

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Order Instituting Investigation on the Commission's own motion into the alleged failure of TracFone Wireless, Inc. (U-4321-C) to collect and remit public purpose program surcharges and user fees on revenue from its sale of intrastate telephone service to California consumers, in violation of the laws, rules and regulations of this State; Order to Show Cause why Respondent should not immediately be ordered to pay all such outstanding sums plus interest, and be subject to penalties for such violations.

I.09-12-016
(Filed December 17, 2009)

**MOTION OF
CONSUMER PROTECTION & SAFETY DIVISION
FOR SUMMARY ADJUDICATION OF THE DUTY ISSUE;
DECLARATION OF LLELA TAN-WALSH
IN SUPPORT (PUBLIC VERSION)**

-- ATTACHMENTS S, T, U AND V FILED UNDER SEAL --

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I. INTRODUCTION

The Consumer Protection & Safety Division (CPSD) hereby moves the Commission, pursuant to Rule 11.1 of the Commission’s Rules of Practice and Procedure, for summary adjudication of the duty issue against Respondent TracFone Wireless, Inc. (U-4321-C) (TracFone). CPSD makes this motion to demonstrate that – *as a matter of law* – TracFone is a telephone corporation licensed in California, and thus has a duty, like all other telephone corporations, to pay into the State’s universal service and user fee funds. TracFone disputes this. CPSD will show below that granting TracFone the exceptional status that it seeks is legally untenable. It would cause substantial damage to California’s public purpose program surcharge funds and to the Commission’s own funding through user fees, and it would work against Commission aspirations to broaden the universal service program to include broadband, thereby narrowing the gap between the “information rich” and “information poor” segments of society.¹

TracFone has argued that it is not a telephone corporation under California law.² Summary adjudication of this one issue – i.e., whether TracFone is a telephone corporation under California law – will largely decide this case. If TracFone is not a telephone corporation, the case for requiring it to pay surcharges and fees is different or non-existent. If TracFone is a telephone corporation, then it has a duty to remit surcharges and fees. It would then fall to TracFone to show an affirmative defense to this duty. CPSD believes there is none.

Resolving the threshold issue of duty will clarify and expedite this proceeding, and conserve staff, Commission, and utility resources. The law provides, and the

¹ This has been a consistent goal of the Legislature in conjunction with surcharge programs. *See, e.g.*, AB 3643, Ch. 278 (Polanco/Moore, 1994), at Section 2(b)(2) (“In order to avoid an ‘information rich’ and ‘information poor’ stratification, there must be an ongoing evaluation of which services are deemed essential and therefore a part of universal service”).

² *See, e.g.*, TracFone October 13, 2009 Comments on Proposed Resolution [T-17235], found as Attachment R to Declaration of Llela Tan-Walsh in Support of Motion for Summary Adjudication, (Tan-Walsh Decl’n) at p. 4 *ff* (“TracFone is not a public utility and is not subject to statutory obligations which California law imposes on public utilities”); *see also* TracFone Application 10-01-15 for Rehearing.

Commission has consistently held, that wireless carriers, prepaid carriers, and resellers are all telephone corporations, and are all required to remit public purpose surcharges and user fees pursuant to statute. There is no legal defense of notice, as carriers are deemed to know the law. CPSD will nevertheless show, as a matter of law and undisputed fact, that TracFone had actual notice that it was a telephone corporation, and full and specific notice that it was required to pay the disputed surcharges and fees. Nor do the defenses of impossibility, waiver, or selective prosecution apply.

Thus, no triable issues of material fact exist, and the duty issue can and should be resolved as a matter of law. Accordingly, CPSD moves the Commission for summary adjudication of TracFone's status as a public utility, and its duty to remit surcharges and fees.

II. FACTUAL BACKGROUND

A. TracFone's Corporate History

TracFone is a Delaware corporation headquartered in Florida. It is what is commonly referred to as a "reseller" of commercial mobile radio service (CMRS). It operates throughout the United States, and has provided non-subsidized, market-rate wireless telephone service in California for a number of years.

TracFone is a subsidiary of América Telecom, S.A.B. de C.V. (América Móvil), a telephone corporation based in Mexico City.³ América Móvil describes its TracFone subsidiary as "engaged in the sale and distribution of prepaid wireless service and wireless phones throughout the United States, Puerto Rico and the U.S. Virgin Islands."⁴ TracFone's prepaid wireless service is marketed and sold under the "TracFone," "Net10,"

³ See Tan-Walsh Decl'n, at Atts. K.1 (Annual Report) and L.1 (Form 20-F of América Móvil, S.A.B. de C.V., filed with the Securities and Exchange Commission (SEC) May 25, 2010, for fiscal year ended December 31, 2009, available on SEC website at http://www.sec.gov/Archives/edgar/data/1129137/000119312509141628/d20f.htm#rom94469_1 (hereinafter América Móvil Form 20-F), at 23, 57. América Móvil, and hence TracFone, are controlled by Carlos Slim Helu and his family. *Id.* at 15.

⁴ *Id.* at 57.

and “SafeLink” brands.⁵ In each case, the customer is required to purchase and activate a TracFone handset.⁶ As of June, 2010, TracFone had approximately 16 million subscribers nationwide,⁷ including all three brands, and describes it self as “the largest operator in the U.S. prepaid cellular market.”⁸

On July 18, 1997, the CPUC’s Telecommunications Division gave to TracFone’s predecessor, Topp Telecom, Inc. (Topp) a Wireless Registration Identification number, U-4231-C.⁹ The CPUC reminded Topp that, as a “newly registered cellular carrier,” it was required to collect surcharges from “all end users” to pay for specified public purpose funds, and comply with other laws relating to telephone service offered in California.¹⁰

Although apparently not reflected in Commission records, América Móvil “first acquired a controlling interest in TracFone [Topp] in February 1999.”¹¹ At some point between 1999 and 2001, Topp “changed its name to TracFone Wireless Inc.”¹²

In 2003, TracFone unilaterally informed a Telecommunications Division staff person that TracFone “does not render any ‘billings’” which would be reportable to the CPUC, implying (TracFone now contends) that TracFone no longer considered itself

⁵ *Id.* at 57. Safelink is apparently TracFone’s Lifeline brand, and accordingly is not yet sold in California. See https://www.safelinkwireless.com/EnrollmentPublic/enroll_lifeline.aspx.

⁶ See <http://www.tracfone.com>, www.net10.com, and www.safelink.com.

⁷ Annual Report, at 26 (Attachment K.1 to Tan-Walsh Decl’n).

⁸ Form 20-F, at 57 (Attachment L.1).

⁹ July 18, 1997 CPUC letter memorializing Topp’s wireless registration (Attachment B), at 1.

¹⁰ See, e.g., *id.* at 1-2 (noting “authority of the Commission to regulate terms and conditions”), ¶ 4 (“user fees”); ¶ 5 (“D.E.A.F. Trust”); ¶ 7 (“required to charge all end users the California High Cost Fund (CHCF) B surcharge”), ¶ 8 (“required to charge all end users the California Teleconnect Fund surcharge”).

¹¹ Form 20-F, at 57.

¹² D.04-09-023, 2004 Cal. PUC LEXIS 607, *2-3 (2004) (“In D.99-10-053, the Commission authorized Topp Telecom, Inc. (Topp), to acquire control of Comm South. Topp subsequently changed its name to TracFone ... On May 9, 2001, Comm South filed an advice letter in accordance with the procedures established by D.98-07-094 for authority to transfer control of Comm South from TracFone to Arbros”).

obligated to collect and remit public purpose surcharges and user fees.¹³ TracFone never formally sought clarifications of the terms or requirements of its Wireless Registration in this regard, including its obligation to collect and remit public purpose surcharges and user fees. Nor did TracFone seek a waiver from the Commission, or the Director of the Telecommunications Division, of the overarching General Order 153 requirement that “All carriers shall assess, collect, and remit the ULTS surcharge.”¹⁴

TracFone claims not to “own any wireless telecommunications facilities or hold any wireless licenses.”¹⁵ Instead, TracFone claims that it “purchases airtime through agreements with facilities-based wireless service providers, and resells that airtime to customers.”¹⁶ TracFone obtains service from the following underlying carriers: Alltel, AT&T mobility, Golden State Cellular, T-Mobile, US Cellular, and Verizon Wireless.¹⁷ Through these agreements, TracFone claims that it “has a nationwide network covering virtually all areas in which wireless services are available.”¹⁸

“Customer usage,” TracFone further asserts, “is controlled using patented, proprietary software installed in each phone TracFone sells, and TracFone provides customer service and manages customers as though it were a network-based carrier.”¹⁹ TracFone sells both its handsets and airtime (sometimes packaged as “monthly plans”) online,²⁰ and through a variety of U.S. retail stores (Mollie Stone and Walmart, for

¹³ March 24, 2003 letter from TracFone counsel to staff person Hassan Mirza (Attachment C), attached to April 22, 2009 TracFone email arguing that the lack of a response from Mr. Mirza indicated no “concern by the Commission regarding TracFone’s understanding of the reporting requirements” (Attachment E).

