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

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| Order Instituting Rulemaking to Consider Whether Text Messaging Services Are Subject to Public Purpose Program Surcharges. | Rulemaking 17-06-023 (Filed June 29, 2017) |

# OPENING BRIEF OF THE CALIFORNIA CABLE & TELECOMMUNICATIONS ASSOCIATION ON THE JOINT RULING OF ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW JUDGE

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# OPENING BRIEF OF THE CALIFORNIA CABLE & TELECOMMUNICATIONS ASSOCIATION ON THE JOINT RULING OF ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW JUDGE

The California Cable & Telecommunications Association ("CCTA") hereby files its Opening Brief in response to the February 21, 2018 Joint Ruling of Assigned Commissioner and Administrative Law Judge ("ALJ") Directing Input on Comments and Briefs, and Updating the Procedural Schedule ("Joint Ruling"), March 2, 2018 E-Mail Ruling Granting Request for Extension of Procedural Schedule, and April 25, 2018 ALJ's Ruling Revising Communications Division Staff Paper and Public Purpose Program Financial Data, and Updating the Procedural Schedule. CCTA submits this opening brief in response to questions in Section 2 of the Joint Ruling, which inquire into the relevant principles of California law and federal law governing whether the California Public Utilities Commission ("Commission") has the authority to assess its public purpose program ("PPP") surcharges and user fee on text messaging service. In addition, because the same legal principles apply to the related question of whether voicemail and directory listings services[1] are properly surchargeable (*i.e.*, subject to PPP Surcharges or the Commission's user fee), CCTA also addresses the surchargeability of those services in this Brief.

[1] The April 25, 2018 ALJ Ruling contained a Revised Communications Division Staff Paper in which the term "directory listing" was changed to "directory advertising." *See* April 25 ALJ Ruling, Appendix A. This revision does not alter CCTA's analysis as the Commission must first find that directory listings are not telecommunications services, and thereby, not subject to PPP surcharges or the user fee, as detailed in this brief.

The law is clear. The Commission may assess its PPP surcharges and user fee only on intrastate telecommunications services and certain expressly enumerated "other" services such as interconnected Voice over Internet Protocol ("VoIP"),[2] and the services discussed in this proceeding (*i.e.*, text messaging, voicemail, and directory listings services) clearly do not fall within that "other" services category. Similarly, under the Federal Communications Commission's ("FCC") rules, information services (which definitionally include text messaging and voicemail) and directory listings services are not subject to federal Universal Service Fund assessments. Moreover, federal law requires that any state programs advancing Universal Service goals must be consistent with federal mechanisms. As a result, the Commission is not free to create or implement a surcharge regime inconsistent with the federal regime.

State law and Commission precedent also limit the services on which the Commission may assess its PPP surcharges and user free. As relevant here, the Commission may assess these surcharges and fees *only on intrastate telecommunications services*.[3] Finally, both state and federal law require surcharges to be implemented in a non-discriminatory and competitively neutral manner. Imposing PPP surcharges and user fees on the subset of text messaging, voicemail and directory listings offered by carriers subject to the CPUC's jurisdiction would run afoul of those fundamental legal requirements.

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[2] *See* Pub. Util. Code § 285. Provided that the Commission assesses PPP surcharges and user fees on VoIP in a manner consistent with the federal Communications Act of 1934 and the Federal Communications Commission's ("FCC") rules and contribution methodologies—which similarly require VoIP providers to contribute to the federal Universal Service Fund, *see, e.g.*, *Universal Service Contribution Methodology*, 25 FCC Rcd 15651, 15658 at ¶ 17 (2010)—those assessments, unlike assessments on text messaging, voicemail, and directory listings service, also would not conflict with federal law.

[3] As discussed below, both California law and federal law limit the Commission's authority to impose these assessments to *intrastate* telecommunications services. However, it is not necessary to determine the jurisdictional nature of any service that does not constitute a "telecommunications service." On that basis alone, the service would be non-surchargeable. *See infra* at 11-12.

## A. RESPONSE TO JOINT RULING'S QUESTIONS FOR LEGAL BRIEFS

### 1. Has the FCC or other federal authority classified text messaging as an interstate service or otherwise exempted it from the imposition surcharges or fees?

