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 CENTER FOR ACCESSIBLE TECHNOLOGY, THE GREENLINING INSTITUTE, AND THE UTILITY REFORM NETWORK

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I. INTRODUCTION

In accordance with the schedule set in the *Joint Ruling of Assigned Commissioner and Administrative Law Judge Directing Input on Comments and Briefs, and Updating the Procedural Schedule* (Joint Ruling) issued on February 21, 2018, as modified by the *Administrative Law Judge's Ruling Revising Communications Division Staff Paper and Public Purpose Program Financial Data, and Updating the Procedural Schedule*, issued on April 25, 2018 (April 25 Ruling), the Center for Accessible Technology, the Greenlining Institute, and The Utility Reform Network (collectively the Joint Consumers) submit this Opening Brief addressing the questions set out for legal briefing in the Joint Ruling.

II. DISCUSSION

A. Overview

Joint Consumers address the questions issued for briefing in the context of the issue framed for consideration in this proceeding, namely whether text message services are appropriately subject to public purpose program (PPP) surcharges and user fees.[1] The Commission has repeatedly and clearly indicated its intent to resolve this issue through this proceeding; other issues (such as the classification of text messaging) may be ancillary to the Commission's review, but are not the focus of consideration.

At this time, it remains unclear which carriers currently assess surcharges on text messaging.[2] It also remains unclear how carriers evaluate revenues they receive for

[1] Scoping Memo and Ruling of Assigned Commissioner, (issued on October 11, 2017) at p. 2. This Brief primarily references surcharges for the Commission's public purpose programs. Joint Consumers intend for this discussion to also apply to user fees assessed on intrastate revenue.
[2] The large wireless carriers that have participated in this proceeding through CTIA have indicated that they do not currently assess surcharges on text messaging. However, the material provided by Communications Division indicates that some carriers do assess such surcharges.

purchase of bundled services (including both text messaging and voice service) to determine what portion of such revenues are subject to surcharge. Because of this, it is not clear whether the current funding for PPPs in California is effectively being spread over the widest possible base and thus providing a competitively neutral mechanism for collecting funds in a way that does not overburden the customers of any particular service. The Commission should make clear its appropriate authority to assess surcharges on text messaging consistent with state and federal law, which would best support California's policy goals for PPPs and support for the Commission through user fees.

B. Responses to Questions

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

Neither the FCC nor any other federal authority has expressly classified text messaging as an interstate service, nor has any federal authority exempted text messaging from the imposition of surcharges or fees. Rather, the FCC has implicitly indicated that the assessment of such fees by states would be appropriate.

a. *The FCC Has Implicitly Acknowledged That Text Messaging Services Can Have an Assessable Intrastate Component*.

While the FCC has not explicitly addressed the classification of text messaging, it has implicitly acknowledged that text messaging services can have an intrastate component that is assessable by states to advance universal service. In a 2012 Further Notice of Proposed Rulemaking (2012 FNPRM),[3] the FCC sought comment on text

[3] Fed. Comm. Comm'n, *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, Further Notice of Proposed Rulemaking, FCC 12-46 (April 27, 2012) (hereafter 2012 FNPRM).

messaging's classification as an interstate or intrastate service for the purposes of Universal Service Fund (USF) contribution:

> [I]f we use our permissive authority to expand or clarify USF contribution requirements to include enterprise communications services, text messaging services, and broadband Internet access services (both fixed and mobile), should we find that for USF contribution purposes, revenues from such services should be reported as 100 percent interstate? *Alternatively, should we use an allocator lower than 100 percent interstate for contribution purposes, to preserve a revenue base that could be assessed for state universal service funds*?[4]

In this request for comment, the FCC clearly contemplates that it has the authority to clarify that text messaging services are part of the USF contribution requirements and that states may assess surcharges on any intrastate text messaging revenues.

Since the 2012 FNPRM was issued and comments were submitted, the FCC has not acted to clarify the extent to which text messaging is an interstate service. As discussed below, the FCC's silence creates a presumption that text messaging is a service with both intrastate and interstate components.

b. *FCC Precedent Supports Classification of Text Messaging as a Service with Assessable Intrastate Revenues*

As discussed above, the FCC has declined to explicitly rule on the intrastate nature of text messaging services. However, the FCC has demonstrated a preference for interpreting the Telecommunications Act in a way that respects separate state and federal

[4] *Id.* at para. 133 (emphasis added).

