



Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Telephone Surcharges--State of Nebraska  
**File:** B-249007  
**Date:** January 19, 1993

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### DIGEST

The federal government is constitutionally immune from paying the 9-1-1 emergency telephone surcharge and the dual-party relay surcharge imposed by the state of Nebraska because the surcharges are vendee taxes, the legal burden of which fall directly on the federal government as a user of telephone services.

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### DECISION

An authorized certifying officer of the Department of Agriculture's National Finance Center has requested an advance decision under 31 U.S.C. § 3529 on the propriety of paying two telephone surcharges assessed against federal agencies in the state of Nebraska. One surcharge is for the development and operation of 9-1-1 emergency telephone communications systems throughout the state. The second surcharge is to provide a dual-party relay system for hearing and speech impaired persons in the state. For the reasons set forth below, we conclude that both surcharges are vendee taxes, the legal burden of which fall directly on the federal government as a user of telephone services, and that the federal government is therefore constitutionally immune from the taxes.

#### 9-1-1 Emergency Telephone Surcharge

Under section 86-1003 of the Revised Statutes of Nebraska, governing bodies in the state are authorized to "impose a uniform service surcharge in an amount not to exceed fifty cents per month on each local exchange access line." The purpose of the surcharge is to fund the development, installation, and operation of 9-1-1 emergency telephone communications systems throughout the state. Neb. Rev. Stat. § 86-1001. The surcharge is collected by the telephone companies who are required to remit the 9-1-1 surcharges collected to the governing bodies on a quarterly basis. Neb. Rev. Stat. §§ 86-1004, 1005. The governing bodies are to credit the funds collected from the surcharge to a separate fund which "shall be used solely to pay for costs for 9-1-1 service." Neb. Rev. Stat. § 86-1007.

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.<sup>1</sup> 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. County of Allegheny, 322 U.S. 174 (1944). These direct taxes, known as "vendee" taxes, are not payable by the federal government unless expressly authorized by Congress. 64 Comp. Gen. 655, 656-57 (1985).

We recently examined 9-1-1 charges in Washington, B-248777, July 6, 1992; Kentucky, B-246517, Apr. 17, 1992; and Indiana, B-248363, Apr. 17, 1992.<sup>2</sup> We held, in these cases, that the 9-1-1 service charges at issue were vendee taxes not payable by the federal government. Under these states' statutes, the telephone companies were merely collection agents, *i.e.*, required to collect the 9-1-1 charges from their customers and then remit the amount collected to the state taxing authorities. *Cf.* B-238410, Sept. 7, 1990. The Indiana statute, for example, makes clear that the legal incidence of the tax falls on the customer by providing that "[t]he person who uses an exchange access facility is liable for the monthly . . . fees."

The Nebraska statute is not materially different from these state statutes. Under the Nebraska 9-1-1 statute, the service supplier, *i.e.*, the telephone company, acts as a collection agent for the governing bodies in the state; the service supplier collects the 9-1-1 surcharge from telephone

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<sup>1</sup>Although the Nebraska statute labels the 9-1-1 emergency telephone charge and the dual-party relay charge as "surcharges," they are, nonetheless, taxes. In 65 Comp. Gen. 879, 881 (1986), we identified the characteristics of telephone charges which make them taxes. First, the telephone service is provided by a local government or by a quasi-governmental unit. Second, public funding of the service requires legal authority, *e.g.*, an ordinance or referendum. Third, the service charge is actually based on a flat rate per telephone line and is unrelated to levels of service. Both the 9-1-1 surcharge and dual-party relay surcharge assessed under the Nebraska statute satisfy all these criteria.