As a preliminary matter, CCTA notes that Question 1 is not the first question the Commission will need to answer in determining whether it may assess its surcharges and user fee on a given service. This question becomes relevant if and only if the service at issue is first properly classified as a telecommunications service.[4] The Order Instituting Rulemaking ("OIR") itself recognizes the importance of this threshold question when it acknowledges that "[t]he Commission imposes Public Participation Program surcharges and user fees on telecommunications services but not on information services."[5] Simply put, there is no basis for the Commission to analyze subsidiary and contingent questions (such as whether text messaging service is interstate, intrastate, or jurisdictionally mixed, or whether that service has been expressly exempted from the Commission's PPP surcharges and user fee) before it has decided the first, dispositive question: whether text messaging is a telecommunications service.

As detailed in CCTA's and CTIA's comments and detailed below, text messaging fits squarely in the definition of information services and squarely outside that of telecommunications services. To find that text messages are subject to surcharges, the Commission would first have to demonstrate such services are telecommunications services;

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[4] *See* CCTA Comments on Order Instituting Rulemaking (Aug. 18, 2017) at 4-6; CCTA Opening Comments on Joint Ruling (Mar. 23, 2018) at 3-6.

[5] Order Regarding Petition 17-02-006 and Order Instituting Rulemaking to Consider Whether Text Messaging Services Are Subject to Public Purpose Program Surcharges, R.17-06-023 ("OIR") (July 7, 2017) at 12 (Finding of Fact 3). *See also* OIR at 1 ("[T]his order institutes a rulemaking proceeding to consider whether to adopt a regulation exempting text messaging services from the Commission's Public Purpose Program surcharge. The Commission may adopt such a regulation it if concludes that text messaging services are 'information services' rather than 'telecommunications services' as such terms are defined in the Communications Act of 1934, as amended.").

otherwise the inquiry is moot. With this framework in mind, CCTA responds below to the specific questions posed with respect to text messaging, voicemail, and directory listings services to assist the Commission's decision-making.

*Text Messaging*:

CCTA responds to Question 1 that, to the best of its knowledge, the FCC has ***never*** found that text messaging services are telecommunications services, and thereby, it has not squarely addressed whether text messaging service is an interstate service. For over two decades, the federal law – specifically, the federal Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the Act") – has expressly defined the terms "telecommunications service" and "information service." As the Commission recognized when instituting this proceeding, those longstanding definitions are controlling here.[6] Moreover, the FCC has made clear that information services are not subject to Universal Service assessments (equivalent to the CPUC's PPP surcharges) at the federal level. While the FCC requires providers to report the different types of revenues they may have, not all such revenues are included for purposes of federal Universal Service Fund ("USF") contributions. To the contrary, the instructions accompanying the FCC's reporting form clearly stated that revenues from all non-telecommunications services, including but not limited to "information services," are not

[6] *See* OIR at 4 (recognizing that definitions of "information service" and "telecommunications service" under the federal Communications Act of 1934, 47 U.S.C. § 153(50), (53), are controlling for purposes of the present proceeding). "The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(53); *see* 47 U.S.C. § 153(50) ("The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."). Additionally, "The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing ,or making available information via telecommunications, and includes electronic publishing . . . ." 47 U.S.C. § 153(24).

part of the USF "contribution base[]" and therefore are not subject to assessment.[7] Specifically, in the instructions addressing Line 418 of that form, the FCC expressly states "information services" should not be included:

> **Line 418 Other revenues that should not be reported in the contribution bases**
> **Non-interconnected VoIP revenues (TRS only)**
>
> Line 418 should include all non-telecommunications service revenues on the filer's books, as well as some revenues that are derived from telecommunications-related functions, but that ***should not be included in the universal service or other fund contribution bases***.
>
> ***Line 418 includes:***
>
> ***• Information services.***
>
> o ***Information services offering a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications are not included in the universal service or other fund contribution bases***. Information services do not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service. For example, voicemail, call moderation, and call transcription services are information services. Revenues allocated to these services should be reported on Line 418.[8]

