

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

**Communications Division
Carrier Oversight and Programs Branch**

**RESOLUTION T-17568
October 12, 2017**

RESOLUTION

Resolution T-17568. Denying Amended Application for Modification of Resolution T-17542 Submitted by MetroPCS California, LLC dba MetroPCS, and T-Mobile West LLC dba T-Mobile.

SUMMARY

This resolution denies the Amended Application for Modification of Resolution T-17542, MetroPCS California, LLC, and T-Mobile West LLC submitted on January 24, 2017. The relief requested is inconsistent with the *Prepaid Mobile Telephony Services Surcharge Collection Act* (enacted by Assembly Bill 1717), which requires the California Board of Equalization to post one statewide prepaid Mobile Telephony Services surcharge rate to be applied in the same manner by all sellers of prepaid mobile telephony services.

In T-17542, issued November 16, 2016, the California Public Utilities Commission (Commission or CPUC) adopted its portion of the state's 2017 prepaid Mobile Telephony Services surcharge at 5.15%, effective January 1, 2017 through December 31, 2017. The Commission's portion of the state surcharge is used to recover the Commission's Public Purpose Program Surcharges and the User Fee, as well as the costs of administering the *Prepaid Mobile Telephony Services Surcharge Collection Act*

In T-17542, the Commission adjusted the CPUC's portion of the state prepaid Mobile Telephony Services surcharge utilizing a prepaid wireless telephone service intrastate allocation factor of 72.75%. This adjusted rate enables all prepaid wireless telephone service sellers to assess the prepaid Mobile Telephony Services surcharge on the *entire sales price* of each retail transaction involving bundled services, as required by law, without assessing the surcharge on service revenues that are not intrastate.

In the Amended Application, MetroPCS California, LLC, and T-Mobile West LLC request that the Commission modify T-17542 to allow prepaid wireless telephone corporations the discretion (1) to assess the prepaid Mobile Telephony Services surcharge in the manner prescribed by T-17542, or alternatively, (2) to utilize carrier-specific methodologies to assess the unadjusted surcharge rate of 7.0854% on intrastate revenue the carriers determine to be subject to the prepaid Mobile Telephony Services surcharge.

BACKGROUND

The Legislature enacted the *Prepaid Mobile Telephony Services Surcharge Collection Act* (Act) by Assembly Bill 1717 (Chapter 885, Statutes 2014, Perea) to standardize the method used to collect communications taxes, fees, and surcharges from end-use consumers of prepaid mobile telephony services (MTS).¹ In enacting AB 1717, the Legislature found that “[p]repaid mobile telephony services are frequently sold by a third-party retailer that is not the provider of mobile telephony services, and collecting taxes, fees, and surcharges from prepaid consumers of mobile telephony services at the time of the retail transaction is necessary and the most efficient and competitively neutral means of collection.”²

The Act specifically requires that “[o]n and after January 1, 2016, a prepaid MTS surcharge shall be imposed on each prepaid consumer and shall be collected by a seller from each prepaid consumer at the time of each retail transaction in this state. The prepaid MTS surcharge shall be imposed as a percentage of the sales price of each retail transaction that occurs in this state.”³ The Act further specifies that “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.”⁴

The Act defines sellers of prepaid mobile telephony services as either a “direct seller” or “a seller that is not a direct seller,” otherwise known as an indirect seller.⁵ A direct

¹ The Act added § 319 to the Public Utilities Code and added and/or modified multiple sections of the Revenue and Taxation Code relating to telecommunications.

² Rev. and Tax. Code § 42002(f).

³ Rev. and Tax. Code § 42010(a)(1).

⁴ Rev. and Tax. Code § 42018(a).

⁵ The Act defines a “direct seller” to mean “a prepaid MTS provider or service supplier...that makes a sale of prepaid mobile telephony services directly to a prepaid consumer for any purpose other than resale in the regular course of business. A direct seller includes, but is not limited, to any of the

seller is the provider of prepaid mobile telephony service, such as MetroPCS. An indirect seller sells prepaid mobile telephony service to a person in a retail transaction, but is not the service provider.⁶ Indirect sellers are third-party retailers, such as Walmart or convenience stores.

For purposes of remitting the prepaid MTS surcharge that all sellers are mandated to collect from customers at the time of the retail transaction, the Act requires direct sellers to report and remit the prepaid MTS surcharge to the Commission.⁷ In contrast, indirect sellers report and remit the prepaid MTS surcharge to the Board of Equalization (BOE), now known as the California Department of Tax and Fee Administration (CDTFA).

Resolution T-17542

As directed by the Act, in T-17542, the Commission adopted its portion of the state's 2017 prepaid MTS surcharge rate at 5.15%, effective January 1, 2017 through December 31, 2017.⁸

The Commission calculated its total rate, inclusive of all six telecommunications Public Purpose Program surcharges (universal service surcharges) and the CPUC User Fee (reimbursement fee), to be 7.0854%.⁹ We then adjusted that rate utilizing an intrastate allocation factor of 72.75% to arrive at its adopted rate of 5.15% for the CPUC portion of the state prepaid MTS surcharge. This rate, with its applied intrastate allocation factor, is intended to exclude interstate, international, and non-jurisdictional revenues from being assessed the prepaid MTS surcharge.¹⁰

following: (A) A telephone corporation, as defined by Section 234 of the Public Utilities Code. (B) An interconnected Voice over Internet Protocol (VoIP) service, as defined in Section 285 of the Public Utilities Code. (C) A retailer...that is a member of the same commonly controlled group...or that is a member of the same combined reporting group...as an entity described in subparagraph (A) or (B)." See Rev. and Tax. Code § 42004(b)(1).