<sup>2</sup>See also 66 Comp. Gen. 385 (1987) (Florida); 65 Comp. Gen. 879 (1986) (Maryland); 64 Comp. Gen. 655 (1985) (Texas); B-239608, Dec. 14, 1990 (Rhode Island); B-230691, May 12, 1988) (Tennessee).

users and remits the amount collected to the state. Neb. Rev. Stat. §§ 86-1004, -1005. The Nebraska law provides that "[e]very service user shall be liable for any service surcharge billed to such user until the surcharge has been paid to the service supplier." Neb. Rev. Stat. § 86-1004. Nebraska's law makes clear that there is no obligation on the telephone companies to take legal action to enforce collection of the surcharge, and states that the telephone companies "shall not be liable for such uncollected amounts." *Id.* Nebraska's 9-1-1 surcharge is, therefore, a vendee tax, the legal incidence of which falls directly on the federal government as a user of telephone services in the state. Consequently, the United States is constitutionally immune and the tax is not payable by the federal government.

#### Dual-Party Relay Surcharge

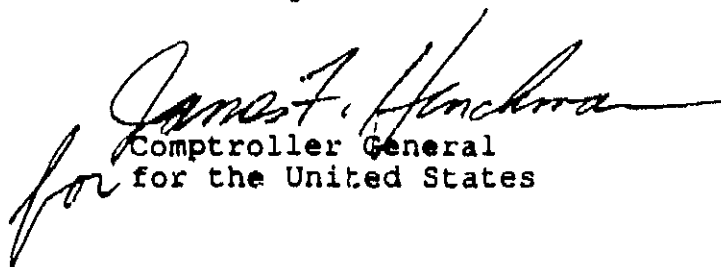
Under section 86-904 of the Revised Statutes of Nebraska, "each telephone company in the state shall collect a surcharge not to exceed ten cents per month on each telephone access line." The purpose of the surcharge is to provide a statewide dual-party relay system for hearing and speech impaired persons "to enable such persons to communicate fully with others using conventional telephone systems twenty-four hours per day, seven days per week." Neb. Rev. Stat. § 86-901. The surcharge is collected by the telephone companies, who are required to add the surcharge to each customer's local telephone bill. Neb. Rev. Stat. 86-904. The telephone companies collect the surcharge on a monthly basis and remit the amount collected to the Public Service Commission, who then is required to remit the funds to the State Treasurer. *Id.* The State Treasurer is required to credit all funds collected from the imposition of the surcharge to the Nebraska Telephone Relay System Fund, available solely to provide the statewide relay system. *Id.*

Like the 9-1-1 emergency telephone surcharge, the dual-party relay surcharge is a vendee tax.' Under Nebraska law, the

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Nebraska's dual-party relay surcharge is easily distinguished from the dual-relay surcharge at issue in B-226527, Feb. 3, 1988. We there held that a surcharge assessed by telephone companies operating in Utah to implement the state's lifeline telephone service program by which lower income individuals receive less expensive service is not a tax, but rather part of an authorized rate for telephone services. The telephone companies do not remit the amount of the surcharge to the state, but rather, use it to provide discounted rates for low income residents. (continued...)

telephone companies are merely collection agents for the state. The telephone companies are required to collect the surcharge from their customers and then remit the amount collected to the state. Neb. Rev. Stat. § 86-904. Nebraska law makes clear that the legal incidence of the tax falls on the customer by providing that "the telephone companies shall not be liable for any surcharge not paid by a customer and shall not be obligated to take legal action to collect the surcharge." *Id.* The dual-party relay surcharge is therefore a vendee tax, the legal incidence of which falls directly on the federal government as a user of telephone service in the state. Consequently, the United States is constitutionally immune and the tax is not payable by the federal government.

  
for Janet F. Henchman  
Comptroller General  
for the United States

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<sup>3</sup>(...continued)

The surcharge therefore represents a partial redistribution of the costs of doing business incurred by telephone companies. In contrast, telephone companies operating in Nebraska act strictly as collection agents for the state and the surcharge is a vendee tax. See In re Mytinger, 31 F. Supp. 977 (N.D. Tex. 1940) for a discussion of the essential characteristics of taxes, and see also note 1 infra.