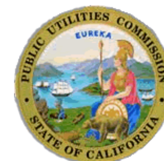

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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

| Order Instituting Rulemaking to Update Surcharge Mechanisms to Ensure Equity and Transparency of Fees, Taxes and Surcharges Assessed on Customers of Telecommunications Services in California. | Rulemaking 21-03-002 |
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# COMMENTS OF CTIA ON PROPOSED DECISION OF ALJ FORTUNE

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CTIA respectfully submits these comments on the Proposed Decision ("PD") regarding the mechanism for calculating the amount of the California Public Utilities Commission's ("Commission's") Public Purpose Programs ("PPP") surcharges.[1] CTIA recommends that the Commission reject the PD's adoption of a connections-based funding mechanism for the PPPs.

## I. INTRODUCTION AND SUMMARY

Adopting the PD's rejection of the current revenue-based PPP surcharge mechanism in favor of a per-connection methodology would be a bad policy outcome for California consumers. The record in this proceeding demonstrates that a connections-based surcharge mechanism would be inequitable and discriminatory to low-income and wireless consumers. The PD fails to address these concerns and there is no record or policy basis for the PD's conclusions.

The record also shows that the current revenue-based mechanism is sustainable despite the downward trend in intrastate telecommunications revenues, and that differences in providers' levels of intrastate revenue are a result of differences in the mix of services sold to their consumers. Nevertheless, the PD baselessly characterizes both issues as problems and attempts to use them to justify a connections-based approach. Because the PD is unsupported by the record, or even its own Findings of Fact, the Commission may not adopt it.

In the event, however, that the Commission adopts a definition of "access line" as part of the surcharge mechanism, it should adopt the industry consensus definition rather than the definition proposed in the PD. This is necessary to provide important clarity and guidance to providers seeking to comply with their surcharge obligations.

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[1] Proposed Decision of Administrative Law Judge Hazlyn Fortune Updating the Mechanism for Surcharges to Support Public Purpose Programs, R.21-03-002 (Sept. 2, 2022) ("PD").

## II. THE PD DOES NOT ADEQUATELY ADDRESS CONCERNS ABOUT THE INEQUITABLE NATURE OF A PER-ACCESS-LINE MECHANISM OR ITS DISPARATE IMPACTS ON WIRELESS CUSTOMERS AND LOW-INCOME CALIFORNIANS

The record in this proceeding is replete with concerns—raised by consumer advocates, service providers, and customers themselves[2]—that a per-connection approach will shift the burden of funding California's PPPs disproportionately onto lower-income and wireless consumers. For example, the Utility Reform Network, the Center for Accessible Technology, and CTIA all explained how a per-access-line surcharge would produce a disproportionately greater financial burden on low-income consumers than higher-income consumers.[3]

The PD fails to adequately address these concerns. It posits that the Commission "cannot actually identify these 'lower-income' customers," then proffers that a "better place to address the 'lower-income' issue is in the LifeLine proceeding" by expanding the class of customers eligible for LifeLine benefits.[4] Yet expanding LifeLine eligibility will increase the size of the LifeLine fund and further increase the burden of funding it. It is therefore demonstrably "better" to *avoid* adopting a new funding mechanism, such as the per-connection proposal, that exacerbates affordability concerns for lower-income and wireless consumers. This is particularly true, given that—as the Commission is well aware—most California consumers eligible for

[2] *See* R2103002 - Public Comments (comments from numerous California consumers, including elderly and disabled consumers, indicating that they cannot afford the proposed new tax on their cell phones; last visited September 20, 2022) .

[3] *See* Reply Comments of The Utility Reform Network and the Center for Accessible Technology on Communications Division Staff Report—Staff Report Part 2 (filed on Dec. 14, 2021) at 2-4; Comments of CTIA on Staff Report Part 2 (filed on Nov. 30, 2021) at 3.

[4] PD at 35.

