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TO PARTIES OF RECORD IN RULEMAKING 17-06-023:

This is the proposed decision of Commissioner Carla J. Peterman. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's December 13, 2018 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

/s/ MICHELLE COOKE for
Anne E. Simon
Chief Administrative Law Judge

AES:avs

Attachment

Decision PROPOSED DECISION OF CMMR. PETERMAN
(Mailed 11/9/2018)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to
Consider Whether Text Messaging
Services are Subject to Public Purpose
Program Surcharges.

Rulemaking 17-06-023

**DECISION DETERMINING TEXT MESSAGING SERVICES REVENUE
SHOULD BE SUBJECT TO PUBLIC
PURPOSE PROGRAM SURCHARGES
AND USER FEES**

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**DECISION DETERMINING TEXT MESSAGING SERVICES REVENUE
SHOULD BE SUBJECT TO PUBLIC PURPOSE PROGRAM
SURCHARGES AND USER FEES**

Summary

In this decision, the California Public Utilities Commission (Commission) determines that text messaging services revenue should be subject to Public Purpose Program surcharges. The Commission finds it has authority to collect Public Purpose Program surcharges under the Commission's All End User Surcharge Mechanism and Point of Sale Mechanism. The Commission opens a second phase of this proceeding to increase the consistency, transparency, and competitive neutrality of the Commission's surcharge mechanisms, as well as to consider methods to update the list of surchargeable services in a timely manner. Also, the Commission determines that intrastate text messaging services revenue is subject to user fees. This proceeding remains open.

1. Factual Background

The federal Communications Act of 1934 (the Act) established universal service in order to create widespread and affordable voice service in the United States. The Act established the Federal Communications Commission (FCC) and charged it with regulating telecommunications carriers and managing the implementation of universal service.

The 1996 Telecommunications Act amended the Act, requiring the FCC to establish support mechanisms to ensure that schools, libraries, health care providers and low-income, rural, insular, or residents in high-cost areas receive access to affordable telecommunications services.¹ At the time the Act, as

¹ 47 U.S.C. § 254.

Footnote continued on next page

amended, was adopted, “only 23% of Americans had dial-up Internet access at home, and virtually no one had broadband.”² In response to the 1996 Act, the FCC created new programs funded by the universal service fund to universalize voice service and increase broadband in schools, libraries and rural health care providers’ facilities.³

Federal universal service is funded by a surcharge assessed on the interstate and international component of all applicable communications services. Interstate means that the communication occurred across state lines. Under the 1996 Telecommunications Act, the Universal Service Administrative Company was charged with managing and collecting surcharges to fund federal universal service programs.

The Act also allowed individual states to implement universal service.⁴ States could implement universal service through state programs funded by the intrastate component of applicable communications services. Intrastate means that the communication occurred within the boundaries of the state.

The Act also granted states discretion to impose requirements “necessary to preserve and advance universal service, to protect safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of customers” in the state on a competitively neutral basis.⁵

² National Broadband Plan (NBP) at 140.

³ *Id.*

⁴ The 1996 Telecommunications Act did not amend §§ 253(b) or 254(f) of the Act. (47 U.S.C §§ 253(b) and 254(f).)

⁵ 47 U.S.C. § 253.

In addition, the Act required every telecommunications carrier providing intrastate telecommunications services to contribute to the state's universal service in a manner determined by the state, on an equitable and nondiscriminatory basis.⁶ The Act's requirements to apply universal service on an equitable, nondiscriminatory, and competitively neutral basis are echoed in enabling statutes for implementing California's universal service.⁷

Universal service in California means that a minimum level of telecommunications services are available to everyone in the state at a reasonable rate.⁸ The concept of what universal service means has evolved over time to keep pace with customer expectations of what communications technology is necessary to participate in society, also called basic service.⁹ Over time, the Commission adopted six Public Purpose Programs to implement California's universal service, which are 1) California High Cost Fund A (CHCF-A),¹⁰ 2) California High Cost Fund B (CHCF-B),¹¹ 3) Universal Lifeline Telephone Services Act (ULTS or Lifeline),¹² 4) Deaf and Disabled Telecommunications Program Administrative Commission Fund (DDTP),¹³ the 5) California Advanced Services Fund (CASF), and 6) the California Teleconnect Fund (CTF).¹⁴

⁶ 47 U.S.C. § 254(f).

⁷ See Pub. Util. Code § 871.5.

⁸ D.95-07-050 at 8.

⁹ *Id.* at 21 (defining basic service as the minimum level of service customers have come to expect, or what services are essential to all residential telephone customers.)

¹⁰ Pub. Util. Code § 275.

¹¹ Pub. Util. Code § 276.

¹² Pub. Util. Code § 277.

¹³ Pub. Util. Code § 281.

¹⁴ Pub. Util. Code § 280.

The Commission has two mechanisms to collect surcharges to fund Public Purpose Programs. The Commission's first funding mechanism is the All End User Surcharge Mechanism, a historical funding mechanism established in 1994. The All End User Surcharge Mechanism requires all end users of telecommunications services to pay Public Purpose Programs surcharges, with the exception of Universal Lifeline Telephone service billings, coin-sent paid calling, debit card messages, one-way radio paging, usage charges to coin operated paid telephones and customers receiving services under existing contracts that were executed on or before September 15, 1994 and directory advertising.¹⁵ The Commission's Communications Division (CD) staff enforces the All End User Surcharge Mechanism by conducting audits on telecommunications carriers. In 2016, the Commission staff updated the Surcharge Directive on the CD website to state that text messaging was a form of two-way messaging, and therefore was subject to Public Purpose Program surcharges.¹⁶ CD staff's website update prompted CTIA-The Wireless Association's (CTIA) petition,¹⁷ which led to the opening of this rulemaking to consider whether text messaging should be subject to Public Purpose Program surcharges and user fees.

The second funding mechanism is the Point of Sale Mechanism.¹⁸ In 2014, the Prepaid Mobile Telephony Services Surcharges Collection Act (MTS) created

¹⁵ D.94-09-065, D.96-10-066.

¹⁶ ALJ's Ruling Revising Communications Division Staff Paper and Public Purpose Program Financial Data, and Updating the Procedural Schedule, Appen. A.

¹⁷ Petition to Adopt, Amend, or Repeal a Regulation Pursuant to Pub. Util. Code § 1708.5.

¹⁸ The Commission is aware that, on November 5, 2018, the United States District Court for the Northern District of California issued Order Regarding Cross Motions for Summary Judgment

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the Point of Sale Mechanism for the collection and remittance of surcharges and fees assessed on prepaid wireless bundled service, effective 2016-2020.¹⁹

2. Procedural Background

This rulemaking was opened pursuant to Section 1708.5 of the Public Utilities (Pub. Util.) Code and proceeded by notice, comment and briefing. On June 29, 2017, the Commission granted Petition 17-02-006 and issued an Order Instituting Rulemaking and a preliminary scoping memo to consider whether text messaging services should be subject to Public Purpose Program surcharges and user fees. On July 17, 2017, the assigned Administrative Law Judges (ALJs) (ALJ DeAngelis and ALJ Kline) issued an email ruling revising and clarifying the preliminary schedule for the proceeding. On August 18, 2017, The Utility Reform Network, The Greenlining Institute and Center for Accessible Technology (collectively, the “Joint Consumers”), CTIA and the California Cable & Telecommunications Association (CC&TA) filed comments in response the question in the preliminary scoping memo.

On August 24, 2017, the assigned ALJs set a prehearing conference (PHC) by ruling. On September 8, 2017, the assigned ALJs revised the commencement time for the PHC by ruling. On September 13, 2017, the assigned ALJs held a PHC to determine parties, discuss the scope, the schedule, and other procedural

(Order) in *METROPCS CALIFORNIA, LLC. v. MICHAEL PICKER, et al.* (Case No. 17-cv-05959-SI). The Court concluded that the Prepaid Mobile Telephony Services Surcharge Act conflicts with federal law and is therefore preempted and unconstitutional. No later than November 15, 2018, the Court directed the parties to meet and confer and submit a proposed order (or competing orders, if the parties cannot agree) regarding the appropriate injunctive relief. The Court also directed the parties to submit a joint letter informing the Court regarding whether any further proceedings are necessary in this case prior to the entry of judgment, and if no further proceedings are necessary, that the parties file a proposed judgment.

¹⁹ Pub. Util. Code § 319.

matters. At the PHC, the assigned ALJs granted motions for party status made by AT&T Mobility,²⁰ Sprint,²¹ Verizon²² and T-Mobile²³ (collectively, the “Carrier Parties”).

On February 21, 2018, ALJ Kline issued a ruling setting a schedule for comments on a Commission Communications Division staff paper and setting a briefing schedule (February Joint Ruling). On March 2, 2018, ALJ Kline granted CTIA’s unopposed request for an extension of time to file comments and briefs by email ruling. On March 23, 2018, parties filed opening comments to the February Joint Ruling.

