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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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)

**RESPONSE OF TRACFONE WIRELESS, INC. TO MOTION OF
CONSUMER PROTECTION & SAFETY DIVISION TO STRIKE PORTIONS OF
THE TESTIMONY OF MESSRS. POLLAK AND SALZMAN**

Pursuant to Rule 11.1(e) of the Commission's Rules of Practice and Procedure, TracFone Wireless, Inc. ("TracFone") hereby responds in opposition to the Motion of Consumer Protection & Safety Division ("CPSD") to Strike Portions of the Testimony of Messrs. Pollak and Salzman filed on January 10, 2011 ("Motion to Strike"). In the Motion to Strike, CPSD attempts to strike substantial portions of TracFone's testimonial presentation and deny it the right to present narrative testimony explaining in detail its position on all of the issues in this case. CPSD's Motion to Strike should be denied in its entirety.

I. IMPACT OF THE ALJ'S E-MAIL OF JANUARY 19, 2011 ON THE MOTION TO STRIKE AND THIS PROCEEDING

On January 19, 2011, ALJ DeAngelis sent an e-mail to the service list in this proceeding. In that e-mail, the ALJ indicated that she would issue a ruling within the next few days that: (a) there no triable issues of material fact exist as to whether TracFone operates in California as a public utility or as a telephone conversation; (b) as a matter of law, TracFone is a public utility and telephone corporation; and (c) the upcoming hearings will not address this issue. Instead,

ALJ DeAngelis indicated that the hearings will focus on whether the public purpose program (“PPP”) surcharges and the user fee apply to TracFone’s service as a public utility and telephone corporation.

At the time of the e-mail, TracFone was finalizing this Response and the concurrent Motion to Strike Portions of the Testimony of CPSD Witness Llela Tan-Walsh and had planned to file both documents on January 19, 2011. In light of the announced ruling, however, TracFone anticipates that some action will need to be taken to identify the portions of the testimony submitted by TracFone and CPSD in this proceeding that will not be addressed in the hearing. For those portions of the testimony, TracFone submits that the Motion to Strike is now moot.¹ Similarly, although TracFone files its Motion to Strike Ms. Tan-Walsh’s testimony concurrently with this response, it acknowledges that some of the sections which it moves to strike address topics that will likely not be considered at the hearing. However, given the imminence of the hearing, TracFone felt it necessary to submit this Response and the companion Motion to Strike.²

Although TracFone has obviously not seen the ruling previewed in ALJ DeAngelis’ e-mail and, for example, does not know yet if such ruling will be in the form of an ALJ’s Ruling or as Proposed or Presiding Officer Decision, it anticipates that it will avail itself of any available

¹ Based on its review of the motion and testimony, TracFone believes that the following sections of its testimony subject to CPSD’s Motion to Strike address issues related to whether the PPP surcharges and the user fee apply to TracFone’s service as a public utility and telephone corporation: Testimony of F.J. Pollak 5:20-21; 6:6 – 7:7; 11:12 – 12:5; 12:8-13; 13:12; 14:6; 16:15; 16:16 – 17:19; 17:20 – 18:12; 18:7-12; 21:10-19; 21:20-22:11; 22:12 – 23:3 and all of the Testimony of Richard Salzman. The other testimony subject to the Motion to Strike generally relates to the public utility issue.

² On the evening of January 19, 2011, TracFone suggested to CPSD that the two parties attempt to resolve this issue and propose a solution to the ALJ. CPSD has agreed to discuss this further with TracFone in the near future.

options to seek reconsideration of the ruling from the full Commission. Accordingly, to preserve the record in the event that the Commission reverses the ALJ's decision, TracFone requests that the portions of the testimony addressing the public utility issue be treated as an offer of proof under Rule 13.6(e). To the extent that CPSD similarly wishes to preserve its testimony, TracFone will not object to a similar Offer of Proof from CPSD.

II. BACKGROUND AND INTRODUCTION

In the September 30, 2010 Scoping Memo (at 3), Assigned Commissioner Grueneich ruled that the issues to be considered in this first phase of this proceeding are as follows:

1. Whether Public Purpose Program (PPP) surcharges and user fees are applicable to TracFone's prepaid wireless service.
2. If so, whether TracFone violated specific laws, rules, orders or directions of the Commission in failing to collect and remit the PPP surcharges and user fees applicable to its prepaid services.

In her January 19, 2011 e-mail, the ALJ has indicated that the hearing in this phase of the proceeding will focus on whether the public purpose program surcharges and user fees apply to TracFone's service. To address these issues, the Commission will first need to find that user fees and the PPP surcharges are applicable to any prepaid wireless service, including a determination whether PPP surcharges are excluded by the express exclusion in GO 153 for debit card services, before turning to any special circumstances involving TracFone's prepaid wireless service. The resolution of these issues requires a factual understanding of how prepaid wireless service is provided and an application to the existing regulatory model.

On October 8, 2010, CPSD submitted one page of "testimony" from witness Llela Tan-Walsh in which she provided no testimonial evidence, but rather incorporated the Staff Report along with the exhibits attached thereto and the exhibits attached to her declaration in support of the Motion for Summary Adjudication. Although CPSD was provided the opportunity to file

additional direct testimony, it did not do so. Similarly, CPSD did not submit any Reply Testimony on December 9, 2010.

On November 18, 2010, TracFone filed the testimony of its President and Chief Executive Officer, F.J. Pollak, and its Executive Vice President and General Counsel, Richard B. Salzman. In its testimony, TracFone provided a full explanation of the facts which underlie its position as to why it is not subject to the PPP and user fees and responded to the Staff Report and the exhibits contained in Ms. Tan-Walsh's testimony. In doing so, Messrs. Pollak and Salzman provide a comprehensive narrative in which facts are tied to the legal issues in this proceeding and the overall basis of TracFone's action to date are explained to the Commission. Neither Mr. Pollak nor Mr. Salzman is offered as an expert on California law. However, their testimony necessarily discusses California law, including GO 153, to place the factual discussion in context explaining why TracFone took certain actions and operated its business as it has.

Nearly two months after TracFone filed its testimony and only three weeks before the hearing, CPSD filed its Motion to Strike on January 10, 2011. If granted, a significant portion of the TracFone's testimony, including important factual information upon which its legal positions are based, would be stricken. The Motion to Strike consists primarily of a chart, pages 1 to 8, in which CPSD references testimony, then quotes or paraphrases one small portion of the targeted testimony and slaps on a "reason" why it should be stricken. CPSD has made no effort to identify the specific language and, in some cases, suggests removal of several pages of testimony based on, for example, an unexplained allegation that the testimony includes legal conclusions. The legal argument portion of the Motion appears almost as an afterthought and also makes little effort to tie the argument to any specific testimony. As such, CPSD has not justified its extreme attack on TracFone's testimony and its motion should be denied in its entirety.

Alternatively, as discussed in Section II.C below, the same standards which CPSD would impose on TracFone must also apply to the testimony offered by Ms. Tan-Walsh. To that end, TracFone has concurrently filed a Motion to Strike portions of Ms. Tan-Walsh's testimony. As explained therein, TracFone believes the best course is to allow the testimony to stand and to permit the ALJ and the Commission a full opportunity to hear both sides of the important issues from witnesses. If, however, CPSD's Motion to Strike TracFone's testimony is given any consideration at all, equity requires that CPSD's own testimony be judged using CPSD's own standards.

III. ARGUMENT

A. The Motion to Strike Should be Denied

1. Having Filed Limited Testimony Itself, CPSD Now Seeks to Prevent TracFone from Presenting Its Full Case.

As part of CPSD's strategy, it decided not to introduce meaningful testimony setting forth the factual basis of its position. For its direct case, CPSD simply incorporated by reference the Staff Report and tacked on various exhibits without any testimony. In the most egregious example, Ms. Tan-Walsh attached a cash register receipt as Exhibit X but declared, without any testimonial explanation, that that the piece of paper was actually a "true and correct copy of a bill and receipt."³ Even after TracFone filed its direct testimony CPSD elected not to file any reply testimony. As such, TracFone's factual evidence on the remaining issues stands unrefuted by CPSD.

Now with hearings to begin in less than two weeks, it appears that CPSD may regret its tactical decision resulting in this effort to eliminate TracFone's right to present its case to the

³ September 16, 2010 Tan-Walsh Declaration, ¶ 26. Ms. Tan-Walsh provides no explanation for this controversial mischaracterization of what is clearly a receipt and not a telephone bill.

Commission. If granted, CPSD's motion would eviscerate TracFone's testimony, removing large portions of the factual testimony.⁴ Already, CPSD's failure to present its case with testimony from informed witnesses with firsthand knowledge of the facts upon which its case is based has prejudiced TracFone by eliminating its opportunity to cross-examine such witnesses.⁵ This is fundamentally wrong and would, once again, threaten TracFone's due process rights to present factual evidence it believes necessary to present its case. This is not a case in court before a jury; rather it is before an ALJ. The ALJ and the Commission itself are well-equipped to place the weight they deem appropriate to the testimony.

