

FEES - The Legislature has not authorized the State to collect 9-1-1 fees for prepaid wireless services purchased from independent retail stores;

REVENUE, DEPARTMENT OF - Absent legislative authority, the Department of Revenue cannot promulgate rules to allow for the collection of the 9-1-1 fees on the sales of prepaid wireless purchased from independent retail stores;

STATUTORY CONSTRUCTION - Montana law provides that when a taxing statute is susceptible of two meanings, it is ambiguous and should be strictly construed against the taxing authority and in a light most favorable to the taxpayer;

ADMINISTRATIVE RULES OF MONTANA - Sections 42.31.401, 42.31.406, 42.31.407, 42.31.408, 42.31.409;

MONTANA CODE ANNOTATED - Sections 1-2-10, 10-4-101(24), 10-4-201, (1), (a), (b), (c), (2), (3), (4), 10-4-202, 10-4-203, 10-4-204(3), (4), 15-53-127 to -156, 53-19-311.

HELD: The Legislature has not authorized the State to collect 9-1-1 fees for prepaid wireless services purchased from independent retail stores. Absent this legislative authority, the Department of Revenue cannot promulgate rules to allow for the collection of the fees on these sales.

January 16, 2014

Representative Mark Blasdel  
Speaker of the House  
P.O. Box 291  
Somers, MT 59932-0291

Dear Speaker Blasdel:

[P1] You have requested my opinion as to two questions which I have restated below:

1. Does Mont. Code Ann. § 10-4-201 apply to amounts charged for prepaid wireless services that are not purchased pursuant to monthly contracts with providers but instead are purchased on an “as needed” basis by purchasers from independent retail stores?

2. If such fees do not apply under the statute, is the Department of Revenue authorized to adopt administrative regulations to impose the fees on prepaid wireless services purchased from independent retail stores?

**[P2]** Nine-one-one (9-1-1) is the phone number most people in the U.S. call to get help in a police, fire or medical emergency. A 9-1-1 call goes over dedicated phone lines to the 9-1-1 answering point closest to the caller, and trained personnel then send the emergency help needed. Enhanced 9-1-1, or E9-1-1, is a system which routes an emergency call to the 9-1-1 center closest to the caller, and automatically displays the caller's phone number and address.

**[P3]** The State of Montana Department of Administration, Information Technology Services Division (ITSD), is responsible for administering the State's 9-1-1 Program on behalf of all local 9-1-1 jurisdictions and providing a single point of coordination and support for managing the 9-1-1 Program on behalf of the local jurisdictions. The State of Montana 9-1-1 Program established a statewide emergency 9-1-1 system that provides citizens with rapid, direct access to public safety agencies. The objective of this is to provide more accessible public safety services and reduce the response time to situations requiring law enforcement, fire, medical, rescue, and other emergency services.

**[P4]** Each household or business pays a small monthly fee for 9-1-1 service on each telephone line that appears on phone bills. Fees totaling \$1.00 per access line are imposed on each service subscriber for telephone exchange access services, wireless telephone service, or other 9-1-1 accessible services. Providers of these services are required to collect the fees from the subscribers every month.

**[P5]** Prepaid wireless service is not a monthly service but is purchased by subscribers or customers on a "pay-as-you-go" basis, usually in the form of prepaid wireless airtime cards that are sold in various quantities. Prepaid wireless services or cards are also often sold to consumers by independent retailers and many others in thousands of retail outlets. There are no monthly or other periodic bills sent to prepaid wireless users, because the service or cards are paid for entirely in advance in independent retail stores. Once a prepaid wireless handset is activated by the customer, and the wireless airtime is loaded or redeemed into the handset, the service functions like any other standard postpaid or billed wireless service.

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*Does Mont. Code Ann. 10-4-201 apply to amounts charged for prepaid wireless services that are not purchased pursuant to monthly contracts with providers but instead are purchased on an “as needed” basis by purchasers from independent retail stores?*

[P6] Central to your first question is whether prepaid wireless service sold through independent retailers clearly fits within the definitions of statute to require companies offering those services to collect the 9-1-1 fees. This question is answered through a basic statutory construction analysis.

