

Decision PROPOSED DECISION OF COMMISSIONER PICKER

(Mailed 5/12/2017)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

Petition 17-02-006
(Filed February 27, 2017)

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

R. _____

ORDER REGARDING PETITION 17-02-006 AND ORDER INSTITUTING RULEMAKING TO CONSIDER WHETHER TEXT MESSAGING SERVICES ARE SUBJECT TO PUBLIC PURPOSE PROGRAM SURCHARGES

Summary

In response to the petition filed by CTIA-The Wireless Association pursuant to Public Utilities Code Section 1708.5, this 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 if it 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.¹

¹ 47 USC § 153 et seq.

1. Procedural background

CTIA-The Wireless Association (CTIA) filed Petition (P.) 17-02-006 February 27, 2017, pursuant to Public Utilities Code (Pub. Util. Code) Section 1708.5 which allows “interested persons to petition the commission to adopt, amend, or repeal a regulation.”

Notice of P.17-02-006 appeared in the Commission’s Daily Calendar on March 2, 2017.

A response was filed on March 29, 2017 by a coalition of consumer groups consisting of The Greenlining Institute (Greenlining), the Center for Accessible Technology and The Utility Reform Network, collectively “Joint Consumers.” CTIA filed a reply to Joint Consumers’ response on April 7, 2017.

2. Summary of P.17-02-006

In P.17-02-006, CTIA asks the Commission to open a rulemaking to adopt a rule stating that text messaging services are not subject to Public Purpose Program (PPP) surcharges or user fees. In support of this request, CTIA argues that text messaging is an “information service” rather than a “telecommunications service” as those terms are defined in the Act. The Act defines “telecommunications” as “the *transmission*, between or among points specified by the user, of information of the user’s choosing *without change in the form or content* of the information as sent and received.”² A “telecommunications service” “means the offering of telecommunications for a fee directly to the public....”³ This definition encompasses offerings like voice and facsimile

² 47 U.S.C. § 153 (50).

³ 47 U.S.C. § 153 (53).

services that provide a “simple transmission path” for relaying content.⁴ Conversely, according to the Act, an information service possesses “a capability for generating, acquiring, *storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.*”⁵ The terms “telecommunications service” and “information service” are mutually exclusive.⁶

Petitioner argues that although the Commission has never directly addressed the question presented in the petition, other actions of the Commission indicate that it embraces the distinction between telecommunications services and information services created by the Act. Accordingly, Petitioner argues that the Commission should affirm that text messaging is an information service; that PPP surcharges apply only to telecommunications services; and, therefore, that PPP surcharges do not apply to text messaging.

3. Response to P.17-02-006

Respondent Joint Consumers oppose the petition to open a rulemaking. They state that imposition of the PPP surcharges on text messaging is within the Commission’s powers and does not conflict with federal law. In support of this position, they argue that text messaging is properly classified as a telecommunications service rather than an information service when the Act’s

⁴ *Report to Congress*, 13 FCC Rcd at 11538-39, para.78 & n. 161.

⁵ 47 U.S.C. § 153(24) (defining an information service) (emphasis added).

⁶ *Report to Congress, Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11523 para. 43 (1998) (“*Report to Congress*”) (“[T]elecommunications services and information services are mutually exclusive categories.”); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24029 para. 34 n. 50 (1998) (“Under the 1996 Act, any service with a communications component must be either a ‘telecommunications service’ or an ‘information service’ (but not both).”).

criteria for distinguishing one from the other are applied to the facts of text messaging.

4. Discussion

In determining whether to grant CTIA's petition to open a rulemaking concerning the application of PPP surcharges to text messages, we first ask whether there is ambiguity regarding the status of text messaging under the Act. We recognize, as pointed out by Petitioner, that text messaging is either a telecommunications service or it is an information service but it cannot be both. We further recognize, as pointed out by Joint Consumers, that text messaging may meet the Act's requirements for classification as a telecommunications service. Because the question presented is one of first impression before this Commission and because the classification of text messaging under the Act is subject to conflicting interpretations as to which reasonable persons may differ, we conclude that the proper classification of text messaging is sufficiently ambiguous as to justify granting the petition to open a rulemaking to resolve that ambiguity and determine whether we should impose PPP surcharges on text messages.