2. Without Explanation, CPSD Seeks An Exception From The Usual Practice Of The Commission Regarding Prepared Written Testimony.

In moving to strike much of TracFone's direct testimony, CPSD now seeks, without explanation, an exception to the usual practice of the Commission regarding prepared testimony.

"As a general matter, the preference at the Commission is not to strike timely prepared written

⁴ In its Motion to Strike, CPSD's specifically moves to strike Attachment 2 to the Testimony of Richard Salzman on p. 6. TracFone assumes that since this Attachment is specifically referenced in the Motion, CPSD is not moving to strike any other Attachments to the Testimony of Mr. Pollak or Mr. Salzman. In the event that any portion of the narrative testimony is stricken, TracFone requests that the ALJ permit a reference to the document to remain and the attachments to be included in the evidentiary record of this proceeding. For example, with Attachment 4 to the Testimony of Richard Salzman (7:7), the sentence "A copy of the OIR is attached hereto as Attachment 4."

⁵ TracFone anticipates that cross-examination of Ms. Tan-Walsh will show that she has actually had little involvement in this investigation and has instead served mostly as a conduit for CPSD counsel to include limited documentary evidence that is then used to support an allegedly "legal" point. For example, Exhibit X, the Walmart receipt was used heavily in CPSD's Reply to the Motion for Summary Adjudication, p. 16, to "prove" that TracFone provides a "billed" service but there is no explanation from a witness in this proceeding why the receipt was deemed to be both a bill and a receipt. Similarly, Mr. Charles Christiansen, who is not a witness in this proceeding, is the author of or heavily involved with many of the documents attached as exhibits to the Tan-Walsh testimony. For example, Exhibit F now offered by Ms. Tan-Walsh is an email from Mr. Christiansen to Mr. Brecher, one of TracFone's counsel in which Mr. Christiansen states a legal conclusion that "[p]repaid wireless service has not been excluded from payment of [PPP] surcharges." The case referenced however does not address prepaid wireless services.

testimony. Instead, the preferred practice is to admit the testimony into the record, but then to afford it only so much weight as the presiding officer considers appropriate.”⁶ Moreover, under California Public Utilities Code section 1701(a)⁷ and Commission Rule of Practice and Procedure 13.6(a),⁸ the technical rules of evidence need not apply in hearings before the Commission, provided that the substantive rights of parties are preserved.⁹ In fact, Commission decisions demonstrate that the Commission has wide discretion in conducting hearings regarding the admission of testimony, including testimony that incorporates legal conclusions.¹⁰

Here, in the usual custom of prepared testimony before the Commission, the direct testimony of TracFone’s C.E.O F.J. Pollak and Executive Vice President and General Counsel Richard Salzman present a narrative that places the evidentiary facts regarding TracFone’s

⁶ Administrative Law Judge’s Ruling Denying Motion of Division of Ratepayer Advocates to Strike Rebuttal Testimony. July 12, 2006. *In the Matter of the Application of Golden State Water Company for an order authorizing it to increase rates for water service by \$14,926,200 or 15.77% in 2007; by \$4,746,000 or 4.3% in 2008; and by \$6,909,300 or 6.02% in 2009 in its Region II Service Area.* Application 06-02-023. (ALJ found that factors argued by DRA did not justify an exception to the Commission’s usual practice.)

⁷ California Public Utilities Code section 1701(a) states “All hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission.”

⁸ Rule of Practice and Procedure 13.6 Evidence: “(a) Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved.”

⁹ See also Witkin, California Evidence, Introduction § 55 (4th ed. 2000) (stating that a basic principle recognized in case law and statutes is that in administrative proceedings “the admission of evidence is not controlled by normal trial rules.”)

¹⁰ See e.g., *Pac-West Telecomm, Inc., Complainant, vs. AT&T Communications of California, Inc., et al.* D.06-06-055. 2006 Cal. PUC LEXIS 248. Decision notes that AT&T had failed to file any testimony on the compensation issue but instead moved to strike testimony on the issue by Pac-West on the grounds that the testimony was “legal argument” and addressed issues not included in the scoping memo. *13. The ALJ denied the motion to strike the testimony. *14.

operations, its communications with the Commission and the business decisions it made based on its understanding of the applicable regulations in the context of the issues to be decided in this proceeding. The testimony presented is based on the witnesses' personal knowledge of the facts and the history of this proceeding in marked contrast to the limited evidence put forth by CPSD. TracFone neither purports to be offering its witnesses as experts on the "thought processes of the Commission," as CPSD alleges,¹¹ nor seeks to somehow "imply" legal conclusions that preempt the Commission from ruling on the legal issues in this case, as CPSD asserts.¹² Moreover, the direct testimony of TracFone's C.E.O. and its Executive Vice President and General Counsel will be subject to cross-examination at the hearing, at which time the Commission can decide for itself the credibility of the witnesses and the sufficiency of the evidence presented. TracFone is confident that the ALJ and the Commission will be able to consider the evidence put forward by both parties and give such evidence its proper weight.

3. CPSD's Motion To Strike On The Grounds That The Testimony Contains Legal Conclusions Should Be Denied Because It Is Unsupported By Its Legal Arguments.

CPSD seeks to strike a substantial portion of TracFone's prepared written testimony on the grounds that the testimony is comprised of "barely-disguised" legal conclusions rather than evidentiary facts. CPSD's Motion to Strike on these grounds should be denied because it is unsupported by its legal argument and, in fact, seeks to strike testimony that contains evidentiary facts or testimony helpful to an understanding of these facts.

¹¹ CPSD Motion to Strike, p. 9.

¹² CPSD Motion to Strike, p. 9.

a. CPSD’s Cited Legal Authorities Fail to Support its Motion

CPSD cites no Commission decisions or rulings in support of its argument that the evidence submitted by TracFone is not admissible in Commission hearings. Instead, it cites to a general treatise on declarations or affidavits in court “proceedings without trial” (*i.e.*, summary judgment or adjudication) and three readily-distinguishable California cases that involve summary judgment motions and/or expert testimony, neither of which is at issue here.¹³

For example, *Guthrey v. State of California* affirms a grant of summary judgment in which the trial court found that plaintiff had failed to present any admissible evidence disputing defendants’ facts.¹⁴ Based on the rules of evidence, the trial court, in this sexual harassment case, had excluded declarations that contained no evidentiary facts.¹⁵ Moreover, the plaintiff’s own declaration was objectionable both because it was not based on evidentiary facts and because it was contradicted by the plaintiff’s own deposition testimony.¹⁶ The case is distinguishable from the proceeding here in that it involves declarations, containing no admissible evidence, submitted in a trial court, to which the rules of evidence apply differently, in response to a motion for summary judgment.

The next case cited by CPSD is also distinguishable as it involves the admission of expert testimony on a matter of pure law, here immigration law, which the appellate court ruled was properly rejected because the issue was not dispositive. *In re Marriage of Dick* involved an appeal from a dissolution of marriage proceeding in which the husband was a non-immigrant

¹³ CPSD Motion to Strike, pp. 8-9.

¹⁴ *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1112, 1127.

¹⁵ *Id.* at 1119.

¹⁶ *Id.* at 1120.

alien.¹⁷ On appeal, the wife stated that the court had erred in excluding her **expert** on immigration law.¹⁸ The court stated that “whether or not to permit expert testimony is largely *within the discretion* of the court. [citation omitted]. Although strict application has been criticized, the general rule is that expert testimony on domestic law is usually inadmissible.”¹⁹ While acknowledging the discretion of the trial court to permit such expert testimony, the court affirmed the trial court’s denial on the grounds that the husband’s immigrant status was not dispositive of his residence status and that the court could have properly determined that the proffered expert testimony was not necessary.²⁰

Finally, *Benavidez v. San Jose Police Department* is distinguishable in that it involves the declaration of an expert in a motion for summary judgment.²¹ The court found that the expert’s conclusions in his declaration were based on incompetent evidence and offered a legal conclusion on the issue of whether a “special relationship” had been created between police officers and a victim of domestic abuse.²² The court stated that “[c]ourts must be cautious where an expert offers legal conclusions as to ultimate facts in the guise of an expert opinion.”²³ The court rejected the declaration to the extent the expert drew legal conclusions.²⁴ In contrast, neither the testimony of Mr. Pollak nor Mr. Salzman have been offered as expert opinions.

¹⁷ *In re Marriage of Dick* (1993) 15 Cal.App.4th 144, 151.

¹⁸ *Id.* at 157.

¹⁹ *Id.* (emphasis added)

²⁰ *Id.*

²¹ *Benavidez v. San Jose Police Department* (1999) 71 Cal.App.4th 853, 864.

²² *Id.* at 864-65.

²³ *Id.* at 865 (citation omitted).