[7] *2018 Instructions to the Telecommunications Reporting Worksheet (Form 499-A)* at 2-3 ("The Communications Act of 1934, as amended, requires that the Commission establish mechanisms to fund universal service (USF), interstate telecommunications relay services (TRS), the administration of the North American Numbering Plan (NANPA), and the shared costs of local number portability administration (LNPA). To accomplish these congressionally directed objectives, the [FCC] requires telecommunications carriers and certain other providers of telecommunications (including Voice-over Internet-Protocol (VoIP) service providers) to report each year on the Telecommunications Reporting Worksheet the revenues they receive from offering service. The administrators of each of these programs use the revenues reported on this Worksheet to calculate and assess any necessary contributions. … In general, contributions are calculated based on each filer's *end-user telecommunications revenue* information, as filed in this Worksheet.") (emphasis added).

[8] *Id*. at 32 (emphasis added).

Because text messaging service falls within the definition of an "information service," as both CCTA and CTIA have demonstrated in prior comments,[9] the FCC has determined that carriers do not have to contribute to federal Universal Service or other public purpose programs based on their revenues from text messaging services (or any other information services).

This determination is particularly relevant to the Commission's authority to assess its PPP surcharges and user fee because the FCC has also recognized that any state programs for advancing Universal Service must be consistent with federal mechanisms,[10] and the Act itself requires such consistency.[11] As a result, the Commission is not free to either ignore the controlling definitions of "telecommunications service" and "information service" in federal law or create and implement a surcharge regime inconsistent with the FCC's decision not to subject information services to federal USF contribution obligations. Indeed, any attempt to surcharge services the FCC has deliberately refrained from subjecting to such contribution obligations would conflict with the federal policy favoring a light-touch regime of regulation for information services and therefore would be preempted.[12]

*Voicemail:* As the Staff Paper acknowledges, the FCC has determined that voicemail is an information service.[13] This is consistent with the manner in which the Commission has

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[9] *See supra* note 3; *see also* CTIA Comments on Order Instituting Rulemaking at 5-13 (Aug. 18, 2017).

[10] *See, e.g.*, *Matter of Universal Service Contribution Methodology*, 25 FCC Rcd 15651, 15658 ¶ 17 (2010).

[11] *See* 47 U.S.C. § 254(f) (state Universal Service programs must not be "inconsistent with" FCC rules); *see also AT&T v. Pub. Util. Comm'n of Tex.*, 373 F.3d 641, 646-47 (5th Cir. 2004).

[12] *See, e.g.*, *Restoring Internet Freedom*, 2018 WL 305638, at *71-73 nn.736, 747 & ¶¶ 196, 202-03 (FCC rel. Jan. 4, 2018) (citations omitted), *petitions for rev. filed* (D.C. Cir. Nos. 18-1051 et al.); *Pulver Ruling*, 19 FCC Rcd 3307, 3316-23 ¶¶ 15-25 (2004); *Vonage Preemption Order*, 19 FCC Rcd 22404, 22425-26 ¶¶ 34-35 (2004), *pet. for review denied*, *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

[13] Staff Paper at 4 ("[T]he Federal Communications Commission has classified voice mail services as an information service …").

classified voicemail.[14] Since voicemail is an information service, the FCC has exempted voicemail from the contribution base for federal universal service and other federal programs.[15] The well-established classification of voicemail as an information service renders it unnecessary to consider subsidiary questions, such as the jurisdictional nature of that service.

*Directory Listings*: The FCC also has not determined that directory listing services is an interstate service. However, that does not matter because fundamentally directory listings are not "telecommunications."[16] According to the FCC, "the heart of 'telecommunications' is transmission." Since directory listings services, including, without limitation, listings and unlisted and non-published telephone numbers, do not involve transmission they are not "telecommunications," and cannot be deemed "telecommunications services."[17]

Additionally, like text messaging and voicemail services, the FCC has exempted revenues from directory listings and non-published listings from the contribution base for federal Universal Service and other federal programs. The FCC's instructions state that carriers required to adhere to the Uniform System of Accounts should base the revenues they report for universal service purposes on their USOA account revenue data.[18] As discussed above, the FCC reporting form requires carriers to include "[o]ther revenues that should not be reported in the contribution bases"

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[14] *See, e.g.*, *Decision Adopting General Order 133-C and Addressing Other Telecommunications Service Quality Reporting Requirements*, D.09-07-019, Attachment 1 at 2 (issued July 16, 2009) ("Examples of enhanced/information services are internet access, *voicemail*, electronic messaging, and videoconferencing.") (emphasis added).