On March 28, 2018, the Joint Consumers filed a motion to suspend the procedural schedule and shorten the response time to the same. On March 29, 2018, CTIA filed a response opposing the Joint Consumer’s motion to shorten time to respond to the Joint Consumer’s motion to suspend the procedural schedule. On March 30, 2018, ALJ Kline denied the Joint Consumer’s motion to shorten time to respond to the motion to suspend the procedural schedule by email ruling. On April 6, 2018, parties filed reply comments to the February Joint Ruling.

On April 20, 2018, ALJ Kline denied the Joint Consumer’s motion to suspend the procedural schedule and added additional information on Public

²⁰ AT&T Mobility refers to the following entities: New Cingular Wireless PCS, LLC (U3060C); AT&T Mobility Wireless Operations Holdings, Inc. (U 3021 C); and Santa Barbara Cellular Systems, Ltd. (U3015C).

²¹ Sprint refers to the following entities: Sprint Communications Company, L.P. (U5112C); Sprint Spectrum L.P. (U3062C); and Virgin Mobile USA, L.P. (U4327C).

²² Cellco Partnership d/b/a Verizon Wireless (U3001C).

²³ T-Mobile West LLC d/b/a T-Mobile (U3056C).

Purpose Program financial data to the record. On April 25, 2018, ALJ Kline issued the Revised CD Staff Paper and Revised Public Purpose Program financial data. On May 4, 2018, parties filed comments on the revised CD staff paper and revised Public Purpose Program financial data.

On May 11, 2018, parties filed opening briefs. On May 17, 2018, the Joint Consumers filed a motion to strike portions of CC&TA's opening brief. On May 18, 2018, ALJ Kline set a shortened response time to respond to CC&TA's May 17, 2018 motion by email ruling, then subsequently granted CC&TA's request for an extension of time to respond to the Joint Consumer's motion by email ruling. On May 23, 2018, CC&TA submitted a response to the Joint Consumer's motion.

On May 23, 2018, ALJ Kline extended the deadline to file reply briefs in order to consider CC&TA's response. On May 25, 2018, ALJ Kline granted the Joint Consumer's motion to strike portions of CC&TA's opening brief. Parties filed reply briefs on June 5, 2018 and the matter was submitted. The Commission has jurisdiction to proceed by notice and comment pursuant to Pub. Util. Code § 1708.5. Any rule adopted in this rulemaking will apply prospectively, consistent with Rule 6.3 (a)²⁴ of the Commission's Rules of Practice and Procedure.²⁵

²⁴ All references to "Rule" or "Rules" shall hereafter refer to the Commission's Rules of Practice and Procedure.

²⁵ Order Regarding Petition 17-02-006 and Order Instituting Rulemaking to Consider Whether Text Messaging Services are Subject to Public Purpose Program Surcharges (OIR) at 5.

3. Issues Before the Commission

The scope of this proceeding is to determine whether text messaging services should be subject to Public Purpose Program surcharges and user fees, as set forth in the Order Instituting Rulemaking (OIR) for this proceeding.²⁶ The assigned Commissioner's October 10, 2017 scoping memo refined the scope of the proceeding pursuant to Rule 7.3(a), to consider the following sub-issues:

- 1) Whether the Commission may impose user fees on text messaging under the Commission's existing user fee collection mechanism;
- 2) Whether the Commission may impose surcharges and user fees on text messaging under state law; and
- 3) Whether the Commission may impose surcharges and user fees on text messaging under federal law; including §§ 253(b) and 254(f) of the Act, and current FCC regulations.

4. Discussion

In today's decision, we determine in principle that the Commission should assess Public Purpose Program surcharges and user fees on all text messaging services revenue. Text messaging services consists of both Short Message Service (SMS) and Multimedia Messaging Service (MMS). SMS allows a cellular customer to send and receive messages of up to 160 characters to and from another cellular service customer.²⁷ MMS is a newer service a customer can use to send text, photos and other information along with the message.²⁸

The Commission begins its inquiry into whether the Commission should surcharge text messaging services by considering whether this surcharge is

²⁶ OIR at 5.

²⁷ ALJ's Ruling Revising Communications Division Staff Paper and Public Purpose Program Financial Data, and Updating the Procedural Schedule, Appen. A at 2.

²⁸ *Id.*, Appen. A at 3.

necessary to preserve and advance universal service under the Act. Next, it determines whether surcharging text messaging services is equitable under the Act. Then, it reviews whether surcharging text messaging revenue is permissible under federal law. Subsequently, it considers whether the Commission has sufficient authority under existing statutes and collection mechanisms to collect surcharges on text messaging services revenue. Finally, the Commission determines whether text messaging revenue is subject to user fees.

4.1. Collecting Surcharges on Text Messaging Services Revenue Helps Preserve and Advance Universal Service in California

In determining whether the Commission should surcharge text messaging revenue, the Commission looks to whether assessing Public Purpose Program surcharges on text messaging revenue will preserve and advance universal service. A review of California's total reported intrastate telecommunications industry revenue, which is used to fund universal service, shows a steady decline in revenue from \$16.527 Billion in 2011 to \$11.296 Billion in 2017. At the same time, California Public Purpose Program budgets show a steady increase from \$670 million in 2011 to \$998 million in 2017, as shown in Table 1.

Table 1. Total Reported Industry Revenue Subject to Public Purpose Program (PPP) Surcharges and PPP Budgets Over Time (\$ United States Dollars (USD) Million).

Year	Total Industry Revenue	Total PPP Budget
2011	\$16,527	\$670
2012	\$15,405	\$649
2013	\$14,437	\$609
2014	\$13,620	\$545
2015	\$12,307	\$620
2016	\$12,000	\$862
2017	\$11,296	\$998

Wireless industry revenue, which made up 53%-61% of total intrastate telecommunications revenue reported between 2011 and 2017, also shows a consistent decrease in total reported wireless industry revenue from \$10.157 Billion in 2011 to \$6.121 Billion in 2017, as shown on Table 2.

Table 2. Total Intrastate Wireless, Wireline and Voice over Internet Protocol (VoIP) Industry Revenue over time (\$ USD million).

Year	Total Wireless Revenue	% Wireless Revenue	Total Wireline Revenue	% Wireline Revenue	Total VoIP Revenue	% VoIP Revenue
2011	\$10,157	61%	\$6,355	38%	\$14	0%
2012	\$9,096	59%	\$5,990	39%	\$320	2%
2013	\$8,369	58%	\$5,675	39%	\$394	3%
2014	\$7,664	56%	\$5,554	41%	\$403	3%
2015	\$6,493	53%	\$5,490	45%	\$324	3%
2016	\$6,418	53%	\$5,296	44%	\$286	2%
2017	\$6,121	54%	\$4,875	43%	\$301	3%

Parties opposed to the Commission's collection of surcharges on text messaging revenue argue that the total surcharges collected by the Commission are always set to equal the annual budgets determined by the Commission. Therefore, assessing surcharges on text messaging revenue will not help preserve and advance universal service.

Parties supporting the collection of surcharges on text messaging revenue argue that it will help preserve and advance universal service by increasing the revenue base upon which Public Purpose Programs rely. We agree.

While the Commission acknowledges surcharge opponents' statements that the Commission sets the surcharge rate to meet the Commission's Public Purpose Program budget each year, diminishing industry revenue and increasing Public Purpose Program budgets over time has resulted in continuous increase to the surcharge rate. This is unsustainable over time. The total Public

Purpose Program surcharge rate increased steadily prior to MTS implementation from 1.88% in 2011 to 7.89% in 2016, as shown on Table 3.

Table 3. Total Industry Revenue, Public Purpose Program Budgets, and Total Surcharge Rates over Time (\$ USD millions).

Year	Total Industry Revenue	Total Wireless Revenue	Total Public Purpose Program Budget	Total Surcharge Rate
2011	\$16,527	\$10,157	\$670	1.88%
2012	\$15,405	\$9,096	\$649	1.87%
2013	\$14,437	\$8,369	\$609	2.78%
2014	\$13,620	\$7,664	\$545	2.58%
2015	\$12,307	\$6,493	\$620	4.34%
2016	\$12,000	\$6,418	\$862	7.89%
2017	\$11,296	\$6,121	\$998	6.68%

Assessing surcharges on bundled services has been shown to steady the decline in the total wireless revenue base and help steady the annual surcharge rate under MTS. As shown on Table 3, the surcharge rate decreased with the implementation of MTS in 2016, declining from 7.89% in 2016 to 6.68% in 2017. Assessing surcharges on bundled services has benefitted California's universal service programs by lowering the individual program surcharge rate, and thereby reducing the surcharge burden on individual customers.

CTIA and the Carrier Parties argue it would not preserve and advance universal service because it does not broaden the base of universal service consumers. The Joint Consumers argue it would preserve and advance universal service by creating the broadest base of customers, consistent with the All End User Surcharge Mechanism. This decision clarifies that the revenue base

depends not only on the number of customers subject to surcharge, but also on the number of services subject to surcharge for each customer.