⁶ See Rev. and Tax. Code § 42004(p); see also § 42010(e).

⁷ Rev. and Tax. Code § 42010(e) governs indirect sellers' obligations to report and remit the prepaid MTS surcharge to the Board of Equalization, whereas, Rev. and Tax Code § 42010(f) governs direct sellers' obligations to report and remit the MTS surcharge to the CPUC.

⁸ See Pub. Util. Code § 319.

⁹ The Act refers to the PPP surcharges as "universal service surcharges" and the CPUC User Fee as "reimbursement fee". See Pub. Util. Code § 319(a)(2) and (3).

¹⁰ See T-17542, p. 10.

The intrastate allocation factor allows for the prepaid MTS surcharge to be applied in the same manner by both direct and indirect sellers to the entire sales price when prepaid wireless telephone services are sold in combination with mobile data services or any other services or products for a single price, as the Act requires.¹¹ In that way, as T-17542 explains, “regardless of the purchase method, location, or seller type, the customer will pay one universal rate, consistent with the Act.”¹²

Comments from Joint Wireless Carriers on Resolution T-17542

On October 31, 2016, the Commission’s Communications Division (CD) received joint comments from T-Mobile West LLC dba T-Mobile, MetroPCS California, LLC dba MetroPCS, Sprint, AT&T California and New Cingular Wireless PCS, LLC (AT&T), Cellco Partnership dba Verizon Wireless (collectively referred to as “Joint Wireless Carriers”), which raised similar issues to those raised in the instant Amended Application for Modification of T-17542 submitted by MetroPCS California, LLC dba Metro PCS and T-Mobile West LLC dba T-Mobile (“MetroPCS/T-Mobile” or “Applicants”).¹³ Of significance here is that the Commission already addressed MetroPCS/T-Mobile’s issues in Resolution T-17542 in direct response to Joint Wireless Carriers’ comments on T-17542.¹⁴

The Joint Wireless Carriers, which included MetroPCS and T-Mobile, had asserted in comments that the intrastate allocation factor the Commission had used in its calculation of the CPUC’s portion of the prepaid MTS surcharge rate should be used as an optional “safe harbor” for direct sellers, but made mandatory for indirect sellers.¹⁵ In other words, indirect sellers would apply the prepaid MTS surcharge to the total sales price of prepaid wireless telephone services they sell. On the other hand, “direct sellers should be able to use that same rate as a ‘safety factor’ or to otherwise adjust the CPUC aggregate base rate by an auditable, carrier-specific intrastate factor.”¹⁶ The

¹¹ See T-17542, pp. 9-10. The Commission could not adjust the CPUC portion of the 2016 prepaid MTS surcharge rate, which was 8.51%, because it was the first year the Act was implemented and the Commission did not have the requisite prepaid MTS jurisdictional allocation and revenue data from carriers to calculate an intrastate allocation factor for that year.

¹² T-17542, p. 10.

¹³ In their Amended Application, MetroPCS and T-Mobile refer to themselves collectively as “Joint Prepaid Carriers.” In this resolution, to avoid confusion with reference to the “Joint Wireless Carriers,” we will refer to these Applicants MetroPCS and T-Mobile collectively as “MetroPCS/T-Mobile” or “Applicants”.

¹⁴ See Resolution T-17542, pp. 14-17.

¹⁵ Joint Wireless Carriers’ Comments, p. 4.

¹⁶ *Id.*, p. 5.

Commission disagreed, and issued T-17542 on November 16, 2016, which contained the following explanation:

Because our goal is to ensure all prepaid wireless customers are treated equally and assessed the MTS surcharge in the same manner, we do not authorize the use of the intrastate factor as an optional “safe harbor” only for direct sellers. The intrastate factor has been applied to assure that all prepaid wireless customers are assessed the MTS surcharge equally regardless of where they purchase their prepaid wireless service(s). As the Act requires, the MTS is to be calculated and adjusted so that it can be applied to the total sales price.¹⁷ Indeed, Joint Carriers agree that the adoption of an intrastate factor in calculating the MTS Surcharge rate is consistent with the Act, in that “adjusting the surcharge rate by an intrastate factor promotes the equitable treatment of wireless consumers regardless of whether they purchase prepaid services from direct or indirect sellers and regardless of whether they are prepaid or postpaid consumers.”¹⁸ Allowing carriers the option to potentially assess an amount for the MTS surcharge that is greater than or less than the amount being assessed on all other customers of indirect sellers would be inconsistent with the Act.¹⁹

On January 24, 2017, MetroPCS/T-Mobile filed the instant Amended Application for Modification of T-17542 seeking similar relief sought in the original Joint Wireless Carriers’ comments.²⁰

DISCUSSION

MetroPCS/T-Mobile’s Request to Allow Direct Sellers to Assess the MTS Surcharge Differently than Indirect Sellers Contravenes the Act

¹⁷ Pub. Util. Code § 319(b).