[15] *See supra* at 2 & *2018 Instructions to the Telecommunications Reporting Worksheet* at 32.

[16] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, 3312, 2004 FCC LEXIS 792, *12 (FCC 04-27, ¶ 9).

[17] *Id*. Additionally, the FCC's rule that generally identifies interstate services subject to federal universal service contributions does not include directory listing services. *See* 47. C.F.R. § 54.706(a).

[18] *2018 Instructions to the Telecommunications Reporting Worksheet* at 34.

and such other revenues include those from published directory services.[19] The FCC's rules governing how carriers allocate revenues under the USOA state that "directory revenues" include "revenues from unlisted and non-published telephone numbers."[20] Accordingly, as in the case of text messaging service, the Commission must not implement its surcharges in a manner that conflicts with this federal regime.[21]

**2. Under 47 U.S.C. § 254(f), does the Commission have legal authority to assess surcharges on text messaging service? Why or why not?**

The Commission does not have authority under 47 U.S.C. § 254(f)[22] to assess surcharges on text messaging, directory listings or voicemail services. To the contrary, that section of the Communications Act reinforces that the Commission's imposition of state surcharges and the user fee on these services is *not* permitted.

Section 254(f) allows states to adopt Universal Service programs *only* to the extent those programs are "not inconsistent with the [FCC's] rules."[23] Here, however, the FCC has: (a) made clear that information services – which, as CCTA has already explained, should include

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[19] *Id.* at 32.

[20] 47 C.F.R. § 32.5230(d) ("Directory revenue. This account shall include . . . charges for unlisted and non-published telephone numbers."). 47 C.F.R. § 32.5200 Miscellaneous Revenue states in part, "This account shall include revenue derived from the following sources, as well as revenue of the type and character detailed in Account 5230, Directory revenue." While all carriers operating in California may not be required to adhere to USOA accounting rules, there is no basis for carriers that do and those that do not to report their directory listing revenues differently.

[21] *See supra* note 2.

[22] That provision provides: "A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms." 47 U.S.C. § 254(f) hereafter ("Section 254(f)").

[23] *Id.*

text messaging service[24] – are not subject to the federal USF assessments,[25] (b) explicitly held that voicemail is an information service,[26] and (c) has clearly indicated that directory listings services are not subject to federal USF assessments.[27] Any attempt by the Commission to impose equivalent state Universal Service surcharges on these same services that are not subject to federal USF contribution obligations would be "inconsistent with the [FCC's] rules," and the federal policies that undergird them, in plain violation of Section 254(f). Moreover, as noted above, this would thwart the federal policy promoting light-touch regulation of information services, and therefore would be preempted.[28]

The Commission also lacks legal authority to impose surcharges on text messaging, voicemail, and directory listing services because, as discussed below, doing so would also be inequitable and discriminatory in violation of Section 253(b).[29]

**3. Under 47 U.S.C. § 253(b), would assessing surcharges on text messaging service further the Commission's efforts to preserve and advance universal service, ensure competitive neutrality, etc.**

Even if text messaging, voicemail and directory listing services were otherwise surchargeable (which, as explained above, should not be the case), under Section 253(b) of the Act, the Commission could impose the PPP surcharges on these services only to the extent that doing so would be competitively neutral and "consistent with section 254" of the Act.[30] This

[24] *See supra* at 2-3 & note 3.

[25] *See supra* at 4 & note 7 (quoting FCC Form 499-A instructions).

[26] *See supra* at 6 & note 13.

[27] *See supra* at 8 & notes 16 and 17.

[28] *See supra* at 6 & note 12.

[29] *See* 47 U.S.C. § 254(f).