5. Compliance with Pub. Util. Code § 1705(c)

Pub. Util. Code § 1708.5(c) states as follows:

If the commission denies a petition, the order or resolution of the commission shall include a statement of the reasons of the commission for that denial.

Today's order denies in part CTIA's Petition to institute a rulemaking proceeding to adopt a rule stating that text messaging services are not subject to PPP surcharges or user fees. We deny the Petition to the extent it seeks to open a rulemaking for that specific purpose. We grant the Petition to open a rulemaking

for the purpose of determining whether text messages should be subject to PPP surcharges or user fees.

6. Order Instituting Rulemaking Proceeding (OIR)

In response to Safety and Enforcement Division's Petition, we hereby institute a rulemaking proceeding pursuant to Pub. Util. Code § 1708.5. This OIR contains a preliminary scoping memo pursuant to Rule 7.1(d) that sets forth the scope and schedule of this rulemaking proceeding, preliminarily determines the category of this proceeding and the need for hearings, and addresses other matters that are customarily the subject of scoping memos.

6.1. Preliminary Scoping Memo

6.1.1. Scope

The scope of this proceeding is to determine whether text messages are subject to public purpose program surcharges and user fees.

Consistent with Rule 6.3(a) of the Commission's Rules of Practice and Procedure, any rule adopted in this rulemaking proceeding will apply prospectively. The assigned Commissioner may refine the scope of this proceeding, as appropriate, in the scoping memo issued pursuant to Rule 7.3(a) of the Commission's Rules of Practice and Procedure.⁷

6.1.2. Proceeding Schedule and Written Comments

The preliminary schedule is summarized below. The schedule may be revised by the assigned Commissioner and/or the assigned Administrative Law Judge (ALJ) to develop an adequate record, provide due process, and conduct this rulemaking proceeding in an orderly and efficient manner.

⁷ Any reference to a rule or rules means the Commission's Rules of Practice and Procedure.

Preliminary Schedule for the Proceeding	
Event	Date⁸
Combined Opening Comments and Prehearing Conference Statements Filed and Served	50 Days
Reply Comments Filed and Served	60 Days
Prehearing Conference (PHC)	To Be Determined
Workshops, Additional Written Comments, Briefs, Etc.	To Be Determined
Projected Submission Date	To Be Determined

The assigned Commissioner and/or the assigned ALJ will schedule a PHC as soon as practicable. The combined opening comments and PHC statements due on Day 50 should address the following matters:

- The matters set forth in Rule 6.2, including any objections to the preliminary scoping memo regarding the category, need for hearings, issues to be considered, or schedule.
- The party’s positions and recommendations regarding matters within the scope of this proceeding. Comments that include factual assertions must be verified in accordance with Rule 1.11.
- Whether text messaging is an information service or a telecommunications service, as those terms are defined in the Act.
- Whether text messages are an economic substitute for voice messages.

⁸ Measured from the effective date of this OIR.

- A proposed schedule for addressing issues within the scope of this proceeding, including all major events contemplated by the party such as additional comments, workshops, workshop reports, mediation, discovery cutoff, evidentiary hearings and/or briefs, and other events.
- Whether an evidentiary hearing is needed. Any party who believes a hearing is necessary to receive testimony regarding adjudicative facts must make an explicit request in its filed comments. The request must (i) identify the material disputed facts, (ii) explain why a hearing must be held, (iii) describe the general nature of the evidence that would be introduced at a hearing, and (iv) provide a schedule for all hearing-related events.
- Any other matters that are relevant to the scope, schedule, or conduct of this rulemaking proceeding.

In order to receive service of comments and reply comments, persons should request addition to the Official Service List as “Information Only” or “State Service.” Instructions for addition to the Official Service List are provided in Section 8.1.5 of today’s order.

Pursuant to Pub. Util. Code § 1708.5(f), the Commission may conduct this proceeding using notice and comment rulemaking procedures. Accordingly, the comments and reply comments due on Day 50 and Day 60, respectively, may constitute the record used by the Commission to decide matters within the scope of this proceeding. Parties should include in their comments and reply comments all legislative facts and other information they want the Commission to consider in this proceeding, as there may not be another opportunity for parties to present such information to the Commission.

