

JOINT COMMITTEE ON GOVERNMENT AND FINANCE
WEST VIRGINIA OFFICE OF THE LEGISLATIVE AUDITOR

POST AUDIT DIVISION

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LEGISLATIVE AUDITOR'S LETTER REPORT

August 20, 2020

Public Service Commission: Wireless Enhanced 911 Fee Diversion

LEGISLATIVE AUDITOR'S STAFF CONTRIBUTORS

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**MODIFIED GENERALLY ACCEPTED GOVERNMENT
AUDITING STANDARDS STATEMENT:
Departure from Auditing Standards
to Provide an Informational Update**

This report, and the work performed to produce it, was not done in compliance with the Generally Accepted Government Auditing Standards (GAGAS). This report is a follow-up to issues contained in a previous GAGAS audit report issued by the Post Audit Division on January 8, 2019, the *West Virginia Public Service Commission Wireless Enhanced 911 Fees* report.

The intent of this report is to communicate information contained in the Federal Communications Commission's (FCC) *Annual Report to Congress on State Collection and Distribution of 911 and Enhanced 911 Fees and Charges*, as well as information obtained from other State sources, to the Legislature regarding an ongoing issue affecting the State. The recommendation made in this report is based solely on the information presented in the FCC report and the Legislative Auditor's January 2019 report on Wireless E-911 Fees, and is meant to alleviate the issue based on the causes identified by the FCC.

While GAGAS was not adhered to, all other applicable internal policies concerning the supervision and review of the work performed to produce this report were followed. It is the judgment of the Legislative Auditor that the information presented in this report is accurate and reliable based on the sources of the information and the internal procedures followed in producing it.

POST AUDIT DIVISION
Director, Justin Robinson

Update

During the 2020 Regular Session, the Legislature passed S.B. 579, which split, but did not change the amount of, the current Wireless E-911 fee, clearly delineating the portion of the current fee that is specifically collected for 911-related services. The funds previously collected to support the West Virginia State Police, the Division of homeland Security and Emergency Management, and the Public Service Commission's Tower Fund are still collected and distributed in the same amounts, but under a separate fee from the Wireless E-911 fee.

The Legislative Auditor believes that passage of this legislation should remove West Virginia from the FCC's list of "diverter states," moving forward. However, it should be noted that the FCC's annual reports look backwards in time. As such, the FCC's *12th Annual Report to Congress on State Collection and Distribution of 911 and Enhanced 911 Fees and Charges*, likely to be published in December 2020, will cover the period from January 1, 2019 through December 31, 2019. Therefore, West Virginia is likely to still be listed as a "diverter" in this report because it covers a period of time prior to the effective date of S.B. 579.

WEST VIRGINIA LEGISLATIVE AUDITOR'S OFFICE

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Justin Robinson
Director



August 20, 2020

The Honorable Mitch Carmichael, President
West Virginia State Senate
Post Audits Subcommittee, Co-Chair
Room 229 M, Building 1
State Capitol Complex
Charleston, WV 25305

The Honorable Roger Hanshaw, Speaker
West Virginia House of Delegates
Post Audits Subcommittee, Co-Chair
Room 228 M, Building 1
State Capitol Complex
Charleston, WV 25305

Mr. President and Mr. Speaker:

The purpose of this letter-report is to inform members of the Post Audits Subcommittee of an issue pertaining to Wireless Enhanced 911 fees (Wireless E-911) that has carried over from the 2019 Regular Session. In December of 2018, Governor Jim Justice indicated that West Virginia had been labeled by the Federal Communications Commission (FCC) as one of several “diverter-states,” a designation which makes the State ineligible to apply for or receive certain federal grants. From 2015 to present, the FCC has designated the State’s distribution of more than \$19 million of Wireless E-911 funds as having been diverted for non-911 purposes. As a result, West Virginia was ineligible to apply for the federal 911 Grant Program in 2019, which made more than \$109 million available to states. Although legislation to correct this issue was introduced during the 2019 Regular Session, it did not pass, and West Virginia was designated as one of five diverter-states in the FCC’s most recent annual report to the U.S. Congress.