¹⁴ G.O. 153, ¶ 10.1. Although G.O. 153 was first issued in 1984 (as described below), the modern version of G.O.153 was promulgated by the Commission in 2000. See D.00-10-028, with G.O. 153 attached Appendix B. The current (2010) version is substantially similar for our purposes, although the section/paragraph numbering has changed slightly.

¹⁵ Form 20-F (Attachment L.1) at 57.

¹⁶ *Id.*

¹⁷ Excerpts of these contracts are found in Confidential Attachments S, T and U to Tan-Walsh Decl’n, filed under seal.

¹⁸ Form 20-F at 57.

¹⁹ *Id.*

²⁰ See <http://www.tracfone.com> and www.net10.com.

example).²¹ TracFone describes itself as “compet[ing] with the major U.S. wireless operators and other mobile virtual network operators.”²²

Although TracFone claims not to have any “wireless telecommunications facilities,” it does admit that, as of December 31, 2009, it had 634 employees.²³

TracFone’s nationwide revenue for 2009 was \$1.7 billion.²⁴ TracFone has confirmed that a significant portion of this was California intrastate revenue.²⁵

B. Separate Statement of Undisputed Facts for Purposes of this Motion.

1. In 1997, TracFone, then Topp Telecom, Inc., was assigned a Commission utility number, U-4231-C, and was authorized “to resell cellular service to the public in California.”²⁶
2. In 1997, Tracfone, then Topp Telecom, Inc., was advised that, except for market entry and rates, the “the authority of the Commission to regulate terms and conditions of newly registered cellular carriers shall apply to the same extent as those holding certificates of CPSCN prior to August 10, 1994.”²⁷
3. In 1997, TracFone, then Topp Telecomm, Inc., was told that it must comply with Commission Rules “as they pertain to the collection of user fees to fund the costs of regulating public utilities.”²⁸
4. In 1997, TracFone, then Topp Telecomm, Inc., was told that it must “comply with PU Code Section 2881 and Resolution T-15801 as they pertain to a surcharge on gross intrastate revenues to fund the “D.E.A.F. Trust” surcharge.”²⁹

²¹ Form 20-F at 57.

²² *Id.*

²³ *Id.*

²⁴ América Móvil Annual Report (Attachment K.1), at 26.

²⁵ TracFone responses to staff’s May 8, 2009 Data Requests. The precise amount of revenue is not at issue in this motion, and thus these responses are not included here.

²⁶ July 18, 1997 wireless registration letter to TracFone then operating as Topp Telecom, Inc., Attachment B to Tan-Walsh Declaration.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

5. In 1997, TracFone, then Topp Telecomm, Inc., was told that “[a]ll telecommunications carriers are required to charge all end users the California High Cost Fund (CHCF) B surcharge” and the California Teleconnect Fund surcharge,” with the following exceptions that do not apply to TracFone: “except for ULTS billings, coin-sent paid calling, debit card messages, one-way radio paging, usage charges to COPTs, customers receiving services under existing contracts that were executed on or before September 15, 1994 and directory advertising.”³⁰
6. “TracFone has a nationwide network” and is “engaged in the sale and distribution of prepaid wireless service and wireless phones” in California.³¹

Additional Undisputed Facts, Related to Alternative Theories and Affirmative Defenses:

7. TracFone admits that it controls customer usage by “using patented, proprietary software installed in each phone TracFone sells, and TracFone provides customer service and manages customers as though it were a network-based carrier.”³²
8. TracFone’s contracts with the underlying carriers requires it to maintain “platforms” and handsets necessary for wireless communication.³³
9. TracFone maintains, or can maintain, “customer identifiable information” about each of its customers.³⁴

The attached Declaration of Llela Tan-Walsh contains the 1997 letter to TracFone/Topp, the SEC filings, the contracts with the wholesalers, and the screenshots from TracFone’s website that establish these facts. The Commission can rule in this

³⁰ *Id.*

³¹ Form 20-F, at 57 (Attachment L.1); *see also* TracFone’s March 24, 2003 letter to Hassan Mirza (Mirza letter) (Attachment C) (“TracFone provides service by reselling the network services of over 40 wireless carriers”).

³² Form 20-F, at 57; *see also* Mirza letter (referring to “TracFone’s wireless handsets” and stating that the “patented technology in the handset then tracks and displays the prepaid minute balance so the user is aware of both the airtime used and when more airtime is needed”).

³³ *See, e.g.*, [Verizon] Wholesale Agreement for TracFone Wireless, at 5, ¶ 2.3(ii) (Attachment S).

³⁴ Tan-Walsh Declaration, Attachment N.1.

proceeding based on the above-stated undisputed facts. Indeed, the Commission can rule based on facts 1-6 alone.

III. ARGUMENT

A. Summary Adjudication of the Duty Issue at this Time is Proper and Salutory.

Summary adjudication is particularly appropriate to adjudicate the merits of certain claims or defenses, in which case the action continues to trial on whatever claims remain. A motion for summary adjudication is appropriate where the evidence presented indicates there are no triable issues as to any material fact and that the moving party is entitled to judgment as a matter of law. (Code of Civil Procedure, §437c; Weil & Brown, Civil Procedure Before Trial, 10:26-27). The interpretation of a statute or regulation is generally seen to be a pure legal issue. *See Manriquez v. Gourley*, 105 Cal. App. 4th 1227, 1234-35 (2003), quoting from *Culligan Water Conditioning v. State Bd. of Equalization*, 17 Cal.3d 86, 93 (1976) (“the interpretation of a regulation, like the interpretation of a statute, is, of course, a question of law . . . an administrative agency's interpretation of its own regulation obviously deserves great weight”). And the issue of duty is specifically identified in C.C.P. § 437(c)(f)(1) as an appropriate object of a summary adjudication motion.

While there is no Commission rule expressly for summary judgment motions, the Commission does have Rule 11.2 (formerly Rule 56), which governs motions to dismiss. This procedure “is analogous in several respects to a motion for summary judgment in civil practice.” *Westcom Long Distance v. Pacific Bell*, D.94-04-082, 54 CPUC 2d 244, [249] (1994). The purpose of both types of motions, the Commission has explained, is to permit determination “before hearing whether there are any triable issues as to any material fact.” *Id.* The Commission looks to California Code of Civil Procedure §437(c) for the standards on which to decide a motion for summary judgment. *Id.*³⁵ Section 437(c) provides:

³⁵ The Commission stated in *Westcom* that:

(continued on next page)

The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers . . . and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.”

C.C.P. §§ 437c(f)(1) and (2) provide for summary adjudication by an analogous procedure.:

A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, *or one or more issues of duty*. ...

A motion for summary adjudication shall proceed ... in all procedural respects as a motion for summary judgment.

A further purpose of such a motion is “that it promotes and protects the administration of justice and expedites litigation by the elimination of needless trials.” *Westcom Long Distance, supra*, 54 CPUC2d at 249. Where appropriate, the Commission regularly grants motions for summary judgment or summary adjudication. *See* D.07-07-040 (granting Chevron judgment against Equilon “as a matter of law”); D.07-01-004 (granting Cox Telecom judgment against Global NAPs of California); D.02-04-051 (granting summary adjudication of a claim by County Sanitation District against SoCal Edison).³⁶

(continued from previous page)

The Commission has not established a rule that explicitly governs summary judgment or summary adjudication of issues, so both [parties] structured their respective motions to follow the requirements of Code of Civil Procedure (Code Civ. Proc.) § 437c(c), modified to reflect Commission practices. The Commission has looked to the requirements of that statute for guidance in resolving motions for summary judgment or summary adjudication.