ratemaking authority.[5] For example, a recent FCC order[6] dealt with the "ten percent rule" which classifies a phone line with more than ten percent interstate traffic as wholly "interstate" for purposes of federal USF surcharges. Carriers argued that the ten percent rule created a presumption that line revenues were intrastate and exempt from federal surcharges absent certification that they were interstate.[7] USAC argued for the opposite presumption that, absent evidence to the contrary, these lines were presumptively interstate.[8] The FCC concluded:

> [T]he nature of the traffic carried on a private line is the primary determinant of the proper jurisdictional assignment . . . carriers and their customers must make a good faith effort to assign a mixed-use private line to the appropriate jurisdiction because no default presumption of interstate or intrastate jurisdiction exists.[9]

The FCC reached its conclusion in that case by interpreting the intent of the Telecommunications Act's drafters in a way that would not deprive states of regulatory power or permit evasion of federal or state authority.[10] As applied to this case, the nature

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[5] Form 499-A directs carriers to apportion the revenue from their services according to the originating and terminating point of the traffic: "Where possible, filers should report their amount of total revenues that are intrastate, interstate, and international by using information from their books of account and other internal data reporting systems." https://www.usac.org/_res/documents/cont/pdf/forms/2018/2018-FCC-Form-499A-Form-Instructions.pdf. *See also* Fed. Comm. Comm'n, *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, Order, DA 17-309 at paras.13-14 (March 30, 2017) (hereafter 2017 Order) (interpreting the *Ten Percent Rule* in a way that upholds "the system of federal and state regulation established in the Communications Act, which provides a central role for the separations process in determining the scope of state and federal ratemaking authority.").

[6] *See generally* 2017 Order.

[7] *Id.* at paras. 5-6.

[8] *Id.*

[9] *Id.* at para. 11.

[10] "The carrier must engage in some kind of good faith query into the jurisdictional nature of the traffic carried on the line. Allowing such a [intrastate] presumption would permit carriers to regularly assign to the state jurisdiction authority, costs and revenues associated with private lines carrying more than ten percent interstate traffic, in violation of the plain language of section 36.154 of the Commission's rules and the Commission's longstanding USF rules and policies." *Id.*at para. 21.

of the traffic of text messaging services should determine whether the service is interstate or intrastate.

Although the 2017 Order did not explicitly address text messaging, the Order reflects a preference for interpreting intent, ambiguity or regulatory silence in a way that respects "the system of federal and state regulation established in the Communications Act, which provides a central role for the separations process in determining the scope of state and federal ratemaking authority."[11] The 10th Circuit has similarly held that a carrier may not declare itself exempt from a State's universal service program simply because its rate structure does not distinguish between the intrastate and interstate nature of the traffic.[12]

The above cases indicate that the Telecommunications Act should be read to respect both state and federal authority to assess surcharges. In the context of universal service contributions, this means separating revenues into assessable intrastate and interstate components. Absent any evidence indicating that the FCC intended to circumscribe the scope of state ratemaking authority for text services, the Commission should find that text messaging has an assessable intrastate component. This conclusion is further supported by the 2012 FNPRM which asked "*What data should be considered when developing that fixed percentage of interstate and intrastate revenues for [text messaging] services?"*[13] While the FCC has not acted on these comments or answered the questions posed, its questions acknowledge the fact that text messaging services can have an intrastate component which can be calculated and surcharged by states.

[11] *Id.*at para. 13 (citing the Separations Joint Board which apportions regulated costs between interstate and intrastate jurisdictions).
[12] *See WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262 (10th Cir. 2007).
[13] 2012 FNPRM at para. 134.

c. *The FCC has not determined whether text messaging services are exempt from taxes or fees.*

The question of whether text messaging should be exempt from surcharges and fees is also undecided at the federal level. The FCC sought comment on whether to specifically exempt text messaging from surcharges or fees in 2012:

> Alternatively, if we conclude that text messaging services should not be assessed, should the Commission conclude that even if such services are telecommunications services, should we exercise our forbearance authority under section 10 of the Act to exempt text messaging from contribution obligations?[14]

This question indicates that the FCC contemplated exempting text messaging services from contribution obligations. However, since requesting comment, the FCC has not chosen to create this exemption. It would be unreasonable to interpret silence on this issue as a rule exempting text messaging from state universal surcharges and fees in light of precedent and separation of powers between the States and the federal government. Unless the FCC takes specific action to create an exemption, text messaging should be understood to be subject to state surcharges.

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?