[30] 47 U.S.C. § 253(b) ("Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 [of this title], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."); *see also AT&T Commc'ns, Inc. v. Eachus*, 174 F. Supp. 2d 1119, 1123 (D. Or. 2001) ("Section 254(f) constrains state regulation by

requirement of competitive neutrality in federal law is similar to California's statutory policy for the LifeLine fund, which provides that LifeLine service should be supported "fairly and equitably by every telephone corporation" and that the Commission should implement the program in a manner that is "equitable, nondiscriminatory, and without competitive consequences for the telecommunications industry in California."[31] Competitive neutrality requires that the Commission's universal service rules should not unfairly advantage or disadvantage one type of provider over another, nor should they unfairly favor nor disfavor one technology over another.

Any attempt by the Commission to impose PPP surcharges on text messaging, voicemail, or directory listings services would violate this principle of federal and state law by subjecting companies that provide these services (and their customers) to a disproportionately higher surcharge burden than those that do not include these services in their offerings. Given the fact that text messaging, directory listings, and voicemail services provided by telecommunications carriers face significant competition from third-party "apps" (provided by companies outside of the Commission's regulatory purview), the imposition of surcharges on only the former set of service providers would be unfair and discriminatory, undermines the competitive neutrality goal, and risks distorting the market.[32] Specifically, providers that are certificated by the

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prohibiting regulations inconsistent with FCC rules to preserve and advance universal service, prohibiting discrimination among carriers concerning contribution") (citing 47 U.S.C. § 254(f)).

[31] Pub. Util. Code § 871.5(d).

[32] *See* CTIA Comments on Order Instituting Rulemaking at 16-18 (Aug. 18, 2017) (providing numerous examples of competing messaging services and applications); PC Magazine, *Not Dead Yet: 5 Voice Mail Alternatives* (January 25, 2017) https://www.pcmag.com/article/351006/not-dead-yet-5-voice-mail-alternatives (listing five voicemail applications customers can download to their phone); Business News Daily, *Free Visual Voicemail Apps* (April 19, 2018) https://www.businessnewsdaily.com/6227-free-visual-voicemail-apps.html (describing several visual voicemail options that are built into the operating system of wireless phones); Lifewire, *Top 21 Email Search Sites and Address Directories* (updated February 06, 2018), https://www.lifewire.com/best-email-search-sites-and-address-directories-1171106 (listing top directories, none of which are telephone company phone books).

Commission should not be subject to universal service obligations with competing directly with uncertificated providers that offer the same or similar services. For example, text messaging services are similar to services provided by X-Box Live, Skype, What's App and a variety of other non-regulated providers. Yet , such service providers do not need to surcharge customers for PPP programs on functionally equivalent services.

Nor would subjecting text messaging, voicemail, and directory listing to the PPP surcharges and the user fee advance Universal Service in any meaningful way. First, surcharging these services will have no impact on the funding of the PPPs because the Commission sets (and adjusts where necessary) the surcharge rates to fully fund the PPP budgets.[33] Thus, regardless of whether the Commission were to decide to surcharge these services, it will collect the amount of money it believes it needs to adequately fund these programs. Second, there is no reason to believe that excluding these services from the funding base would diminish the size of that base to any significant extent. As CTIA has explained, because the major wireless carriers have consistently treated text messaging as an information service and have not assessed surcharges on this service, a Commission decision confirming that text messaging is not surchargeable would merely preserve the status quo.[34] Moreover, given the declining use of voicemail and directory listing services, it is unlikely that the inclusion of these services would have a meaningful impact on the size of the funding base – much less any material impact on the

[33] CTIA Comments on Order Instituting Rulemaking at 19-20 (Aug. 18, 2017).

[34] CTIA Comments on Order Instituting Rulemaking at 3-4 (Aug. 18, 2017). ("To be clear, a determination that text messaging is not subject to PPP surcharges and user fees will not affect the funding of those important programs. At minimum, AT&T, Sprint, T-Mobile, and Verizon have consistently treated text messaging as an information service. Thus, these carriers' postpaid customers (and likely many others), who comprise the large majority of the wireless market, do not currently pay surcharges on text messaging, and the revenue base on which surcharges are established does not include those revenues.").

advancement of the Commission's Universal Service goals.[35] Finally, diminishing wireline subscription translates into a declining revenue base for directory listings because wireless customers do not use directory listing services for wireless numbers.