The Commission's Communications Division calculates that text messaging revenue currently makes up approximately 10% of the revenue reported from prepaid wireless services under MTS.²⁹ Since Carrier Parties currently treat text messaging revenue for postpaid wireless service as an information service and do not report text messaging revenue for postpaid wireless services,³⁰ assessing surcharges on text messaging revenue is likely to increase the total revenue upon which Public Purpose Program surcharge percentages are based. Surcharging text messaging services would therefore further increase the total reportable industry revenue upon which Public Purpose Program programs are funded, which in turn would help preserve and advance the Commission's Public Purpose Programs. Accordingly, the Commission finds that it should assess surcharges on text messaging revenue to preserve and advance universal service.

4.2. Collecting Surcharges on All Text Messaging Revenue is Equitable

The Commission next looks to determine if collecting surcharges on text messaging revenue is equitable. Equity requires that Public Purpose Program funding burden correlates with the customers receiving the benefit.

Wireless industry customers receive a benefit from surcharges paid for DDTP and the Lifeline, with the majority of the benefit going to Lifeline.

²⁹ ALJ's Ruling Revising Communications Division Staff Paper and Public Purpose Program Financial Data, and Updating the Procedural Schedule, Appen. B at 1.

³⁰ Opening Brief of CTIA and Carrier Parties at 2-3.

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Wireless industry customers began receiving a benefit for text messaging services in 2014, when the Commission expanded Lifeline service to include wireless voice and text messaging services.³¹

Lifeline³² is the largest Public Purpose Program operated by the Commission, and the wireless industry receives a growing portion of the funding due to increasing subscribership by wireless Lifeline customers. As shown on Table 4, the majority of Public Purpose Program funding received by the wireless industry is for Lifeline service to wireless customers. Supporters of a surcharge on text messaging service revenue also point to the equity in surcharging a service from which customers receive a benefit.³³ We agree. Wireless customers receive a benefit from surcharges on text messaging because the funding pays for text messaging service for Lifeline customers.

Table 4. Total Public Purpose Program and Universal Lifeline Telephone Service Surcharges Paid by and Disbursed to the Wireless Industry Over Time (\$USD Million).

Year	Total PPP Surcharges Paid by Wireless Industry	Total ULTS Surcharge Paid by Wireless Industry	Total ULTS Funds Disbursed to Wireless Industry
2013	\$230.0	\$96.4	Not Available (NA)
2014	\$178.2	\$78.9	\$197 (Fiscal Year (FY) 2014-15)
2015	\$325.8	\$192.8	\$284 (FY 2015-16)
2016	\$473.7	\$327.6	\$316 (FY 2016-17)
2017	\$355.2	\$252.6	NA

³¹ D.14-01-036

³² The Moore Universal Telephone Act of 1987 enacted the state's Lifeline program in order "to offer high quality basic telephone service at affordable rates to the greatest number of California residents, and has become an important means of achieving universal service by making residential service affordable to low-income citizens" ³²

³³ Pub. Util. Code § 871.5.

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CTIA and the Carrier Parties contend that imposing surcharges on text messaging revenue would not broaden the base of customers contributing to the state's universal fund because wireless customers already pay into the fund for wireless voice service.³⁴ Rather, "it would simply increase the relative burden of the PPPs and the Commission's budget on wireless customers as compared to the customers of other carriers."³⁵ This includes low-income customers who are more likely to live in households with only wireless telephones.³⁶ The Commission disagrees.

Low-income customers enrolled in Lifeline are not subject to Public Purpose Program surcharges.³⁷ Second, prepaid mobile customers,³⁸ who are disproportionately lower income compared to postpaid mobile customers, already pay surcharges on text messaging services revenue under MTS. Affirming the Commission's collection of Public Purpose Program surcharges on text messaging services broadens the base of customers to include postpaid wireless carriers who have not remitted surcharges on text messaging services to date and thereby reduce the relative burden on all wireless customers, including low income wireless customers. Accordingly, this decision holds that assessing Public Purpose Program surcharges on text messaging services is equitable because it supports the distribution of Public Purpose Program funds for the

³⁴ Comments of CTIA and Carrier Parties (Mar. 23, 2018) at 9.

³⁵ *Id.* at 9.

³⁶ Opening Brief of CTIA and Carrier Parties (May 11, 2018) at 2, 7.

³⁷ Pub. Util. Code § 879(c).

³⁸ Prepaid mobile customers pay surcharges on the cost of bundled service, including text messaging services.

same service distributed under Lifeline and will not disproportionately affect low income customers.

4.6. Surcharging Text Messaging Revenue Is “Not Inconsistent” With Federal Universal Support Funding

This section considers whether surcharging text messaging services meets the federal requirements for states to implement universal service in a manner “not inconsistent” with federal universal service.³⁹ Specifically, it reviews whether surcharges on text messaging services are “not inconsistent” with federal universal support reform as well as federal funding mechanisms for universal support.

First, the Commission reviews the National Broadband Plan (NBP) to determine whether surcharges on text messaging revenue are “not inconsistent” with federal universal support funding. The American Recovery and Reinvestment Act of 2009 required the FCC to create a roadmap to universal service reform, which the FCC discussed in the NBP. The goal of the NBP is “to provide everyone with affordable voice and broadband.”⁴⁰ The NBP recommends federal universal service reform in three stages, 1) Stage One⁴¹ (2010-2011), 2) Stage two (2012 - 2106) and 3) stage three (2017-2020).

In stage two, the NBP recommends broadening the universal service contribution base. The NBP states, “[t]he revenue base for universal service

³⁹ 47 U.S.C. § 254(f).

⁴⁰ NBP at 140.

⁴¹ In Stage One, the NBP recommends identifying funding that could be shifted immediately to jumpstart broadband deployment in unserved areas; creating the framework for a new Connect America Fund (CAF) and the Mobility Fund.

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contribution – telecommunications services – has remained flat over the last decade, even though total revenues reported to the FCC by communications firms grew from \$335 billion in 2000 to more than \$430 billion in 2008.

Broadband related revenues are projected to grow steadily over time.”⁴²

The NBP as notes that:

Service providers are increasingly offering packages that “bundle” voice and broadband and deliver them over the same infrastructure. Assessing only the telecommunications services revenues provides incentives for companies to characterize their offerings as “information services” to reduce contributions to the fund.

□

As the FCC establishes the CAF, it should also adopt revised contribution methodology rules to ensure the [federal universal service fund] remains sustainable over time. Whichever path the FCC ultimately takes, it should take steps to minimize opportunities to arbitrage as new products and services are developed and remove the need to continuously update regulation to catch up with technology and the market.⁴³

Stage three of the proposed federal universal service fund reform calls for transforming the High-Cost Program, ending support for voice-only networks and complete reform of intercarrier compensation. The NBP also supports maintaining the federal universal service fund at its size as of 2010, eliminating the high cost plan,⁴⁴ and expanding the Lifeline and Link Up programs to subsidize broadband service for low-income customers.⁴⁵

⁴² NBP at 149.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 127-184.

The NBP shows that collection of Public Purpose Program surcharges on text messaging revenue is consistent with the FCC's universal support system because it minimizes the opportunity for arbitrage by the telecommunications industry to avoid funding universal service support. It also helps ensure that Lifeline, which the NBP supports expansion of, is sustainably funded.

CTIA and the Carrier Parties argue that 47 U.S.C. § 254(f) does not provide the Commission with authority to assess surcharges on text messaging services because it is inconsistent with the federal policy of nonregulation of information services.⁴⁶ They point to the FCC's *Pulver Order* for the proposition that states have limited state authority in the area of information services⁴⁷ and the FCC's *Restoring Internet Freedom Order* for the proposition that federal jurisdiction preempted state regulation of broadband internet access.⁴⁸ Similarly, CC&TA states that "any attempt to surcharge services the FCC deliberately refrained from subjecting to such contribution obligations would conflict with the federal policy favoring a light-touch regime of regulation for information services and therefore would be preempted."⁴⁹ CC&TA cites to the *Restoring Internet Freedom Order*, *Pulver Ruling*, and *Vonage Preemption Order* to support the proposition that

⁴⁶ Opening Brief of CTIA and Carrier Parties (May 11, 2018) at 3-5, *citing* Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications Not a Telecommunications Service, Memorandum, Opinion, and Order, 19 FCC Rcd 3307, 3316 ¶ 15 (2004) (*Pulver Order*).

⁴⁷ *Id.* at 3-5, *citing* Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications Not a Telecommunications Service, Memorandum, Opinion, and Order, 19 FCC Rcd 3307, 3316-17 ¶¶ 15-16 (2004).

⁴⁸ *Id.* at 4-5, *citing* Restoring Internet Freedom, Declaratory Ruling, Report and Order, 33 FCC Rcd 311, 431 ¶202 (rel Jan. 4, 2018).