CTIA has repeatedly and incorrectly argued[15] that the question of whether the Commission has legal authority to assess surcharges on text messaging can only be answered by resolving the "threshold" question of whether text messaging is an information service or a telecommunication services.[16] CTIA also emphasizes that the

[14] 2012 FNPRM at para. 28.
[15] *See e.g.* Reply Comments of CTIA to the Order Instituting Rulemaking, R-17-06-023 (filed August 28, 2017) at p. 14.
[16] Although the Commission need not address the telecommunications and information service distinction, text messaging is properly classified as a telecommunications service under federal law. FCC precedent establishes text messaging as a telecommunications service because (1) text messaging uses ordinary equipment with no enhanced functionality; (2) it originates and terminates on the public switched telephone network; (3) text messaging undergoes no net

FCC has not ruled that text messaging is a telecommunications service,[17] but downplays the fact that the FCC has declined to classify text messaging as *either* a telecommunications or information service, a fact the Commission acknowledged in the Joint Ruling.[18]

The classification issue is not determinative of the Commission's authority to assess surcharges.[19] Rather, past FCC precedent has held that PPP surcharges can be imposed on services without regard to whether those services are telecommunications or information services. For example, the FCC has expressly declined to rule on whether VoIP is a telecommunications service or that it is an information service.[20] Despite this, the FCC has made it clear that VoIP services should be eligible for USF support.[21]

In this case, too, a determination of whether text messaging is a telecommunications or an information service is not required to establish that the Commission has authority to assess surcharges on text messaging services. Instead, the

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protocol conversion to end users and provides no enhanced functionality to end users and (4) text messaging customers do not subscribe to a service separate from telephone services. *See* Opening Comments of the Center for Accessible Technology, The Greenlining Institute and The Utility Reform Network to the Order Instituting Rulemaking, R-17-06-023 (filed August 18, 2017) at pp. 1-7.

[17] "[T]he FCC has declined to classify test messaging as a telecommunications service subject to USF assessments." CTIA Petition 17-02-006 to Adopt, Amend or Repeal a Regulation Pursuant to Pub. Util. Code 1708.5 (filed February 27, 2017) at p. 6.

[18] "To date, the Federal Communications Commission (FCC) has not determined whether text messaging service is an "information service" or a "telecommunications service" under the Telecommunications Act of 1996." Joint Ruling at p. 3.

[19] While a determination that text messaging is a telecommunications service, as Joint Consumers argue, would mandate a further determination that it is subject to surcharge, classification of text messaging as an information service would not establish an exemption.

[20] Report And Order And Further Notice Of Proposed Rulemaking, WC Docket No. 10-90, In the Matter of Connect America Fund (Nov. 18, 2011).

[21] *Id.* ("If interconnected VoIP services are telecommunications services, our authority under section 254 to define universal service after 'taking into account advances in telecommunications and information technologies and services' enables us to include interconnected VoIP services as a type of voice telephony service entitled to federal universal service support. And . . . if interconnected VoIP services are information services, we have authority to support the deployment of broadband networks used to provide such services").

primary question is whether 47 U.S.C. § 254(f) gives the Commission such legal authority. As discussed below, the Commission has legal authority to assess surcharges on text messages under 47 U.S.C. § 254(f).

a. *Plain Language*

In discerning the limits of a state's regulatory authority to assess surcharges, the Telecommunications Act itself is key.[22] The plain language of 47 U.S.C. § 254(f) indicates that a State can decide the manner in which it requires telecommunication carriers to contribute to the universal service fund. Specifically, the Telecommunications Act provides that "[e]very 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."[23] The Telecommunications Act does not contain an explicit prohibition on assessing surcharges on text messaging. Accordingly, a state's decision to impose surcharges on text messaging would be consistent with the broad authority granted by Section 254(f) so long as it advances universal service, does not burden the federal program, and is equitable and nondiscriminatory.[24] Accordingly, the Commission's imposition of surcharges on text messaging would not conflict with the Federal universal service program.

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[22] *See WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262 (10th Cir. 2007) ("[I]n discerning the limits of a state's regulatory authority, we look past a mere rule of thumb demarcating jurisdiction over interstate or intrastate communications, and instead look to the Telecommunications Act itself").

[23] 47 U.S.C. § 254(f).

[24] 47 U.S.C. § 254(f). *See also WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262 (10th Cir. 2007) ("It is clear that states have authority under the Telecommunications Act to adopt their own universal service standards and create funding mechanisms sufficient to support those standards, as long as the standards are not inconsistent with the FCC's rules, and as long as the state program does not burden the federal program").