³⁶ D.02-04-051, Slip Op. at 6-7 (rehearing granted on other grounds, D.02-09-025).

Initially, the moving party bears the burden of establishing evidentiary facts sufficient to prove or disprove the elements of a particular claim, and then the burden shifts to the opposing party to show a material issue of fact or an affirmative defense. C.C.P. §§ 437c(c), (f), (p). As the Commission stated in D.06-08-006:

Under the summary judgment procedure, the moving party has the burden of showing that there are no disputed facts by means of "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." *The opposition to the motion must state which facts are still in dispute.* The motion shall be granted if all the papers show that there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. If the parties' filings disclose the existence of a disputed issue of material fact, the motion must be denied.³⁷

This process, and these clear standards, allow the Commission to efficiently distill and resolve the opposing views of the parties in this case, as to whether TracFone has a duty to remit surcharges or fees.

B. The California Public Utilities Code Requires that all Telecommunications Corporations Remit Public Purpose Surcharges and User Fees.

California P.U. Code § 275(b) authorizes the Commission to set High-Cost Fund-A surcharge rates which all "*telephone corporations*" shall collect and remit to the Commission. Section 276(b) does the same for High-Cost Fund-B, as section 277(b) does for the Universal Lifeline Telephone Service Trust.

As to user fees – which TracFone also refuses to pay – the statutes are even clearer: Section 431, for example, requires the Commission to “annually determine a fee to be paid by every ... *public utility* providing service directly to customers or

³⁷ *Westcom Long Distance, supra*, 54 CPUC 2d at 249, quoted in D.06-08-006 *Qwest Communications v. Pacific Bell*.

subscribers.³⁸ Section 432(c)(3) specifically includes “*telephone and telegraph corporations*” within this duty to pay.

Section 739.3(c) requires only that the Commission’s universal service funds for high-cost areas be “suitable, competitively neutral, and broad-based.” Nowhere in these statutes is there a limitation of surcharge and fee remittance obligations to wireline carriers, facilities-based carriers, post-paid carriers, or to those carriers who concede they offer “billed services” or collect “billed revenue.” Instead, these statutes – and the Commission decisions implementing them – have been consistently applied to *all* telecommunications carriers, as shown below. In D.96-10-066, for example, Commission:

reaffirm[ed] the position which we took in D.94-09-065 ... In that decision, we held that *all end users of every LEC, IEC, 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* for the ULTS program and the Deaf and Disabled Telecommunications program...³⁹

This ruling is consistent with the statutory bases for the collection of public purpose surcharges and user fees.

C. TracFone is a Public Utility Telephone Corporation, Based on Its Self-Description Before this Commission, and in Other Public Documents.

TracFone is a telephone corporation, and therefore owes surcharges and fees, based on any of several theories: (1) TracFone has applied to this Commission to be declared an eligible “telecommunications carrier,” and is now estopped from claiming otherwise; (2) even as a pure reseller, TracFone has the duties of a public utility telephone corporation in California; and (3) as the operator of “appliances, ... fixtures

³⁸ P.U. Code § 431 (emphasis added). Section 431 appears to exempt railroads from this duty.

³⁹ D.96-10-066, Slip Op. at 288-89 (emphasis added). At page 269, we clarified that surcharges are “imposed on all customers’ expenditures for telecommunications services.” See also *id.* at 278 (“imposed on all telecommunications services and customers”); Finding of Fact 164. Ordering paragraph 10(d) enunciated the same ruling for the California Teleconnect Fund.

[or] personal property ... to facilitate communication by telephone” in California, TracFone has those same duties.

1. TracFone Has Repeatedly Admitted that it is a Telecommunications Carrier – and Therefore a Public Utility.

Before we plunge into Commission precedent and a closer analysis of what it constitutes a public utility telephone corporation under the California Public Utilities Code, it is useful to look at how TracFone has described itself to the world. First and foremost are the questions left begging by its application to this Commission for designation as an “Eligible Telecommunications *Carrier*” (ETC) pursuant to 47 U.S.C. § 214(e).⁴⁰ Section 214(e) clearly limits the ETC designation to “common carriers.” 47 U.S.C. §214(e)(1) and (e)(2). Under 47 U.S.C. § 153(10), a common carrier is any entity that engages “in interstate or foreign communication by wire or radio,” and offers to carry such communication to the public or some part of the public.⁴¹ Common carriers are that subset of telecommunications carriers that offer “telecommunication service,” i.e., offering to the public “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.” 47 U.S.C. §§ 153(43), (44), and (46).

TracFone’s ETC Petition constitutes an admission that it is a common carrier, and therefore a public utility telephone corporation. Rule 1.1 of the Commission’s Rules of Practice and Procedure, and the principles of collateral estoppel, preclude TracFone from now arguing that it does not offer such transmission to the public. If it offers such transmission to the public, then it is a public utility telephone corporation, per the definitions of P.U. Code §§ 216, 233-34.

TracFone’s self-description before the Federal Communications Commission (FCC) is consistent with its common carrier status. TracFone has presented itself to the

⁴⁰ See TracFone’s Advice Letter Petition for ETC status (Tan-Walsh Decl’n, Attachment Q).

⁴¹ See also *NARUC v. FCC*, 533 F.2d 601, 608 (D.C. Cir 1976) (offer to all or any part of the public).

FCC as a provider of “prepaid wireless telecommunications services.”⁴² Its Form 499s similarly require TracFone to state the “jurisdictions in which the filing entity provides telecommunications service,” and allow it to designate California as one of those jurisdictions⁴³

2. As a Reseller of Telephone Service, TracFone Is a Telephone Corporation, and Therefore has the Duties of a Public Utility.

TracFone’s parent corporation describes TracFone as “engaged in the sale and distribution of prepaid wireless service and wireless phones throughout the United States, Puerto Rico and the U.S. Virgin Islands.”⁴⁴ TracFone nevertheless claims its status as a reseller offering prepaid wireless telecommunication services, and its provision of service through a “virtual network” consisting of services obtained from facilities-based carriers including AT&T Wireless, T-Mobile, and Verizon Wireless, demonstrate that it is “not a Telephone Corporation [sic] as defined by the Public Utilities Code” and that it is therefore “not statutorily subject to the fee requirements codified at PU Code Section 432.”⁴⁵

TracFone’s claims that it is a “pure” or 100% reseller, with no facilities of its own, is: (a) not credible in any absolute sense, as described below; and (b) *is in any event irrelevant*, as it would not absolve TracFone of its duties as a utility. The Commission regularly imposes utility regulation on wireless carriers,⁴⁶ prepaid carriers,⁴⁷ and

⁴² Tan-Walsh Decl’n, Attachment Q, at Exhibit 1 (FCC September 6/8, 2005 Order granting TracFone’s Petition for Forbearance in CC Docket 96-45).

⁴³ Tan-Walsh Decl’n, Confidential Attachment V, at TF 006.

⁴⁴ América Móvil Form 20-F, at 52-53.

⁴⁵ May 15, 2009 letter of TracFone counsel to staff (Tan-Walsh Declaration, Attachment H) at 3.

⁴⁶ See, e.g., D. 04-09-062 (*Cingular OII*).

⁴⁷ Some of the largest telephone companies in the State in fact bill their customers in advance, i.e., provide prepaid service. See AT&T Rule 9 tariff sheet, at pp. 9 ff, available at <http://cpr.bellsouth.com/pdf/ca/a002.pdf>. See particularly pp. 94-97 – Residential Flat Rate service is paid in advance (2.1.9.B.1), Measured Rate services are billed in advance for the basic amount of service and any amounts over the basic amount of minutes is billed in arrears (2.1.9.B.2.a.(1) and b.(1)).

resellers.⁴⁸ It requires both competitive local exchange carriers (CLECs) and inter-exchange carriers (IXCs), even if resellers, to collect and remit user fees and public purpose surcharges.⁴⁹ The letter granting TracFone's predecessor a wireless registration number specifically conditioned that grant on the carrier's compliance with all Public Utilities Code sections applicable to telecommunications carriers, except for those regulating rates and market entry.⁵⁰

The Commission has consistently held that even switchless or non facilities-based resellers remain public utilities subject to its jurisdiction. "Resellers not falling within the exemption language [of Section 234, relating to hospitals, motels, and hotels] are subject to our regulation."⁵¹ Conversely, "only certificated utilities should be permitted to act as resellers."⁵² As we explained in Decision 92-06-069:

[T]here are at least two types of NDIEC reseller, those that own or lease, and operate facilities such as telephone cable and switching equipment, and those which provide telephone services over facilities owned by others. In our opinion, both types of resellers are public utilities as defined in the California Constitution and the Public Utilities Code.