⁴⁹ Opening Brief of CC&TA at 6.

the federal policy of a light touch regime prohibits universal service surcharges on information services.⁵⁰

Upon consideration, the Commission finds that the collection of Public Purpose Program surcharges on text messaging revenue is “not inconsistent” with the FCC’s light touch regime for information services. The *Restoring Internet Freedom Order* recategorized broadband as an “information service” rather than a “telecommunications service” under the Act, as amended, but was silent with regard to classifying text messaging services.⁵¹ Similarly, the *Pulver Order* declared that pulver.com’s Free World Dialup offering was an unregulated “information service” under the Act, as amended, but was silent on the categorization of text messaging services.⁵² Therefore, neither the *Restoring Internet Freedom Order* nor the *Pulver Order* determine the issue at hand.

Additionally, the *Vonage Preemption Order* does not make collection of Public Purpose Program surcharges on text messaging revenue inconsistent with the federal universal service fund. In the *Vonage Preemption Order*, the FCC ordered all state determinations on the surchargeability of VoIP services preempted under the impossibility doctrine, whereby the FCC held it impossible for states to collect surcharges on a service the FCC had not yet determined to have an intrastate component or determined the percentage of such component.⁵³

⁵⁰ *Id.* at 6.

⁵¹ Fed. Comm. Comm’n, *Restoring Internet Freedom*, Declaratory Ruling, Report, and Order, 33 FCC Rcd 311 (2018) (*Restoring Internet Freedom Order*).

⁵² Fed. Comm. Comm’n, *Petition for a Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum, Opinion, and Order, 19 FCC Rcd 3307 (2004).

⁵³ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum, Opinion and Order, 19 FCC Rcd 22404 (2004) (*Vonage Preemption Order*).

The subsequent *VoIP Declaratory Ruling* authorized states to collect Public Purpose Program surcharges on VoIP revenue under the FCC *Interim Contribution Methodology Order*, which created safe harbors for collecting surcharges on bundled services even when they included “information services.” With the *Interim Contribution Methodology Order*, the states may collect Public Purpose Program surcharges on text messaging revenue in accordance with federally approved methods for collection of unclassified services such as text messaging.

Second, this decision looks to determine whether the federal universal support collection mechanism is “not inconsistent” with a Commission surcharge on text messaging. Parties opposing surcharges on text messaging revenue argue the surcharge is not consistent with the federal surcharge collection mechanism, which does not assess surcharges on text messaging service revenues. CC&TA cites to Line 418 of the FCC Form 499-A’s revenue reporting form to show that non-telecommunications services are treated separately by the FCC and are not surchargeable.⁵⁴

We note that the Commission’s surcharge mechanism does not have to be the same as the federal system in order to be “not inconsistent”⁵⁵ with the federal system. Since the FCC does not assess interstate text messaging services revenue for contribution to the federal universal service fund as a standalone service, collecting surcharges on the intrastate component of text messaging services is not inconsistent with the federal surcharge system as long as states do not charge carriers interstate surcharges on the same service.

⁵⁴ Opening Brief of CC&TA at 4-5.

⁵⁵ 47 U.S.C. § 253.

The Commission also notes that the FCC allows carriers to assess surcharges on text messaging as a bundled service. The FCC distinguishes revenue based on whether services are bundled or unbundled for the purposes of assessing contributions to the universal service fund, and divides revenue into the following four categories:

- 1) revenues from other non-telecommunications goods or services that are bundled with wireline or wireless circuit switched exchange access services;
- 2) revenues from other non-telecommunications goods or services that are bundled with US interconnected VoIP service;
- 3) all other revenues properly reported under line 418 except those reported in Lines 418.1, 418.2 and 418.4 not reportable in Line 406 and all non-common carrier wireline broadband Internet access service and cable modem service; and
- 4) revenues from non-interconnected VoIP services.⁵⁶

“The [FCC] adopted two safe harbor methods for allocating revenue when telecommunications services and [customer premises equipment (CPE)]/enhanced services are offered as a bundled package.”⁵⁷ Under the first option, utilities report revenue from bundled telecommunications and CPE/enhanced service offerings based on the unbundled service offering prices, with no discount from the bundled offering being allocated to telecommunications services.⁵⁸ The second option is for utilities to treat all

⁵⁶ 2016 Instructions to the Telecommunications Reporting Worksheet at 33.

⁵⁷ FCC, *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace et al.*, FCC 01-98, Report and Order, para. 47-54 (*FCC Unbundling Order*).

⁵⁸ *Id.* at para. 50.

bundled revenues as telecommunications service revenues for purposes of determining their universal service obligations.⁵⁹ Filers may choose other allocation methods, but the FCC may consider them unreasonable upon review.⁶⁰

Since the FCC has a safe harbor method which allows utilities to treat the interstate portion of all bundled services as telecommunications services, including text messaging services, for the purpose of determining universal service obligations, it is “not inconsistent” for the Commission to determine the same for the inverse of federal safe harbor method when assessing the intrastate component of bundled service that includes text messaging service. Accordingly, the Commission may collect Public Purpose Program surcharges on text messaging revenue by assessing surcharges on the intrastate component of text messaging services or on the intrastate component of bundled service offerings.

4.3. The Commission Declines to Classify Text Messaging Services As Either An “Information Service” or a “Telecommunications Service” Under the Act

The Commission will next consider whether classifying text messaging as either an “information service” or a “telecommunications service” under the Act, as amended, is a prerequisite to determining the surchargability of text messaging services.

The Act defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing,

⁵⁹ *Id.* at para. 51.

⁶⁰ *Id.* at para. 52

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without change in the form or content of the information as sent and received.”⁶¹ “Telecommunications service” is defined as “the offering of telecommunications for a fee to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”⁶² This definition encompasses offerings like voice and facsimile services that provide a “simple transmission path” for relaying content.⁶³

An “information service” is:

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.⁶⁴

The terms “information service” and “telecommunications service” are mutually exclusive,⁶⁵ and the classification of text messaging under the Act, as amended, is ambiguous.⁶⁶

It is undisputed that the FCC has, to date, neither classified text messaging as an “information service” nor a “telecommunications service.” Parties

⁶¹ 47 U.S.C. § 153 (50).

⁶² 47 U.S.C. § 153 (53).

⁶³ OIR at 3, *citing Report to Congress*, 13 FCC Rcd. at 11538-39, para. 78 & n.161.

⁶⁴ 47 U.S.C. § 153 (24).

⁶⁵ OIR at 3-4, *citing Report to Congress*, Federal-State Joint Board on Universal Service, 13 FCC Rcd 11501,11523 para. 43 (1998) (“Under the 1996 Act, any service with a communications component must be either a ‘telecommunications service’ or an ‘information service’ (but not both).”)

⁶⁶ OIR at 4.

opposing a surcharge on text messaging argue that classification of text messaging as either a “telecommunications service” or an “information service” is a threshold issue which the Commission should resolve by categorizing text messaging as an “information service.” These parties argue that text messaging meets the definition of an “information service,” including 1) “data storage,” 2) “transforming” and “processing” and 3) “retrieving” information and “making information available.”⁶⁷

Parties supporting surcharges on text messaging argue the Commission may collect Public Purpose Program surcharges on text messaging services regardless of its classification as either an “information service” or a “telecommunications service” under the Act, as amended.⁶⁸ However, if the Commission were to classify text messaging, they support classification of text messaging as a “telecommunications service.” These parties consider the question a matter of law, properly determined by applying the FCC’s *IP-in-the-Middle* test. Under the *IP-in-the-Middle* test, a service is a “telecommunications service” if it 1) uses ordinary customer premises equipment, 2) originates and terminates from the Public Switched Telephone Network and 3) does not undergo any net protocol conversion.⁶⁹

The Commission looks to the surchargeability of VoIP service in examining whether the classification under the Act is properly a threshold issue.

⁶⁷ 47 U.S.C. § 153(24).

⁶⁸ Opening Comment of Joint Consumers (Aug. 18, 2018) at 7-20.

⁶⁹ *Id.* at 1-5, citing Fed. Comm. Comm’n, *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361 (Apr. 21, 2004).

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In 2010, the FCC's *VoIP Declaratory Ruling* held that states may extend their universal service contribution requirements to intrastate revenues of nomadic interconnected VoIP under the contribution methodology developed in the *Interim Contribution Methodology Order*.⁷⁰ To date, the FCC has yet to classify VoIP as either a "telecommunications service" or an "information service." Since VoIP is an unclassified service subject to universal service contribution, it suggests other unclassified services may be surcharged as well.

We note that the FCC also intends to determine if text messaging is surchargeable without determining the classification of text messaging under the Act, as amended. On April 30, 2012, the FCC initiated a proceeding to examine issues relating to the modernization of the universal service contribution methodology.⁷¹ This FCC rulemaking explicitly seeks comment on whether federal universal service surcharges should be assessed on text messaging revenues. The FCC's inquiry was not limited to a determination of whether text messaging is a "telecommunications service" or an "information service." Rather, the FCC asked whether surcharges should be assessed or exempted under the FCC's permissive authority, based on impacts on market competition and neutrality, impacts on the contribution base, and with regard to revenue generated for text messaging services.⁷² By seeking comment for the specific

⁷⁰ *In the Matter of Universal Service Contribution Methodology Petition of Nebraska Public Service Commission and for Declaratory Ruling, or in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, WC Docket No. 06-122 (Nov. 2010) (*Interim Contribution Methodology Order*).