Furthermore, 47 U.S.C. § 152(b), which governs the application of § 254(f), notes that "nothing in this chapter shall be construed to apply or to give the [Federal Communications] Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." Under the plain language of the statute, states have exclusive jurisdiction over intrastate services. Accordingly, the Commission's imposition of surcharges on intrastate text messaging would not violate federal law or otherwise conflict with the Federal universal service program.

b. *Court Precedent*

Legal precedent clearly supports state authority to build upon the federal program when promoting universal service where Congress or the FCC is silent, as is the case for text messaging. In *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), the Supreme Court interpreted 47 U.S.C. § 152(b) to reserve to states the authority to regulate intrastate communications "[i]nsofar as Congress has remained silent" about the regulatory matter at issue.[25] Furthermore, precedent supports independent state action to promote universal service.[26] In *Qwest Corp. v. FCC*, 258 F.3d 1191, 1203 (10th Cir.2001), the Tenth Circuit Court held that the "Telecommunications Act plainly contemplates a partnership between the federal and state governments to support universal service…. Thus, it is appropriate – even necessary – for the FCC to rely on state action in this area." Assessing surcharges on text messaging services to support state

[25] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 381 n.8 (1999).
[26] *WWC Holding Co., Inc. v. Sopkin* 488 F.3d 1262, 1271 (10th Cir. 2007) (cited with approval by the Commission in D.13-05-035 at p. 22 (May 23, 2013)).

universal service programs is exactly the type of state action that the Telecommunications Act, and specifically 47 USC § 254(f) was designed to support.

Nor does the fact that text messaging services have an interstate component affect the Commission's legal authority to impose surcharges on the intrastate portion of text messaging revenues. The Supreme Court has rejected the suggestion that the FCC's jurisdiction preempts state action whenever the state action impacts assets used for both interstate and intrastate communication.[27] The limitations on "state and federal authority instead focuses on the types of requirements being imposed, not whether the regulated entity offers bundled interstate services with its intrastate services."[28]

Based on these standards and the relevant precedent, the Commission has legal authority to surcharge intrastate text messaging revenues so long as the requirements are reasonable.

3. Under 47 U.S.C. § 253(b), would assessing surcharges on text messaging service further the Commission's efforts to promote the following goals: (a) Ensuring competitive neutrality; (b) Preserving universal service: (c) Advancing universal service; (d) Protecting the public safety and welfare; (e) Ensuring the continued quality of telecommunications services; and (f) Safeguarding the rights of consumers?

Broadly speaking, the Commission's policy goals, as enumerated in the Joint Ruling, are all supported by assessing surcharges on the intrastate component of text messaging services. By collecting surcharges on these services, the Commission maintains its goal of collecting surcharges from the widest possible customer base,[29] which spreads the cost of public purpose programs among the greatest number of

[27] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-75 (1986).
[28] *WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262 (10th Cir. 2007).
[29] *See* Communications Division Staff Paper (as revised and attached to the April 25 Ruling) at p. 1; *see also* D.12-02-023 at p. 27 and D.96-10-066 at p. 78.

customers and collects more revenue from those customers who use more in services. As Joint Consumers have previously noted, the Commission's efforts to embrace the largest appropriate base of customer support for user fees and surcharges ensures that the level of fees and surcharges paid by any individual customer is minimized.[30] By spreading the burden while also fully funding important programs, the Commission helps preserve and advance universal service and safeguard the rights of consumers while also protecting public safety and welfare.

While CTIA and the carriers have expended substantial effort in multiple filings to insist that PPPs are fully funded regardless of the base of services from which funding is collected,[31] this statement is beside the point. Commission policy not only requires collection of needed funding, but also recognizes that the collection of funds from all appropriate services avoids overburdening the customers of any individual service (and thus supports competitive neutrality) while also ensuring the continued quality of services by reducing the risk of backlash among customers who pay into the PPP fund. If the Commission declines to collect surcharges from all eligible services, it is obligated to either increase the amount it collects from a smaller set of services (primarily the shrinking pool of reported intrastate revenue collected from voice customers),[32] or else put the full funding of the supported programs at risk.

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[30] *See* Comments of the Center for Accessible Technology, the Greenlining Institute, and The Utility Reform Network in Response to Joint Ruling of Assigned Commissioner and Administrative Law Judge (Joint Consumers' Comments on Joint Ruling), filed on March 23, 2018, at pp. 5-6.

[31] *See e.g.* Reply Comments of CTIA to the Order Instituting Rulemaking, R-17-06-023 (filed August 28, 2017) at p. 2; Opening Comments of CTIA and Carrier Parties (filed March 23, 2018) at p. 10.

[32] *See* Joint Consumer Opening Comments on Ruling (filed March 23, 2018) at p. 5, footnote 9 (citing to FCC 2017 Wireless Competition Report); s*ee also* Appendix B of the April 25 Ruling where Staff's report demonstrates a clear decline in intrastate revenue for both wireline and wireless services, suggesting a related decline in usage of intrastate services.