²⁴ *Id.*

b. CPSD Provides No Analysis Of The Specific Testimony It Broadly Seeks To Exclude.

Further, CPSD seeks to strike most of TracFone’s written testimony as “legal conclusions” without any real explanation or analysis of the specific testimony challenged. Commission Rule of Practice and Procedure 13.6 states that objections to the admission of evidence shall be stated briefly,²⁵ but that hardly seems to justify no explanation at all when seeking to strike most of TracFone’s testimony prior to hearing. In its chart, CPSD merely appends its objections as “labels” to the challenged testimony.

In fact, much of testimony challenged by CPSD as “legal conclusions” encompass important evidentiary facts.²⁶ In addition, many of the challenged “legal conclusions” are actually evidentiary facts regarding TracFone’s business operations and practices, regardless of whether the same “terms” are used in the language of the governing statutes. For example, TracFone’s testimony addresses issues whether customers receive bills or invoices from TracFone; whether TracFone offers debit card services; whether TracFone has any retail outlets in California; or whether a letter received by TracFone from the Commission referenced the debit card exception.²⁷ Necessarily, an explanation of TracFone’s business operations, practices, products and services requires the use of commonly-used terms such as “retailer,” “bill,”

²⁵ Rule of Practice and Procedure 13.6 Evidence: “(b) When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly.”

²⁶ See e.g., Testimony of F.J. Pollak, pp. 16:16-17:19, which is replete with evidentiary facts concerning TracFone’s business operations including, but not limited to facts “Coin –sent paid services and debit card calling services are non-billed services” (17:3-4); “customers purchase cards for stated amounts of money which provide the purchaser with stated amounts of telephone service” (17:7-9); “As they use the airtime from the purchased debit cards for telephone calls, the balance of prepaid service is debited or decremented with each use (17:11-12).

²⁷ See Testimony of F.J. Pollak, pp. 5:20-21; 11:13; 14:6. See Testimony of Richard B. Salzman, pp. 6:3-4.

“receipt,” and “invoice.” The use of such terms does not transform every statement into a legal conclusion. Similarly, another large part of the testimony CPSD challenges includes opinions of the witnesses based on the facts in the testimony as part of the narrative that in no way constitute legal conclusions.²⁸ Just because a sentence can be construed as a witness’ opinion does not automatically make it a legal conclusion. CPSD’s does not object to the testimony as “opinion,” but solely on the grounds of “legal conclusion.”

Given the volume of testimony that CPSD seeks to have stricken, TracFone responds to each individual challenge in a modified version of CPSD’s chart below in Section B. However, CPSD’s Motion to Strike TracFone testimony on the grounds that the testimony is not admissible as “legal conclusion” should be denied in its entirety because it is unsupported by CPSD’s legal argument.

4. Factual Evidence About Other Carriers’ is Critical to Analysis of Whether the PPP Surcharges are Applicable to Prepaid Wireless Providers and Is Not Part of a “Selective Prosecution” Argument

CPSD’s second broad attack is on the portion of Mr. Salzman’s testimony in which he presents factual and documentary evidence related to the practices and statements of other prepaid wireless carriers; the Commission’s own investigation of what other prepaid wireless carriers do or not do in terms of PPP surcharge collection and remittance; and the rulemaking promised by the Commission in July 2010 to be opened in the near future to look at the issue of whether PPP surcharges are applicable to prepaid services on an industry-wide basis.²⁹ The sole support for this portion of the motion to strike is a reference to a discovery ruling earlier in this

²⁸ See e.g., Testimony of F.J. Pollak, pp. 17:20 – 18:17 explaining how TracFone’s debit cards work in comparison to other debit cards.

²⁹ Specifically, CPSD moves to strike pages and lines 2:17-3:2, 8:1-20, and 16:17-23:3 based only on a relevancy argument that the Commission should not care how other prepaid wireless providers have acted under GO 153. CPSD Motion, pp. 5-7 and 10.

proceeding denying TracFone's motion to compel additional discovery of the Commission's investigation of other carriers' practices.³⁰ While this ruling foreclosed additional discovery on this topic, it certainly did not preclude TracFone from submitting testimony based on information already available to it through prior disclosures or statements on the record in related Commission proceedings.

No matter how many times CPSD repeats its claim that this a selective prosecution argument, Mr. Salzman's testimony is ***not*** offered in this proceeding to support a "selective prosecution" argument and CPSD's reliance on *People v. Casa Blanca Convalescent Homes, Inc.*³¹ case is inapposite to the circumstances before the Commission in the instant proceeding.³² In *Casa Blanca*, the State of California had brought a civil action against a nursing home for violations of established nursing home regulations supported by evidence showing that the defendant had mistreated its elderly patients.³³ In its defense, Casa Blanca argued that the fact that other nursing home providers also violated the law but were not prosecuted made the State's prosecution of its violations unconstitutional.³⁴ Under those circumstances, the court correctly

³⁰ CPSD misquotes the statement to make it sound like a broader ruling than it was. The correct statement from the October 28, 2010 ALJ's Ruling Denying TracFone's Motion to Compel is "CPSD's references to the practices of other carriers are irrelevant to the issues presented in this proceeding." CPSD Motion to Strike, p. 10.

³¹ *People v. Casa Blanca Convalescent Homes* (1984) 159 Cal.App.3d 509

³² The process leading to the ALJ Ruling at issue was rushed. TracFone filed its Motion to Compel on October 13, 2010. CPSD filed its Response to the Motion on the afternoon of October 19, 2010. The following morning, counsel for TracFone requested leave to file a reply to the CPSD response. Such request was denied by the ALJ. As a result, the ALJ Ruling upon which CPSD relies was made with no opportunity for TracFone to provide argument on the shortfalls in CPSD's selective prosecution argument.

³³ *Casa Blanca Convalescent Homes*, 159 Cal.App.3d at 515.

³⁴ *Id.* at 527-28.

held that where there is clear evidence of wrongdoing, the fact that it did not prosecute all wrongdoers is not material.³⁵

The current situation is entirely different from *Casa Blanca*. There, the existing regulations were clear and their applicability to all nursing homes was not in dispute. Here, the Commission is faced with an issue of first impression on how prepaid wireless service fits into the existing regulatory model and particularly whether the exclusion expressly stated in GO 153 for debit card service includes debit card services provided by prepaid wireless service providers as well as by prepaid wireline service providers. TracFone (and, as shown in Mr. Salzman's testimony, other major providers of wireless debit card services) consider that the exclusion applies to their debit card services. CPSD disagrees. To resolve this issue, the ALJ and the Commission should have before them a record which includes all the facts available to it on this topic and should consider the legal arguments presented by TracFone, by CPSD, and by other interested parties.³⁶

With the issue of PPP surcharges, the question whether such surcharges apply to TracFone prepaid wireless service necessarily requires the Commission to determine first whether PPP surcharges are applicable to *any* prepaid wireless service offered by any provider. This issue exists because the Commission's regulations in GO 153 contain an exclusion for coin-sent paid telephone calls and debit card services, based on the fact that both of those services are

³⁵ *Id.*

³⁶ TracFone notes its strong disagreement with the January 11, 2011 ALJ Ruling Denying the Motion by Verizon Wireless For Leave to Appear as Amicus Curiae and for Leave to File Amicus Brief. As a provider of prepaid wireless services which similarly has concluded that the obligation to collect and remit PPP surcharges is not applicable to prepaid services, Verizon Wireless' legal bases for that conclusion are of central importance to this proceeding and the Commission would benefit from such input.

unbilled.³⁷ In such circumstances, providers have no ability to collect and remit surcharges from end-users. TracFone believes, as stated in Mr. Salzman's testimony, that it falls within the debit card service exclusion because it provides debit card service and does not provide billed service.³⁸

Although CPSD has never fully articulated its reasons why and has provided no testimony on the subject, it has asserted that TracFone's prepaid wireless debit card service does not fall within the debit card service exclusion contained in GO 153 since 1996.³⁹ TracFone strongly disagrees and believes that the way that other providers have acted based on their understanding of the same provision of GO 153 is very relevant to the issue of regulatory interpretation here. The testimony CPSD seeks to strike contains statements made by two of the largest wireless companies, Verizon Wireless and T-Mobile. Those statements provide independent corroboration of TracFone's position that the debit card service exemption covers wireline and wireless debit card services, and further explains the opposition from CPSD to provide information obtained by the Commission in the inquiry initiated by the May 8, 2009 letter to All CMRS Providers discussed in the Staff Report and in Mr. Salzman's testimony. If

³⁷ General Order 153, §10.5.1.3 ("All end-user intrastate telecommunications services, whether tariffed or detariffed, are subject to the LifeLine surcharge, except for the following services:...Coin sent paid telephone calls (coin in box) and *debit card calls*.")