¹⁸ Joint Wireless Carriers’ Comments, p. 4.

¹⁹ Resolution T-17452, p. 15.

²⁰ Compare Amended Application, Appendix C, p. 21 (proposed redline to ordering paragraphs) *with* Joint Wireless Carriers’ Comments, Exhibit C, p. 16 (proposed redline to ordering paragraphs).

MetroPCS/T-Mobile's Amended Application for Modification of T-17542 specifically requests that the Commission modify T-17542's Ordering Paragraph (OP) 2 to state: "All indirect sellers shall, beginning January 1, 2017, assess the adopted Mobile Telephony Service surcharge on the total sales price of prepaid wireless telephone service subject to surcharge and collected from end-users in California. Telephone corporations [direct sellers] may choose to use the intrastate adjusted rate in Appendix A as a safe harbor or utilize a carrier-specific traffic study, and/or books and records, to assess the MTS Surcharge on intrastate revenues."²¹

As seen by the language of their proposed modification to T-17542's OP 2, Applicants are requesting that the Commission modify the Order to allow for disparate treatment of customers by indirect and direct sellers. However, nothing in the Act permits sellers the discretion to assess the prepaid MTS surcharge in the manner of their choosing, as MetroPCS/T-Mobile request. To the contrary, the Act specifies one manner in which the MTS surcharge is to be assessed by "a seller", without regard to whether it is a direct or indirect seller, by stating unambiguously:

On and after January 1, 2016, *a prepaid MTS surcharge* shall be imposed on each prepaid consumer and shall be collected by *a seller* from each prepaid consumer at the time of each retail transaction in this state. The prepaid MTS surcharge shall be imposed as a percentage of the sales price of each retail transaction that occurs in this state.²²

The Act further states:

[I]f 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.²³

The plain language in these provisions demonstrates that the Act does not allow for the seller to determine the treatment of revenues subject to the surcharge. To the contrary, the Act mandates the same application of the prepaid MTS surcharge by direct and indirect sellers. If the Legislature had intended for sellers to have the discretion that MetroPCS/T-Mobile seek, it would have stated so in the Act.

²¹ Amended Application, Appendix C, p. 21 (proposed redlines to T-17542's ordering paragraph 2).

²² Rev. and Tax. Code § 42010(a)(1) (emphasis added).

²³ Rev. and Tax Code § 42018(a).

Moreover, as T-17542 explained, MetroPCS/T-Mobile's request would improperly result in disparate treatment among prepaid customers.²⁴ For example, those customers who purchase prepaid wireless telephone service bundled with other services for a single price from an indirect seller, such as Walmart, would be assessed the prepaid MTS surcharge on the entire sales price as required by the statute. Whereas, those customers who purchase *the same prepaid wireless telephone service bundle* from a direct seller, such as T-Mobile, could pay a prepaid MTS surcharge only on that amount the telephone corporation has self-determined to be subject to the surcharge.

Nonetheless, MetroPCS/T-Mobile claim, citing to Rev. & Tax. Code section 42002(e), that the Act has no requirement to ensure equitable treatment among prepaid MTS customers,²⁵ arguing the Legislature only intended "to focus on a much broader goal" of ensuring equitable contributions as between post-paid wireless customers and pre-paid wireless customers." MetroPCS/T-Mobile misread this provision.

Rev. and Tax. Code section 42002(e) states: "To ensure equitable contributions from end-use customers of postpaid and prepaid mobile telephony services in this state, *there should be standardization with respect to the method used to collect communications taxes, fees and surcharges from end-use consumers of prepaid mobile telephony services.*"²⁶ As seen by the plain language of the second (emphasized) phrase of this provision, the Act's intended standardization relates to the method of collecting the MTS surcharge as between prepaid customers, and not as MetroPCS/T-Mobile claim, as between postpaid and prepaid customers. MetroPCS/T-Mobile's comparison of postpaid customers and prepaid customers while interpreting an Act that established a surcharge applicable *only to prepaid customers* is inapposite.

In short, MetroPCS/T-Mobile's request to treat direct sellers differently from indirect sellers, which in turn would allow for disparate treatment among prepaid customers, contravenes the Act.

MetroPCS/T-Mobile Fail to Demonstrate that T-17542's Intrastate Allocation Factor of 72.75% Does Not Accurately Account for Intrastate Revenue

²⁴ See e.g., T-17542, p. 15.

²⁵ See Amended Application, p. 11 (arguing no requirement in the Act that requires ensuring equitable treatment for direct and indirect prepaid wireless services).

²⁶ Rev. & Taxation Code § 42002(e)(emphasis added).

To justify the relief requested in the Amended Application, MetroPCS/T-Mobile attempt to undermine the 72.75% intrastate allocation factor utilized in T-17542 to calculate the CPUC's portion of the prepaid MTS surcharge rate, which is 5.15%. MetroPCS/T-Mobile present an analysis of several postpaid and prepaid wireless invoices or statements to support their claim that the Resolution's intrastate allocation factor is overstated.²⁷ They argue that the CPUC's adjusted rate of 5.15% "imposes surcharges on non-surchageable revenue, including but not limited to revenue attributable to mobile broadband services and interstate telephone services."²⁸ We disagree with MetroPCS/T-Mobile's claim.