To the extent the Commission declines to assess surcharges on eligible services, the customers who purchase those services are inappropriately relieved of the obligation to support public purpose programs. Providers of those services also gain a competitive advantage by offering lower total bills with fewer surcharges. At the same time, the customers of services on which surcharges are assessed are then required to pay increased surcharge costs in order to ensure that the programs are fully funded. This is not only uncompetitive, but it also puts the viability of the programs at increased risk when the costs are not fairly allocated over the widest possible base.

The carriers and CTIA implicitly recognize this imbalance, notwithstanding their repeated assertions that the PPPs are fully funded regardless of the services assessed, when they argue that the imposition of surcharges on text messages would increase the costs to wireless customers.[33] While they claim that this "increase" would be an unreasonable burden on these customers, the inverse is actually true: by inappropriately failing to assess surcharges on eligible text messaging services for their customers, the carriers now are improperly shifting a disproportionate level of the burden of support for PPPs to voice-only customers.

California's PPPs benefit all California ratepayers. The pool of total intrastate revenue available for surcharge is linked to the Commission's ability to ensure adequate funding for these programs. By maintaining or expanding the base through clear inclusion of text messaging, the Commission will be able to maintain support for these

[33] Opening Comments of CTIA and Carrier Parties (filed March 23, 2019) at p. 9. Joint Consumers note that any "increase" in surcharge costs to wireless customers comes from the fact that, to date, these carriers have failed to collect surcharges on text messages. As noted above, the record is not clear whether all text message customers will see an increase in surcharges as some carriers appear to assess surcharges currently.

programs, and potentially reduce the surcharge rate across the board if this clarification results in revenue from services that were previously failing to provide support.

Not only would such a clarification ensure the widest appropriate base for contributions, but it would also provide certainty and predictability about payments into the fund, which would help preserve the stability of the fund. Currently providers self-assess the amount of intrastate revenue subject to surcharge, which threatens the stability and predictability of the fund. Indeed, it remains unclear how the wireless carriers who claim that they do not currently report text messaging revenue calculate the relative proportion of each service provided as part of their bundled offerings (specifically including both voice and text) to evaluate the extent to which the revenue generated from such bundles is subject to surcharge. Yet bundled offerings, particularly of voice and text services, are standard in the industry.[34] Moreover, most carriers do not price the voice component of a bundled plan separately from the text component. Because of this, there is no clear way to evaluate whether carriers are submitting surcharges even on the portion of revenue that they agree is subject to surcharge. [35]

As previously noted by Joint Consumers, a policy of assessing surcharges on all bundled services would eliminate this uncertainty and risk of inconsistency among providers, as well as the risk that carriers are undercollecting surcharges even for those services where their obligation to collect such surcharges is undisputed. Moreover, a

[34] Mirroring this overwhelming trend in the industry, the Commission's LifeLine program allows carriers to offer bundled services, including text messaging with wireless voice services. Wireless LifeLine providers are not required to separate out the elements of the bundle, which, from the customer's perspective, results in the LifeLine Fund, essentially, subsidizing the text messaging services along with the other elements of the offering.

[35] Each of the carriers presumably has an internal formula that they use to determine the portion of their bundled revenues that can be attributed to intrastate voice service and thus serve as the basis for assessing surcharges, but they have declined to provide any information about such calculations in their filings in this proceeding.

clear determination that text messaging is subject to surcharge will allow for the establishment of specific, bright-line rules to ensure that all appropriate surcharges are assessed and thus support the ongoing stability of the fund.[36]

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

Joint Consumers' responses regarding state law issues are combined with our response to Question 5, below.

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?

a. *State Law Grants the Commission Broad Authority to Impose Surcharges or User Fees on Intrastate Revenue from Telephone Corporation and VoIP Services.*

There is no state statute, rule or Commission regulation that prohibits the Commission from imposing surcharges on the intrastate revenue generated from text messaging services. Indeed, far from being prohibited from imposing surcharge collection and remittance obligations on text messaging revenue, the Commission has broad discretion to design surcharge and user fee mechanisms to support its public purpose programs.