⁷¹ See FCC, *In the Matter of Universal Service Contribution Methodology; A National Broadband Plan for Our Future, Further Notice of Proposed Rulemaking*, GN Docket No. 09-51 (Filed Apr. 30, 2012) at 2 (FNPRM).

⁷² FNPRM at ¶ 50-56.

purpose of assessing whether text messaging services should be assessed universal service contribution surcharges, the FCC indicated its intent to resolve this issue without classification. Accordingly, this decision finds it is not necessary to classify text messaging as either a “telecommunications service” or an “information service” under the Act prior to determining whether the Commission should assess surcharges on text messaging services, and declines to do so at this time.

4.5. The Commission Affirms the Collection of Surcharges on Text Messaging Services Revenue Under Existing Surcharge Mechanisms

This section considers whether the Commission’s existing statutory authority and surcharge collection mechanisms are sufficient to collect Public Purpose Program surcharges on text messaging services revenue.

4.5.1 Statutory Authority

The parties disagree with regard to the Commission’s authority to collect surcharges on text messaging services revenue. CTIA and the Carrier Parties argue that the Commission’s general authority under Pub. Util. Code §§ 701, 451 and 709 do not empower the Commission to take action inconsistent with specific grants of authority of statutes related to the collection of Public Purpose Program surcharges and user fees. Specific grants of authority to collect Public Purpose Program surcharges all authorize surcharges to be assessed on “intrastate telecommunications services.”⁷³

CTIA also argues that assessing Public Purpose Program surcharges on text messaging would violate Pub. Util. Code § 871.5(d) because it would cause

⁷³ Opening Brief of CTIA and Carrier Parties at 8-10.

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inequity, discrimination and competitive harm to text messaging providers in the “much larger messaging marketplace.”⁷⁴ CTIA compares traditional text messaging to over-the-top (OTT) messaging applications, such as Facebook Messenger, WhatsApp, Snapchat, Kik, Wickr, YikYak, Whisper and Google Hangouts.⁷⁵ CTIA compares the competition between traditional text messaging and OTT applications to the competition between VoIP and traditional telephone service. CTIA’s cites to the FCC and California’s decision to impose universal surcharge obligations on VoIP so that the obligations to contribute to universal service “should not fall differently on providers that compete with one another.”⁷⁶

The Joint Consumers comment that the Commission has a broad grant of authority to regulate public utilities pursuant to Pub. Util. Code §§ 701⁷⁷ and 451.⁷⁸ They also argue the Commission also has broad authority to “to assure the continued affordability and widespread availability of high-quality telecommunications services to all Californians” pursuant Pub. Util. Code § 709 by imposing Public Purpose Program surcharges on intrastate services provided

⁷⁴ Opening Comments of CTIA (Aug. 18, 2017) at 16.

⁷⁵ *Id.* at 17.

⁷⁶ *Id.* at 18; see *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7541 ¶ 44 (2006); see A.B. 841 (2011), Bill Analysis, Senate Rules Committee, available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0801-0850/ab_841_cfa_20110712_174315_sen_floor.html.

⁷⁷ Pursuant to Pub. Util. Code § 701, “[t]he Commission may supersede and regulate every public utility in the State and may do all things, whether specifically designated in this part or in additional thereto, which are necessary and convenient in the exercise of such power and jurisdiction.”

⁷⁸ Pursuant to Pub. Util. Code § 451, the Commission has authority to ensure that “[a]ll charges should be just and reasonable.”⁷⁸

by telecommunications carriers regardless of classification. Joint Consumers point to Pub. Util. Code §§ 275, 276, 276.5, 285 and 879(b)⁷⁹ to argue that none of the statutes authorizing the Commission to collect support for Public Purpose Programs limits the collection to a specific set of services.⁸⁰

CC&TA points out that the Joint Consumers erroneously cite to Pub. Util. Code § 285 as evidence that the Commission may collect surcharges on other non-telecommunications services.⁸¹ They argue that Pub. Util. Code § 285 is a grant of legislative authority to the Commission authorizing collection of surcharges on VoIP and no such statutory authorization is allowed for text messaging services.⁸² CC&TA also echo's CTIA's comments with regard to funding under Pub. Util. Code § 879(b), by stating that this statute authorized Commission funding to provide text messaging services but does authorize the collection of surcharge revenue from text messaging services.⁸³

The Commission begins its review by examining the statutes authorizing the Commission's collection of surcharges for Public Purpose Programs, which include the CHCF-A, CHCF-B, Lifeline, the CTF, CASF and the DDTP. The

⁷⁹ Opening Comments of Joint Consumers (Aug. 18, 2017) at 10.

⁸⁰ Opening Brief of Joint Consumers at 16.

⁸¹ Reply Comments of CC&TA (Aug. 28, 2017) at 4.

⁸² *Id.* at 4.

⁸³ *Id.* at 5.

statutes enabling the CHCF-A^{84, 85} and the CHCF-B^{86, 87} both have general language regarding the source of funding for the programs, stating that “[a]ll revenues collected through surcharges authorized by the commission to fund the program specified in subdivision (a) shall be submitted to the commission pursuant to a schedule established by the commission.”

Similar to the CHCF-A and CHCF-B, the enabling statute for Lifeline⁸⁸ and the CTF⁸⁹ make no specific reference to the collection of funds through surcharges, both stating that “[a]ll revenues collected by telephone corporations in rates authorized by the commission to fund the program specified in subdivision (a) shall be submitted to the commission pursuant to a schedule established by the commission.”⁹⁰ The Lifeline enabling statute additionally states that “the Commission may change rates, funding requirements, and

⁸⁴ The CHCF-A provides universal service support to small, independent telephone corporations to promote affordability and widespread availability of safe, reliable, high-quality communications services in rural areas of the state, including advanced services and broadband-capable facilities. Pub. Util. Code §§ 275.6(a) and 275.6(b)(5).

⁸⁵ Pub. Util. Code § 275 (“All revenues collected through surcharges by the Commission to fund the program specified in subdivision (a) shall be submitted to the commission pursuant to a schedule established by the Commission.”)

⁸⁶ CHCF-B provides universal service support to telephone corporations where the cost of providing service exceeds rates charged by providers. (Pub. Util. Code §§ 276.5(a).) (This statute will expire effective January 1, 2019.)

⁸⁷ Pub. Util. Code § 276.

⁸⁸ Lifeline promotes “universal service by making basic telephone service affordable to low-income households through the creation of a lifeline class of service.” Pub. Util. Code § 871.5.

⁸⁹ CTF advances universal service by providing discounted rates to qualifying schools, community colleges, libraries hospitals, health clinics and community organizations. Pub. Util. Code § 280(a).

⁹⁰ Pub. Util. Code §§ 277, 280.

funding methods proposed by the telephone corporations in any manner necessary, including reasonably spreading the funding among the services offered by the telephone corporations, to meet the public interest.”⁹¹

Likewise, the CASF⁹² enabling statute makes only a general reference to the surcharges used to fund the account, stating that “[t]he commission shall transfer the moneys received by the commission from the surcharge imposed to fund the accounts to the Controller for deposit in the California Advanced Services Fund.”⁹³ Finally, VoIP providers must submit surcharges on California intrastate revenues to support all six of the Commission’s Public Purpose Programs, with no limitation on the source of funding to intrastate telecommunications services since VoIP is an IP-enabled service which is unclassified under the Act.⁹⁴

Only the Deaf and Disabled Fund’s⁹⁵ enabling statutes limit the funding source to intrastate telecommunications services, stating that “[t]he commission shall establish a rate recovery mechanism through a surcharge not to exceed one-half of 1 percent uniformly applied to a subscriber’s intrastate telephone service, other than one-way radio paging service and universal telephone service, both within a service area and between service areas”⁹⁶

⁹¹ Pub. Util. Code § 879(b).

⁹² CASF encourages the “deployment of high-quality advanced communications services to all Californians.” Pub. Util. Code § 281.

⁹³ Pub. Util. Code § 281.

⁹⁴ Pub. Util. Code § 285.

⁹⁵ DDTP is a program to provide a telecommunications device capable of serving the needs of customers who are deaf or hard of hearing. Pub. Util. Code § 2881(a).

⁹⁶ Pub. Util. Code §§278, 2881(g).

Therefore, of the six Public Purpose Programs' enabling statutes, only the Deaf and Disabled program statutes limits the payment of surcharges to "telephone services." The term "telephone service" is broadly defined as

any service provided by a telecommunication provider. A specified set of user-information transfer capabilities provided to a group of users. The telecommunication service provider has the responsibility for the acceptance, transmission, and delivery of the message.⁹⁷

The Commission first compiled a comprehensive list of basic service elements in the D.95-07-052, later adopted by D.96-06-066, which were not exclusive to "telecommunications services" as defined in the Act.⁹⁸ Subsequent updates to the Commission's list of telephone services continue to include services unclassified under the Act.⁹⁹ Therefore, the limitation of the enabling statute for the Deaf and Disabled Program does not define whether surcharges must be limited solely to intrastate "telecommunications services," and not unclassified services, under the Act.