As discussed *supra*, MetroPCS/T-Mobile's request is inconsistent with the Act. Even assuming *arguendo* that the Act permitted sellers to apply the prepaid MTS surcharge differently, we find T-17542's intrastate allocation factor of 72.75% to be reasonable. As explained below, it is based upon objective revenue and allocation information obtained directly from 27 prepaid wireless telephone corporations that comprise 99.89% of the intrastate prepaid wireless revenue reported to the CPUC. We are not persuaded by MetroPCS/T-Mobile's arguments that T-17542's intrastate allocation factor is overstated.

First, MetroPCS/T-Mobile's Amended Application states that indirect sellers should be mandated to assess the prepaid MTS surcharge as ordered in T-17542, which necessarily implies that the 72.75% intrastate allocation factor that T-17542 utilized is reasonable.²⁹ Yet, at the same time, MetroPCS/T-Mobile argue that the Resolution's 72.75% intrastate allocation factor is improper when applied to direct sellers in the same manner as indirect sellers. MetroPCS/T-Mobile justify this contrary treatment with a claim that "the adjustment factor substantially overstates the relative intrastate portion of any prepaid wireless plan and is otherwise not supported by any evidence or analysis."³⁰ We find these arguments inconsistent and unpersuasive. However, we believe it would be helpful to provide further explanation as to how the Commission's Communications Division (CD) derived T-17542's intrastate allocation factor of 72.75%.

The Act requires, as explained above, all prepaid wireless sellers to assess the prepaid MTS surcharge in the same manner, i.e., on the entire sales price of a prepaid MTS retail transaction. That is precisely why the CPUC's portion of the 2017 prepaid MTS

²⁷ Amended Application, pp. 8-11.

²⁸ *Id.*, p. 5.

²⁹ See *id.*, pp. 3-4.

³⁰ *Id.*, pp. 2-3.

surcharge rate is adjusted by an intrastate allocation factor.³¹ When the state prepaid MTS surcharge, posted by the BOE, is applied to any prepaid service retail transaction involving bundles, only the intrastate portion of that sale will be assessed the prepaid MTS surcharge because use of the intrastate allocation factor excludes revenue that is interstate, international, or otherwise non-surchageable.

As MetroPCS/T-Mobile acknowledge, “[t]he Resolution attempted to adjust the MTS Surcharge so that it applies only to intrastate revenue while being ‘assessed’ on the total bundled service prices. It did so by adjusting the aggregated rate of 7.0854% (for all surcharges and the user fee) by an intrastate adjustment factor of 72.75% to create a rate of 5.15% (the ‘Adjusted Rate’).”³² T-17542 explains that the CPUC’s portion of the 2017 prepaid MTS surcharge rate was calculated from “2016 surcharge payment and revenue reporting data collected by the Commission through [the CPUC’s Telecommunications and User Fee Filing System] TUFFS and the reporting of MTS remittances to the CPUC by BOE.”³³ The Commission generally treats carrier-specific revenue data as confidential, and thus T-17542 does not disclose the individual carrier revenue and service allocation data it has collected to calculate the 72.75% intrastate allocation factor. That does not mean, however, as MetroPCS/T-Mobile contend, that there is no factual and evidentiary basis to support it.

To the contrary, T-17542’s 72.75% intrastate allocation factor was based on extensive revenue and reporting information that the CD had obtained from the TUFFS’ database and through data requests to prepaid wireless telephone corporations.³⁴ The CD utilized TUFFS to first identify those prepaid wireless telephone corporations operating in California in 2016, which were those who had reported any prepaid wireless telephone service revenue to the Commission. In this effort, the CD identified 45 prepaid wireless telephone corporations, which included the affiliates and subsidiaries of all the major wireless carriers. These 45 carriers are encompassed in 31 total holding companies.

³¹ Information necessary to calculate an appropriate intrastate allocation factor was not available in 2016, when the prepaid MTS surcharge was first implemented.

³² Amended Application, p. 2.

³³ T-17542, p. 9. T-17542, p. 9. The Telecommunications and User Fee Filing System (TUFFS) is where wireless carriers report, separately, the following revenues subject to surcharge: total postpaid revenue, direct prepaid revenue and indirect prepaid revenue. Information about TUFFS can be found at <http://www.cpuc.ca.gov/surcharges/>.

³⁴ Specific revenue information gathered from TUFFS is reported as confidential and thus is not disclosed in T-17542, or in this Resolution. Similarly, data responses from prepaid MTS telephone corporations were submitted as confidential pursuant to Pub. Util. Code section 583 and General Order 583 and thus are not disclosed in T-17542 or here, unless otherwise ordered by the Commission.

A. Prepaid Wireless Revenue Reporting and Data Requests

On August 5, 2016, the CD sent 19 out of those 31 holding companies, including T-Mobile and MetroPCS, a data request seeking information about jurisdictional and revenue allocations practices for those services sold in California for the period of January 1, 2016 through June 30, 2016. A copy of the data request is attached to this Resolution as Appendix A.

The 19 holding companies that were sent data requests encompass 32 total carriers and represent 99.90% of the prepaid wireless intrastate revenue reported to the CPUC in 2016³⁵.