Background

The Wireless E-911 fee is established by W.Va. Code §24-6-6b as one of two funding sources for the State’s emergency telephone system. Wireless E-911 fees are assessed by Commercial Mobile Radio Service (CMRS) providers, or wireless telephone service providers, on the monthly bills of in-state residents. As of December 2018, the Wireless E-911 fee was \$3.34 per subscriber. As required by W.Va. Code §24-6-6b(c), the PSC recalculated the fee in 2019 to \$3.86 per subscriber effective July 1, 2019.

The PSC distributes these funds according to Code. The statutory distribution of the Wireless E-911 fee is broken down as follows:

- On an annual basis, \$1,000,000 is placed into the Enhanced 911 Wireless Tower Access Assistance Fund (Tower Fund) within the PSC to subsidize the construction of towers to better supplement the E-911 program.
- 10¢ is collected each month from each wireless telephone service subscriber and distributed to the West Virginia State Police (WVSP) for equipment upgrades to improve and integrate their communication with that of the E-911 system.
- 5 percent of the total annual fee collections is deposited in a special fund established by the Division of Homeland Security and Emergency Management (DHSEM) to be used solely for the construction, maintenance and upgrades of the WV Interoperable Radio Project and any other costs related to establish and maintain the infrastructure of the system.
- Each county receives 0.085 percent of the total annual amount collected. The remainder of the total annual fees collected are distributed according to the population figures as of the last decennial census where each county receives a percentage of the remaining balance that corresponds to its percentage of the State’s total population (i.e., Kanawha County makes up 10 percent of the State’s population and receives 10 percent of the remaining funds).

Figure 1 below shows the total amount of Wireless E-911 funds distributed to each of the required recipients from 2009 to 2018.

Figure 1 Distribution of Wireless E-911 Fees FY 2009-2018	
Fee Recipient	Total Received Since Fiscal Year 2009
Counties	\$323,803,980.53
DHSEM	\$18,201,447.53
WVSP	\$12,283,668.69
Wireless Tower Fund	\$10,000,000.00
Total	\$364,289,096.75
<i>Source: Figures provided to the Legislative Auditor by the PSC.</i>	

West Virginia is Routinely Designated by the U.S. Federal Communications Commission as a “Diverter-State.”

Each year, states are required to report information regarding all of their 911 fees to the U.S. FCC. Upon receipt of the data, the FCC issues an annual report to Congress detailing states efforts to establish, maintain, and fund emergency telephone systems.

According to the FCC’s annual reports from 2015 through 2019, the FCC has designated West Virginia as a “diverter-state.” In these reports, the FCC details its determination that certain

allocations of the State’s Wireless E-911 fees are not consistent with “911-related purposes within the meaning of the NET 911 Act.” In total, from 2015 through 2019, the FCC has determined that West Virginia has diverted approximately \$19 million in Wireless E-911 fees. Figure 2 provides a breakdown.

Figure 2 Wireless E-911 Fees Designated by U.S. FCC as Diverted Funds						
	2015	2016	2017	2018	2019	Total
PSC Tower Fund	\$1,000,000	\$1,000,000	\$1,000,000	\$1,000,000	\$1,000,000	\$5,000,000
WVSP	\$3,514,400 ¹	\$1,193,678	\$1,157,335	\$1,116,945	\$1,119,025*	\$6,982,358
DHSEM	\$1,757,200	\$1,790,517	\$1,736,003	\$1,865,298	\$1,868,771*	\$7,149,018
Total	\$6,271,600	\$3,984,195	\$3,893,338	\$3,982,242	\$1,000,000*	\$19,131,375*

*Dollar values not included in the FCC’s calculation of total funds diverted in its 2019 annual report.
Source: FCC’s Annual Reports to Congress on State Collection and Distribution of 911 and Enhanced 911 Fees and Charges. 2015-2019.

In particular, the FCC routinely takes issue with the State’s allocation of \$1,000,000 annually to the PSC’s Tower Fund, used to subsidize construction of commercial cellular towers. In its 2019 annual report, issued on December 19, 2019, the FCC indicated:

Consistent with our finding in last year’s Tenth Report, we do not agree with West Virginia that the construction of commercial cellular towers to expand cellular coverage is “911-related” within the meaning of the NET 911 Act. Although expanding cellular coverage enhances the public’s ability to call 911, the NET 911 Act focuses on funding the elements of the 911 call-handling system that are operated and paid for by state and local 911 authorities. Accordingly, we conclude that West Virginia diverted the \$1,000,000 in 911 fees that it allocated for commercial network construction

In addition, the FCC has, since 2015, designated the State’s allocation of funds to the Division of Homeland Security and Emergency Management (DHSEM) and its allocation of funds to the West Virginia State Police (WVSP) as diversions of Wireless E-911 fees. However, the FCC has repeatedly indicated in its reports that these allocations of funds “may be considered 911-related if the state shows a clear nexus to the 911 system.” Based on these reports, it appears that the State has routinely omitted sufficient documentation to support these allocations, which has led to those funds being listed as “diversions².”