In a determination of public utility status, it does not matter whether the ownership, control, operation, or management of the telephone line is direct or indirect. As Article XII, Section 3 of the California Constitution states, "[p]rivate corporations and persons that own, operate, control, or manage a line, plant, or system for . . . the transmission of telephone . . . directly or indirectly to or for the public . . . are public utilities. . . ."

⁴⁸ See, e.g., *Investigation of Clear World*, D. 05-06-033, Slip Op. at 2, O.P. 1 (\$100,000 fine for unauthorized re-sale of long distance service).

⁴⁹ See, e.g., *Id* at O.P. 2(f) (investigation into reseller's failure to pay required fees and surcharges).

⁵⁰ July 18, 1997 Commission letter to Topp Telecom, Inc., *supra*, at 1 ("In all respects except for market entry and rates, the authority of the Commission to regulate terms and conditions of newly registered cellular carriers shall apply to the same extent as those holding certificates of CPCN prior to August 10, 1994").

⁵¹ D.87-01-063, 1987 Cal. PUC LEXIS 838, *40-41, 23 CPUC 2d 554.

⁵² D.84-04-014, 1984 Cal. PUC LEXIS 1359, *75; 14 CPUC 2d 563.

The fact that a company does not own or physically operate a switch does not determine whether it operates or manages facilities in connection with the provision of telecommunications services. From the customer's viewpoint, the switchless reseller is the telephone company; it orders the establishment of service to the customers' premises and controls the rates that will be charged, and is the business they will look to when problems arise. The switchless nature of a business is irrelevant to its status as a public utility.⁵³

Certainly, from a customer's viewpoint, TracFone is a telephone company.⁵⁴

3. Because It Operates Personal Property to Facilitate the Delivery of Telephone Service in California, and/or Because it Manages Certain Network Functions, TracFone Is a Telephone Corporation and Therefore has the Duties of a Public Utility.

Public Utilities Code § 234 provides that a telephone corporation (and therefore a utility under § 216) “includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state.” A “telephone line” is defined very broadly in Public Utilities Code § 233:

“Telephone line” includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires.⁵⁵

TracFone in fact does “own, control, or manage” at least two, if not three or more, species of “appliances, ... fixtures, [or] personal property” in California, which qualifies it as the operator of a telephone line in California, and therefore a public utility.

First, it controls the handset. “Equipment” is a defined term in Respondent's agreements with its underlying carrier, referring to the “equipment, software, technology,

⁵³ 1992 Cal. PUC LEXIS 972, *9, 44 CPUC 2d 747; *see also* D.95-01-044.

⁵⁴ See TracFone brochures and website at Attachments M and N.1 to Tan-Walsh Decl'n.

⁵⁵ P.U. Code § 233.

handsets, accessories or other materials or equipment used by [TracFone] in its business operation or by [TracFone's] End Users.”⁵⁶ TracFone has copyrighted its software and defended the copyright, as well as its rights in other business operations, equipment, and personal property necessary to operate its network. In *TracFone Wireless, Inc. v. Carson*, TracFone’s complaint alleged:

Unlawful business practices involving the unauthorized and unlawful bulk purchase and resale of TracFone/NET 10 Prepaid Phones, unauthorized and unlawful computer unlocking or reflashing of TracFone/NET 10 Prepaid Phones, [and] alteration of TracFone’s copyrighted and proprietary software computer code installed in the Phones . . .⁵⁷

Under California law, software is a form of personal property.⁵⁸

In controlling the handsets through software, TracFone fits the description of telephone service set out in D. 92-06-069:

This "equipment, appliances, real estate, fixtures, and personal property," is owned, controlled, operated and/or managed in order "to facilitate communication by telephone," and thus is "telephone line." (*PU Code § 233.*) If a reseller owns, controls, operates, or manages any telephone line for compensation, it is a "telephone corporation." (*PU Code § 234.*) "[S]uch ownership may be of 'any part' of such plant or equipment." (*Commercial Communications, Inc. v. Public Utilities Commission (1958) 50 C. 2d 512, at 520-521.*) Thus, it does not matter if a reseller does not own equipment over which calls actually move. If a telephone corporation provides a commodity or service to the public for compensation, it is a public utility. (*PU Code § 216.*)⁵⁹

⁵⁶ [T-Mobile] Wireless Service Purchase Agreement, at Section 1.14 (emphasis added) (Attachment U).

⁵⁷ *TracFone Wireless, Inc. v. Carson*, Civil Action No. 3:07-CV-1761-G, August 28, 2008 Memorandum Opinion and Order, 2008 U.S. Dist. LEXIS 68673 (N.D. Tex), at *2.

⁵⁸ California Commercial Code § 9102(a)(42) (falling under the category “general intangible” personal property, which “includes payment intangibles and software”).

⁵⁹ D. 92-06-069, 1992 Cal. PUC LEXIS 972, 10-11, fn. 2.

Alternatively, but in the same vein, TracFone “control” or “management” of “telephone lines” is reflected in its reseller agreements with T-Mobile, AT&T, and Verizon,⁶⁰ and is confirmed by services TracFone offers on its website. From the reseller agreements, it is apparent that TracFone manages or controls instrumentalities and -- to some degree -- communication on the networks from which it purchases wholesale service. Thus, its agreement with AT&T provides that TracFone “must provide and maintain all Mobile Radio Unit equipment and ensure that it is technically and operationally compatible with the CMRS systems [of AT&T].”⁶¹ Similarly, TracFone’s agreement with Verizon Wireless requires TracFone “to own, operate and maintain at all times during this Agreement the technology platform (‘Platform’) that supports and monitors the TracFone Handset.”⁶² While these provisions refer in large part to the handset, it remains true that wireless telephone communication occurs only when the handset and the wireless signal (i.e., the network) work together.⁶³

Thus, TracFone is able to control various communication functionalities, as disclosed on its website:

- * phone activation, including assignment of telephone number to TracFone handset;⁶⁴
- * number portability (from old carrier to TracFone, from TracFone to new carrier);⁶⁵

⁶⁰ In response to a staff Data Request, TracFone produced its Wholesale Agreement with Verizon Wireless, and its Resale Agreement with AT&T Mobility, both pursuant to the confidentiality provisions of P.U. Code § 583. Staff has in the interim received permission from TracFone to use limited excerpts from those Agreements, which are quoted herein. More extended excerpts from the contracts are filed under seal as confidential Attachments S, T, and U to the Tan-Walsh declaration.

⁶¹ AT&T Reseller Agreement at 10 (Attachment T).

⁶²[Verizon] Wholesale Agreement for TracFone Wireless, at 5, ¶ 2.3(ii) (Attachment S).

⁶³ D.04-09-062 (*Cingular*), Slip Op. at 6 (“Cingular sells wireless personal communication services under a variety of service plans to individual and business customers. Cingular also sells the related handsets and accessories to these customers”); *see also id.* at 25 (description of how different handsets interact with network signal), 30 (“the handset models Cingular offers are manufactured to appropriate GSM standards and checked for compliance”).

⁶⁴ Tan-Walsh Declaration, Attachment N.1 (screenshots from www.tracfone.com), at Screenshot 000026 (“Products > Phone”) (“number assigned to your wireless phone upon Activation”).

⁶⁵ *Id.* at 000029.