³⁸ Although CPSD portrays the debit card exclusion as appearing out of the blue, it was added in D.96-10-066 as a change "consistent with" the exclusion of coin sent paid calls adopted in D.94-09-065. In that decision, coin sent paid calls were excluded because the provider could not collect the surcharges from end users. By adding debit card calls to the same exclusion as coin sent paid calls, the Commission recognized that other services which could not collect surcharges as line items on bills should also be excluded from the PPP surcharge billing base.

³⁹ CPSD's only discussion of this important exclusion is an improper opinion of its counsel in the so-called "Separate Statement of Undisputed Facts" in its Motion for Summary Adjudication" p. 6 and a brief discussion, again solely by its counsel, in its December 9, 2010 Reply In Support of Motion For Summary Adjudication, pp. 11-18. CPSD has not submitted any testimony in support of its numerous theories.

these carriers and others on which the Commission Staff has additional information have all viewed the debit card exclusion as including them, such actions are clearly relevant to the Commission's ultimate determination whether prepaid wireless debit card services fall within the existing debit card exclusion. In addition, CPSD has repeatedly made assertions that "other" or "most" carriers pay PPP surcharges.⁴⁰ The evidence presented directly refutes CPSD's factual allegations regarding the conduct of other providers and compels that evidence of such other providers' conduct is relevant and admissible.

CPSD also has moved to strike Mr. Salzman's brief discussion (8: 1-20) of the Verizon Wireless petition for a rulemaking and the Commission's commitment in D.10-07-028. That proceeding and this proceeding have been closely related as noted even in the September 30, 2010 Amended Scoping Memo.⁴¹ If the OIR that was promised in D.10-07-028 had in fact already been issued, the schedule in this proceeding would most likely have been altered.⁴² The fact that the Commission has not yet opened this proceeding is important to have in this record, and TracFone is entitled to include this in its testimony. TracFone continues to believe that issues of industry-wide importance should be addressed in industry-wide proceedings and notes that, on January 13, 2010, the Commission issued an OIR which could potentially modify GO 153 by including VoIP services within the billing base.⁴³ The Commission opened the rulemaking to consider changes in its rules regarding the applicability of the PPP surcharges to VoIP. The same course of action could be and should be followed on the issue of applicability

⁴⁰ See Staff Report, p. 6; March 4, 2010 PHC Transcript, p. 13:16-26; CPSD Opposition to TracFone's Motion for Stay, pp. 6-7.

⁴¹ September 30, 2010 Assigned Commissioner's Amended Scoping Memo and Ruling, p. 6.

⁴² *Id.*

⁴³ R.11-01-018.

of those same PPP surcharges to wireless debit card service as well. In both cases, the Commission is grappling with the need to adjust the PPP funding mechanisms in light of new service models that differ in certain respects from those known to the Commission when the regulations were promulgated.

5. The Testimony Regarding Mr. Mirza and TracFone's Interaction with the Commission is Responsive to the Staff Report and is Relevant to the Issues in this Proceeding

CPSD also moves to strike all testimony relating to significant communication between Mr. Salzman and Commission employee, Mr. Hassan Mirza.⁴⁴ In his testimony, Mr. Salzman discusses communications with Mr. Mirza in 2003.⁴⁵ This testimony is directly responsive to and refutes Ms. Tan-Walsh's assertion in the Staff Report regarding TracFone's alleged failure to seek clarification from the Commission regarding the terms and requirements of its Registration. In the Staff Report, the letter sent to Mr. Mirza is attached as Exhibit C, and is paraphrased by the author of the Staff Report on page 3.

Mr. Salzman was a participant in the communications with Mr. Mirza and the testimony regarding those conversations is completely appropriate and relevant to the issues in this case. CPSD argues, incorrectly, that TracFone is claiming that Mr. Mirza granted some sort of waiver.⁴⁶ That is not correct and is not the point of the testimony. In fact, at pages 11-12 of the testimony, Mr. Salzman provides information concerning his purpose in contacting Mr. Mirza and the details of their communications that directly addresses this contention.

⁴⁴ CPSD Motion, pp. 6-7 and 11.

⁴⁵ Testimony of Richard Salzman, 11:13 – 13:20.

⁴⁶ CPSD Motion, p. 11.

Indeed, CPSD's argument is not a relevancy argument at all. It is an argument on the importance of Mr. Mirza's comments. If TracFone were to assert in a post-hearing brief that Mr. Mirza granted a waiver of an applicable rule to TracFone, CPSD could then appropriately cite D.00-09-092 for the proposition that the Commission speaks only through its written decisions. CPSD has, however, entirely failed to demonstrate any reason to strike this testimony. It is important to note that TracFone has never asked for waiver of any rule governing PPP surcharges, that it has never characterized its communications with Mr. Mirza as requesting a waiver, and that it has never asserted that Mr. Mirza's response to TracFone regarding the inapplicability of the rule constitutes a waiver as asserted without foundation by CPSD. Mr. Salzman will be available for cross-examination on this topic.

6. CPSD's "Equity" Arguments Fail as CPSD Took No Timely Steps to Pursue Discovery and Mr. Pollak's Testimony Do Not Involve Any Specific Contracts.

At p. 12 of its Motion to Strike, CPSD creates a novel "equity" argument that an objection to a data request by TracFone should now preclude testimony by Mr. Pollak on TracFone's business relations with its retail vendors. It is correct that CPSD submitted a data request in which it requested a copy of a contract for the sale of handsets to one retailer, Walmart, to which TracFone objected. After such objection, CPSD originally did not "meet and confer" with TracFone on the discovery dispute and has never filed a motion to compel. CPSD did not explain to TracFone why a contract for handsets was relevant to any issue in this

proceeding. As such, CPSD did not pursue the contract. TracFone offers this testimony to refute the notion asserted by CPSD that the retail vendors could collect the PPP surcharges.⁴⁷

In any event, the testimony which CPSD seeks to have stricken does not reference the contract at issue. At page 6, as part of an explanation of TracFone's business model, CEO F.J. Pollak generally discusses the relationship between TracFone and the retail vendors of its services. In the first paragraph (p. 6, lines 8-13), Mr. Pollak explains that the handsets are sold by TracFone to retail vendors who then sell handsets to customers. In the second paragraph of the answer (p. 6, lines 14-23), Mr. Pollak discusses the sale of prepaid airtime debit cards. CPSD did not make any discovery requests regarding such sales. As such, Mr. Pollak will be available for cross-examination during the hearing should CPSD elect to inquire further into those sales arrangements.

CPSD also seeks to strike Mr. Pollak's testimony on page 7 addressing whether the retail vendors, such as Walmart and Target, who sell TracFone products to the customers are agents of TracFone. This testimony was included here solely in anticipation that CPSD would argue such claim. CPSD has not presented any testimony on this point. Rather, it indicated in response to a data request that it may claim that Target, for example, is an agent for TracFone. Mr. Pollak's testimony states the presumably obvious fact that they are not TracFone agents. If CPSD is

⁴⁷ On January 17, 2011, CPSD counsel contacted the undersigned counsel to initiate a meet and confer on this document request. TracFone and CPSD are discussing this matter. TracFone has offered to provide a copy of the Walmart contract to CPSD at this time in exchange for CPSD's withdrawal of the motion to strike on these grounds.

willing to stipulate that it will not be arguing that retail vendors are agents, TracFone would consent to withdrawal of the testimony at p. 7, lines 1-7.⁴⁸

In Mr. Salzman's testimony at p. 24, lines 23-24, CPSD seeks to strike one sentence of testimony that states "Most significantly, there is no ability for TracFone to include a line item on a Walmart receipt." At p. 25, lines 7-13, CPSD similarly seeks to strike testimony stating that "TracFone has no authority, for example, to require Walmart or any other retail vendor to collect surcharges and remit them to TracFone or to the State of California, and Walmart and other retail vendors who sell TracFone prepaid debit cards have no obligation or authority to add a surcharge to the cost of the product." Again, the specific contract at issue regarding the sale of handsets to one retailer, Walmart, is not referenced. Moreover, a contract for the sale of handsets to Walmart would not address the issues addressed in Mr. Salzman's testimony.

7. The Salzman Testimony on Point of Sale Surcharges is Directly Relevant to the Issues Here As It Suggests a Method The Commission Could Use to Collect and Remit End User Surcharges on Sales of Prepaid Services

CPSD's Motion also seeks to strike testimony presented by Mr. Salzman (at pages 25 to 29 of the testimony) regarding a potential solution to the logistical problem that prevents TracFone or any other provider of unbilled prepaid services from collecting an end-user surcharge.⁴⁹ This testimony was offered in this proceeding to show that other states have grappled with the issue of collection of surcharges on sales of unbilled services and have found a

⁴⁸ TracFone doubts, however, that CPSD will be willing to so stipulate. Even without testimony on this topic, CPSD adds as complete non-sequitur that Walmart or Target are comparable to "independent sales agents" "as they were referred to in the *Cingular* case." (CPSD Motion to Strike, p. 12.) As CPSD counsel is well aware, there is no factual similarity between the "independent sales agents" in the *Cingular* case and Walmart and TracFone. Comments such as CPSD's uncited reference to another case are completely inappropriate and should be disregarded by the ALJ and the Commission.

