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Opinion No. 13-43

Emergency Telephone Charges on Wireless Phone Service

QUESTIONS

1. Does a wireless cell phone service plan that has a flat fee due each month prior to use but does not have an associated amount of dollars or minutes which decline with use (also known as an unlimited prepaid plan) satisfy the requirements of Tenn. Code Ann. § 7-86-128(a)(5) for "prepaid wireless emergency telephone service"?

2. If such a wireless service plan does not qualify as "prepaid wireless emergency telephone service" pursuant to Tenn. Code Ann. § 7-86-128, should those plans carry the statewide 911 service charge set pursuant to Tenn. Code Ann. § 7-86-108(a)(1)(B)(i)(*a*)?

OPINIONS

1. No, a wireless cell phone service plan for which a flat fee is charged each month before use but which is not "sold in predetermined units or dollars of which the number declines with use in a known amount" does not satisfy the requirements of Tenn. Code Ann. § 7-86-128.

2. Yes, a plan of this type should carry the statewide 911 service charge of $1.00 set pursuant to Tenn. Code Ann. § 7-86-108(a)(1)(B)(i)(*a*).

ANALYSIS

All "commercial mobile radio service" subscribers and users in Tennessee are required to pay an emergency telephone service charge at a flat statewide rate, which is set by the Tennessee Emergency Communications Board. Tenn. Code Ann. § 7-86-108(a)(1)(B)(i). This statute specifically provides as follows:

> Effective April 1, 1999, commercial mobile radio service (CMRS) subscribers and users shall be subject to the emergency telephone service charge, a flat statewide rate, not to exceed the business classification rate established in subdivision (a)(2)(A). The specific amount of such emergency telephone service charge, and any subsequent increase in such charge, shall be determined by the board, but must be ratified by a joint resolution of the general assembly prior to implementation.

Tenn. Code Ann. § 7-86-108(a)(1)(B)(i)(*a*). The Emergency Communications Board has advised this Office that the statewide rate is currently set at $1.00.

A separate "prepaid wireless emergency telephone service charge" for the purchase of "prepaid wireless telecommunications service" is established by Tenn. Code Ann. § 7-86-128. The term "prepaid wireless telecommunications service" means

> a wireless telecommunications service that allows a caller to dial 911 to access the 911 system, which service must be paid for in advance and is sold in predetermined units or dollars *of which the number declines with use in a known amount*;

Tenn. Code Ann. § 7-86-128(a)(5) (emphasis added). A statewide prepaid wireless emergency telephone service charge is imposed in place of the emergency telephone service charge contained in Tenn. Code Ann. § 7-86-108(a)(1)(B)(i) as follows:

> A statewide prepaid wireless emergency telephone charge of fifty-three cents (53¢), or an adjusted amount as provided in subdivision (b)(6), shall be imposed on each retail transaction in lieu of the charge imposed pursuant to § 7-86-108.

Tenn. Code Ann. § 7-86-128(b)(1)(A). The seller may elect not to apply this charge if a minimal amount of prepaid wireless telecommunications service is sold, minimal meaning ten minutes or less or five dollars or less. Tenn. Code Ann. § 7-86-128(b)(1)(B).

A prepaid wireless telecommunications service plan that requires a monthly payment before use but provides an unlimited number of minutes does not qualify for the charge of fifty-three cents established by Tenn. Code Ann. § 7-86-128(b)(1)(A), since the service available does not decline with use and the fee must be paid every month in full even if the phone is not used at all. In contrast, some wireless phone service is offered for a one-time payment in a specific dollar amount, with such payment entitling the user to a fixed amount of phone time. The usage available then declines, measured either in terms of the dollar amount or the number of minutes remaining, as a result of the user's using the phone; thus, the remaining available units "decline with use." This is the only type of service that fits the definition of "[p]repaid wireless emergency telephone service" in Tenn. Code Ann. § 7-86-128(a)(5), and thus it is the only type of service to which the telephone service charge in § 7-86-128(b)(1)(A) applies. *See Rich v. Tennessee Bd. of Medical Examiners*, 350 S.W.3d 919, 926 (Tenn. 2011) (*quoting State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000)) (explaining that courts will examine "the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning").

In summary, the lower charge established in Tenn. Code Ann. § 7-86-128(b)(1)(A), which imposes a fifty-three cent charge "in lieu of the charge imposed pursuant to § 7-86-108," applies only if the conditions stated in § 7-86-128(a)(5) are met. This structure thus requires that the charge for emergency telephone service imposed under Tenn. Code Ann. § 7-86-108 continues to apply to other types of service plans. Those plans would presumably be ones that

do not have an associated dollar or minute amount that "declines with use." Applying the lower charge to plans in which a flat fee is required and in which no gradual reduction in available use occurs would improperly substitute the exception established under Tenn. Code Ann. § 7-86-128(b)(1)(A) for the default charge set under Tenn. Code Ann. § 7-86-108(a)(1)(B)(i)(*a*).

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