Next, we turn to the Commission's broader enabling statutes, including Pub. Util. Code §§ 701, 709 and 451, to consider whether the Commission has discretionary authority to impose surcharges on unclassified services when enacting the All End User Surcharge Mechanism. In examining these statutes we

⁹⁷ Newton, Harry. *Newton's Telecom Dictionary*, 31rst Updated and Expanded Edition (2018) at 1252.

⁹⁸ D.96-06-066 at 18-20.

⁹⁹ See *e.g.*, D.12-12-038 at Appen. A.

note that “[the Commission] is not an ordinary administrative agency, but a constitutional body with broad legislative and judicial powers.”¹⁰⁰

Pub. Util. Code § 701 grants the Commission sole authority to regulate intrastate telecommunications in California, stating:

The Commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part, or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.¹⁰¹

Pub. Util. Code § 451 creates a general obligation and authority for the Commission to keep consumer rates reasonable.

Under Pub. Util. Code § 709, the Commission is also tasked with encouraging the development and deployment of new technologies and the equitable provision of services in a way that efficiently meets consumer need and encourages the ubiquitous availability of a wide choice of state-of-the art services as well as to assist in bridging the state’s digital divide.

While Pub. Util. Code § 709’s statutory language is broadly written, the Commission has long recognized that its ability to fulfill its legislative intent is often limited by its lack of jurisdiction over advanced services, which are often classified as information services under the Act or otherwise exist in unregulated markets. When discussing the deployment of advanced services under Pub. Util. Code § 709 in D.96-10-066, the Commission noted that:

part of the problem with developing incentives to promote the deployment of advanced technologies is that this Commission’s jurisdiction is limited to public utilities. Many of the advanced services being developed and offered today

¹⁰⁰ *Wise v. Pacific Gas & Electric Co.* (1999) 77 Cal.App.4th 287, 300.

¹⁰¹ Pub. Util. Code § 701.

require hardware, software, and other components, in addition to the information that is provided to the end user. The Commission can formulate incentives with respect to the telecommunications services that are utilized, but cannot order incentives or impose assessments on the other non-regulated companies that are coming together to offer these services.¹⁰²

With the continued advancement and widespread adoption of advanced communications, consumers are increasingly communicating over technologies deemed “information services.” The Commission’s jurisdiction over communications services does not, and has not extended, to “information services,” except as authorized by the FCC, because the authority for the Commission to enact universal service is granted by the Act.

The Act, however, is silent regarding unclassified services offered by telecommunications carriers. Having determined that the Commission has a broad grant of authority to regulate telecommunications carriers under its enabling statutes, this decision finds that the Commission may assess surcharges on text messaging services as an unclassified service offered by a telecommunications carrier.

4.5.2 The All End User Surcharge Mechanism

The main issue of contention between parties is the interpretation of which services are subject to surcharge through differing interpretations of the All End User Surcharge Mechanism.

CTIA, the Carrier Parties and CC&TA are generally aligned in their contention that the Commission’s All End User Surcharge Mechanism does not support the collection of Public Purpose Program surcharges on text messaging

¹⁰² D.96-06-066 at 45-46.

services revenue. Primarily, they argue that text messaging should not be subject to Public Purpose Program surcharges because the All End User Surcharge Mechanism extends to intrastate “telecommunications services.” Since these parties contend that text messaging should properly be classified as an “information service” under the Act, they conclude that the Commission cannot impose Public Purpose Program surcharges on text messaging services revenue because it is an “information service.”

To support the contention that only “telecommunications services” are subject to All End User Surcharge Mechanism, CTIA and the Carrier Parties point out that “the Commission has reiterated numerous times, that Public Purpose Program surcharges are imposed exclusively on intrastate *telecommunications services.*”¹⁰³ They point specifically to examples of this language in D.94-09-065,¹⁰⁴ General Order 153 §§ 2.5.1 and 10.5, various Commission resolutions¹⁰⁵ regarding Public Purpose Program budgets and the TracFone¹⁰⁶ decision.¹⁰⁷

¹⁰³ Opening Brief of CTIA and Carrier Parties at 8.

¹⁰⁴ D.94-09-065 at 128-130.

¹⁰⁵ Approval of CHCF-A Administrative Committee Fund Expense Budget for Fiscal Year 2016-17 et al., Cal. Pub. Util. Comm’n, Commc’ns Div. Res. T-17491 at 3 (Oct. 1, 2015); Approval of CHCF-B Administrative Committee Expense Budget for Fiscal Year 2015-16 et al., Cal. Pub. Util. Comm’n, Commc’ns Div. Res. T-17446 at 1 (Nov. 5, 2014); Approval of CTF Administrative Committee Budget for Fiscal Year 2016-17 et al., Cal. Pub. Util. Comm’n, Commc’ns Div. Res. T-17496 at 2 (Oct. 1, 2015); Approval of the California Advances Series Surcharge rate Reduction from 0.4464% effective December 1, 2016, Cal. Pub. Util. Com’n, Commc’ns Div. Res. T-17536 at 1 (Oct. 13, 2016); Approval of the DDTP Fund Surcharge Rate of 0.50% Effective February 1, 2015, Cal. Pub. Util. Comm’n, Commc’ns Div. Res. T-17458 at 1 (Dec. 18, 2014).

¹⁰⁶ D.15-05-032, Appen. A at 6.

¹⁰⁷ Opening Brief of CTIA and Carrier Parties at 8-10.

In contrast, the Joint Consumers argue that imposing Public Purpose Program surcharges on text messaging services is authorized by long-standing Commission policy, focusing on the Commission's authority to collect Public Purpose Program surcharges from a broad base. They cite to D.96-10-066 for the proposition that the Commission can impose a "broad based, end user surcharge on 'all telecommunications services and customers... because everyone who uses telecommunications services in California is affected by the surcharges.'"¹⁰⁸ Joint Consumer also look to D.96-10-066 to reaffirm the Commission's position that "all end users of every [Local Exchange Carrier, Incumbent Local Exchange Carrier,] cellular, and paging company in the state, receive value from the interconnection to the switched network, and that all users should be included in the billing base of the Universal Lifeline Telephone Service program and the Deaf and Disabled Telecommunications program,"¹⁰⁹ with limited exceptions as enumerated.

The Joint Consumers note that the Commission's Communications Division Telecommunications User Fee Filing System (TUFFs) website names text messaging as a service subject to surcharge.¹¹⁰ The Joint Consumers also point out that text messaging does not fall under the enumerated exceptions to surcharging in General Order 153 § 10.5.1 and therefore may be subject to surcharge.¹¹¹

¹⁰⁸ Opening Comments of Joint Consumers (Aug. 18, 2017) at 12, *citing* D.96-10-066 at 78.

¹⁰⁹ Opening Comments of Joint Consumers (Aug. 18, 2017) at 12.

¹¹⁰ *Id.* at 13-14, *citing* TUFFS Website; *See*, Carrier Directives for Mobile Telephony Service Surcharge for 2017 at <http://www.cpuc.ca.gov/General.aspx?id=9958>.

¹¹¹ *Id.* at 14.

The Commission's Communications Division staff paper also urges this Commission to consider that the Communications Division has a longstanding interpretation of the All End User Surcharge Mechanism as assessing surcharges on all intrastate telecommunications services, including unclassified services, unless the services are expressly exempted.¹¹²

Turning to our review of the All End User Surcharge Mechanism, we note that the Commission established the All End User Surcharge Mechanism on an interim basis for Lifeline and CHCF-A in Decision (D.) 94-09-065, when the Commission responded to market deregulation by changing the Commission's Public Purpose Program surcharge mechanism¹¹³ from a set of utility-specific and program-specific surcharges to a surcharge on all end-users of intrastate telecommunications services, with enumerated exceptions to the collection of Public Purpose Program surcharges on certain services as required by statute. Surcharges were assessed on all category I, II and III services:

- Category I¹¹⁴ consisted of those services deemed to be basic monopoly services. Rates and charges for these services are set or changed only upon approval of the Commission.

¹¹² ALJ's Ruling Revising Communications Division Staff Paper and Public Purpose Program Financial Data, and Updating the Procedural Schedule at Appen. A.

¹¹³ At the time, the all end user surcharge mechanism funded the 1) Deaf and Disabled Telecommunications Program, 2) ULTS/Lifeline and the 3) California High Cost Fund. The California High Cost Fund provided financial support to companies serving rural and small metropolitan areas.

¹¹⁴ Category I services included basic exchange services, semipublic telephone service, public coin telephone service, customer-owned paid telephone access line, switched access, operator services - 911, Basic Service Network Elements - other Open Network Architecture Services, intra Local Access and Transport Area (intraLATA) directory assistance, local measured usage, Zone Unit Measurement, Extended Area Service, Foreign Exchange Service, Foreign Prefix Service, Pacific's Multiple Line Call Detail Service. (D.94-09-065 at 116.)