[P7] A primal rule of statutory interpretation requires courts to apply plain and unambiguous statutes according to their express terms. Mont. Code Ann. § 1-2-10. A court cannot amend, omit or insert terms of the statute. *Id.* “When the statute is plain, unambiguous, direct and certain, the statute speaks for itself and there is no need to resort to extrinsic means of interpretation.” *In re Marriage of Christian*, 1999 MT 189, ¶ 12, 295 Mont. 352, 983 P.2d 966; *State ex rel. Cobbs v. Montana Dep’t of Social and Rehabilitation Servs.*, 274 Mont. 157, 162, 906 P.2d 204, 207 (1995) (“The Court is to effectuate the intent of the Legislature, and if the Legislature’s intent can be determined from the plain meaning of the words used in a statute, the courts may not go further and apply any other means of interpretation.”); *Ravalli County v. Erickson*, 2004 MT 35, ¶ 11, 320 Mont. 31, 85 P.3d 772 (“This Court has repeatedly held that the role of courts in applying a statute has always been to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted . . .”).

[P8] Montana law provides that when a taxing statute is susceptible of two meanings, it is ambiguous and should be strictly construed against the taxing authority and in a light most favorable to the taxpayer. *See Western Energy Co.*, 297 Mont. 55, 58, 990 P.2d 767, 769 and *Canbra Foods v. Department of Rev.*, 278 Mont. 368, 373, 925 P.2d 855, 857-58 (1996).

[P9] The key provision governing imposition and collection of the 9-1-1 fees is Mont. Code Ann. § 10-4-201, which reads as follows:

**10-4-201. Fees imposed for services. 9-1-1**, (1) Except as provided in 10-4-202:

(a) for basic 9-1-1 services, a fee of 25 cents a month per access line on each service subscriber in the state is imposed on the amount charged for telephone exchange access services, wireless telephone service, or other 9-1-1 accessible services;

(b) for enhanced 9-1-1 services, a fee of 25 cents a month per access line on each service subscriber in the state is imposed on the amount charged for telephone exchange access services, wireless telephone service, or other 9-1-1 accessible services; and

(c) for wireless enhanced 9-1-1 services, a fee of 50 cents a month per access line or subscriber in the state is imposed on the amount charged for telephone exchange access services, wireless telephone service, or other 9-1-1 accessible services.

(2) The subscriber paying for exchange access line services is liable for the fees imposed by this section.

(3) The provider shall collect the fees. The amount of the fees collected by the provider is considered payment by the subscriber for that amount of fees.

(4) Any return made by the provider collecting the fees is prima facie evidence of payments by the subscribers of the amount of fees indicated on the return.

**[P10]** Each of the three fees is established by the Act at the rates of \$.25, \$.25, and \$.50 per month per access line on each service “subscriber”, and each fee is imposed on the “amount charged” for three types of services--“exchange access services, wireless telephone service, or other 9-1-1 accessible services”.

**[P11]** Plainly interpreted, several pertinent statutory definitions and provisions show the Legislature did not consider prepaid wireless transactions when Mont. Code Ann. § 10-4-201 was enacted:

1. “Subscriber” is defined as an end user who receives telephone exchange access services or who contracts with a wireless provider for commercial mobile radio services. Mont. Code Ann. § 10-4-101(24). In the case of prepaid wireless service, the prepaid customer does not enter into a contract with a wireless provider that is typical with conventional billed wireless subscribers.
2. The 9-1-1 fee is a recurring monthly fee. Mont. Code Ann. § 10-4-201(1). The statutes do not address prepaid wireless services, which is procured when a customer purchases the service, not on a monthly basis. A monthly fee cannot be calculated and applied to a non-monthly service.