The data request specifically directed each prepaid wireless telephone corporation to provide its “jurisdictional allocations,” the methodology used to assign revenue to the appropriate jurisdiction (i.e., intrastate, interstate, international or non-jurisdictional) and the percentages of each assignment.³⁶ The data request further asked whether carriers used the same methodology for postpaid wireless service and requested copies of carriers’ most recent Form 499-A filed with the Federal Communications Commission.³⁷ Additionally, the CD’s data request required a carrier to provide its “service allocations,” including the percentages of revenue derived from the following services: voice, text messaging, data/internet, and other. For each of these service types, carriers were asked to indicate the jurisdictional allocation and corresponding revenue percentage.³⁸

Of the 19 holding companies that received the data request, 14³⁹ provided sufficient responses to be included in the sample from which the CD derived the 72.75% intrastate allocation factor.⁴⁰ The 14 responses represent 27 prepaid wireless telephone

³⁵ Total Revenue to the Commission for Jan through June 2016 was \$827,025,149.73 and the 32 sample carriers represent \$826,179,522.88

³⁶ See Appendix A, Staff Data Request, p. 2.

³⁷ See *id.*, Staff Data Request, p. 2.

³⁸ See *id.*, Staff Data Request, p.3.

³⁹ The 14 consisted of the following holding companies: Sprint; T-Mobile; MetroPCS; AT&T; Tracfone; Verizon; Flat West Wireless LLC; Onstar, LLC; UVNV, Inc; US Cellular Corp; Puretalk Holdings, LLC; Red Pocket, Inc; Blue Jay Wireless, LLC; and Global Connection Inc of America.

⁴⁰ CD adjusted the sample by excluding responses from non-responsive carriers or those who provided insufficient information that could not be used for calculating an intrastate allocation factor. The five companies who either did not respond to the data request or provided unusable data were: Nexus Communications, Inc., Telscape Communications, Inc., Budget Prepay, Inc., AmeriMex Communications

corporations. This sample represents 99.89% of the prepaid wireless intrastate revenue reported to the CPUC in 2016.⁴¹

In Resolution T-17542, the Commission did not provide “specific carrier data” because carriers’ responses to staff’s data requests were submitted as confidential pursuant to General Order 66-C and Pub. Util. Code section 583. However, upon further consideration, the Commission finds it appropriate to provide aggregated data for discussion purposes here, regarding the intrastate allocation factor calculation.

As explained in further detail below, staff used these 14 carriers’ responses to question 2 from the August 5, 2016 data request, which asked for each carrier’s jurisdictional allocation for intrastate, interstate, international, and non-jurisdictional (or non-surchageable), to arrive at the 72.75%.⁴² Staff took the average of the percentages corresponding to the “intrastate” percentage assignments that the carriers provided. The intrastate allocation factor therefore results from the calculation of 1018.46% aggregate intrastate assignments / 14 holding companies = 72.75 % average intrastate assignments.

B. Determining the Intrastate Allocation Factor

In determining the intrastate allocation factor applicable to the CPUC’s portion of the prepaid MTS surcharge rate, staff used the intrastate jurisdiction percentage assignments for four categories: voice, text messaging, data/internet and other services. These assignments were then used to determine the average percentage for all 27 prepaid MTS telephone corporations in the sample, which resulted in an intrastate allocation factor of 72.75%. Next, the CD used the disaggregated information from the revenue percentage for jurisdictional and service allocations (voice, text, data/internet and other) to validate if the total intrastate factor of 72.75% was representative of carrier practice. Accordingly, T-17542’s intrastate allocation factor of 72.75% accurately

Corp. and Air Voice Wireless, LLC. The portion of the sample excluded in the computation represents a minimal .01% of total revenue reported to the Commission for January through June 2016 or \$72,784.22.

⁴¹ Total Revenue reported to the Commission for January through June 2016 was \$827,025,149.73 and the 27 carriers included in the 2017 intrastate factor computation represent \$826,106,738.66.

⁴² Question 2 of the data request stated:

“Please provide the individual percentage assignments from for each jurisdiction resulting from the methodology indicated above

e. Intrastate []

f. Interstate []

g. International []

h. Non-jurisdictional or non-surchageable []”.

represents that portion of prepaid wireless telephone service revenue that is intrastate and therefore subject to the prepaid MTS surcharge.⁴³

We are not persuaded by MetroPCS/T-Mobile's hypotheticals and analysis of eight non-specific post-paid plans and 10 MetroPCS prepaid plans used to support the claim that the intrastate allocation factor is overstated.⁴⁴ First, MetroPCS/T-Mobile's comparison of postpaid plans, which notably are not provided in the Amended Application, is inappropriate. As discussed above, the primary purpose of the Act is to standardize the manner in which the MTS surcharge is collected from prepaid customers. Second, MetroPCS/T-Mobile's sample size is insignificant, consisting of only two actual invoices and the hypotheticals identified above. Thus, MetroPCS/T-Mobile's sample is neither adequate nor reliable.

In contrast, T-17542's 72.75% intrastate allocation factor was derived using 6 months (January 1, 2016 through June 31, 2016) of revenue information gathered from 27 prepaid telephone corporations comprising 99.89% of the prepaid wireless market in California. The CD estimates this would represent hundreds of thousands of billing records, as opposed to the two invoices for MetroPCS that were provided in the Amended Application.