Consistent with Rule 6.2 and the statutory deadline for quasi-legislative proceedings set forth in Pub. Util. Code § 1701.5(b), we expect this proceeding to

conclude no later than 18 months from the date the scoping memo is issued pursuant to Rule 7.3(a) of the Commission's Rules of Practice and Procedure.

The final schedule for this proceeding will be established by the assigned Commissioner in a scoping memo issued pursuant to Rule 7.3(a).

6.1.3. Proceeding Category and Need for Hearings

Pursuant to Rule 7.1(d), we preliminarily determine that (1) the category for this rulemaking proceeding is quasi-legislative as that term is defined in Rule 1.3(d), and (2) there is no need for evidentiary hearings in this proceeding.

As permitted by Rule 6.2, parties may address these preliminary determinations (and all other determinations in this preliminary scoping memo) in their written comments that are filed and served in accordance with the previously identified schedule for this proceeding. The assigned Commissioner will make a final determination regarding the category of this proceeding and the need for hearings in a scoping memo issued pursuant to Rules 7.1(d) and 7.3(a).

6.1.4. Ex Parte Communications

This proceeding is preliminarily categorized as quasi-legislative. In a quasi-legislative proceeding, *ex parte* communications with the assigned Commissioner, other Commissioners, their advisors, and the ALJ are permitted without restriction or reporting as described in Pub. Util. Code § 1701.4(b) and Article 8 of the Commission's Rules.

6.1.5. Intervenor Compensation

In accordance with Pub. Util. Code § 1804(a)(1) and Rule 17.1, a customer who intends to seek an award of compensation must file and serve a notice of intent to claim compensation no later than 30 days after the date of the PHC or as otherwise directed by the assigned Commissioner or the assigned ALJ.

6.1.6. Party Status and Participation

The Official Service List for P.16-05-004 shall constitute the initial Official Service List for the rulemaking proceeding instituted by this order. Thus, any person or entity that is listed in the Party category, State Service category, or

Information Only category on the Official Service List for P.16-05-004 will retain this category on the initial Official Service List for this rulemaking proceeding.

Henceforth, additions to the Party category on the Official Service List for this rulemaking proceeding shall be governed by Rule 1.4.

The Commission's practice is to list only one representative per party in the "Party" category of the official service list. Other representatives for the same party may be placed on the service list in the "State Service" category or the "Information Only" category.

Any person or entity that wants to receive electronic service of documents in this proceeding may be added to the Official Service List for this proceeding as "Information Only" by completing the Request for Addition or Change to Service List(http://www.cpuc.ca.gov/forms/service_list_addition_change.pdf.) and submitting it to the Commission's Process Office (process_office@cpuc.ca.gov).

To ensure receipt of all documents, requests to be added to the Official Service List in the "State Service" category or the "Information Only" category should be sent to the Process Office as soon as practical. The Commission's Process Office will publish the official service list on the Commission's website (www.cpuc.ca.gov) and will update the list as necessary.

The Official Service List for this rulemaking proceeding is available on the Commission's web page. Each person on the Official Service List is responsible for ensuring that the information they have provided is correct and up-to-date.

This information can be changed, corrected, and updated by sending an e-mail to the Process Office, with a copy to everyone on the Official Service List. Prior to serving any document, each party must ensure that it is using the most up-to-date service list. The list on the Commission's website meets this definition.

6.1.7. Subscription Service

Persons may monitor this proceeding by subscribing to receive electronic copies of documents in this proceeding that are published on the Commission's website. There is no need to be on the Official Service List in order to use the subscription service. Instructions for enrolling in the subscription service are available at <http://subscribecpuc.cpuc.ca.gov>.

6.1.8. Filing and Serving Documents

All pleadings in this proceeding shall be filed and served in conformance with Article 1 of the Commission's Rules of Practice and Procedure. The assigned Commissioner and the assigned ALJ may establish additional requirements for filing and/or serving documents in this proceeding.