3. Montana Code Annotated § 10-4-201(1) further provides that the fee is applicable to the “amount charged” for wireless telephone service. For traditional services, the amount charged is what is collected by the provider on monthly bills, which includes the cost of wireless service plus applicable taxes or fees, including 9-1-1. For prepaid wireless, the amount charged is the retail price paid by the customer in independent retail stores. The provider is not a party to the transactions in independent retail stores, where the “amount charged” is the obligation of the store.
4. The law also requires that the “provider shall collect the fees” that are applicable to the “amounts charged” by such provider. Mont. Code Ann. § 10-4- 201(3). It does not require the provider to collect fees in connection with “amounts charged” by independent retailers, because the provider is not a direct party to such transactions. The law imposes no collection duties on non-providers.
5. Finally, the statute calls for providers to remit the fees based on the “net amount billed for the exchange access service fee”, which equals the “gross amount billed for such service, less adjustments for uncollectible accounts, refunds, incorrect billings, and other appropriate adjustments.” Mont. Code Ann. § 10-4-204(3), (4). While this section pertains to filing of returns and remitting fees applicable to exchange access lines, the section would necessarily also apply to “wireless telephone service, or other 9-1-1 accessible service. Otherwise, there would be no requirement for providers collecting fees from wireless and other services to file returns and to remit the fees to the state, a result the legislature could not have intended.

[P12] While the issue of imposing a duty on prepaid wireless to collect 9-1-1 fees has not been addressed by a Montana court or tax board, Montana cases have looked at whether other statutes specifically mandate that companies collect other types of telecommunication taxes and fees on prepaid wireless.

[P13] In 2012, the district court in Montana’s First Judicial District held that the Montana retail telecommunications excise tax (RTET) and the telecommunications relay services (TRS) fee did not apply to prepaid wireless service. *Alltel Communications v. Department of Rev.*, 2012 Mont. Dist. LEXIS 28 (2012). With respect to the TRS fee, the issue was whether the statute, which was amended in 2007 to specifically cover prepaid

wireless, applied to prepaid wireless prior to the new legislation. The pre-2007 statute created a fund consisting of “all charges billed and collected pursuant to 53-19-311”, which assessed a fee on access lines “provided and billed” by certain providers of local exchange and wireless services. Consequently, the provider was required to “bill each customer for the charge” and to transmit “all charges billed and collected” to the state, but the provider was allowed to deduct and retain some of the “total charges billed and collected” to cover compliance costs.

**[P14]** In *Alltel Communications*, the district court rejected the Department of Revenue’s claim that the term “bill” means to maintain an accounting system rather than actually sending statements to customers. In addition, the court relied on legislative history, which revealed that HB 611 was passed to explicitly address a prepaid wireless company’s duty to collect the TRS fees. The court emphasized:

More persuasive to the Court is the fact that the legislature found it necessary to amend the statute to specifically provide application to prepaid services. “It is a rule of statutory construction that the legislature does not pass meaningless legislation.” *In re Seizure of 1988 Chevrolet Van*, 251 Mont. 180, 189, 823 P.2d 858, 859 (1991).

**[P15]** The court came to the same conclusion regarding the RTET tax (Mont. Code Ann. § 15-53-127 to -156), which applied to wireless service “that is billed to the customer.” The court rejected the Department of Revenue’s arguments that bills are just customer accounts, saying:

The Court considers the more applicable interpretation of the phrase “that are billed to” as requiring application of the tax to situations in which the customer is actually sent a bill.

**[P16]** In a case similar to the *Alltel Communications* decision, the State Tax Appeal Board ruled that the RTET did not apply to the prepaid wireless services of TracFone Wireless, Inc., and rejected assertions by the Department of Revenue that TracFone should conform its business model to the RTET to make the tax apply. *TracFone Wireless v. Montana Dep’t of Rev.*, Cause No. MT 2009-3 (2011). The State Tax Appeal Board determined that “there is no justification for the DOR’s strained interpretation of clear legislative language” to make the RTET apply to prepaid wireless.