**4. Is the Commission prohibited from imposing surcharges or user fees on text messaging service under state law?**

Yes. Both state law and longstanding Commission precedent reflect that the Commission is prohibited from imposing PPP surcharges or its user fee on any service that is not a telecommunications service (such as text messaging, voicemail, and directory listings services). For example, Pub. Util. Code § 2881(g) expressly limits the Deaf & Disabled Telecommunications Program surcharges to telecommunications service revenues: "[t]he commission shall establish a rate recovery mechanism through a surcharge not to exceed one-half of 1 percent uniformly applied to a subscriber's *intrastate telephone service.*"[36] Similarly, as early as the 1990s, the Commission has applied the PPP surcharges only to intrastate end user telecommunications services.[37] Since that time, the Commission has consistently reaffirmed that that the PPP surcharges and user fees are imposed on intrastate telecommunications services.[38]

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[35] *See, e.g.*, The Philadelphia Inquirer, *Is this the End of Verizon's Printed Phone Books? Google and Mobile Phones Threaten Yellow Pages* (Feb. 27, 2017), http://www.philly.com/philly/business/Almost-nobody-is-asking-for-Verizon-telephone-books-as-they-search-social-media-and-online-sites-.html (less than 1% of Verizon Pennsylvania telephone customers request residential directories); Resolution T-17302, Approving Verizon California Inc.'s Advice Letter No. 12535 permitting Verizon to end automatic delivery of white page directories containing residential listings; The New York Times, *At the Tone Leave a What? Millennials Shy Away from Voice Mail* (June 13, 2014), https://www.nytimes.com/2014/06/15/fashion/millennials-shy-away-from-voice-mail.html.

[36] Pub. Util. Code § 2881(g) (emphasis added).

[37] *See Rulemaking on the Commission's Own Motion into Universal Service and to Comply with the Mandates of Assembly Bill 3643,* D.96-10-066, mimeo at 184 (emphasis added) (imposing the CHCFB (California High Cost Fund-B)) and CTF (California Teleconnect Fund), "on all [intrastate] *telecommunications services* and customers"; *see also Alternative Regulatory Frameworks for Local Exchange Carriers,* D.94-09-065, 1994 Cal. PUC Lexis 681 (1994).

[38] *See, e.g.*, General Order 153 § 2.11 ("California Lifeline is funded by a surcharge on all end users of *intrastate telecommunications services* for discounted services to eligible customers.") (emphasis added); Resolution T-17491 at 3 ("CHCF-A is funded by a surcharge assessed on revenues collected from end-users for *intrastate telecommunications services* subject to surcharge.") (emphasis added); Resolution T-

Indeed, the OIR in this proceeding recognized this longstanding limitation on the Commission's authority: "[t]he Commission imposes Public Participation Program surcharges and user fees on telecommunications services but not on information services."[39]

In addition to these constraints under California law, any attempt to surcharge information services while the FCC has deliberately declined to subject the same services to USF assessments at the federal level would conflict with federal law, as described above. Finally, CCTA notes that even if the Commission could surmount these obstacles (and it cannot), before it embarked on the perilous and unprecedented task of attempting to surcharge information services, it would need to institute a very different proceeding – one with a broader scope and with the entire telecommunications industry and information service providers as respondents. Such a significant action demands more due process and broader input than a proceeding focused on the surchargeability of a few distinct services and should consider the competitive impact on regulated providers as compared to non-regulated providers or functionally equivalent services. Moreover, since the decisions which initially imposed surcharges on telecommunications service in 1994-1995 included hearings, the Commission may need to conduct a hearing in any