- * use of “customer identifiable information to investigate and help prevent potentially unlawful activity or activity that threatens the network ...”,⁶⁶
- * technical support, including trouble shooting and “ticket number status” (TracFone apparently has one technical support office and functionality for all underlying networks),⁶⁷ and
- * managing the downloads of ringtones, and the use of voicemail, caller ID, and call waiting.⁶⁸

TracFone controls these features not as an agent of another carrier but in its own name: “TRACFONE provides nationwide prepaid wireless service.”⁶⁹ Nowhere on TracFone’s website does it disclose that it is operating as anything other than a service provider and principal. Even when it touts the fact that it “use[s] the nation’s leading cellular providers” networks, it is to “create a national footprint” under TracFone’s brand.

Finally, the Commission may also conclude that the telephone numbers assigned to TracFone by the underlying carriers are instrumentalities managed by TracFone to deliver service. TracFone mates these numbers with its phones, which are identified via serial number that Tracfone “tracks.”⁷⁰

All of these facts – the control of the handset and other “equipment,” the software, the assignment of numbers, the network access and control necessary for activation, number portability, customer tracking, technical support, and delivery of products like voicemail and ringtones -- or any of them, would support a determination that TracFone is operating, managing, or controlling “instruments,” “appliances,” or other forms of “personal property” to “facilitate communications by telephone” in California, and is doing so “for compensation in this state.”⁷¹ TracFone is thus a public utility telephone

⁶⁶ *Id.* at 000004 (“Privacy Policy ... Improper Conduct”).

⁶⁷ *Id.* at 0000011 (“Technical Support”)

⁶⁸ *Id.* at 0000016.

⁶⁹ *Id.* at 000010.

⁷⁰ *Id.* at 000026 (“Products > Phone”) (“number assigned to your wireless phone upon Activation”); *see also* “How to Activate Card” (Attachment X).

⁷¹ P.U. Code §§ 216, 233-34. TracFone, in turn, cites a provision from its contract with T-Mobile that
(continued on next page)

corporation, and as such has a duty to collect and remit surcharges and fees to the Commission.

D. TracFone’s Affirmative Defenses Fail as a Matter of Law

Amendments to California’s summary judgment/adjudication statute in 1992 and 1993 made clear that it is not the Commission’s initial burden to disprove affirmative defenses. C.C.P. § 437(c)(p). Thus, once TracFone’s status as a telephone corporation and its duty to remit surcharges have been established, “the burden shifts to the defendant ... to show that a triable issue of one or more material facts exists as to that [duty] or a defense thereto.” C.C.P § 437(c)(p)(1). Because, however, the Assigned Commissioner’s August 25, 2010 Scoping Memo and Ruling (ACR) requests briefing on several of the possible affirmative defenses, CPSD will address them here.

1. There Was No Lack of a Commission-Approved Collection Methodology, and – Even If there Was – a Lack of Methodology Would Not Exempt TracFone from the Duty to Remit Surcharges and Fees.

TracFone argues that the “Commission’s regulations governing these public purpose program surcharges specifically contemplate their applicability only to billed charges.”⁷² TracFone points to language in General Order 153 that defines “surcharge” as the percentage increment, as determined by the Commission, which is applied *to the end user’s bill* by the carrier for intrastate telecommunications services.”⁷³ The ACR frames the issue as whether “TracFone’s obligation to collect PPP surcharges and user fees from customers of prepaid wireless services depends upon the existence of a

(continued from previous page)

“No provision of th[e] Agreement shall be construed as vesting in [TracFone] any control whatsoever in any Facilities or operations of CARRIER.” Comments on Proposed Resolution (Attachment R) at 8. CPSD does not cite the contract provisions or other aspects of TracFone’s operations to prove how the parties to that contract may have *construed* its meaning, but as evidence of what actually occurs at the interface between TracFone and the underlying networks.

⁷² Application for Rehearing, at 19.

⁷³ *Id.* citing GO. 153, ¶ 2.143 (emphasis in original).

Commission-approved collection procedure.” This issue, in turn, is closely related to the “impossibility” issue discussed below.

The Commission’s 25-year history of rulemaking on surcharge collection methodologies has – to borrow a phrase from Justice Scalia – been something less than a “model of clarity,”⁷⁴ largely because it is a reflection of the rapidly evolving telecommunications field. The case of prepaid wireless service, for example, has never been put to the Commission – partly due to TracFone’s decision not to seek a formal waiver of the G.O. 153 rules.⁷⁵

TracFone’s argument fails for these reasons, *inter alia*: (a) there is no showing that TracFone does not have “billed revenue” within the meaning of the statute; (b) the Commission has never created any exemption for any class of carrier from the obligation to collect and remit surcharges and fees; (c) the Commission would in any event lack authority to create such an exemption; and (d) TracFone’s argument fails to address user fees, which have never been tied to “billed” revenue.

a) There is No Ambiguity in G.O. 153, as TracFone Does Have Billed Revenue.

Although G.O. 153 applies only to the ULTS fund, we may localize the dispute there. The following provisions of G.O. 153 may be said to typify the purported ambiguity in the Order:

1.2 This General Order is applicable to all telecommunications carriers operating in California;

2.1.43 [cited by TracFone] “Surcharge” –The percentage increment as determined by the commission, that is applied to the end-user’s bill by the carrier for intrastate telecommunications services;

10.1 All carriers shall assess, collect, and remit the ULTS surcharge;

⁷⁴ *AT&T v. Iowa Utils. Bd.*, 525 US 366, 397 (1999) (“It would be gross understatement to say that the 1996 [Federal Telecommunications] Act is not a model of clarity”).

⁷⁵ G.O. 153, at ¶¶ 14.1 and 14.2 (“Carriers and utilities may request a waiver of any administrative requirement ... by submitting a written waiver request to the Director of TD.

10.5.1 All end-user intrastate telecommunications services, whether tariffed or untariffed, are subject to the ULTS surcharge, except for ...

10.5.1.3 [cited by TracFone] Coin sent telephone calls (coin in box) and debit card calls;⁷⁶

11.3.1 Carriers shall report and remit their ULTS surcharge revenues based on intrastate end-user billings.

For TracFone to succeed with its theory, it must prove two things: (1) that “billings” or the “end-user’s bill” can refer only to the sort of billing that ILECs have traditionally sent; and (2) that the references in Commission decisions and orders referring to “billings” were meant by the Commission as a *limitation* to the “all [telecommunications] carriers” provisions of sections 1.2, 10.1, and 10.5.1.

CPSD submits that there is nothing in G.O.153 that limits “billings” to traditional phone bills, or precludes that rubric from being applied to – and reflected on -- cash register receipts printed out at Walmart or other “brick-and-mortar” distributors, or provided on TracFone’s online sales interface. Indeed, if one looks closely at what is commonly referred to as a “receipt,” one sees that it is both a “bill” – i.e., it lists the charges, and a “receipt” – i.e., it shows that payment for those charges has been received.⁷⁷

As pointed out in the discussion below under “impossibility” (incorporated here), TracFone cannot create an exemption for itself by choosing to structure its relationship with its customers through paperless transactions. More importantly, at no time from the first use of the phrase “end-user billing” in a Commission decision⁷⁸ to date has it been

⁷⁶ In its Application 10-01-015 for Rehearing, at 23, TracFone persists in its argument that it is categorically no different than a provider of debit card or coin-sent paid calling services, and thus comes within the specified exceptions to the “all carriers” rule of G.O. 153. TracFone, however, cites no authority for this contention. Nor does it anywhere rebut the obvious argument, advanced by CPSD, that debit card nor coin-sent paid calling services are fundamentally different, because they do not provide the customer with his or her own phone number, handset, ability to receive incoming calls, and the like. In other words, they do not provide what is commonly understood as full telecommunications service.

⁷⁷ See Walmart bill and receipt for a TracFone (Tan-Walsh Decl’n Attachment X).

⁷⁸ CPSD believes that the first use of “end-user billing” in this context came in R.98-09-005, 1998 Cal. PUC LEXIS 573, *70-71 (1998).

used in a way that *narrows* the surcharge billing base to something less than “all carriers.” Indeed, the “all end-user billing was a convention of the time intended to cover all carriers and end-users.”⁷⁹

b) Commission Rulemakings and General Orders Make Clear that – Regardless of Methodology – the Obligation to Collect and Remit Surcharges Has Always Extended to All Carriers, and that No Exemption Exists for TracFone.