Nor are we persuaded by MetroPCS/T-Mobile's contention, based on its same hypotheticals and analysis, that "the Resolution would impose a surcharge burden on prepaid services that is significantly higher than the surcharge burden on equivalent postpaid services or that was imposed on the same prepaid services by carriers like MetroPCS prior to the adoption of the Resolution."⁴⁵ This argument is a red herring.

First, as explained, the focus on postpaid invoices is misplaced. Second, whether MetroPCS's own customers would purportedly see a surcharge increase does not invalidate T-17542's intrastate allocation factor because other prepaid MTS carriers' customers could at the same time see a surcharge decrease with implementation of T-17542. For instance, the CD is aware of prepaid carriers who were assessing last year's prepaid MTS surcharge rate utilizing an intrastate allocation factor of 100%. Thus, with

⁴³ We need not to address the legal arguments raised in MetroPCS/T-Mobile's Amended Application concerning federal preemption of interstate surcharges because as explained, the CPUC MTS rate is an intrastate surcharge. We do not disagree that the CPUC may not impose a state surcharge on interstate or non-surchargeable services.

⁴⁴ Amended Application, pp. 8-9.

⁴⁵ *Id.*, pp. 9-10.

this year's 2017 intrastate allocation factor of 72.75%, those customers' surcharge burden is reduced by nearly 30%.

The purpose of the CPUC prepaid MTS surcharge is to recover the California Public Utilities Commission's Public Purpose Program Surcharges and User Fee, as well as the costs associated with implementing the Act; it is not, as MetroPCS/T-Mobile suggest, to achieve the lowest surcharge burden for its customers.

Compliance with Resolution T-17542

Pursuant to Rule 16.4(h), the filing of a petition for modification does not stay or excuse compliance with the order of the decision proposed to be modified. The decision remains in effect until the effective date of any decision modifying the decision. In this instance, MetroPCS/T-Mobile should have been remitting the prepaid MTS surcharge in accordance with the orders set forth in T-17542, as of January 1, 2017. Consistent with this Resolution's denial of MetroPCS/T-Mobile's Application for Modification of T-17542, Metro PCS/T-Mobile shall remit all 2017 prepaid MTS surcharges due to the Commission in accordance with T-17542 and the Commission's surcharge and user fee reporting rules, including interest and penalties, on amounts overdue.⁴⁶

Comments on Draft Resolution

On September 4, 2017, the Commission received two sets of comments, submitted separately by Applicants T-Mobile and MetroPCS, on the August 14, 2017 draft of this Resolution ("Draft Resolution").⁴⁷ Both sets of comments reiterate arguments Applicants had raised in the Amended Application.⁴⁸ T-Mobile repeats the claim that T-17542 is inconsistent with the Act because it would result in inequitable contributions from post-paid and pre-paid wireless customers, with prepaid customers subject to a higher surcharge burden.⁴⁹ MetroPCS repeats the argument that the 72.75% intrastate allocation factor utilized in T-17542 lacks credible factual support and overstates the intrastate revenues attributable to T-Mobile and MetroPCS and presumably other carriers' prepaid calling plans.⁵⁰

⁴⁶ See T-17542, pp. 11-12

⁴⁷ T-Mobile and MetroPCS each submitted a confidential and public version of comments.

⁴⁸ Compare T-Mobile Comments on Draft Res. T-17568 with Amended Application, pp. 3, 9-12; compare MetroPCS Comments on Draft Res. T-17568 with Amended Application, at pp. 7-9.

⁴⁹ T-Mobile Comments on Draft Res. T-17568; compare with Amended Application, at pp. 9-12.

⁵⁰ MetroPCS Comments on Draft Res. T-17568, pp. 2-5.

We have reviewed and considered the arguments raised in Applicants' comments. In response, we have revised the discussion to provide some additional clarification about the Commission's methodology used to calculate the intrastate allocation factor. We also note that footnote 38 in the Draft Resolution should be modified to make clear that the revenue numbers used in T-17542 represent intrastate revenue reported to the Commission by prepaid wireless carriers for the period January through June 2016, which was \$827,025,149.73; the 27 sample carriers represent \$826,106,738.66 of this revenue.

However, we find no basis to change the determination in the Draft Resolution to deny MetroPCS/T-Mobile's Amended Application. Contrary to Applicants' assertion, the Commission does not have discretion here to exempt direct sellers from assessing the prepaid MTS surcharge in the manner specified by the Legislature in Rev. & Tax. Code sections 42010 and 42108.

In response to comments, we provide further clarification below on some issues related to the impact of the surcharge and legislative intent.

T-Mobile's comments argue that the Draft Resolution misconstrues the intent of the Act, which it claims was focused on ensuring equitable contributions between postpaid and prepaid wireless customers.⁵¹ T-Mobile notes that many prepaid wireless customers are low-income and claims the Draft Resolution is dismissive of this issue "[f]or reasons which are as of yet unclear."⁵² We reject these arguments here as we did in Decision (D.) 16-12-029.⁵³

In D.16-12-029, CTIA – The Wireless Association sought rehearing of Res. T-17504, the Commission's first resolution implementing the Act in 2016 ("2016 MTS Resolution"). CTIA's rehearing application challenged the legality of the Commission only requiring prepaid wireless customers to pay the Commission's administrative costs of implementing the Act.⁵⁴ CTIA argued T-17504 was invalid because it would have a

⁵¹ T-Mobile Comments on Draft Res. T-17568, pp. 1-3.

