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United States General Accounting Office  
Washington, DC 20548

Comptroller General  
of the United States

## Decision

**Matter of:** National Weather Service – Alabama 911 Service Charge and Utility Service Use Tax

**File:** B-300737

**Date:** June 27, 2003

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### DIGEST

The federal government is constitutionally immune from paying the Alabama 911 Service Charge and the Alabama Utility Service Use Tax because they are both vendee taxes, the legal burdens of which fall directly on the federal government as a user of telephone services.

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### DECISION

The Chief of the Financial Management Division for the Mountain Administrative Support Center of the Department of Commerce has requested an advance decision under 31 U.S.C. § 3529 on the propriety of paying the 911 service charge and the utility service use tax assessed against National Weather Service telephone lines by the state of Alabama. For the reasons set forth below, we conclude that both the 911 service charge and the utility service use tax are vendee taxes, the legal burdens of which fall directly on the federal government as a user of telephone services, and that the federal government is therefore constitutionally immune from these taxes.

### BACKGROUND

#### 911 Service Charge

Under section 11-98-2 of the Alabama Statutes, municipal or county governments may establish emergency telephone communications districts, which are deemed political and legal subdivisions of the state. Ala. Code § 11-98-2 (LEXIS 2003). The districts may levy an emergency telephone service charge not to exceed five percent

of the tariff rate<sup>1</sup> after approval by a majority of voters within the district. Ala. Code § 11-98-5(a). The emergency telephone service charge is imposed only on the amount received from the tariff rate for exchange access lines.<sup>2</sup> Ala. Code § 11-98-5(c). Funds generated from emergency telephone service charges must be used to establish, operate, maintain, and replace any emergency communication system. Ala. Code § 11-95-5(i). If proceeds generated by the service charge exceed the amount necessary to fund it, the district must suspend or reduce the emergency telephone service charge rate to an amount adequate to fund the district. Ala. Code § 11-98-5(b). The district is permitted to reestablish the original rate, or lift the suspension up to the five percent ceiling, if funding becomes inadequate. Id.

The emergency telephone service charge is included and may be stated separately in the billing by the service supplier to the service user.<sup>3</sup> Ala. Code § 11-98-5(c). Every billed service user is liable for any emergency telephone service charge imposed until it has been paid to the service supplier. Id. The service supplier has no obligation to take legal action to enforce collection of any emergency telephone service charge, but must provide the district with a quarterly list of uncollected amounts, including names and addresses of service users carrying an unpaid balance. Ala. Code § 11-98-5(d). Amounts collected by the service supplier for the emergency telephone service charge are due, and are remitted to the district, monthly. Ala. Code § 11-98-5(e). The service supplier is entitled to retain a one-percent administrative fee from the gross receipts to be remitted to the district. Id.

### Utility Service Use Tax

Alabama also levies a tax on the storage, use, or other consumption of utility services in the state. Ala. Code §§ 40-21-101 to -107 (LEXIS 2003). This includes a six percent tax on telephone services. Ala. Code § 40-21-102(b). Every person storing, using or otherwise consuming utility services in the state is liable for the tax.

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<sup>1</sup> “Tariff Rate” means the rate or rates billed by a service supplier as stated in the service supplier’s tariffs and approved by the Alabama Public Service Commission, which represent the service supplier’s recurring charges for exchange access facilities, exclusive of all taxes, licenses or similar charges. Ala. Code § 11-98-1(9).

<sup>2</sup> The statute does not define “exchange access lines,” “exchange telephone service” or “local exchange service.” See Ala. Code § 11-98-1(4) (defining “exchange access facilities”); see also Rule T-2, Tel. Rules, Ala. Pub. Serv. Comm’n, No. 15957 (June 29, 2000), available at <http://www.psc.state.al.us/Administrative/Revtelephonerulesoct6.pdf> (defining “exchange” and “exchange service area”).

<sup>3</sup> “Service supplier” means any person providing exchange telephone service to any service user throughout the county or municipality. Ala. Code § 11-98-1(7). “Service user” means any person, not otherwise exempt from taxation, who is provided exchange telephone service in the municipality or county. Ala. Code § 11-98-1(8).

Ala. Code § 40-21-102(c). The utility furnishing telephone services collects the tax and remits it to the Department of Revenue, retaining one-fourth of one percent of the gross amount of the tax billed to cover collection costs. Ala. Code § 40-21-102(b). All funds received from the utility service use tax remaining after administration and enforcement expenses are deposited into the state treasury to credit the Education Trust Fund. Ala. Code § 40-21-107. The storage, use or other consumption of utility services is expressly exempted from the utility service use tax whenever the State of Alabama is prohibited from taxing such storage, use, or consumption under the Constitution or the laws of the United States. Ala. Code § 40-21-103(1).<sup>4</sup>

### ANALYSIS

The issue before us is whether the Alabama 911 service charge and the utility service use tax are the types of taxes which the National Weather Service must pay. It is an unquestioned principle of constitutional law that the United States and its instrumentalities are immune from direct taxation by state and local governments. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Direct taxation occurs where the legal incidence of the tax falls directly on the United States as the buyer of goods, Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954), or as the consumer of services, 53 Comp. Gen. 410 (1973), or as the owner of property, United States v. Allegheny County, 322 U.S. 174 (1944). When the legal incidence of such a tax falls directly on the federal government as the “vendee,” the tax is not payable unless expressly authorized by Congress. 64 Comp. Gen. 655, 656-7 (1985).