⁴⁹ CPSD Motion to Strike, p. 8.

way to collect surcharges from unbilled service such as TracFone's prepaid wireless debit card service. As Mr. Salzman testifies, Walmart and other retail vendors have been unwilling to attempt to collect surcharges from consumers unless required to do so by state legislatures. Mr. Salzman recognizes that the growth of the prepaid wireless services market in recent years – like the growth of the VoIP market – may require changes in the collection mechanisms. For VoIP, as discussed above, the Commission just issued a rulemaking proceeding to sort out the best way to have that market segment contribute to the PPP.

The testimony offered by Mr. Salzman was intended to show the Commission that there is a solution which could be implemented in California, which would enable collection and remittance of PPP surcharges from all debit cards, wireline and wireless. TracFone recognizes that it is unlikely that the Commission would (or even could) adopt this proposal in this proceeding but presents this testimony for consideration to show how other states are dealing with this issue. When the Commission opens an OIR on prepaid wireless issues, as promised in D.10-07-028, TracFone will likely propose this to the Commission again as an industry-wide solution to an industry-wide issue. In addition, this testimony supports Mr. Salzman's statement (25:10-13) that Walmart will not collect surcharges unless specifically compelled to do so by applicable law.

B. TracFone's Responses to CPSD's Objections to Specific Testimony.

In addition to TracFone's general legal argument in Section A, TracFone offers the following responses to the specific testimony challenged by CPSD. The bolded sections in the chart represent testimony that TracFone has identified as addressing issues related to whether the PPP surcharges and the user fees apply to TracFone's service.

Page	Subject of, and/or Quotation from, Respondent's Testimony	Reason to Strike
Pollak		
4:6-8	"Unlike TracFone, those underlying facilities-based carriers are telephone corporations ..."	Legal Assertion/ Conclusion (hereinafter "Legal Conclusion")
	<p><i>Complete quote: "Unlike TracFone, those underlying facilities-based carriers are telephone corporations since they own, control, operate or manage lines for the provision of telephone service in California." 4:6-8.</i></p> <p><i>This one-sentence statement is part of a factual explanation of TracFone's business operations providing service on a resale basis only. The sentence merely places the facts regarding TracFone in the context of the legal issues.</i></p>	
4:11-12	"TracFone does not ... operate or manage any [telephone] lines ..."	Legal Conclusion
	<p><i>Correct quote: "TracFone does not own, control, operate or manage any lines of communication or any network facilities in California or in any other state." 4:11-13.</i></p> <p><i>This is a statement of fact regarding TracFone made by the company's CEO. It is not a legal conclusion.</i></p>	
4:21	"TracFone's remedies would all be in breach of contract ..."	Legal Conclusion
	<p><i>Correct quote: "TracFone's remedies would all be in breach of contract."</i></p> <p><i>This is one common sense, general statement by the CEO of TracFone made in the context of describing TracFone's relationship with the wireless service providers from which it purchases service.</i></p>	
5:20-21	"...customers do not receive bills or invoices for TracFone services ..."	Legal Conclusion (as to what constitutes a bill or invoice)
	<i>Complete Quotes: "Since airtime is purchased and paid for in advance, either directly from TracFone, or from retail establishments, customers do not receive bills or invoices for TracFone services." 5:19-21.</i>	

	<p><i>This is a clear statement of fact made by TracFone’s CEO using commonly-understood business terms. It is not a legal conclusion.</i></p> <p><i>Moreover, CPSD’s own witness, Ms. Tan-Walsh first raised this topic in her statement that a Walmart receipt was also a bill. Tan-Walsh Declaration in Support of Motion of CPSD for Summary Adjudication, ¶ 26 (Incorporated as part of her direct testimony).</i></p>	
6:6-7:7	<p>Testimony regarding TracFone’s relationship with its “retail vendors”</p>	<p>Equity – TracFone has refused to provide its contract with the retailer.</p>
	<p><i>In this testimony, TracFone CEO F.J. Pollak describes TracFone’s relationship with retail vendors in very general terms and explains factual matters on business practices. It is not testimony about any one particular retail vendor.</i></p> <p><i>In one data request, CPSD asks for an agreement with Walmart. TracFone timely objected to the request and CPSD did not take any timely steps to meet and confer regarding the request or to move to compel. CPSD initiated discussions on a meet and confer on 1/17/11 in which TracFone has offered to provide the Walmart contract in exchange for withdrawal of this portion of the motion to strike.</i></p> <p><i>P. 7, lines 1-7. If CPSD will acknowledge that no part of their case involves a claim that the retail vendors are agents of TracFone, then TracFone will voluntarily withdraw this statement. In a data request reply, CPSD counsel implied that agency was an issue.</i></p>	
10:21-11:11	<p>Opinion re whether “as a result of the proprietary software in the handset, TracFone ... controls telecommunications facilities”</p>	<p>Legal Conclusion</p>
	<p><i>CPSD seeks to strike two-paragraphs of testimony composed entirely of statements of fact generally explaining the TracFone handset and the function of software in its operations. CPSD seeks to strike these facts based solely on the question, partially quoted above, that places the testimony in the context of CPSD’s repeated assertions regarding ownership of the handset and the role of software on the handset.” (See e.g., page 4 of the Staff Report now incorporated as Tan-Walsh testimony)</i></p>	

11:3-4	“When we sell the handset to the retailer, the retailer owns the phone.”	Equity – TracFone has refused to provide its contract with the retailer.
	<i>See response above regarding CPSD’s equity challenge to the Testimony of F.J. Pollak, 6:6-7:7.</i>	
11:12-12:5	Opinion re “Is TracFone’s Service a Debit Card Service?”	Legal Conclusion
	<i>This testimony is entirely factual. Although CPSD had not laid out its position in testimony, it has argued that the debit card exception in GO 153 does not apply to TracFone. In this testimony, Mr. Pollak explains the debit card nature of the TracFone business model.</i>	
12:8-13	“...it is my understanding that in California telephone corporations which are public utilities and which provide billed services are required to bill their customers amounts to cover certain surcharges and to remit billed amounts collected from the customers of the Public Utilities Commission ...”	Legal Conclusion
	<i>Complete and correct quote: “I am not an attorney and profess no understanding of the legal nuances of California law. However, it is my understanding that in California, telephone corporations which are public utilities and which provide billed services are required to bill their customers amounts to cover certain surcharges and to remit the billed amounts collected from the customers of the Public Utilities Commission to support these funds.”</i> <i>In this statement, Mr. Pollak is not professing to make a legal statement but simply stating his understanding of the PPP surcharge process to place in context the testimony that follows. Mr. Pollak is not offered as an expert witness on California law.</i>	
13:11	“TracFone is not a public utility under applicable California law”	Legal Conclusion
	<i>CPSD has taken this statement out of context. This statement merely provides TracFone’s position as part of the narrative testimony submitted. We would be willing to modify the statement to read: “First, TracFone believes it is not a public utility under applicable California law.”</i>	
13:12	“[E]ven if TracFone were deemed to be a public utility under California law, the Public Utility Commission’s rules governing collection and	Legal Conclusion

	remittance of Public Purpose Program surcharges specifically exempt certain non-billed services, including debit card services such as those provided by TracFone.”	
	<i>Similarly, this statement, like 13:11, is a statement of a reason why TracFone has concluded that the PPP surcharges do not apply to its business. This testimony was included to place the rest of the testimony in context and is not offered as expert testimony.</i>	
13:19-14:4	“I understand that in California, companies who are telephone corporations are deemed to be public utilities, and that ‘telephone corporation’ is defined by the Public Utilities Code as entities which own, control, operate, or manage lines for compensation within California. Even though the term ‘lines’ has been broadly defined to include conduits, ducts, poles, wires, cables, instruments, and appliances, and other real estate, fixtures, and personal property managed in connection with or to facilitate communication by telephones, TracFone does not own, control, operate or manage anything in California in connection with or to facilitate communication by telephones. Our company does not own, control, operate or manage any telecommunications facility in California ...”	Legal Conclusion
	<i>This statement was prefaced with a statement that Mr. Pollak is not an attorney. This is testimony of the CEO of the company regarding his understanding of what “things” (e.g., ducts, conduits, poles, wires etc...) have been found to constitute “telephone lines” as context for his factual statements at 14:1- 5 regarding TracFone’s ownership, operation, control, or management of these things in California in its business operations. Here, CPSD seeks to exclude evidentiary facts and their context.</i>	
14:6	“The company does not have any retail outlets in California.”	Legal Conclusion to the extent that it characterizes TracFone’s relationship with Wal-Mart and other outlets where TracFones are sold.
	<i>This is a statement of fact. TracFone does not own retail outlets.</i>	
14:8-10	“Since the company does not own, control, operate or manage any line in California, TracFone is not a public	Legal Conclusion