**[P17]** The issue of collecting similar 9-1-1 fees has been addressed in other jurisdictions where, as in Montana, legislatures did not clearly envision prepaid wireless purchases from independent retailers when statutes were adopted. For example, the Texas Supreme

Court recently held in *TracFone Wireless v. Commission on State Emergency Communications*, 397 S.W.3d 173, (Tex. 2013), that Texas law did not apply to prepaid wireless because:

. . . the mandatory mechanics of the pre-2010 statute seem nearly impossible to apply coherently to prepaid service. For one thing, it requires providers to collect the fee from customers on a monthly basis, even though prepaid is not sold in monthly increments, and customers use an unpredictable number of months of prepaid service. Similarly, the pre-2010 statute requires that the fee be billed “in the same manner” a service provider otherwise bills its customers, even though prepaid customers are not billed on a recurring basis.

[P18] Although an analysis beyond the plain meaning of the Montana statutes is unnecessary, the legislative record likewise clearly shows that the Legislature has not authorized the State to collect 9-1-1 fees for prepaid wireless services purchased from independent retail stores. On two occasions, efforts have been made in the Legislature to address the 9-1-1 collection requirement in situations involving prepaid wireless sales from independent retailers. In 2007, the Department of Revenue lobbied for House Bill 33 to cover prepaid wireless. A Department of Revenue employee who lobbied for the bill at the House Federal Relations, Energy and Telecommunications Committee hearing on January 17, 2007 stated that the bill provided needed “clarification” to address the “problem” the State had in collecting the 9-1-1 fees on prepaid wireless services. The effort to clarify the law was unsuccessful and the bill died.

[P19] In 2013, House Bill 509 was introduced to allow prepaid wireless customers to pay 9-1-1 fees in connection with purchases of prepaid wireless cards in independent retail stores. House Bill 509 passed out of the Legislature, but was vetoed by the Governor.

[P20] While the Legislature has the authority to authorize the collection of 9-1-1 fees from prepaid wireless services sold by independent retailers, it has not done so. Plainly read, Mont. Code Ann. § 10-4-201 and the related definitions reveal that the 9-1-1 fee collection requirement does not apply to prepaid wireless services. This conclusion is consistent with the decision in *Alltel Communications* regarding the RTE tax and TRS fee, the State Tax Appeal Board’s decision in the *TracFone* case regarding RTET, and with cases from other jurisdictions involving similar state laws.

Representative Mark Blasdel

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*If such fees do not apply under the statute, is the Department of Revenue authorized to adopt administrative regulations to impose the fees on prepaid wireless services purchased from independent retail stores?*

[P21] After the failure of HB 33 in the 2007 Legislative Session, the Department of Revenue promulgated new rules (Mont. Admin. R. 42.31.406, 42.31.407, 42.31.408, 42.31.409 and an amendment to Mont. Admin. R. 42.31.401) to accomplish the goals of HB 33. The Department stated that its authority to implement its new rules originated from Mont. Code Ann. § 10-4-203, which states:

Every provider responsible for the collection of the fee imposed by 10-4-201, MCA shall keep records, render statements, make returns, and comply with the rules adopted by the Department of Revenue with respect to the fee. Whenever necessary in the judgment of the department of revenue, it may require the provider or subscriber to make returns, render statements, or keep records sufficient to show whether there is liability for the fee.

[P22] As explained in the answer to your first question, Mont. Code Ann. § 10-4-201 does not include prepaid wireless transactions. Consequently, the Department does not have the authority to impose the 9-1-1 fees on prepaid wireless transactions.

THEREFORE, IT IS MY OPINION:

The Legislature has not authorized the State to collect 9-1-1 fees for prepaid wireless services purchased from independent retail stores. Absent this legislative authority, the Department of Revenue cannot promulgate rules to allow for the collection of the fees on these sales.

Sincerely,

TIMOTHY C. FOX  
Attorney General

tcf/jb/jym