LifeLine do not participate in the program,[5] and thus are unable to take advantage of the exemption for LifeLine participants from PPP surcharges.[6]

The PD also fails to address the concerns that CTIA and other parties have raised about the disproportionate impact of the per-connection proposal on wireless consumers relative to consumers of other types of communications services.[7] CTIA has explained that the burden of funding PPPs would disproportionately shift onto wireless consumers, who would face an estimated four-fold increase in their contribution burden.[8] The PD makes no effort to explain how this disproportionate impact on wireless customers is consistent with the requirement for the surcharge mechanism to be "equitable and nondiscriminatory."[9]

## III. THE PD MISCHARACTERIZES ACTUAL DIFFERENCES AMONG PROVIDERS' PRODUCT OFFERINGS AS INEQUITABLE AND BASELESSLY CRITICIZES PROVIDERS' REVENUE REPORTING PRACTICES

Contrary to the PD's assertions, the record does not support the conclusions that providers' remit surcharges in a "non-uniform" manner,[10] or that assessing surcharges based on intrastate telecommunications revenues causes inequitable or discriminatory results.[11]

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[5] *See* Universal Service Administrative Company, "Program Data," *available at* [https://www.usac.org/LifeLine/resources/program-data/](https://www.usac.org/LifeLine/resources/program-data/) (last accessed Sept. 16, 2022).

[6] *See* PD at 38.

[7] *See* Comments of CTIA on Staff Report Part 2 (filed on Nov. 30, 2021) at 4-5; *see also* Reply Comments of the Utility Reform Network and the Center for Accessible Technology on Communications Division Staff Report—Part 2 (filed on Nov. 30, 2021) at 11.

[8] *See* Comments of CTIA on Staff Report Part (filed on Nov. 30, 2021) 2 at 4-5.

[9] *See* PD at 8, citing 47 U.S.C. § 254.

[10] PD at 17.

[11] *See, e.g.,* PD at 14, 18.

The PD implies that a problem exists because there is "significant variation between wireline and wireless providers in the percentage of intrastate revenue providers allocate"[12] or because "[p]repaid and VoIP providers acknowledge that surcharge collections for their services may be lower."[13] However, these differences simply reflect the varying mixes of services that customers choose to purchase from different kinds of providers. Wireless service bills often include charges for information services such as mobile broadband and text messaging, as well as for telecommunications services, while wireline telephone bills are comprised almost entirely of telecommunications services, and also likely reflect a higher percentage of intrastate telecommunications services, such as intrastate calling.[14] In fact, the record shows that, under the current mechanism, all providers (and customers) pay surcharges based on the *same* percentage of their intrastate telecommunications revenues.[15] In contrast, as CTIA and others pointed out in comments, the proposed per-connection mechanism will reflect an assessment of a significantly higher percentage of wireless customers' intrastate telecommunications revenues than those of wireline customers.[16]

The PD also fails to grapple with the fact that the per-connection surcharge approach would exclude all intrastate telecommunications service providers that do not provision end-user connections, such as interexchange carriers.[17] This outcome is inequitable and discriminatory, and also patently prohibited by the legal requirement that the state's surcharge mechanism must

[12] PD at 16.

[13] PD at 14.

[14] *See* Comments of CTIA on Staff Report Part 2 (filed on Nov. 30, 2021) at 6.

[15] *See* California Public Utilities Commission Staff Report – Part 1, R.21-03-002 (June 2021) at 9.

[16] *See* Comments of CTIA on Staff Report Part 2 (filed on Nov. 30, 2021) at 8.

[17] *See, e.g.,* CTIA Comments on OIR (filed April 5, 2021) at 10-11.

assess "*[e]very* telecommunications carrier that provides intrastate telecommunications services" in the state.[18]

Thus, the current mechanism is equitable and non-discriminatory, while the per-connection proposal will be inequitable and discriminatory to customers that purchase intrastate telecommunications services in bundles along with interstate telecommunications services and information services such as broadband internet access. Simply stated, it is the proposed per-connection surcharge mechanism, and *not* the current revenue-based mechanism, that would "create[] inequality among customers who use different communications services."[19]