¹ While this is the dollar figure included in the FCC’s 7th Annual Report to Congress, the PSC and the Legislative Auditor agree that this dollar figure seems inconsistent with the statutory distribution of the Wireless E-911 fee and inexplicably high compared to subsequent years.

² The Legislative Auditor notes that the FCC’s 2019 annual report continues to express skepticism regarding the allocations to DHSEM and the WVSP but did not include those allocations in the total amounts diverted for the 2019 reporting period.

West Virginia Remains Ineligible to Receive Certain Federal Grant Funds Due to Diversion of Wireless 911 Funds.

The Legislative Auditor was informed by the Director of the Division of Homeland Security and Emergency Management that West Virginia was ineligible to apply for or receive funds from the federal 911 Grant Program administered jointly by the U.S. Departments of Transportation and Commerce.

In a letter dated December 21, 2018, Director Todorovich indicated that as much as \$109 million could be made available under the program, and that West Virginia could miss out on a minimum of \$2 million over four years. To remedy this issue, legislation was introduced during the 2019 Regular Session to separate the Wireless E-911 fees from monies collected and distributed to DHSEM, the WVSP, and the PSC's Tower Fund. However, the legislation did not complete the legislative process.

On August 9, 2019, the U.S. Departments of Transportation and Commerce issued a press release announcing that it had awarded 34 states funds as part of the 911 Grant Program to "help 911 call centers upgrade to Next Generation 911 (NG911) capabilities." The release goes on to indicate that grant funds:

*[W]ere available to states, territories, and tribal nations and the District of Columbia, provided that they successfully submitted a state 911 plan and project budget, designated a 911 coordinator, and certified that **they did not use funds designated for 911 systems for other purposes in the past 180 days** (Emphasis added).*

As a result, West Virginia did not receive any of the \$109,250,000 of federal funds available under the 911 Grant Program in 2019. While an effort to remedy this issue through legislation was introduced during the 2019 Regular Session, those bills did not complete legislative action. Thus, the State of West Virginia remains an FCC-designated diverter-state and is likely to be ineligible for future federal grant funds related to the provision of 911 services. Therefore, the Legislative Auditor makes the following recommendation:

Recommendations

1. The Legislature should consider modifying the current Wireless E-911 fee structure to avoid being designated as a diverter-state and to enable the State to apply for and receive federal grant funds related to 911 services.

Respectfully Submitted,



Justin Robinson



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JEFF S. SANDY CFE, CAMS
CABINET SECRETARY

THOMAS L. KIRK
DEPUTY SECRETARY

Date: Tuesday, January 28, 2020

To: Adam R. Fridley, CGAP, Audit Director, West Virginia Legislative Auditors Office

From: Jeff S. Sandy, CFE, CAMS, Cabinet Secretary

A handwritten signature in blue ink that reads "Jeff S. Sandy".

Re: Wire Enhanced 911 fees

I have reviewed your audit report and concur with its detailed analysis of the issues. Your report clearly analyzes the past, present, and the future harm to the state from not being in compliance with the Federal Communications Commission (FCC).

In conclusion, The Department of Military Affairs and Public Safety (DMAPS) supports your audit report and recommendation as follows:

Recommendation

- 1. The Legislature should consider modifying the current Wireless E-911 fee structure to avoid being designated as a diverter-state and to enable the State to apply for and receive federal grant funds related to 911 services.***

Be advised that Counsels Stacy Nowicki and Daniel Armstrong, with guidance from the Governor's office, will work diligently with our legislators to meet the guidelines and requirements of the FCC; but even as important, I will ensure you that DMAPS will make certain the 30,000 daily users of our states communication system have a reliable system.

As always, contact me 24/7 if you have any questions.