⁵² T-Mobile Comments on Draft Resolution, p. 3; see also Applicants' September 26, 2017 Urgent Request Letter, p. 1.

⁵³ See D.16-12-029, Order Modifying Resolution T-17504, and Denying Rehearing of Resolution T-17504, as Modified [no legal error for disproportionate impact on prepaid consumers compared to other telecommunications consumers].

⁵⁴ See D.16-12-029, p. 3.

disproportionate impact on prepaid consumers, including low-income customers.⁵⁵ The Commission rejected this argument in D.16-12-029, stating in relevant part:

Moreover, legislative history makes clear that the effect of AB 1717 would be to benefit service providers, leaving low-income customers to bear the burden. Therefore, it is the AB 1717 itself, as sponsored by CTIA, that singles out prepaid consumers by mandating a new and separate collection process for the purpose of providing a benefit to service providers.⁵⁶

D.16-12-029 also explained what the Legislature meant with respect to “equitable contributions” between postpaid and prepaid customers, stating:

AB 1717 created a new point-of-sale mechanism for service providers to collect surcharges from prepaid consumers. The need for this mechanism was based on service providers’ claims that they were unable to recoup the surcharges in question from prepaid consumers, leaving postpaid consumers to pay all of the charges.

Early on, AB 1717 was couched as “leveling the playing field” for postpaid consumers by charging prepaid consumers through the new point-of-sale mechanism. The bill was cast as providing “greater accountability and transparency” which, along with fairness and equity, were recurring themes promoted throughout the Act’s legislative history. To the extent postpaid consumers were discussed at all, they were generally characterized as benefitting from the Act.⁵⁷

Thus, the fact that prepaid customers could be subject to a higher surcharge burden than postpaid customers is inapposite to the analysis here. This argument is also unconvincing coming from Applicants who supported AB 1717, despite being aware

⁵⁵ *Id.*, pp. 13-14.

⁵⁶ *Id.*, pp. 13-14.

⁵⁷ *Id.*, pp. 11-12.

that low-income consumers would be especially affected by this new prepaid MTS surcharge.⁵⁸

Finally, we note that in comments on the 2016 MTS Resolution, these Applicants, as part of a collective of “Joint Wireless Carriers” recommended that the Commission utilize a one-size fits all intrastate allocation factor when calculating the CPUC’s portion of the prepaid MTS surcharge. Specifically, Applicants proposed the precise methodology which they now challenge:

In particular, the Joint Wireless Carriers recommend that the Commission, through the Resolution, adjust its portion of the MTS Surcharge to account for the fact that it applies only to intrastate revenue. In other words, take the rate of the aggregated Commission surcharges and fees (e.g., 8.07%), multiply it by a reasonable estimate of the intrastate portion of prepaid revenues (e.g., a weighted average of the major carriers’ intrastate traffic factors), and then post that adjusted rate with the BOE. This adjustment would have the effect of removing interstate and international charges from the surcharge base. This alternative approach provides a number of advantages for all the stakeholders including, but not limited to, the following:

- Consumer clarity – consumers will be able to more easily identify the amount of surcharges and fees they are required to pay for the Commission programs.
- Equitable charges – consumers will be subject to the same MTS surcharge regardless of whether they purchase prepaid wireless services directly from a wireless provider or from a third party retailer.[]
- Simpler audits – the Commission will be able to more readily audit the collection and remittance of these

⁵⁸ See e.g., D.16-12-029, pp. 13-14, citing legislative history: “7. Who Benefits From this Bill? ... Service providers benefit because they will no longer be required to pay surcharges out of profits, and prepaid customers will instead pay the surcharges on top of the price for service. . . 8. Will Low-Income Customers Bear the Burden? The group that definitely not benefit from this bill are customers of prepaid service because they will be required to pay an additional amount on top of the price of service, which they do not currently pay. . . this will especially affect low-income people who are a significant portion of the prepaid market. . .” (Sen. Energy, Utilities and Communications Com., Analysis of Assem. Bill No. 1717 (2013-2014 Reg. Sess., as amended May 28, 2014, pp. 6-7.)

charges since the MTS surcharge amounts collected from consumers will match the adjusted rates. Carriers would not adjust their reported intrastate revenue figures under this approach, as the rate adjustment already removes the portion of the revenue which is attributable to interstate and international traffic.⁵⁹

In 2016, the Commission did not adopt the use of an intrastate allocation factor in its calculation of its portion of the prepaid MTS surcharge because the Commission did not have the requisite data to calculate one. Calculating an appropriate intrastate allocation factor would have required the use of prepaid wireless carrier information from 2015, which the Commission had not required prepaid carriers to report prior to 2016.

CONCLUSION

MetroPCS/T-Mobile's request to modify T-17542 to allow direct sellers discretion with the manner in which they assess the 2017 prepaid MTS surcharge is inconsistent with the *Prepaid Mobile Telephony Services Surcharge Act*, which was enacted with the express purpose of standardizing how sellers are to collect the prepaid MTS surcharge from prepaid customers. We find the intrastate allocation factor of 72.75% utilized in T-17542 to calculate the CPUC's portion of the prepaid MTS surcharge rate of 5.15% to be reasonable. Accordingly, we deny MetroPCS/T-Mobile's Amended Application for Modification of T-17542.