On the other hand, if the legal incidence of the tax falls directly on a business enterprise (the “vendor”), which is supplying the federal government as a customer with goods or services, immunity does not apply. 61 Comp. Gen. 257 (1982) (requirement that a utility tax be passed on to the user must be part of the taxing statute for the government to invoke the principles of sovereign immunity). When the vendor is the entity being taxed, it may typically shift the economic burden of the tax to its customers. In such instances, federal agencies may use appropriated funds for costs necessary to obtain those goods and services, even though some of the cost of the item is attributable to taxes paid by the vendor. 64 Comp. Gen. 655, 656-7 (1985). In other words, a tax does not necessarily violate the government’s immunity merely because the government must bear the financial burden of a tax levied on others. 61 Comp. Gen. 257 (1982). See also 63 Comp. Gen. 49 (1983).

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<sup>4</sup> Unlike the utility service use tax, the provisions of the emergency telephone service surcharge do not include such an exemption.

In determining whether a charge is a “tax” or “fee,” the nomenclature is not determinative and the inquiry must focus on explicit factual circumstances. Valero Terrestrial Corp. v. Caffrey, 205 F.3d 130, 134 (4<sup>th</sup> Cir. 2000).<sup>5</sup> One court described a “classic tax” as one imposed by a legislature upon many, or all citizens, raises money, and is spent for the benefit of the entire community. San Juan Cellular Tel. Co. v. Public Service Comm'n, 967 F.2d 683, 685 (1st Cir. 1992). Other courts employ this same three-part test in distinguishing a tax from a fee. See, e.g., Valero, 205 F.3d at 134; Bidart Bros. v. California Apple Comm'n, 73 F.3d 925, 931 (9th Cir. 1996).<sup>6</sup>

In addition to the analysis of where the legal incidence of the tax falls, we also consider additional characteristics of the 911 charges. First, does a local government or quasi-governmental unit provide the emergency telephone service; second, does the public funding of the service require legal authority, e.g., an ordinance or a referendum, and third, is the service charge actually based on a flat rate per telephone line, unrelated to levels of service. 64 Comp. Gen. 655 (1985); 65 Comp. Gen. 879 (1986).

#### 911 Service Charge

Although the Alabama statute labels it a 911 “service charge,” it is clearly a tax imposed by emergency telephone communications districts, state governmental units, on a class of citizens, namely, those with telephone service. San Juan. The five percent rate ceiling is set by statute and applies to every billed telephone user. Ala. Code § 11-98-5. The 911 service charge raises money which is spent to provide emergency telephone service for the benefit of the entire community. San Juan. While the telephone service provider is required to collect the 911 service charge and remit it to the communications district, sections 11-98-4 and 11-98-5(g)–(i) make it clear that the communications district provides the emergency telephone service. Funds generated by the 911 service charge must only be used to establish, operate, maintain and replace an emergency communication system. Ala. Code § 11-98-5(i). The statute mandates that local communications districts must lower or suspend the taxation if proceeds exceed the cost of providing the emergency telephone service. Ala. Code § 11-98-5(b).

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<sup>5</sup> We note here that the Alabama statute labels its 911 tax a “service charge,” not a “fee.” These terms, however, are synonymous. See Black’s Law Dictionary 629 (7<sup>th</sup> ed. 1999) (defining “fee” as a charge for labor or services). See also Webster’s Ninth New Collegiate Dictionary 1076 (1983) (defining “service charge” as a fee charged for a particular service).

<sup>6</sup> See also Collins Holding Corp. v. Jasper County, 123 F.3d 797, 800 (4<sup>th</sup> Cir. 1997); National Cable Television Ass’n v. United States, 425 U.S. 336, 340 (1974); 49 Comp. Gen. 72 (1969).

The Alabama 911 service charge also satisfies the additional criteria of 64 Comp. Gen. 655 (1985). The emergency telephone communications districts, which § 11-98-2 defines as political and legal subdivisions of the state, establish, operate and maintain the emergency telephone service. Ala. Code §§ 11-98-5(g)–(i). Public funding of the emergency telephone service requires an initial referendum and, then an ordinance or resolution for subsequent rate changes. Ala. Code §§ 11-98-5(a)–(b). The 911 service charge is imposed only on the amount received from the tariff rate for exchange access lines. Ala. Code § 11-98-5(c).