This proceeding will follow the electronic service protocols in Rule 1.10. All parties in this proceeding shall serve documents and pleadings using electronic mail, whenever possible, transmitted no later than 5:00 p.m. on the date scheduled for service.⁹ The format of served documents must comply with

⁹ If no e-mail address is provided, service should be made by first-class mail. Parties are expected to provide paper copies of served documents upon request.

the requirements in Rules 1.5 and 1.6. Additionally, Rule 1.10 requires service on the ALJ of both an electronic and a paper copy of filed or served documents.

Rules 1.9 and 1.10 govern service of documents only and do not change the Rules regarding the tendering of documents for filing. Information about electronic filing of documents is available at www.cpuc.ca.gov/PUC/efiling. All documents formally filed with the Commission's Docket Office must include the caption approved by the Docket Office.

Finally, any supporting documents required in this proceeding shall be submitted electronically to the Commission's website in accordance with the instructions contained in Appendix A of this preliminary scoping memo.

6.1.9. Public Advisor

Any person interested in participating in this proceeding who is unfamiliar with the Commission's procedures may obtain more information by visiting the Commission's website at <http://consumers.cpuc.ca.gov/pao>, by calling the Commission's Public Advisor at 866-849-8390 or 415-703-2074 or 866-836-7825 (TTY), or by e-mailing the Public Advisor at public.advisor@cpuc.ca.gov.

6.1.10. Workshops

Any workshops in this proceeding shall be open to the public and noticed in the Commission's Daily Calendar. The notice in the Daily Calendar shall inform the public that a decision-maker or an advisor may be present at the workshop. Parties shall check the Daily Calendar regularly for such notices.

6.2. Service of this OIR

The Executive Director shall serve a notice of availability of this OIR on the service list for P.17-02-006. Such service does not confer party status in this

rulemaking proceeding or result in any person or entity being placed on the service list for this proceeding.

7. Comments on Proposed Decision

The proposed order in this matter was mailed to the parties in P.17-02-006 in accordance with Section 311 of the Public Utilities Code, and comments were allowed pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on June 1, 2017 by Cox California Telcom LLC (Cox). Reply comments were filed on June 6, 2017 by Joint Consumers.

In its comments Cox urged the Commission to expand the scope of the proceeding to include directory service charges as well as text messages. In their reply, Joint Consumers asked the Commission to reject Cox's comments as non-responsive because they do not comply with Commission Rule 14.3(c) which requires that comments "shall focus on factual, legal or technical errors" in the proposed decision. We concur with Joint Consumers and accordingly we reject Cox's comments.

8. Assignment of Proceeding

Michael Picker is the assigned Commissioner and Karl J. Bemesderfer is the assigned ALJ in this proceeding.

Findings of Fact

1. Wireless phones are capable of sending and receiving text messages in addition to sending and receiving voice messages.
2. All services accessible through a wireless phone are classified by the Telecommunications Act of 1934, as amended, as either "information services" or "telecommunications services."
3. The Commission imposes Public Participation Program surcharges and user fees on telecommunications services but not on information services.

4. The Commission has never ruled on whether text messaging is an information service or a telecommunications service.

Conclusions of Law

1. It is appropriate to open a rulemaking proceeding to determine the proper classification of text messaging services as either information services or telecommunications services.

2. P.17-02-006 should be granted to the extent it asks the Commission to open a rulemaking proceeding to consider the matters identified in the previous Conclusion of Law. The Petition should be denied in all other respects.

3. The following order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. A rulemaking proceeding is instituted to determine whether text messaging services should be subject to Public Purpose Program surcharges and user fees.

2. The preliminary schedule for this rulemaking proceeding is set forth in the body of this Order, at Section 6.1.2. The assigned Commissioner and/or the assigned Administrative Law Judge may modify the proceeding schedule for the reasonable, efficient, and orderly conduct of this proceeding.

3. The preliminary category for this rulemaking proceeding is quasi-legislative as that term is defined in Rule 1.3(d) of the Commission's Rules of Practice and Procedure.

4. There is no preliminary need for an evidentiary hearing in this proceeding.

5. The Executive Director shall serve a notice of availability for this Order Instituting Rulemaking on the service list for Petition 17-02-006. Service of

this Order does not confer party status or placement on the Official Service List for this rulemaking proceeding.