FINDINGS

1. MetroPCS/T-Mobile's request for direct and indirect sellers to assess the prepaid mobile telephony services (MTS) surcharge utilizing different methods is inconsistent with the *Prepaid Mobile Telephony Services Surcharge Collection Act* (Act).
2. Nothing in the Act, or other law, allows the Commission to exercise discretion to exempt direct sellers from assessing the prepaid MTS surcharge in the manner prescribed by Rev. & Tax Code sections 42010 and 42018.
3. The Commission's Communications Division's methodology for calculating the intrastate allocation factor of 72.75% in T-17542 is based on data received from 27

⁵⁹ Wireless Industry Comments on Draft Resolution T-17504, October 26, 2015, pp. 3-4 (citations omitted).

prepaid wireless telephone corporations operating in California, who represent 99.89% of the prepaid wireless industry in California.

4. Communications Division's methodology for calculating the intrastate allocation factor of 72.75% in T-17542 is based upon jurisdictional and service allocation data provided by a majority of prepaid wireless telephone corporations operating in California.
5. Communications Division's methodology for calculating the intrastate allocation factor of 72.75% in T-17542 is reasonable.
6. The Commission's portion of the 2017 prepaid MTS surcharge rate is an intrastate surcharge.
7. MetroPCS and T-Mobile are required to report and remit all 2017 prepaid MTS surcharges in accordance with Resolution T-17542.

THEREFORE, IT IS ORDERED that:

1. The Amended Application for Modification of Resolution T-17452 submitted on January 24, 2017, by Metro PCS California, LLC dba Metro PCS, and T-Mobile West LLC dba T-Mobile is denied for the reasons stated herein.
2. MetroPCS and T-Mobile shall report and remit all prepaid Mobile Telephony Service surcharges due beginning January 1, 2017 pursuant to the orders set forth in Resolution T-17542 and within 30 days of adoption of this Resolution T-17568.
3. Resolution T-17542 is affirmed.

This resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on _____, the following Commissioners voting favorable thereon:

TIMOTHY J. SULLIVAN
Executive Director

Appendix A

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

**DATA REQUEST**

Date: August 5, 2016

To: [REDACTED]

From: Communications Division, CPUC

Subject: Prepaid Wireless Telephone Service Revenue

The Prepaid Mobile Telephony Service Surcharge Collection Act directs the California Public Utilities Commission (CPUC) in Public Utilities Code Section 319 (3)(b)(c) to calculate the CPUC's portion of the Mobile Telephony Service (MTS) surcharge as a percentage of the sales price of prepaid wireless telephone services.

In an effort to calculate the 2017 MTS surcharge the CPUC is collecting data from those wireless telephone corporations who have reported prepaid wireless telephone service revenues. The information being requested here will allow the CPUC to develop a revised MTS surcharge rate that may be equitably applied to the entire purchase price of both direct and indirect prepaid wireless telephone service sales.

Responses are to be submitted to Devla Singh of the CPUC at dsc@cpuc.ca.gov on or before August 26, 2016. If you have any questions please contact Ms. Singh at (415) 703-5581.

The data request questions and an area to provide your response is attached on page two and three.

Sincerely,

Eric Van Wambeke, Supervisor
Communications Division

MTS Data Request

Due 8/26/16

Unless otherwise indicated all responses are to be based on those operations and associated prepaid wireless revenues generated between January 1, 2016 and June 30, 2016 in California.

Jurisdictional Allocation

1. Please indicate the methodology used to assign **prepaid** wireless service revenues to the appropriate jurisdiction i.e. intrastate, interstate, international or non-jurisdictional.

- a. Traffic study []
- b. Books and records []
- c. FCC safe harbor []
- d. Other []

Please explain _____

2. Please provide the individual percentage assignment for each jurisdiction resulting from the methodology indicated above

- e. Intrastate []
- f. Interstate []
- g. International []
- h. Non-jurisdictional or non-surchageable []

3. Does the utility use the same methodology to assign revenues for **postpaid** wireless services? If not please also provide the above requested information for postpaid wireless revenues.

Yes [] No []

4. Please provide a copy of your most recently filed 2016 Federal Communications Commission form 499-A which was due April 1, 2016 for reporting 2015 revenues.

Service Allocation

1. Please indicate what percentage of your revenue was derived from the following services.

- i. Voice [] []
- j. Text messaging [] []
- k. Data/Internet [] []
- l. Other [] []

2. Please indicate the jurisdictional allocation and corresponding percentage for that revenue derived from each of the services listed below?

- m. Voice
 - Intrastate [] []
 - Interstate [] []
 - International [] []
 - Non-jurisdictional or non-surchageable [] []
- n. Text messaging
 - Intrastate [] []
 - Interstate [] []
 - International [] []
 - Non-jurisdictional or non-surchageable [] []
- o. Data/Internet
 - Intrastate [] []
 - Interstate [] []
 - International [] []
 - Non-jurisdictional or non-surchageable [] []
- p. Other
 - Intrastate [] []
 - Interstate [] []
 - International [] []
 - Non-jurisdictional or non-surchageable [] []