	utility under applicable California law.”	
	<i>This sentences at the end of a paragraph states TracFone’s position and is a logical conclusion to the factual testimony presented above it.</i>	
15:14-17	“[I]f TracFone is not a company which owns, controls, operates, or manages telephone lines for compensation in California. Then it is not a telephone corporation and is therefore not a public utility.”	Legal Conclusion
	<i>This partial sentence is also a restatement of TracFone’s position and understanding offered to place the testimony regarding TracFone’s business operations in context.</i>	
16:5-10	“We were also aware that the Public Utilities Commission had the authority to require [mobile] providers, including resellers, to register ... derived from Section 332(c) of the [F]ederal Communications Act and is not dependent on whether of commercial mobile service is or is not a public utility under California law.”	Legal Conclusion
	<i>CPSD misquotes the challenged testimony above by joining and partially quoting two separate sentences.</i> <i>The first sentence of the challenged testimony is not a legal conclusion. In context, both sentences explain TracFone’s reasons for registering and is in direct response to CPSD past arguments that the act of registering was itself an admission of public utility status. Together, these are a statement of fact as to the reason why TracFone took action in 1997.</i>	
16:15	“... because [TracFone] was not a public utility under California law.”	Legal Conclusion
	<i>Complete Quote: “In 2003, as part of an overall review of our tax programs, TracFone determined that it should not have paid these fees because it was not a California public utility.” 16:14-15.</i> <i>As part of a complete sentence, the challenged testimony is not a legal conclusion, but a statement of fact as to why TracFone did not pay user fees after 2003. To strike the last eight words of the sentence is nonsensical.</i>	
16:16-17:19	Argument that TracFone exempt from surcharge and user fee requirements: “Q. EVEN IF TRACFONE WERE DEEMED TO BE A PUBLIC UTILITY, WOULD IT BE SUBJECT TO PUBLIC PURPOSE PROGRAM SURCHARGE COLLECTION AND REMITTANCE REQUIREMENTS?”	Legal Conclusion

	<p>A. No.</p> <p>Q. ON WHAT BASIS ...?</p> <p>A. ...there are exemptions for non-billed services, including coin-sent-paid service and debit card calling service. Coin-sent paid services and debit card calling services are non-billed services ...”</p>	
	<p><i>CPSD selectively quotes the nearly page and a half of testimony it seeks to strike. This testimony is a straightforward narrative explanation of TracFone’s position regarding the debit card exclusion. It is replete with evidentiary facts provided by CEO Pollak regarding debit card services, including TracFone’s. See e.g., 17:3-14 and 17:18-19. Moreover, 17:14-18 is also not a legal opinion.</i></p>	
17:20-18:12	<p>Assertion that there are no differences “of any significance” between TracFone’s “airtime debit card calling services and other companies’ debit card calling services.”</p>	Legal Conclusion
	<p><i>The challenged testimony is <u>not</u> a legal conclusion or opinion.</i></p> <p><i>The first four words “None of any significance” (18:1) are Mr. Pollak’s non-legal opinion based on the evidentiary facts regarding TracFone’s business model, including those within the challenged testimony (18:1-7). Mr. Pollak’s testimony presents facts that TracFone’s service is the same as other debit cards in all significant manners (a topic for which CPSD has chosen not to put in any testimony). Moreover, 18:7-12 are Mr. Pollak’s statements regarding whether he is aware of any California laws or regulations on this issue, which is not a legal conclusion.</i></p>	
18:7-12	<p>“I am not aware of any California law or regulation which defines debit card calling in a manner which would include some debit card providers’ services but would exclude TracFone’s debit card calling services. Neither am I aware of any California law or regulation that distinguishes between debit card services primarily associated with wireline calling from debit card services primarily associated with wireless calling.”</p>	Legal Conclusion
	<p><i>This challenged testimony is duplicative of the previous challenge above. As explained above, 18:7-12 does not constitute a legal conclusion.</i></p>	
21:10 - 21:19	<p>“I understand that the federal statute establishing the federal Universal Service Fund imposes the obligation</p>	Legal Conclusion

	<p>on providers and resellers of interstate telecommunications service to contribute a portion of their revenues derived from interstate telecommunications services to the federal fund. Unlike the California public purpose program surcharges which place the contribution obligation on consumers and the collection and remittance obligations on telephone corporations, the federal law places the contribution obligation on providers. TracFone is a provider of interstate telecommunications service. As such, it is required by the federal statute and by the FCC’s rules to contribute a portion of its revenues derived from interstate telecommunications services.”</p>	
	<p><i>The first sentence of the section, excluded from the challenged testimony reads: “Again, I am not an attorney and it is not my intent to provide testimony on legal issues.” (21:9-10). The last sentence, excluded by the challenged testimony reads, “It has consistently done so.” (21:19)</i></p> <p><i>In the Staff Report (pp. 7-8), incorporated as Ms. Tan-Walsh’s testimony, Staff directly raises payment of federal funds and references the FCC consumer webpage stating that “staff notes that TracFone has paid into similarly constructed Federal funds. Staff further notes that TracFone pays into these funds notwithstanding the fact that the FCC Consumer Fact webpage on Universal Support Mechanisms states that telephone carriers contribute to the Federal Universal Service Fund “USF” based on the ‘. . . percentage of amount billed to their residential and business customers for interstate and international calls.” The purpose of this testimony is to respond to this statement in Tracfone’s direct testimony and is an explanation of why TracFone has concluded that it is required to, and does, contribute to the Federal Universal Service Fund in light of its business model. It is not intended as a legal conclusion.</i></p>	
<p>21:20 – 22:11.</p>	<p>“Q. IS THE FACT THAT TRACFONE CONTRIBUTES TO THE FEDERAL USF SIGNIFICANT IN THE DETERMINATION OF WHETHER TRACFONE SHOULD HAVE PAID CALIFORNIA SURCHARGES?</p> <p>A. No. The federal USF and the California public purpose program funding are based upon different</p>	<p>Legal Conclusion</p>

	regulatory approaches. In California, the Commission has determined to fund its programs through end user surcharges and has designated its program accordingly ... In contrast, Congress elected to establish the federal Universal Service Fund by requiring contributions from providers of interstate telecommunications service. That statutory obligation for providers to contribute exists irrespective of whether the providers elect to recover all or portions of their contribution obligations from their customers”	
	<i>See preceding comment regarding this exact issues raised by CPSD in its staff report incorporated as Ms. Tan-Walsh’s testimony in which an opinion is expressed.</i>	
22:12-23:3	Opinion regarding whether “the fact that TracFone has sought designation as an ETC in California change[s] its obligation with regard to California surcharges.”	Legal Conclusion
	<i>In the Staff Report, p. 6, the ETC advice letter is attached and the implication is made that TracFone’s petition for ETC had some effect with regard to its status as a public utility subject to surcharge, which CPSD later argued in its Motion for Summary Adjudication amounted to an admission by TracFone. This testimony is in response to these implications and assertions and are intended as explanations of TracFone’s position and its ETC petition.</i>	
Salzman		
2:8-12	“The primary focus of my testimony in this proceeding relates to TracFone’s lack of current obligation to remit surcharges to fund the Public Purpose Programs given that it does not send bills to customers. As part of that testimony, I first explain why TracFone is not obligated to pay surcharges to these Programs, just like other providers of non-billed services.”	Legal Conclusion
	<i>This statement is not a legal conclusion. It is part of an introduction that explains the purpose of Mr. Salzman’s testimony.</i>	
2:17-3:2	“...payment practices of other providers ... demonstrate to the Commission that the existing requirement is clear that all prepaid service providers are excepted from the collection and remittance obligations of post-paid carriers that are applicable to	Irrelevant (practices of other providers); Legal Conclusion; Argumentative;