We have examined 911 charges imposed by several states on nearly two dozen occasions, recently in Utah, B-283464, Feb. 28, 2000. See also B-265776, Nov. 29, 1995 (Illinois); B-259029, May 30, 1995 (Alaska); and B-254628, Apr. 7, 1994 (Michigan). In all of these cases, we held that the 911 surcharges were vendee taxes not payable by the federal government.<sup>7</sup> Under the Alaska statute, for example, municipalities are authorized to impose a 911 surcharge on each local exchange access line; the telephone customer is explicitly liable for payment of the 911 surcharge; the funds collected are available only to pay the costs of the 911 emergency phone system; the local exchange carrier is required to collect the money and remit it to the local authority; and the carrier retains one percent of the funds collected for administrative collecting costs. There we found that the telephone company was merely collecting the tax for the local authority and that the Alaska 911 surcharge was a vendee tax. Because the legal incidence fell directly on the federal government as a user of telephone services, we found the federal government constitutionally immune from paying the Alaska 911 surcharge.

Contrast these cases with our decision in B-238410, Sept. 7, 1990, where we found that the offices of the two United States Senators from Arizona were not constitutionally immune from paying Arizona's 911 tax. Although we recognized that the economic burden of the tax would fall on the Senators' offices as the consumers, we concluded that the statute and the surrounding circumstances clearly indicated that the legal incidence of the Arizona 911 tax fell on the vendor, not the vendee. See also 61 Comp. Gen. 257, 260 (1982) (statute clearly imposed the utility license tax on the operator of electric utilities and Veterans' Administration Medical Centers not constitutionally immune).

Here, the Alabama 911 service charge statute is not materially different from those of other states where we concluded such surcharges were "vendee" taxes. In fact, the Alabama 911 service charge is nearly identical to the Alaska 911 statute. Local emergency telephone communications districts in Alabama are authorized to impose a 911 service charge on each local exchange access line; the telephone customer is

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<sup>7</sup> See also B-254712, Feb. 14, 1994 (North Carolina); B-255092, Feb. 14, 1994 (Wyoming); B-253695, July 28, 1993 (Pennsylvania); B-249007, Jan. 19, 1993 (Nebraska); B-248907, Jan. 19, 1993 (Wisconsin).

explicitly liable for payment of the 911 charge; the funds collected are available only to pay the costs of the 911 emergency phone system; and the local exchange carrier is required to collect the money and remit it to the local authority, retaining one percent of the funds collected for administrative collecting costs. As with the Alaska surcharge, we conclude that the Alabama 911 service charge is a vendee tax. The legal incidence of the tax falls unmistakably on the National Weather Service as a user of telephone services. The National Weather Service, therefore, is constitutionally immune from paying the Alabama 911 service charge.

### Utility Service Use Tax

The next issue is whether the National Weather Service is constitutionally immune from paying the Alabama utility service use tax. The use tax is imposed by the state legislature on "every person storing, using or otherwise consuming utility services in the State of Alabama." Ala. Code § 40-21-102(c). Indeed, § 40-21-101 explicitly states that the tax is intended to apply to purchases of utility services from any utility. The tax is computed based on the sales price of the customer's total monthly utility consumption. Ala. Code § 40-21-102(b). The use tax revenue, minus administrative and enforcement expenses, are deposited to the credit of the Alabama Education Trust Fund.

The Alabama utility service use tax is clearly distinguishable from the Alabama public utility license tax we considered in 61 Comp. Gen. 257, 260 (1982). There we concluded that Veterans' Administration Medical Centers should pay the Alabama public utility license tax. The license tax was clearly imposed on the operator of electric or hydroelectric utilities. The legal incidence of the license tax was on the utility companies, not the consumer. Whereas the legal incidence of the license tax fell squarely on the utility vendor in 61 Comp. Gen. 257, the legal incidence of the utility service use tax imposed by § 40-21-102 falls unmistakably on the National Weather Service as vendee. Because the legal incidence of the tax falls on the National Weather Service as a user of telephone services, the National Weather Service is, therefore, constitutionally immune from paying the Alabama utility service use tax.

### CONCLUSION

We find that the Alabama 911 service charge and the utility service use tax are both vendee taxes, the legal burdens of which fall directly on the federal government as a user of telephone services, and that the federal government is therefore constitutionally immune from these taxes. We note that although the National Weather Service has informed the telephone service provider of its constitutional immunity from these taxes, the provider has nevertheless refused to remove these assessments. To the extent that federal agencies are threatened with

discontinuation of telephone or other utility services for non-payment of such taxes, we suggest you first discuss the issue with the relevant state taxing authority, and if that fails, consult with the Department of Justice.

/Signed/

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General Counsel