6. The Official Service List for Petition 17-02-006 shall constitute the initial Official Service List for the rulemaking proceeding initiated by this Order. Additions to the Party category on the Official Service List for this rulemaking proceeding shall be governed by Rule 1.4 of the Commission's Rules of Practice and Procedure.

7. Any person may file opening comments or reply comments regarding the subject matter of this rulemaking proceeding. The scope of the comments is set forth in the body of this Order at Section 6.1.1.

8. The deadline in this rulemaking proceeding to file and serve notices of intent to claim intervenor compensation is 30 days after the date of the prehearing conference or as otherwise directed by the assigned Commissioner or the assigned Administrative Law Judge.

9. Petition 17-02-006 is granted to the extent set forth above. The Petition is denied in all other respects.

10. The Docket for Petition 17-02-006 is closed.

This order is effective today.

Dated _____, at Sacramento, California.

Appendix A

Instructions for the Electronic Submission and Format of Supporting Documents

The Commission's website accepts electronic submittal of supporting documents such as testimony and work papers. If such documents are required in this proceeding, parties shall submit their testimony or work papers in this proceeding through the Commission's electronic filing system.¹⁰

Parties must adhere to the following:

- The Instructions for Using the "Supporting Documents" Feature: (<http://docs.cpuc.ca.gov/SearchRes.aspx?docformat=ALL&DocID=158653546>) and
- The Naming Convention for Electronic Submission of Supporting Documents: ([http://docs.cpuc.ca.gov/SearchRes.aspx?docformat=ALL &DocID=100902765](http://docs.cpuc.ca.gov/SearchRes.aspx?docformat=ALL&DocID=100902765)).
- The Supporting Document feature does not change or replace the Commission's Rules of Practice and Procedure. Parties must continue to adhere to all rules and guidelines in the Commission's Rules of Practice and Procedures including but not limited to rules for participating in a formal proceeding, filing and serving formal documents and rules for written and oral communications with Commissioners and advisors (i.e., "ex parte communications") or other matters related to a proceeding.
- The Supporting Document feature is intended to be solely for the purpose of parties submitting electronic public copies of testimony, work papers and workshop reports (unless instructed otherwise by the ALJ), and does not replace the requirement to serve documents to other parties in a proceeding.
- Unauthorized or improper use of the Supporting Document feature will result in the removal of the submitted document by the CPUC.
- Supporting Documents should not be construed as the formal files of the proceeding. The documents submitted through the Supporting Document feature are for information

¹⁰ These instructions are for submitting supporting documents such as testimony and work papers in formal proceedings through the Commission's electronic filing system. Parties must follow all other rules regarding serving testimony. Any document that needs to be formally filed such as motions, briefs, comments, etc., should be submitted using Tabs 1 through 4 in the electronic filing screen.

only and are not part of the formal file (i.e., “record”) unless accepted into the record by the ALJ.

All documents submitted through the “Supporting Documents” Feature shall be in PDF/A format. The reasons for requiring PDF/A format are:

- Security – PDF/A prohibits the use of programming or links to external executable files. Therefore, it does not allow malicious codes in the document.
- Retention – The Commission is required by [Resolution L-204](#), dated September 20, 1978, to retain documents in formal proceedings for 30 years. PDF/A is an independent standard and the Commission staff anticipates that programs will remain available in 30 years to read PDF/A.
- Accessibility – PDF/A requires text behind the PDF graphics so the files can be read by devices designed for those with limited sight. PDF/A is also searchable. Until further notice, the “Supporting Documents” do not appear on the Docket Card. In order to find the supporting documents that are submitted electronically, go to:
 - Online documents, choose: “E-filed Documents, ”
 - Select “Supporting Document” as the document type, (do not choose testimony),
 - Type in the proceeding number and hit search.

Please refer all technical questions regarding the submittal of supporting documents to:

- Kale Williams (kale.williams@cpuc.ca.gov) (415) 703-3251 and
- Ryan Cayabyab (ryan.cayabyab@cpuc.ca.gov) (415) 703-5999

(END OF APPENDIX A)