- Category II¹¹⁵ included discretionary or partially competitive services for which the Local Exchange Carrier retains significant, though perhaps declining, market power. Pricing flexibility between Commission-approved price ceilings and floors is allowed.
- Category III consisted of fully competitive services, with maximum pricing flexibility allowed by law, provided certain notice requirements are met.¹¹⁶

Coin-sent paid calling,¹¹⁷ debit card messages, one-way radio paging,¹¹⁸ Lifeline billings,¹¹⁹ usage charges to coin operated paid telephone service, and customers paying for services under existing contracts executed on or before September 15, 1994 were exempt from surcharges according to their respective statutes and directory advertising.^{120,121}

A number of factors suggest that the Commission intended to surcharge unclassified services offered by telecommunications carriers. The inclusion of category III services, which are fully competitive, suggests the Commission

¹¹⁵ Category II services included directory listing services, IEC directory assistance, Operator services (0+), Operator services (0-), intraLATA message toll, custom calling/vertical services, Centrex/CentraNet service, Private Branch Exchange trunkline service, special access, private line, billing and collection services (except Pacific's multiple line call detail service). (D.94-09-065 at 117.)

¹¹⁶ D.89-10-031.

¹¹⁷ Coin sent paid calling was excluded because it generated no bills.

¹¹⁸ One-way paging was exempted from surcharges by Pub. Util. Code § 2881(d).

¹¹⁹ Lifeline billing was exempted by Pub. Util. Code § 879(c).

¹²⁰ See D.96-10-066 at 8, Appen. B.

¹²¹ In D.95-02-050, the Commission also exempted directory advertising from the All End User Surcharge Mechanism based on a statute which limited the Commission's jurisdiction with regard to directory advertising and differentiated this service from other category III services.

intended to surcharge “telephone services” rather than solely services classified as “telecommunications services” under the Act. The list of surchargeable services in D.94-09-065 also include services not yet classified under the Act, such as directory listings services.

In D.96-10-066, the Commission adopted the All End-User Surcharge Mechanism established in D.94-09-065 on a permanent basis. The Commission expressed its intent to impose the surcharge on “all telecommunications services and customers.”¹²² As in D.94-06-065, the Commission included directory listing as a basic service subject to surcharge, once again suggesting that the Commission’s surcharges applied to all telephone services within its jurisdiction. As discussed above, the Commission has broad authority to regulate telecommunications within its jurisdiction and discretion in the manner it assesses surcharges. Directory listing services, like text messaging services, are both “unclassified services” offered by telecommunications carriers which are akin to telephone services subject to the Commission’s jurisdiction. Therefore, the Commission’s Communications Division staff reasonably interpreted two-way messaging, or text messaging, as surchargeable under D.96-10-066.

Another reason the term “telecommunications services” is not exclusive to “telecommunications services” under the Act, is that telecommunications carriers may submit surcharges on intrastate text messaging services revenue by submitting the inverse of the FCC safe harbor method when text messaging is bundled with other telecommunications services.

Assessing surcharges on bundled services is also consistent with the current state of the California marketplace. There are approximately fifty-five

¹²² D.96-10-066 at 184; 257 (FOF # 158).

million voice lines in service in California – roughly fifteen million landlines and forty million wireless lines. Of those fifty-five million lines, approximately ninety-two percent provide voice bundled with broadband service.”¹²³ For wireless competitors, over 95 percent have voice bundled with broadband services.¹²⁴

Finally, telecommunications carriers cannot apply the term “intrastate telecommunications service” in GO-153 D¹²⁵ as the sole basis for submitting Public Purpose Program surcharges due to the known surchargeability of VoIP services revenue, another unclassified service under the Act.¹²⁶

With regard to text messaging services, we affirm the Commission’s collection of text messaging services revenue under the All End User Surcharge Mechanism as an unclassified service under the Act, as well as the Commission’s authority to collect surcharges on text messaging service revenue under the All End User Surcharge Mechanism using the inverse of an FCC safe harbor method. As the Commission is affirming an existing policy, some telecommunications carriers may be liable for past amounts due for text messaging surcharges owed. All wireless carriers shall submit Tier 2 Advice Letters within 90 days from the

¹²³ D.16-12-025 at 9.

¹²⁴ *Id.* at 22.

¹²⁵ GO 153-D states that all “end user intrastate telecommunications services, whether tariffed or not, are subject to the California Lifeline surcharge, except the following services: California Lifeline Billing, charges to other certificated carriers or Non-Traditional Providers for services that are to be resold, coin sent paid telephone calls (coin in box and debit card calls, usage charges for coin-operated pay telephones, customer specific contracts effective before September 1, 1994, directory advertising, and one-way radio paging. “Intrastate Telecommunications Services” are defined as a telecommunications service that originates and terminates within the boundaries of the State of California.” There is no mention of text messaging.

¹²⁶ Pub. Util. Code § 285.

date of this Decision, informing the Commission whether they have reported and remitted surcharges on text messaging services revenue. Wireless carriers who have not reported and remitted surcharges on text messaging within the last five years shall identify the amount of intrastate surcharges owed on text messaging services and propose a payment plan in their advice letter filings. The Communications Division is authorized to review and approve the advice letter, including the payment plan, through a Commission resolution. As discussed below, the Commission will open a second phase of this proceeding to make the list of surchargeable services more transparent.

4.5.3 The Point of Sale Mechanism

Next, we examine whether the Commission's Point of Sale Mechanism is sufficient to collect surcharges on text messaging services revenue on bundled prepaid wireless services. In 2014, the Prepaid Mobile Telephony Surcharges Collection Act (MTS) created the Point of Sale Mechanism for the collection and remittance of surcharges assessed on prepaid wireless bundled service.¹²⁷ Bundled service was defined as prepaid mobile telephony services sold in combination with other services or products for a single price.¹²⁸ Under Pub. Util. Code § 319, the Commission will enact the MTS surcharge from 2016-2020.

MTS authorizes the Commission to collect surcharges as a percentage of the sales price for prepaid mobile services, which includes text messaging

¹²⁷ Pub. Util. Code § 319.

¹²⁸ Rev. & Tax. Code § 42018.

Footnote continued on next page

revenue.¹²⁹ The Commission has collected surcharges on bundled service revenue for prepaid mobile customers since 2016.

CTIA, the Carrier Parties and CC&TA argue that the MTS is not relevant to this proceeding, as the purpose of the MTS Act was not to broaden the funding base and does not address the jurisdictional nature of text messaging.¹³⁰ The Joint Consumers, on the other hand, point to MTS as an example of the Commission's ability to surcharge text messaging services.

This decision finds that the Commission's current collection of surcharges on text messaging revenue through MTS is relevant to the Commission's authority to collect surcharges. The Commission has and continues to collect Public Purpose Program surcharges on bundled text messaging revenue, in accordance with the inverse FCC safe harbor methods,¹³¹ in order to fulfill its statutory obligation to collect surcharges on prepaid wireless bundled services through the Point of Sale Mechanism.

4.7. The Commission Orders A Second Phase of this Proceeding

Having determined that text messaging services should be surcharged using the Commission's existing All End User Surcharge Mechanism and Point of Sale Surcharge Mechanism, this decision opens a second phase of this phase to clarify the services subject to Public Purpose Program surcharge. By clarifying the services subject to surcharge, we promote transparency in the Commission's

¹²⁹ Pub. Util. Code § 319(4).

¹³⁰ Reply Comments of CTIA (Aug. 28, 2017) at 18-19.

¹³¹ *FCC Unbundling Order* at para 47-54.

surcharge process. This scope of the second phase will be broadened to consider all services offered by telecommunications carriers.

Opening up the proceeding to all services offered by telecommunications carriers also allows this Commission to address competitive neutrality issues between various services, which the Commission is unable to adequately address without the participation of entities representing all services.¹³² The second phase will also review the Commission's various surcharge mechanisms, and thereby help fulfill the legislative intent of MTS to increase competitive neutrality between prepaid and postpaid mobile users over time.¹³³ Finally, the Commission will consider ways to promote timely updates to the Commission's list of surchargeable services in the second phase of this proceeding.

4.9. Collecting User Fees on Text Messaging Revenue is Consistent With Statutory Requirements to Collect User Fees on Gross Intrastate Revenues

Public utilities are obligated to pay the user fees set forth in Pub. Util. Code §§ 401-410 and 431-435. These statutes provide, in pertinent part, that user fees are based on the gross intrastate revenues of the utility.¹³⁴ Gross intrastate revenues are defined as "those revenues from a public utility subject to the

¹³² Since the scope of this proceeding is limited to text messaging services, which are only offered by wireless entities, only the wireless carriers, wireless carrier trade organizations, and consumers groups participated in this proceeding.