Should the Commission nevertheless determine that Rules 10.1 and 11.3.1, standing alone or placed in juxtaposition, create some sort of ambiguity, the principles of statutory construction tell us that harmonize "the various parts of a statutory enactment ... by considering the particular clause or section in the context of the statutory framework as a whole." D.04-07-039, citing *People v. Mendoza*, 23 C.4th 896, 907-908 (2000). TracFone’s selective use of language from Commission rulemakings and from General Order 153 ignores the over-arching principles and intent reflected in these rulemakings and Order. The Commission has consistently sought to make the revenue base as broad as possible, to support equally broad surcharge programs. Although individual regulations sometimes appear contradictory, three themes emerge as consistent throughout the Commission’s rules and decisions relating to public purpose surcharge and user fee funds: (a) *all telephone corporations* have the duty to remit such surcharges and fees; (b) the revenue base should be as broad as possible; and (c) the assessment of these fees must be “competitively neutral.”

CPSD requests the Commission’s indulgence for a brief history of universal service surcharges which bears out these contentions. Universal service programs as they exist today trace their lineage back to the 1983 Moore Universal Telephone Service Act (which codified earlier efforts to subsidize, through rate structures, telephone service for

⁷⁹ As shown below, previous decisions had referred to the surcharge as an “all end-user surcharge” (AEUS).

low-income customers).⁸⁰ The Moore Act authorized the Commission to set a “tax” of up to 4% on all interLATA intrastate telecommunications services, as well as other intrastate telecommunications telecommunications services if necessary.⁸¹ All telecommunications “service suppliers” were subject to the tax, which was to be set by the Commission but collected by the State Franchise Tax Board.⁸²

In D.87-10-088, the Commission moved from tax to surcharge funding, and rejected a move by certain competitive carriers to exclude themselves from the surcharge obligations, noting instead “the Legislature has clarified that ULTS *should be supported equitably by all telephone corporations.*”⁸³ For essentially the same reason, the Commission also denied the motion of the Cellular Resellers Association to be dismissed from the Investigation, noting that “Cellular Utilities ... are telephone corporations and, as such, should participate in subsidizing the ULTS program as the need arises.”⁸⁴

In 1996, the Legislature added that the Commission’s program, particularly its High-Cost Fund-A, should be “competitively neutral, and broad based.”⁸⁵

In 1994, the Legislature passed AB 3643, which called on the Commission to “design and recommend equitable and *broad based* subsidy support for universal service in freely competitive markets.”⁸⁶ The Commission’s design was to be “consistent” with “principles” that “telecommunications services should be provided at affordable prices to all Californians,” and “include a *broad based and competitively neutral* funding

⁸⁰ D.84-04-053, 1984 Cal. PUC LEXIS 1314, *1, *passim*.

⁸¹ *Id.*

⁸² *Id.* at *25.

⁸³ 1987 Cal. PUC LEXIS 336, *18.

⁸⁴ *Id.* at *23-24.

⁸⁵ SB 207, adopted 1996 Cal Stats, ch. 750; codified at P.U. Code § 739.3(c).

⁸⁶ This has been a consistent goal of the Legislature in conjunction with surcharge programs. *See, e.g.*, AB 3643, Ch. 278 (Polanco/Moore, 1994), at Section 2(b)(2) (“In order to avoid an ‘information rich’ and ‘information poor’ stratification, there must be an ongoing evaluation of which services are deemed essential and therefore a part of universal service”).

mechanism, and be imposed in a manner that clearly identifies the source of the subsidy.”⁸⁷

In D.96-10-066, the Commission promulgated rules implementing AB 3643, adopting an “all end-user surcharge (AEUS), and providing that “*All telecommunications carriers are required to charge all end users the CHCF-B surcharge as set by the Commission, except for ULTS billings, coin-sent paid calling, debit card messages, [and other exceptions not applicable to or claimed by TracFone].*”⁸⁸

In 1998, the Commission instituted a Rulemaking to update G.O. 153 and incorporate a number of *de facto* changes to the ULTS program. In Decision 00-10-028, the Commission adopted a new version of GO 153, which plainly stated that “*All carriers shall assess, collect, and remit the ULTS surcharge.*”⁸⁹ It required “[e]ach telecommunications carrier” to “annually submit to TD an estimate of the carrier’s projected gross revenues subject to the ULTS surcharge for the following year.”⁹⁰ It included “[a]ll end-user intrastate telecommunications, whether tariffed or untariffed,” to be included with in the ULTS revenue base.”⁹¹ Finally, it required all carriers to “report and remit their ULTS surcharge revenues based on intrastate end-user billings less estimated uncollectibles.”⁹² The current version of G.O. 153 has substantially the same language, as set forth above.

It is this “end-user billings” language on which TracFone relies, and here is the crux of the dispute. Even if one were to assume, however, that there is a conflict, that conflict exists in the first instance because TracFone has chosen to offer a prepaid product without traditional billing (see discussion under “impossibility” below). A conflict between ¶9.1 and ¶ 10.3.1 in the 2000 version G.O. 153 (or ¶10.1 and ¶11.3.1 in

⁸⁷ AB 3643, adopted 1994 Cal Stats ch. 278, at §§ 2(a)(3).

⁸⁸ D.96-10-066, 1996 Cal. PUC LEXIS 1046, *426-27.

⁸⁹ D.00-11-028, 2000 Cal. PUC LEXIS 838, at Appendix B, GO 153 at ¶9.1.

⁹⁰ *Id.* at ¶ 9.4.1.

⁹¹ *Id.* at ¶ 9.5. It again contained the exception for coin calling and debit cards.

⁹² *Id.* at ¶ 10.3.1.

the current version) is not insoluble. The intent of the public purpose programs is clear, to subsidize universal service; allowing a whole class of carriers to opt out by choosing a prepaid model would subvert that intent. As the Commission stated in D.04-07-039 (*GTE/Bell Atlantic Intervenor Compensation*): the Commission must “compl[y] with the basic tenets of statutory construction, i.e., reading the statute as a whole and harmonizing potentially conflicting provisions, rather than considering language in isolation.” The Commission cited these further rules of construction:

* The fundamental task of statutory construction is to determine the intent of the legislators in order to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272; *People v. Peters* (1991) 52 Cal.3d 894, 898; *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572; *People v. Murphy* (2001) 25 Cal.4th 136, 142.);

* Statutes must be harmonized, both internally and with each other, to the extent possible. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.) ... [W]e do not consider the statutory language "in isolation." Rather, we look to "the entire substance of the statute . . . in order to determine the scope and purpose of the provision . . ." That is, we construe the words in question "in context, keeping in mind the nature and obvious purpose of the statute. . . ." We must harmonize "the various parts of a statutory enactment . . . by considering the particular clause or section in the context of the statutory framework as a whole."

* Where a claim persists of ambiguity or conflict between regulatory or statutory provisions or interpretations, it is sometimes necessary to review the legislative history, which should be considered in ascertaining legislative intent. (*California Mfrs. Assn. v. PUC* (1979) 24 Cal.3d 836, 844; see also *Mildred Lewis v. Karen Eleanor Ryan* (1976) 64 Cal.App.3d 330, 333-334.)⁹³

The brief history cited above makes clear that the Commission has always intended that all telecommunications carriers offering full service – i.e., dialtone, a number on which calls can be received, and in most cases some form of telephone

⁹³ D.04-07-039, 2004 Cal. PUC LEXIS 339, * 9 ff (some citations omitted).

equipment -- be part of the billing base. Thus the Commission must now construe – if at all possible -- billed revenue to include revenue collected via sales at retail outlets. None of the proceedings described above, or any other of which CPSD is aware, have created an exception to the “all carriers” rule for prepaid services that do not appear on a bill. Nor does CPSD believe that there is necessarily a conflict here. Even a customer who purchases a TracFone at Walgreens gets a bill and receipt, and there is no reason that this bill and receipt cannot satisfy the billed revenue requirement.