For example, California Public Utilities Code Section 879, subdivision (b), states, in pertinent part, that "[t]he commission may change the rates, funding requirements, and funding methods [for the LifeLine program] proposed by the telephone corporations in any manner necessary, including reasonably spreading the funding among the services

[36] *See* Joint Consumer Comments on Joint Ruling at p. 9.

offered by the telephone corporations, to meet the public interest."[37] The plain language of the statue refers only to "services offered by telephone corporations," giving the Commission statutory authority to properly impose surcharges on the intrastate revenue of any service offered by a telephone corporation, including text messaging. In 1984, when first implementing this statute, the Commission found that it had the responsibility and broad authority to identify the intrastate services that would be subject to the surcharge mechanism.[38] Since 1984, the Commission has expanded the services subject to the surcharge mechanism as the marketplace and technology have evolved.[39]

Other state statutes give the Commission additional broad authority to create subsidy mechanisms to support Commission programs. Public Utilities Code Section 275 assumes that the Commission will craft the scope and scale of surcharge obligations when it directs "all revenues collected through surcharges authorized by the commission to fund [the California High-Cost Fund-A]" be submitted to the Commission, gives the Commission "regulatory authority to maintain the [A-Fund program] to provide universal service rate support" and declares that "maintaining adequate funding levels for the fund is critical to public health and safety."[40] Public Utilities Code Sections 276 and 276.5 together create the California High-Cost Fund-B which also gives the Commission broad

[37] Pub. Util. Code §879(b). It is undisputed in this proceeding that CTIA members and other wireless providers are "telephone corporations" pursuant to Pub. Util Code §234 and have broad obligations to comply with Commission rules and state law. *See also* CPUC findings that wireless carriers are telephone corporations, including General Order 168, D.06-03-013 (R.00-02-004); D.12-10-018 (I.09-12-016) at pp. 1, 14-15 (TracFone Wireless, Inc. is a telephone corporation operating as a public utility in California").
[38] D.84-04-053, 1984 Cal. PUC LEXIS 1314 *1
[39] D.12-02-032 (I.09-12-016) at p. 25 ("Since the Commission's initial implementation order in 1984, the types of telecommunication services subject to the surcharge have evolved as technology has changed."), The latest example of this evolution is Pub. Util. Code §285 and D.13-02-022 (R.11-01-008) requiring VoIP providers to assess intrastate revenue to support public purpose programs.
[40] Pub. Util. Code §275(b) and (d); Pub. Util. Code §275.6(a).

authority and states, "except as otherwise explicitly provided, this subdivision does not limit the manner in which the commission collects and disperses funds, and does not limit the manner in which it may include or exclude the revenue of contributing entities in structuring the program."[41] Except for the assumed limitation that revenue subject to Commission surcharge must come from services that are jurisdictionally intrastate, none of the statutory mandates for the Commission to design and create rate support for public purpose program funds limits surcharge collection to a specific set of services.

More recent legislation further demonstrates legislative intent that the Commission fund public purpose programs using a funding base far broader than only voice calls. The 2014 Prepaid Mobile Telephony Services Surcharge Collection Act,[42] requires providers to collect surcharges on revenues based, in part, from text messaging. The Act, supported by CTIA and other wireless providers, created a mechanism for the Commission to collect PPP surcharges from ratepayers purchasing prepaid phone service at third-party retailers or online.[43] In both intent and implementation language, the Act uses broad descriptions to define the types of revenue eligible for surcharge. Specifically, the Act establishes that "providers of end-use communications services, including providers of mobile voice telecommunications services …are required to

[41] Pub. Util. Code §§276, 276.5(a).
[42] Assem. Bill 1717, 2013-2014 Chapter 885, Stat. 2014 (September 30, 2014).
[43] Rev. & Tax Code § 42001 et seq., §42010(a)(1). The Act refers to prepaid service as "mobile telephony service," defined as "commercially available interconnected mobile phone services that provide access to the public switched telephone network (PSTN) via mobile communication devices employing radiowave technology to transmit calls, including cellular radiotelephone, broadband Personal Communications Services (PCS), and digital Specialized Mobile Radio (SMR)." Rev. & Tax Code § 42004(h), citing Pub. Util. Code § 224.4. Pub. Util. Code §224.4 further states that "'Mobile telephony services' does not include mobile satellite telephone services or mobile data services used exclusively for the delivery of nonvoice information to a mobile device." Text messaging, however, uses the SMS network and not the carriers' data network. (*See* CTIA Opening Comments on OIR (August 18, 2017), Exhibit A).

collect and remit communications taxes, fess, and surcharges on *various types of communication service revenues*, as provided by existing state or local law."[44] Further, it states, "if prepaid mobile telephony services are sold in combination with mobile data services or any other services or products for a single price, then the prepaid MTS surcharge and local charges shall apply to the *entire price*."[45]

The statute supports a broad revenue base for surcharge collection because it recognizes that "[m]aintaining effective and efficient communications services, 911 emergency systems, communications-related public policy programs to promote universal service, and various local programs across the state benefits all persons with access to the telecommunications system."[46] The statute emphasizes the importance of equitable contributions from ratepayers in a competitively neutral manner.[47] Based on the plain language of the Act, the Legislature intended to impose PPP surcharges on text messaging and other services at the point of the retail transaction, in part, to ensure that all wireless providers and their customers are contributing to the state's programs in a competitively neutral manner. Accordingly, the Commission's policy and practice to impose PPP surcharges and user fees on text messaging is consistent with California statutes and legislative intent.

