their outlets throughout the country. Moreover, state and local E-911 fees vary widely.

As a result, Sprinkle said, providers do not know where their products will be sold or what fee to embed in the price of the card or handset.

Flat Fee Versus Percentage

Retailers, who generally oppose the point-of-sale collection method, favor a flat fee over one based on a percentage of the sale.

But a number of lawmakers objected to a flat fee out of concern that low-income users of prepaid wireless, who are more likely to make multiple purchases in small denominations each month, would be hit particularly hard.

In a resolution urging states to pass legislation implementing collection of E-911 fees at the prepaid wireless point of sale, the committee noted that existing methods of collecting the fee are ill-suited to prepaid wireless because of the lack of a billing relationship between wireless service users and providers.

But prepaid wireless users now account for 18 percent of the wireless market, making them a logical source of needed funding for E-911 systems, according to the resolution.

In the absence of guidance from NCSL, which postponed action on a model bill at its May 29 meeting, Maine, Texas, Louisiana, and Wisconsin in the last six weeks enacted differing methods of collecting E-911 fees on prepaid wireless service.

Massachusetts state Rep. Mark Falzone (D), who in May recommended delaying task force action on the model legislation, said the momentum building in the states to address the issue made it urgent for the task force to take a position.

By Lorraine McCarthy