Moreover, if TracFone had found it as impossible as it now says it is to remit public purpose surcharges, it could have requested a waiver pursuant to the terms of GO 153 itself, which provides that “Carriers and utilities may request a waiver by submitting a written waiver request to the Director of TD. The request must provide a thorough explanation for why the waiver is necessary.”²⁴ By failing to do that, TracFone deprived the TD, and the Commission, of any forum to resolve what TracFone now says is an irreconcilable conflict.

c) The Statutory Authorization for Public Purpose Surcharges, Read as a Whole, Reflects A Legislative Intent to Include All Carriers’ and their Customers Within the Surcharge Revenue Base.

Section 739.3(c) of the Public Utilities Code requires that the rural (high-cost) support programs be “competitively neutral and broadbased.” Section 431 requires that “telephone, telegraph ... and every other public utility providing service directly to customers or subscribers” shall pay user fees. Sections 275(b), 276(b), 277(b), and 280(c) relating to the CHCF-A, CHCF-B, ULTS, and CTF funds respectively, are predicated on “all revenues collected by telephone corporations in rates.” The Legislature has several times voiced its support for a “broad-based” and “competitively neutral” surcharge revenue base.²⁵

²⁴ GO 153, at ¶ 14.2 (formerly ¶ 13.2).

²⁵ See, e.g., P.U. Code § 739.3, and history set forth above.

It is clear that the statutory architecture authorizing the Commission's universal service programs, read as a whole, is based on the notion that all telecommunications carriers will participate. There is, on the other hand, no hint of any authorization for an exemption of prepaid wireless carriers from these surcharge obligations.

d) User Fees Pursuant to Sections 431-35 of the Public Utilities Code Are Collected Without Reference to "Billed Revenue."

Even if TracFone were correct that certain of the surcharge programs would not apply to prepaid wireless carriers, it offers no argument at all why section 431-35 user fees should not apply – save for its claim that it is not a public utility. Section 435 makes clear that these fees are derived directly from “gross intrastate revenues,” with no reference to the intermediating concept of “billed revenue.”

2. TracFone Had Notice of its Obligations.

The ACR identifies “notice” as a possible issue here⁹⁶ (if so, this would come as an affirmative defense to the duty to collect and remit surcharges and fees). It is undisputed that TracFone received explicit and particularized notice that it, a reseller of wireless telephone services, would be required to pay surcharge and fees as a condition of operating in California. *See* Undisputed Facts 1-5 above.

Moreover, all carriers are deemed to have knowledge of the law, just as all citizens are deemed to have knowledge of the law. As the Commission held in D.91-04-045,

Although applicant pleads ignorance of our regulatory requirements, it has long been a principle of law that *ignorantia legis neminem excusat* [n6: Ignorance of the law excuses no one]. Those in charge of regulated entities have a duty to educate themselves as to their legal responsibilities under our regulatory scheme.

TracFone cannot claim, either as a matter of fact or law, that it had no notice of its surcharge and fee collection and remittance obligations.

⁹⁶ ACR at 5.

If TracFone claimed that it was unclear about the notice provided to it in 1997, or that this notice had become inapplicable due to TracFone's decision to enter into the prepaid marketplace, it could have formally sought Commission clarification. As set forth below, an exemption for prepaid providers would have been a substantive change in GO 153, and required a Commission decision, not simply the verbal say-so of a Commission staff person.

3. Staff Did Not Grant TracFone a Waiver.

TracFone conflates the notice issue with the waiver issue. TracFone appears to argue that because it had sought (and secured?) Commission agreement that, as “a prepaid service provider with no billed revenues,” it had no obligation to remit or collect surcharges *or* fees, it therefore had no notice that such fees would be required.²⁷

As a general matter, the Commission only speaks through its decisions. As stated in D.00-09-042 (Cal Water): “it is well settled that the Commission speaks only through its written decisions. Applicants have cited no authority and we are aware of none for the proposition that oral comments made by individual commissioners affect the validity of the decision.

Nor can the Commission's failure to respond to TracFone's letter to Mr. Mirza be construed as Commission acquiescence in the view expressed in that letter. D.06-05-041 (*851 Gain on Sale* proceeding), 2006 Cal. PUC LEXIS 291, *125 (“Commission silence in response to the notice should not be interpreted as consent to the sale”); D.94-10-041 (*Edison* rate case), 1994 Cal. PUC LEXIS 691, *25 (rejecting Edison's claim that Commission silence in the face of Edison's reporting constituted “an indication of [its] compliance with Commission orders”).

Here, specific procedures in GO 153 allow a carrier to seek a waiver or amendment to the surcharge collection rules. TracFone did not avail itself of these procedures.

²⁷ See, e.g., TracFone's September 3, 2010 Motion for Evidentiary Hearings and Discovery, at 9.

4. TracFone Suffered From No Legal Inability or Legal or Factual Impossibility of Performance.

In addition to claiming that the surcharge and fee statutes and regulations do not apply to it, TracFone from time to time has suggested that it would be impossible for it to comply with the statutes and regulations as written, even if they were found to apply as a matter of law. The ACR suggests this issue with its question about “the existence of a Commission-approved collection procedure.”⁹⁸

TracFone’s impossibility claim must fail as a matter of law. California Civil Code § 1597 provides an objective criterion: “Everything is deemed possible except that which is impossible in the nature of things.” It is necessary for defendant to show affirmatively that performance was impossible despite the exercise of skill, diligence, and good faith. *Oosten v. Hay Haulers Dairy Employees and Helpers Union*, 45 Cal. 2d 784, 789 (1955) (contractor not excused “unless he shows affirmatively that ... in spite of skill, diligence and good faith on his part, performance became impossible or unreasonably expensive”).

As a threshold matter, a regulated entity cannot structure its business so as to evade regulation. D.78171 (*In re ABC Messenger*), 1971 Cal. PUC LEXIS 1244 (business “arrangement cannot be a device to evade regulation”); D9806022, 1998 Cal. PUC LEXIS 347, *20 (failure to keep paperwork “indicative of devices to evade regulation”).

Even if the distributor’s receipt were not considered a bill (and both postpaid and prepaid wireless companies use unaffiliated distributors to reach their customers⁹⁹), TracFone has plenty of opportunities to provide customer with a bill (and even traditional billed service can be either postpaid or prepaid). In order to activate a TracFone, the customer must either call customer service or log on to the website.¹⁰⁰ When a customer activates, s/he may be required to provide “customer identifiable information” which

⁹⁸ ACR at 5.

⁹⁹ D.04-09-062 (*Cingular*), Slip Op. at 6 (“The indirect distribution network comprises exclusive agents, exclusive dealers, non-exclusive dealers and non-exclusive national retailers”).

¹⁰⁰ Tan-Walsh Decl’n, Attachment X, TF Unit 002 (“How to Activate Card”).

TracFone reserves the right to use “for various purposes, including but not limited to, billing purposes.”¹⁰¹ All “Value Plan” customers further agree to provide, “[f]or purposes of identification, billing and marketing ... current, accurate and complete contact and billing information, including your legal name, address, telephone number(s), email address, applicable payment data (e.g., bank account or credit card number), as well as any other information TracFone Wireless may request.”¹⁰² For some of its plans, TracFone actually states that its charges “include[] all wireless taxes and fees that can add up to 20% of most other wireless service plans.”¹⁰³

Furthermore, TracFone pays *federal* universal service surcharges on its interstate revenue.¹⁰⁴ The Code of Federal Regulations provides methods to estimate revenue, safe harbors, and the like to facilitate the payment of federal surcharges. There is no reason that TracFone could not have asked the Communications Division for a “waiver” as set out in GO 153. TracFone contributes to the Federal Universal Service Fund (“USF”),¹⁰⁵ even though USF contributions are similarly predicated on a “... percentage of amount billed to ... residential and business customers.”¹⁰⁶

¹⁰¹ Attachment N.1, at Screenshot 000003, 000022; Attachment X, “How to Activate Card.”

¹⁰² *Id.* at 0000008.

¹⁰³ *See, e.g., id.*

¹⁰⁴ *See* 499A and 499Q Forms (Attachment V).

¹⁰⁵ Information available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Locator/.

¹⁰⁶ According to the FCC Consumer Fact on Universal Service Support Mechanisms:

Companies contribute a certain percentage of the amount **billed** to their residential and business customers for interstate and international calls. The exact percentage that companies contribute is adjusted every quarter based on projected demand for Universal Service Funding. [Emphasis added]

See <http://www.fcc.gov/cgb/consumerfacts/universalservice.html>.