	<p>post-paid services [and] to demonstrate that prepaid wireless providers have believed that prepaid services are not billed services and, as such, are excluded from the obligations to collect and remit surcharges. The evidence corroborates my testimony that TracFone, even if deemed to be a public utility, is not obligated to remit surcharges that it is unable to collect from end-users.”</p>	<p>also Assumes Facts Not in Evidence (that TracFone cannot collect from end-users).</p>
	<p><i>Complete sentence: The beginning of the first sentence excluded by CPSD reads: “Second, I am presenting testimony regarding information learned in this proceeding and elsewhere regarding...” (2:16-17).</i></p> <p><i>This statement is also not a legal conclusion or argumentative. It is part of an introduction that explains the purpose of Mr. Salzman’s testimony.</i></p> <p><i>As an executive of TracFone, Mr. Salzman has personal knowledge of TracFone’s business model and its ability to collect surcharges from end-users. Does not assume facts not in evidence.</i></p> <p><i>It explains why Mr. Salzman is presenting testimony regarding the payment practices of other providers, which is in direct response to Ms. Tan-Walsh’s testimony found in the Staff Report at p. 6 where it states that “TracFone’s competitors collect and remit public purpose surcharges and user fees” and at p. 7 where it states that TracFone has erroneously viewed the debit card exclusion as applicable to it.</i></p>	
3:7-15	<p>“[P]roposal for a solution to the problem faced by the Commission”</p>	Irrelevant
	<p><i>Complete quote: “Fourth, I present a proposal for a solution to the problem faced by the Commission in this proceeding.”</i></p> <p><i>This statement is part of an introduction that explains the purpose of Mr. Salzman’s testimony. Although TracFone believes that existing regulation looks to end-users to fund the programs through surcharges on bills, this testimony acknowledges that there may be a problem with growing segments of the market being excluded. Mr. Salzman’s testimony discusses an approach used in other states that might work in California. This testimony acknowledges the Commission’s intention, also noted in the Amended</i></p>	

	<i>Scoping Memo to this proceeding, to open a rulemaking on prepaid wireless issues as promised in D.10-07-028.</i>	
4:14-5:15	Salzman’s “Understanding of the Existing Approach to Funding the Public Purpose Programs”	Legal Conclusion, Irrelevant
	<i>This testimony describes TracFone’s understanding of the Public Purpose Programs and contrasts it with the federal Universal Service Fund. It is further testimony offered in response to the Staff Report (pp. 7-8), incorporated as Ms. Tan-Walsh’s testimony, which directly raises payment of federal funds and references the FCC consumer webpage stating that “staff notes that TracFone has paid into similarly constructed Federal funds. Staff further notes that TracFone pays into these funds notwithstanding the fact that the FCC Consumer Fact webpage on Universal Support Mechanisms states that telephone carriers contribute to the Federal Universal Service Fund “USF” based on the ‘. . . percentage of amount billed to their residential and business customers for interstate and international calls.” (emphasis added)</i>	
6:3-4	The registration “letter contains very clear exclusions for unbilled services including debit card services ...	Legal Conclusion (letter speaks for itself)
	<i>This is not legal conclusion, but rather a statement regarding the content of a letter received by TracFone from the Commission and attached as exhibit B to the Staff Report incorporated as Ms. Tan-Walsh’s testimony.</i> <i>It is similar to Ms. Tan-Walsh’s testimony at p. 3 of the Staff Report also describing the contents of the same letter.</i>	
6:4-6	“TracFone sells debit card services and provides prepaid service and is excluded form the obligation to collect and remit PPP surcharges.”	Legal Conclusion
	<i>This concluding sentence merely states the evidentiary facts that TracFone sells debit cards services and provides prepaid services and reiterates TracFone’s position that it is exempt from public purpose surcharges.</i>	
6:7-19 and Attach 2	Salzman’s Understanding of G.O. 153 G.O. 153 text	Legal Conclusion
	<i>This testimony is intended to provide context for the explanation why TracFone’s has determined that it is not obligated to collect and remit surcharges given the</i>	

	<p><i>evidentiary facts concerning its business model.</i></p> <p><i>Moreover, the testimony at 6:17-19, attaching a copy of GO 153, and a reference to which section of GO 153 contains the debit card exclusion at issue in this case are not legal conclusions.</i></p>	
6:20-7:11	Salzman description of 2006 Staff Report on Public Policy Programs	Legal Conclusion (as to whether this Division Staff Report constitutes an expression of Commission policy); Relevance (document speaks for itself)
	<p><i>The testimony is not proffered as an expression of Commission policy. Rather, it is clearly described in the testimony for what it is, a staff report providing staff's explanation of the history and background of the PPP surcharges.</i></p> <p><i>It is offered to provide further information regarding the history and background of the PPP surcharges and the current state of the program to put in context the facts and issues involved in this proceedings. It is relevant in light of Ms. Tan-Walsh's assertion that it is Staff's position, without explanation, that prepaid wireless offered by a reseller, such as TracFone, is not exempt under the debit card exception (Staff Report at p. 7), particularly in light of the rulemaking on prepaid wireless service promised in D.10-07-028.</i></p>	
7:12-22	Salzman description of R.06-05-028	Irrelevant (document speaks for itself); Legal Conclusion (as to what R.06-05-028 means)
	<p><i>The testimony is relevant for the same reasons as the previous entry.</i></p> <p><i>Moreover, all but one sentence of this section of testimony contain factual statements either about when the OIR was issued (7:14-15), attaching a copy of the OIR (7:17) or quoting the OIR directly (7:17-22) that do not purport to state what R.06-05-028 itself means. The other sentence (7:15-17) is merely a logical</i></p>	

	<i>description from the direct language of the OIR.</i>	
8:1-20	Salzman description of Verizon Wireless Petition for Rulemaking	Irrelevant (activities of other carriers, document speaks for itself); Legal Conclusion (as to what document means)
	<p><i>The testimony merely states that the Verizon Wireless Petition “requested that the Commission open a rulemaking to determine whether the PPP surcharges applied to prepaid wireless and, if they did, to determine a collection method.” This is hardly a legal conclusion regarding what the document means or what Verizon argued but rather a simple description of what Verizon requested in its petition.</i></p> <p><i>This testimony merely provides the procedural and factual background regarding the Petition as it related to this proceeding, which culminated in a Commission promise to initiate a rulemaking concerning prepaid wireless that the Amended Scoping Memo acknowledged might have an impact on this proceeding.</i></p> <p><i>Moreover, as argued in Section A of this Response, TracFone, the activities of other carriers are relevant since a potential issue in this proceeding is whether PPP surcharges are applicable to any prepaid wireless service, a matter of first impression for the Commission.</i></p>	
9:15-18	“[T]he rationale for excluding coin in box and debit card calls results from a Commission determination ...” (Salzman description of February 28, 2003 Notice to All Certificated Telecommunications Companies in California re Projected Revenue Data)	Irrelevant (document speaks for itself); Legal Conclusion (as to what document means);
	<i>This section of testimony is Mr. Salzman’s description of a Commission document sent to TracFone requesting information on “surchargeable billings” that attached a reporting form. These documents were Commission instructions or guidance to TracFone regarding the PPP surcharges. As part of his narrative testimony, Mr. Salzman describes the contents of these documents, which is not a legal conclusion. The reporting form is part of Ms. Tan-Walsh’s testimony,</i>	

	<i>Staff Report attachment C and discussed at p. 3. The challenged sentence merely provides part of Mr. Salzman’s explanation for why he completed the Commission form as he did on behalf of TracFone. In context, the statement is not a legal conclusion.</i>	
12:1-4	“As I saw it then and continue to believe, TracFone’s prepaid wireless service is a debit card service. Because the existing rules as set out in the instructions excluded revenues associated with debit card calls, I understood that our revenues were exempted from the PPP surcharges”	Mr. Salzman’s opinion is irrelevant to the question of whether a duty is owed (state of mind may be relevant in amount owed/penalty phase of this proceeding),
	<i>As explained in Section A, the testimony is offered in direct response to Ms. Tan-Walsh’s testimony, as found in the Staff Report at pp. 3-4, regarding TracFone’s alleged failure to seek “clarification of the terms and requirements of its Wireless Registration Identification in this regard, including its obligation to pay public purpose surcharges and user fees, nor could Staff find any record that Commission staff ever agreed with TracFone’s view.” It is also relevant to refute CPSD’s continued assertion that TracFone has argued that Mr. Mirza granted TracFone a waiver. That is not the case. As the person who had contact with Mr. Mirza, Mr. Salzman briefly explains why the purpose of his communication with the Commission was not to request special treatment or some sort of waiver.</i>	
12:5-24	Salzman description of discussions with Hassan Mirza.	Irrelevant as a matter of law (alleged representations of individual staff). Also hearsay, but CPSD does not rely on a hearsay objection here.
	<i>As explained in Section A to this Response, this testimony is directly responsive to and refutes Ms. Tan-Walsh’s testimony in the Staff Report at pp. 3-4 regarding TracFone’s alleged failure to seek clarification of the terms and requirements of its Registration.</i>	