Public Utilities Code Section 285 also displays legislative intent to create a broad base of revenue support for the Commission's public purpose programs by directing the Commission to "require interconnected VoIP service providers to collect and remit

[44] Rev. & Tax Code §42002(b) (emphasis added) (Note the use of the term "mobile voice" to describe the carriers subject to surcharge, but the clear absence of the term "voice" or "telecommunications" in the description of the revenue).
[45] Rev. & Tax Code §42018(a) (emphasis added).
[46] Rev. & Tax Code § 42002(a).
[47] Rev. & Tax Code § 42002(f).

surcharges on their California intrastate revenues in support of . . . public purpose program funds."[48] As discussed above, even though the FCC has declined to issue a determination regarding the regulatory classification of VoIP services, state law recognizes broad authority for the Commission to assess and collect surcharges on revenue to support user fees and public purpose programs.

Moreover, the statute allows a provider to choose a method to determine the revenues that are subject to state surcharge. One possible method includes the "inverse of the interstate safe harbor percentages established by the Federal Communications Commission."[49] By including this method of identifying intrastate revenue amounts, the Commission and the Legislature were well aware that under this method, providers would designate a portion of their revenue as interstate and the remainder or the inverse would be designated as intrastate. This statute recognizes that the lines between jurisdictional classifications are softening, yet providers must be able to identify intrastate revenue, especially when the policy goal is to support important public purpose programs and rural rate support.

b. *Commission Precedent*

The Commission's precedent demonstrates a policy and a practice supporting the assessment of surcharges on intrastate text messaging revenue. The Commission's Staff

[48] Pub. Util. Code §285(b) notes that "[t]he Legislature finds and declares that the sole purpose of this section is to require the commission to impose the surcharges pursuant to this section to ensure that end-use customers of interconnected VoIP service providers contribute to the funds enumerated in this section, and, therefore, this section does not indicate the intent of the Legislature with respect to any other purpose." While the authority to surcharge VoIP revenue is not precedential for the Commission to apply additional regulation on VoIP providers, the analogy to text messaging is particularly apt on the issue of PPP surcharges.

[49] Pub. Util. Code § 285(e)(1).

Report[50] and the data provided to the parties on April 20, 2018 (and revised in the April 25 Ruling), as discussed above, is consistent with Commission precedent.[51] The Commission has not preempted itself nor declared an intent to exempt text messaging intrastate revenue from its surcharge collection practices. Instead, in compliance with its legislative mandate discussed above, the Commission has consistently adopted decisions that define the revenue base for surcharge collection to be broad so that its public purpose programs, user fees, and rural rate support funds are well supported and surcharge collection is nondiscriminatory.[52] The Commission has further held that any exceptions to the imposition of surcharges in intrastate revenue should be drawn very narrowly not only to ensure sufficient support for its services, but also to "provide a competitively neutral universal service mechanism which will minimize market distortions."[53]

For example, during its litigation with Tracfone regarding the legal obligation of prepaid carriers to assess public purpose program surcharges, the Commission reaffirmed an assumption that its public purpose programs, including LifeLine, are supported by surcharges on revenues on "'all end-user intrastate telecommunications services, whether tariffed or not…,' *except specifically exempted services*."[54] As discussed above, and further evidenced by Commission directives such as General Order 153, neither the

[50] April 25 Ruling, Appendix A at pp. 2-3 (The Commission has not expressly exempted text messaging and it is, therefore subject to surcharge.)
[51] *Id.* at Appendix B, p. 1 (estimating that 10% of the total amount of surcharge revenue collected from wireless services is from text messaging "based on data from prepaid wireless carriers").
[52] D.12-02-032 (I.09-12-016, TracFone Phase 1) at p. 27; D.96-10-066, at p. 79 ("all end users of every LEC, IEC, cellular, and paging company in the state, receive value from the interconnection to the switched network, and that all users should be included in the billing base for the ULTS program and the Deaf and Disabled Telecommunications program).
[53] D.12-02-032 (I.09-12-016, TracFone Phase 1) at p. 28-29; D.96-10-066 at p. 78, Appendix B, Rule 3.
[54] D.12-10-018 (I.09-12-016, TracFone Rehearing) at p. 12, citing General Order 153 Section 10.5.1.