5. Selective Prosecution Arguments Are Not Available Here.

TracFone's claim that "everyone else is doing it," i.e., that "the practices of other prepaid wireless service providers are absolutely relevant here,"¹⁰⁷ apparently triggered the ACR's question regarding the "allegations of "other providers of prepaid wireless service."¹⁰⁸ TracFone linking of its claims of impossibility to assertions of industry-wide non-compliance and claims of selective enforcement echo the arguments of other regulated industries:

Casa Blanca offers a second basis for its constitutional argument of impossibility of compliance with the regulations. This argument is based upon its claim of industry-wide noncompliance with the regulations.

People v. Casa Blanca Homes, Inc. (1984) 159 C.A.3d 509, [532] (district attorney not estopped from enforcing public health regulations under § 17200 merely because it had not sued similar violators); *see also People v. Toomey* (1985) 157 C.A.3d 1, 12 ("equal protection violation does not arise whenever officials 'prosecute one and not [another] for the same act"). The Court in *Casa Blanca* rejected "others are doing it" argument, in language uncannily apropos to TracFone's argument here:

That other nursing homes also violate the regulations is no lawful excuse or evidence of unconstitutionality. Wrongdoing is not excused merely because others engaged in it. Courts have long upheld prosecutorial discretion to select a defendant from a number of wrongdoers. (See *People v. Superior Court (Lyons Buick-Opel-GMC, Inc.)* 70 Cal.App.3d 341 [138 Cal.Rptr. 791].) Whether competitors employ the same or similar methods in their business practices is immaterial to the charge made against Casa Blanca concerning those methods...

A court cannot excuse unfair acts with a claim that business considerations of industry-wide practice justify such conduct. (*International Art Co. v. Federal Trade Commission, supra*, 109 F.2d 393, 397; *Hobby Industry Assn. of America, Inc. v.*

¹⁰⁷ Motion at 9-10.

¹⁰⁸ ACR at 5.

Younger (1980) 101 Cal.App.3d 358, 372 [161 Cal.Rptr. 601].)

Thus, to address directly TracFone's argument and the ACR's query re "other providers of prepaid wireless service," they are irrelevant to this enforcement and collection action.

E. There Are No Triable Issues of Material Fact, and CPSD Is Entitled to Summary Adjudication of the Duty Issue, i.e., a Declaration that TracFone is a Telephone Corporation and Required to Remit Surcharges and Fees.

1. No Material Facts are Disputed.

If the Commission accepts TracFone's self-description as a "reseller" of network services from "over 40 wireless carriers," *or* TracFone's admitted control of the handset by "patented technology" and/or software, *or* sees TracFone's access to the network to activate and manage its customers' accounts as a species of line management, then this Commission *must* find that TracFone is a telephone corporation because "there is no genuine issue as to any material fact' ... that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law." *Aguilar v. Atlantic Richfield*, 25 C4th 826, 844 (2001), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986) (other citations omitted). The first two facts, that TracFone is a "reseller" and that it controls its handsets, are based on TracFone's description of itself, and may not be disputed. TracFone's line management is a reasonable inference from uncontested evidence, and also may be a predicate of summary adjudication.

2. Summary Adjudication of the Duty Issue is Appropriate here

This OII proceeding, at its simplest, is a collection action. It borrows, then, from all collection actions. First, the creditor party must establish that there is a legal duty to pay, through a contract or otherwise. If the creditor cannot establish this fact, the action fails. If the creditor does establish this fact, then the inquiry shifts to the amount owed. This *is* a factual matter, and hearings would be appropriate on this issue. But those hearings will be short and focused. And because they are focused, the issues are more amenable to settlement. Thus, summary adjudication will have accomplished what it is

supposed to accomplish: "...encourage settlement, reduce trial time, save money for the parties, and preserve limited judicial [and administrative] resources." *United Community Church v. Garcin*, 231 CA3d 327, 329 (1991).¹⁰⁹

3. Law and Sound Public Policy Require that *All Telephone Corporations Contribute on an Equitable Basis to Public Purpose Surcharge Funds.*

Federal statutes authorize states to create their own universal service programs and statutory schemes,¹¹⁰ and foresee federal-state cooperation in the administration of these programs.¹¹¹ Universal carrier contributions are a cornerstone of both federal and state programs. "Nonpayment of universal service contributions is an egregious offense that bestows on delinquent carriers an unfair competitive advantage by shifting to compliant carriers the economic costs and burdens associated with universal service."¹¹² A carrier's "failure to file [surcharge remittance forms] ... or its submission of inaccurate or untruthful information causes delay, denies the use of funds for their intended purposes, and results in additional administrative costs."¹¹³

It is contrary to the overarching goals of these inter-related state and federal universal service programs to allow one carrier, or even a class of carrier, not to pay into the universal service funds. Non-surcharge-compliant carriers threaten the "competitive

¹⁰⁹ *UCC v. Garcin* was decided before the 1992 and 1993 amendments to the summary judgment/adjudication statute, and thus has some incorrect statements about burden of proof.

¹¹⁰ See, e.g., 47 USC 254(f).

¹¹¹ Cf. *WWC Holding Co. v. Sopkin*, 488 F3d 1262, 1277 (10th Cir., 2007) ("The structure of Section 254 of the Telecommunications Act delineates a federal universal service program ... and a state's authority to create its own such program") (citations omitted).

¹¹² *In the Matter of Local Phone Services, Inc., Apparent Liability for Forfeiture*, 21 FCC Rcd 9974, ¶ 15 (2006).

¹¹³ *In the Matter of Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight; Federal-State Joint Board on Universal Service; Schools and Libraries Universal Service Support Mechanism; Rural Health Care Support Mechanism; Lifeline and Link-Up; Changes to the Board of Directors for the National Exchange Carrier Association, Inc.*, WC Docket No. 05-195; CC Docket No. 96-45; CC Docket No. 02-6; WC Docket No. 02-60; WC Docket No. 03-109; CC Docket No. 97-21, 22 FCC Rcd 16372, ¶ 9 (2007) [hereinafter *USF Comprehensive Review 2007*].

neutrality” which is a fundamental part of telecommunications regulation at both state and federal level.¹¹⁴ The federal statute contains an “explicit requirement of equitable and nondiscriminatory contributions” to federal universal service, and California’s determination that “all telecommunications carriers must collect and remit” the surcharges.¹¹⁵

IV. CONCLUSION

TracFone is a telecommunications carrier that has, according to the USAC website, been awarded over \$386 million in federal [Lifeline] low-income disbursements over the last three years,¹¹⁶ and it has asked this Commission to certify its eligibility to receive yet more federal funds. Yet it refuses to contribute any of its revenue to support California’s universal service programs. Indeed, it refuses to remit even user fees to the Commission, based solely on the presence of the words “billed revenue” on the transmittal form (regardless of the absence of this qualification in the user fee statutes). The most charitable thing that can be said about this conduct is that TracFone is elevating form over substance.

¹¹⁴ *In the Matter of Federal-State Joint Board on Universal Service, First Report and Order*, 12 FCC Rcd 8776 (1997) (Universal Service First Report and Order), at ¶¶ 45 ff.(competitive neutrality “necessary and appropriate for the protection of the public interest”); P.U. Code § 739.3(c) Commission’s universal service funds for high-cost areas be “suitable, competitively neutral, and broad-based.”

¹¹⁵ *Id.* at ¶ 48.

¹¹⁶ See Attachment W to Tan-Walsh Declaration.

For all of the foregoing reasons, the Commission should summarily adjudicate the duty issue in this case. CPSD seeks a declaration that TracFone is a public utility telephone corporation, and that it is therefore required to collect and remit public purpose surcharges and user fees to the Commission.

Respectfully submitted,

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September 17, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **MOTION OF CONSUMER PROTECTION & SAFETY DIVISION FOR SUMMARY ADJUDICATION OF THE DUTY ISSUE; DECLARATION OF LLELA TAN-WALSH IN SUPPORT (PUBLIC VERSION)** to the official service list in **I.09-12-016** by using the following service:

E-Mail Service: sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

U.S. Mail Service: mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on September 17, 2010 at San Francisco, California.

/s/ Nancy Salyer

Nancy Salyer

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