¹³³ Pub. Util. Code § 319(4), ("It is the intent of the Legislature that reimbursement fees and universal service surcharges be applied, as much as possible, in a competitively neutral manner that does not favor either prepaid or postpaid payment for mobile telephony services, and that, over time, collections of state charges from prepaid and postpaid consumers balance out so that neither pay a disproportionate amount.")

¹³⁴ Pub. Util. Code § 432(c)(3).

jurisdiction of the commission and accounted for according to the uniform system of accounts maintained by the commission.”¹³⁵

It is well established that in examining and interpreting the words of a statute, courts are guided by the plain meaning of the statutory language and courts will adopt a literal interpretation unless it is repugnant to the obvious purpose of the statute.¹³⁶ A plain reading of the statute shows that text messaging services may be applied a surcharge as long as the gross intrastate revenues may be assessed as a component of the service. Therefore, nothing in Pub. Util. Code §§ 401-405 and 431-435 bars the Commission from assessing user fees on text messaging revenues. Accordingly, intrastate text messaging services revenue is subject to user fees.

5. Comments on Proposed Decision

As provided by Rule 14.3 of the Commission’s Rules of Practice and Procedure and Pub. Util. Code § 311(g)(1), the draft decision of the ALJ in this matter was mailed to the parties on _____. Comments were filed on _____, and reply comments were filed on _____ by _____.

6. Assignment of Proceeding

Carla J. Peterman is the assigned Commissioner and Zita Kline is the assigned ALJ in this proceeding.

Findings of Fact

1. The Commission collects Public Purpose Program surcharges under the Point of Sale Mechanism and the All End User Surcharge Mechanism.

¹³⁵ Pub. Util. Code § 435(c).

¹³⁶ *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.

2. The Commission has collected surcharges on bundled prepaid wireless services, including text messaging services, under MTS since 2016.
3. Wireless Carriers have assessed the intrastate component to text messaging services under the Point of Sale Mechanism since 2016.
4. The All End User Surcharge Mechanism applies to category III services, which may include text messaging services as they are a fully competitive service.
5. The All End User Surcharge Mechanism established in 1994 on an interim basis included services unclassified under the Act.
6. The All End User Surcharge Mechanism set as a permanent surcharge collection mechanism in 1996 included services unclassified under the Act.
7. The Commission's Public Purpose Program enabling statutes authorize surcharges on intrastate telecommunications and intrastate VoIP services.
8. The wireless industry receives a benefit from Public Purpose Program revenue collected for Lifeline when it receives Lifeline disbursements for voice and text messaging services.
9. The Public Purpose Program total surcharge rate for 2017 is 6.68%.
10. The Lifeline surcharge rate for 2016-2018 is 4.75%.
11. In 2018, the surcharge rate is 0.5% for the Deaf and Disabled Program, 0.35% for the California High Cost Fund A, 1.08% for California Teleconnect Fund and 0.56% for California Advanced Series Fund.
12. The total Public Purpose Program surcharge rate increased steadily prior to MTS implementation, from 1.88% in 2011 to 7.89% in 2016.
13. The total Public Purpose Program surcharge rate decreased with the implementation of MTS in 2016, declining from 7.89% in 2016 to 6.68% in 2018.

14. Low-income customers eligible for Lifeline are not subject to Public Purpose Program surcharges pursuant to Section 879(c) of the Public Utilities Code.

15. The amount of Public Purpose Program funding disbursed to the wireless industry under Lifeline increased substantially since 2014 due to increasing Lifeline wireless customer subscribership.

16. The Lifeline program is the largest Public Purpose Program operated by the Commission.

17. The total communications industry revenue upon which California relies to fund its Public Purpose Programs decreased from \$16.527 billion in 2011 to \$11.296 billion 2017.

18. California's Public Purpose Program budget increased from \$670 million in 2011 to \$998 million in 2017.

19. Wireless industry revenue, which made up 52%-61% of total telecommunications revenue reported between 2011 and 2018, also shows a consistent decrease in total reported wireless industry revenue from \$10.157 billion in 2011 to \$6.121 billion in 2017.

20. The total Lifeline funds disbursed to the wireless industry compared to the revenue collected from the wireless industry has shown a deficit of \$118.1 million in fiscal year (FY) 2014-15, \$91.2 million in FY 2015-2016, and \$11.6 million in FY 2016-2017, as shown in 2016-2017 since wireless service was included in Lifeline distribution pursuant to D.14-01-036 in 2014.

21. Text messaging revenue accounts for approximately 10% of surcharge revenue collected by the Commission under MTS from 2016 to 2018.

22. Assessing Public Purpose Program surcharges on text messaging services revenue increases the total intrastate wireless industry revenue because

non-prepaid wireless carriers will report intrastate text messaging revenue in their total reported revenue.

23. Increasing the total communications industry intrastate revenue base helps preserve and advance California's universal service program by funding Public Purpose Programs.

24. The National Broadband Plan states that assessing only the telecommunications services revenues "provides incentives for companies to characterize their services as 'information services' to reduce contributions to the fund."

25. The National Broadband Plan states that the FCC should adopt a new contribution methodology "to ensure the [federal universal service fund] remains sustainable over time" and reduce "arbitrage as new products and services are developed."

26. Currently, the FCC does not assess text messaging revenue for contribution to the federal universal service fund as a standalone service.

27. Currently, the FCC assesses text messaging revenue for contribution to the federal universal service fund as a bundled service offering under a safe harbor method.

28. It is reasonable to assess Public Purpose Program surcharges for bundled service offerings using the inverse of the federal safe harbor method.

29. The Commission's surcharge mechanism does not have to be the same as the federal system to be consistent with federal law.

30. The Act defines a "telecommunications service" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."

31. The Act defines an “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management of a telecommunications system or the management of a telecommunications service.”

32. The terms “telecommunications service” and “information service” are mutually exclusive under the Act.

33. The FCC has not classified text messaging services as either an “information service” or a “telecommunications service” under the Act, as amended.

34. The FCC authorized the collection universal service surcharges of VoIP by states without classifying VoIP services as either an “information service” or a “telecommunications service” under the Act.

35. The FCC is currently considering whether to assess surcharges on text messaging services without consideration for whether text messaging is an “information service” or a “telecommunications service” under the Act.

36. Directory listing services are subject to intrastate surcharge by the Commission, but remain unclassified under the Act.

Conclusions of Law

1. Collecting Public Purpose Program surcharges on text messaging service revenue helps preserve and advance the California’s universal service.

2. The FCC *Restoring Internet Freedom Order* recategorized broadband from a “telecommunications service” to an “information service” but did not categorize text messaging services under the Act, as amended.

3. The FCC *Pulver Order* categorized pulver.com's Free World Dialup offering but did not categorize text messaging under the Act, as amended.
4. Collecting Public Purpose Program surcharges on bundled communications service revenue, including text messaging service revenue, is not inconsistent with federal law.
5. Categorizing text messaging services as either a "telecommunications service" or an "information service" under the Act is not a prerequisite to assessing Public Purpose Program surcharges on text messaging revenue.
6. The Commission has a broad grant of authority to regulate public utilities, which may be expressly limited or clarified by statute.
7. The term "telephone service" as referred to in Pub. Util. Code § 2881(g) is not synonymous with services classified as "telecommunications services" under the Act but may include services not yet classified under the Act.
8. MTS authorizes the Commission to collect Public Purpose Program surcharges on bundled prepaid mobile services, which includes the collection of surcharges on text messaging service revenue.
9. The term "telecommunications services" as used in the Commission's All End User Surcharge Mechanism is not equivalent to services classified as "telecommunications services" under the Act, but may include telephone services unclassified under the Act.
10. The collection of surcharges on intrastate telecommunications services under the All End User Surcharge Mechanism may include collection of unclassified services.
11. The Commission should affirm the collection of Public Purpose Program surcharges on bundled and unbundled text messaging services revenue.

12. The Commission is authorized to collect user fees on bundled and unbundled intrastate text messaging services revenue.

O R D E R

IT IS ORDERED that:

1. The Commission affirms collection of Public Purpose Program surcharges on bundled and unbundled intrastate text messaging services revenue under the All End User Surcharge Mechanism and the Point of Sale Mechanism.

2. All wireless carriers shall submit Tier 2 Advice Letters within 90 days from the date of this Decision, informing the Commission whether they have reported and remitted surcharges on text messaging services revenue. Wireless carriers who have not reported and remitted surcharges on text messaging within the last five years shall identify the amount of intrastate surcharges owed on text messaging services and propose a payment plan in their advice letter filings. The Communications Division is authorized to review and approve the advice letter, including the payment plan, through a Commission resolution.

3. The Commission affirms the collection of user fees on text messaging services revenue as gross intrastate revenue.

4. The Commission shall open a second phase of this rulemaking to consider ways to 1) promote consistency and competitive neutrality among the All End User Surcharge Mechanism and the Point of Sale Mechanism, 2) increase the transparency of services subject to Public Purpose Program surcharges 3) promote the timely update of the Commission's surcharge mechanisms.

5. Rulemaking 17-06-023 remains open.

This order is effective today.

Dated _____, at San Francisco, California.