17446 at 1 ("The CHCF-B program is funded by a surcharge assessed on *intrastate telecommunications service* revenues collected from end-users.") (emphasis added); Resolution T-17496 at 2 ("The CTF Program is funded by a surcharge assessed on revenues collected from end-users for *intrastate telecommunications services* subject to surcharge.") (emphasis added); Resolution T-17536 at 1 ("All regulated telecommunication carriers shall revise the CASF surcharge rate from 0.464% to 0.00% on their end-user charges billed for *intrastate telecommunications services* beginning December 1, 2016.") (emphasis added); *TracFone Wireless, Inc.,* D.15-05-032, App. A, mimeo at 6 ("Both user fees and PPP surcharges are calculated by applying a percentage (determined periodically by the Commission) to the carrier's intrastate telecommunications revenues."). *See also* February 21, 2018 Joint Ruling Directing the Impact on Comments and Briefs and Updating the Procedural Schedule at 4, note 5 ("By 'surcharges' herein, we are referring to the Commission-mandated surcharges to fund state universal service programs. These surcharges are currently assessed on revenues collected from end-users of intrastate telecommunications services and Voice over Internet Protocol Service.").

[39] OIR at 12 (Finding of Fact 3).

proceeding which would modify those decisions under the requirements of PU Code section 1708.5.[40]

**5. Under the Public Utilities Code, the Commission has both general and specific surcharge authorities to fund PPPs. Do these authorities permit the Commission to assess surcharges on text messaging service? Why or why not?**

Please see response to Question 4 above.

**6. For carrier parties: What legal authority does your entity rely on when determining whether to assess and submit surcharges and user fees for text messaging services?**

In determining whether to assess, collect and remit surcharges and user fees for any service, CCTA members rely on relevant federal statutes and FCC decisions and regulations that define the regulatory classification and jurisdictional nature of the services at issue and which limit or set parameters around what services may be subject to state surcharges and fees. Subject to federal law and orders, CCTA members also rely on the relevant Public Utilities Code sections and Commission decisions and resolutions adopting and implementing each of the PPP surcharges and the user fee and establishing the surcharge rates.

## B. THE COMMISSION SHOULD CONCLUDE THAT CARRIERS WILL NOT BE SUBJECT TO END USER CLAIMS OR AUDITS FOR PAST COLLECTION AND REMITTANCE PRACTICES THAT ARE NOT CONSISTENT WITH THE COMMISSION'S FINAL DECISION IN THIS PROCEEDING.

The Petition that gave rise to the Commission opening this proceeding and the comments in this proceeding plainly reveal that Staff and carriers are reasonably interpreting federal and state laws governing the imposition of PPP surcharges and the user fee differently. Indeed, the Commission opened the proceeding due to the ambiguity of applicable law and the need for the

[40] Cal Pub. Util. Code § 1708.5(f) ("Notwithstanding Section 1708, the commission may conduct any proceeding to adopt, amend, or repeal a regulation using notice and comment rulemaking procedures, without an evidentiary hearing, *except with respect to a regulation being amended or repealed that was adopted after an evidentiary hearing, in which case the parties to the original proceeding shall retain any right to an evidentiary hearing accorded by Section 1708*.") (emphasis added).

Commission to make a final determination.[41] Importantly, the Commission concluded that "the classification of text messaging under the Act is *subject to conflicting interpretations as to which reasonable persons may differ*."[42] The same is true for voicemail and directory listings.

While it believes the law is clear as described herein, CCTA acknowledges that Staff and other parties have taken a different position, and thus, the Commission must make a final decision on issues that are also of first impression. Upon the Commission doing so, CCTA anticipates that some carriers will have surcharge and user fee collection and remittance practices that are inconsistent – in whole or part - with the Commission's decision, and will need to make changes.

To ensure that all carriers are treated fairly and not punished for reasonably interpreting applicable law, CCTA respectfully requests that the Commission conclude that carriers will not be subject to end-user claims or audits related to their respective past practices of collecting surcharges and user fee with respect to text messaging, voicemail and directory listings prior to the date of the Commission's decision in this proceeding. Instead, carriers will be required to comply with a determination regarding the surchargeability of text messaging, voicemail and directory listing services only on a going-forward basis. Moreover, the Commission should direct Staff to withdraw any audits concerning text messaging, voice mail and directory listings that have taken place in the last few years and/or that are pending.

Respectfully submitted,

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[41] *See* OIR at 4-5.

[42] *Id.*at 4 (emphasis added).

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