Commission nor the Legislature have explicitly exempted text messaging from any surcharge assessment obligations.[55] The Commission found that "the plain language of the statute [Pub. Util. Code §871] does not specifically identify either the types of public utilities that must collect the surcharges or the types of utility services to which the surcharges apply."[56] Therefore, with no legislative mandate to exclude specific services, like texting, from the surcharge mechanisms, the Commission has since 1984 recognized that "its responsibility to establish a funding mechanism reasonably included the identification of the services subject to the surcharge."[57]

Indeed, during the TracFone litigation the Commission found that the Board of Equalization (BOE) had established a broad base for surcharge collection to support emergency communications programs, including "other revenue sources, such as internet access, data and ring tones."[58] While the Commission declined to go as far as the BOE to define its funding base, the Commission noted that by reporting its jurisdictionally mixed service revenue to the BOE, TracFone demonstrated the capability to separate its intrastate revenue for the purpose of surcharge collection. The Commission also listed specific services that would be exempted or included in this calculation, such as Voice Mail (exempted) and Abbreviated Dialing (included).[59] The Commission did not discuss text messaging as one of the exemptions when calculating TracFone's surcharge payment obligation.[60] It is reasonable to assume that the Commission intended to include text

[55] *Id.* (listing specific services that are explicitly exempted in G.O. 153, Section 10-5-1-10-5-1-6).
[56] D.12-02-032 (I.09-12-016, TracFone Phase 1) at p. 23.
[57] D.12-02-032 (I.09-12-016, TracFone Phase 1) at p. 24, citing D.84-04-053.
[58] D.14-01-037 (I.09-12-016, TracFone Phase 2) at p. 37.
[59] D.14-01-037 (I.09-12-016, TracFone Phase 2) at p. 38.
[60] *Id. at* p. 38. The detailed matrices used to calculate TracFone's payment obligations were submitted under seal and are not publicly available. The Commission's decision ordering TracFone's payment, including its application for rehearing of the payment order, does not include text messaging as an exempt service from the calculations.

messaging revenue in what it defined as surchargable revenue, because text messaging uses the cellular voice network, not a data or IP network, to transmit its messages. [61] Moreover, the Commission found that TracFone, like other prepaid carriers, is a "full services telecommunications provider" and, as such, it was critical that it properly remitted end-user surcharge assessments to ensure competitive neutrality for other "public utilities providing telephony services in California" and to properly fund these programs.[62]

In other contexts, the Commission has also described the public purpose program surcharges by noting that these programs are "funded by an all-end-user surcharge, which is a percentage applied to customers' intrastate-billed services."[63] The use of the term "intrastate-billed services" is worth noting because it can include a broad array of services not limited to voice-specific service. For example, prepaid service users can put money into an account through the purchase of minutes and use those funds or minutes for any service offered by the provider (presumably including text messaging); accordingly, most services provided by the prepaid carriers are "billed" in a bundle as intrastate and interstate services, making the revenue difficult to separate out. Yet, consistent with decades of policy and decisions, the Commission ordered TracFone to report intrastate revenue from its prepaid customers for the purpose of surcharge assessment.

[61] Response of Joint Consumers to Petition of CTIA, filed March 28, 2017, at p. 13 (text messages travel on the telephone network).
[62] D.12-10-018 (I.09-12-016, TracFone Rehearing) at p. 13.
[63] Order Instituting Rulemaking on the Commission's Own Motion to Review the Telecommunications Public Policy Programs (R.06-05-028) at p. 4.

Based on various state statutes that give the Commission broad authority to design and implement the funding mechanisms for user fees and its public purpose programs, and Commission precedent implementing those statutes, state law provides clear direction to the Commission. Not only is the Commission well within its authority to assess intrastate revenue on text messaging services, but its policy of supporting PPPs with the broadest possible base means that it must do so to ensure text messaging revenue is included in its surcharge calculations.

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?

This question is not addressed to the Joint Consumers, but we expect to respond to the information provided by the carrier parties in our reply brief.

III. CONCLUSION

Joint Consumers respectfully urge the Commission to resolve the fundamental question at issue in this proceeding in the affirmative by concluding that text messages are subject to public purpose program surcharges and user fees. The Commission need not resolve whether text messaging is a communications service or an information service in order to reach this conclusion.

Once the Commission has established that text messaging is subject to public purpose program surcharges and user fees, it should set further proceedings to determine the appropriate way to ensure that all providers implement their surcharge obligations equitably.

Respectfully submitted,

May 11, 2018 /s/ Melissa W. Kasnitz

[Authorized to sign for Joint Consumers]
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