12:22-13:11	Salzman's description of letter he wrote to Mirza (Attachment C to Tan-Walsh Declaration/Testimony)	Irrelevant (document speaks for itself)
	<i>In this testimony, Mr. Salzman describes a letter <u>he wrote</u> to staff member Mr. Mirza, which is attached to the Staff Report as attachment C. The Staff Report paraphrases the contents of the letter at p. 3. As explained in Section A of this Response, this testimony is directly responsive to and refutes Ms. Tan-Walsh's testimony in the Staff Report at pp.3-4 regarding TracFone's failure to seek clarification of the terms and requirements of its Registration. Mr. Salzman is certainly entitled to present facts regarding communications with designated Commission staff members on the topics set for hearing in this proceeding.</i>	
13:12-23	Further narrative related to Mr. Mirza	Mr. Mirza viewpoint and statements irrelevant as a matter of law (alleged representations of individual staff).
	<i>This testimony provides further information regarding Mr. Salzman's communications with staff member Mirza. As explained further in Section A of TracFone's Response, this testimony is directly responsive to and refutes Ms. Tan-Walsh's testimony in the Staff Report at pp.3-4 regarding TracFone's failure to seek clarification of the terms and requirements of its Registration.</i>	
14:16-15:2	Salzman narrative re ETC petition	Irrelevant (as Mr. Salzman admits at 14:22.
	<i>CPSD mischaracterizes this testimony. The testimony describes the start of the Commission inquiry into TracFone's payment of user fees and surcharges and its connection to TracFone's ETC petition, specifically referencing an e-mail received by TracFone's outside counsel from Charles Christianson, attached as exhibit D to the Staff Report. In her testimony, at p. 6 of the Staff Report, also discusses the same connection between the start of the inquiry and TracFone's ETC Petition. In both cases, the testimony provides context regarding the background history of this proceeding.</i>	

15:7-13	Description of TracFone Legal Conclusion	Legal Conclusion, Irrelevant
	<i>This testimony is relevant because it provides information regarding TracFone’s response to the Commission’s initial inquiries regarding the payment of surcharges and fees that led to this proceeding in the form of an email from TracFone’s outside counsel to Mr. Christiansen of the Commission. The email is attachment E to the Staff Report and discussed by Ms. Tan-Walsh in her testimony in the Staff Report at p. 7. As a description of TracFone’s response to the Commission, it is not a legal conclusion.</i>	
16:1-4	Narrative related to Mr. Mirza	Irrelevant
	<i>This is not a narrative concerning Mr. Mirza; this is two short, simple sentences concerning whether Mr. Christiansen, in his communications with TracFone, referenced TracFone’s earlier correspondence with Mr. Mirza. It is relevant as a continuation of testimony concerning TracFone’s communications with the Commission regarding payment of PPP surcharges and user fees. CPSD makes no argument why information concerning communications with Mr. Christiansen is irrelevant. The Staff Report(incorporated as Ms. Tan-Walsh’s testimony) attaches Mr. Christiansen’s e-mail as Attachment F and discusses it at p. 6.</i>	
16:5-16	Narrative related to Draft Resolution T-17175	Legal Conclusion, Irrelevant
	<i>CPSD fails to explain why this testimony is either a legal conclusion or irrelevant (as it has failed to do with most of the challenged testimony). The testimony notes that attachment A, a compliance form, to draft resolution T-17175 had expressly stated that TracFone had complied with its user fee and PPP surcharge obligations. A copy of the draft resolution is attached to the testimony. The document is relevant because it indicates that the Commission may have had inconsistent positions regarding whether the fees and surcharges applied to TracFone, or any prepaid wireless carrier, a matter of first impression with the Commission. CPSD offered no testimony on this evidence or issue.</i>	
16:17-23:3	Discussion of “whether other prepaid wireless service providers have, in fact, been collecting and remitting PPP surcharges?”	Irrelevant; also laced with assertions that this topic is relevant, an assertion which is

		itself a Legal Conclusion.
	<p><i>As argued more fully in Section A of this Response, TracFone assert that the activities of other carriers are relevant since a potential issue in this proceeding is whether PPP surcharges are applicable to any prepaid wireless service, a matter of first impression for the Commission. CPSD itself has provided no testimony on this issue.</i></p> <p><i>However, CPSD itself has raised the practices of other carriers. Ms. Tan-Walsh’s testimony, Staff Report at pp. 5-6, asserts that TracFone’s competitors collect and remit public purpose surcharge while also noting that the Commission opened an inquiry of all CMRS carriers on May 8, 2009 regarding “CMRS Revenue Reporting and User/Fee Surcharge,” Staff Report p. 6, attachment G.</i></p>	
24:5-25:3	Argument that Wal-Mart receipt is not a “bill”	Legal Conclusion
	<i>This testimony is in direct response to Ms. Tan-Walsh’s testimony that a receipt is a “bill” incorporated from her Declaration in support of Motion of CPSD for Summary Adjudication, ¶ 26. As a business executive, Mr. Salzman provides his understanding of whether a receipt constitutes a bill as these terms are commonly understood. Whether something is a bill or a receipt is a statement of fact, not a legal conclusion.</i>	
24:23-24	“Most significantly, there is no ability for TracFone to include a line item on a Walmart receipt.”	Equity (TracFone refuses to produce its contract(s) with Walmart)
	<i>In one data request, CPSD asks for an agreement with Walmart. TracFone timely objected to the request and CPSD did not take any steps to meet and confer regarding the request or to move to compel until 1/17/11. TracFone offers this testimony to refute CPSD’s assertions that TracFone could collect the PPP surcharges. CPSD and TracFone are attempting to negotiate a resolution to this issue.</i>	
25:2-3	“A prepaid wireless or wireline transaction occurs without a bill”	Legal Conclusion; also assumes facts not in evidence.
	<i>This testimony is a statement of fact from an executive in the prepaid wireless business. CPSD fails to state or argue which facts are not in evidence.</i>	

25:7-13	<p>“TracFone has no power over Walmart or other retail vendors to require them to collect surcharges ...”</p>	<p>Equity (TracFone refuses to produce its contract(s) with Walmart); Irrelevant (TracFone’s contracts with retail outlets cannot affect its legal duties)</p>
	<p><i>In one data request, CPSD asks for an agreement with Walmart. TracFone timely objected to the request and CPSD did not take any steps to meet and confer regarding the request or to move to compel until January 17, 2011. TracFone offers this testimony to refute CPSD’s assertions that TracFone could collect the PPP surcharges</i></p> <p><i>The testimony is relevant because the relationship with TracFone’s retail vendors is part of TracFone’s business model regarding ownership and sale of the TracFone handsets and TracFone debit cards and the prepaid nature of TracFone’s business.</i></p> <p><i>CPSD and TracFone are attempting to resolve this issue.</i></p>	
25:14-29:17	<p>TracFone’s “Proposal for a solution to the changing market and the impact of an increasing prepaid market on PPP funding.”</p>	<p>Irrelevant</p>
	<p><i>Although TracFone believes that existing regulation looks to end-users to fund the programs through surcharges on bills, this testimony acknowledges that there is a problem with a growing segment of the market being excluded. Mr. Salzman’s testimony discusses an approach used in other states that might work in California. This testimony acknowledges the Commission’s intention, also noted in the Amended Scoping Memo to this proceeding, to open a rulemaking on prepaid wireless issues as promised in D.10-07-028.</i></p>	
30:3	<p>Communications Division and CPSD “have found an obligation [to collect and remit surcharges] where there is none.”</p>	<p>Legal Conclusion</p>
	<p><i>Complete Quote: “By doing so, they have found an obligation where there is none based on a non-existent record.”</i></p>	

	<i>This sentence is merely part of a conclusion to the narrative testimony that reiterates TracFone’s position based on the testimony submitted.</i>	
30:13-15	Commission should recognize that to date non-billed services, including debit card call services, both wireline and wireless, have not been included in the surcharge billings base.”	Legal Conclusion
	<i>This sentence is merely part of a conclusion to the narrative testimony that reiterates TracFone’s position based on the testimony submitted.</i>	

C. If Any Portion of the Pollak or Salzman Testimony Are Stricken, Ms. Tan-Walsh’s Testimony in this Proceeding Must Also Be Stricken

Consistent with Commission practice and for the reasons stated in this Response, TracFone encourages the ALJ to deny the CPSD’s Motion to Strike. However, if CPSD’s motion is granted in part or in whole, CPSD must then be held to CPSD’s standard. Concurrent with this motion, TracFone has filed a Motion to Strike identifying portions of the Staff Report incorporated by reference as Ms. Tan-Walsh’s direct testimony in this proceeding as well as statements contained in the Declaration supporting the Motion for Summary Adjudication. Such testimony for example contains legal conclusions, includes testimony on topics on which CPSD refused to answer discovery requests, and covers topics that are irrelevant to the issues here.

IV. CONCLUSION

For the foregoing reasons, TracFone respectfully requests that CPSD’s January 10, 2011 Motion to Strike should be denied in its entirety. Alternatively, if the Motion to Strike is given any consideration, CPSD’s own testimony must be held to CPSD’s standards as further detailed in TracFone’s Motion to Strike the Testimony of Llela Tan-Walsh.

Respectfully submitted,

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Dated: January 21, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing,

_____, by using the following service:

[X] E-mail service: sending the entire document as an attachment to an e-mail message to all known parties of record to this proceeding who provided electronic mail addresses (see attached Service List).

[X] 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 and to:

ALJ Regina DeAngelis

Executed this 21st day of January, 2011, at San Francisco, California.

/s/ Trina C. Morgan
Trina C. Morgan

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