The PD also errs in asserting that, under the current mechanism, prepaid providers evade paying surcharges on revenues from third-party sales.[20] The PD selectively quotes from TracFone's comments to create this inaccurate impression, omitting the key sentence from TracFone's comments: Even though prepaid providers have "no opportunity to collect PPP surcharges and user fees from customers" for third-party sales, "*TracFone nevertheless remits PPP surcharges and user fees to the Commission based on all of TracFone's sales*."[21] In other words, even where TracFone cannot recover surcharges from customers via line items on customers' bills, it remits them out of its own revenues. There is thus no evidence in the record

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[18] 47 U.S.C. § 254(f) (emphasis added). *See also* Finding of Fact 3, PD at 65. As a result of this defect in the per-connection approach, it will be impossible for intrastate telecommunications service providers with no end-user connections to comply with Ordering Paragraph 3 which directs that "*all* wireline … carriers or providers shall implement the new access line surcharge collection and remittance mechanism …." PD at 67.

[19] PD at 34.

[20] *See, e.g.,* PD at 14-15, 17.

[21] TracFone Comments on the Assigned Comm'r's Scoping Memo and Ruling (filed on July 28, 2021) at 3.

to support the notion that a change in the surcharge mechanism is needed to prevent prepaid providers from evading their fair share of contributions to the PPPs.[22]

## IV. THE PD INACCURATELY ASSERTS THAT THE REVENUE-BASED MECHANISM IS "UNSUSTAINABLE" AND HAS RESULTED IN REDUCED PPP REVENUES

The PD repeatedly attempts to manufacture a non-existent crisis by implying that the revenue-based mechanism has resulted in a "drop in PPP funding."[23] While "year-over-year declines in the intrastate billing base for surcharges" may have "resulted in lower surcharge revenue collected for all PPPs *compared to the amount forecasted*,"[24] this simply reflects a need for more accurate forecasts—there is no evidence in the record that any of the PPPs have gone under-funded. While intrastate telecommunications *revenues* may have declined over time, the Commission's periodic adjustments to the surcharge rate have ensured that all the PPPs remain fully funded, and there is no indication in the record that the Commission could not continue to do so.

## V. THE COMMISSION SHOULD ADOPT THE INDUSTRY CONSENSUS DEFINITIONS OF "ACCESS LINE" AND OTHER KEY TERMS

Beyond the broad systemic flaws in the connections-based contribution mechanism proposal, the PD proposes to adopt a definition of "access line" and associated terms that differs from the consensus proposal in the record without explanation. By doing so, the PD would omit crucial guidance relevant to prepaid providers' computation of surcharges under the new mechanism and would introduce other unnecessary uncertainty and confusion into the surcharge process. Indeed, the PD mentions only in passing that the record reflects an industry-wide

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[22] The Commission must ensure that any new mechanism is workable for prepaid providers, as discussed in section V, *infra*.

[23] PD at 27.

[24] PD at 3 (emphasis added).

consensus as to how "access line" and other related terms should be defined if the Commission adopts such a framework[25] but offers no explanation as to why the Commission would reject a consensus on such a significant issue. To the extent that the Commission adopts a definition of "access line" in this proceeding, there are important reasons why the Commission should adopt the industry consensus proposal.

***"Place of Purchase" Provision Necessary for Prepaid Providers.*** A significant discrepancy between the PD's proposed definitional framework and the industry consensus is the PD's omission of a provision to tie "access lines" to California based on "place of purchase"—a matter that is crucial for prepaid providers in order to have a common method to determine the jurisdiction of "access lines."[26] In the PD's definition, "access lines" would be associated with California either based on a "service address" or a "Place of Primary Use" (PPU).[27] However, many prepaid wireless providers do not have a "service address," or any address at all, associated with some customer accounts and the statutory definition of PPU specifically excludes prepaid services.[28]

As a result, unless the Commission includes the "place of purchase" provision from the industry consensus in any adopted definition of "access line," prepaid providers will have no guidance on how to determine the jurisdiction of their customers for the purposes of PPP contributions. This could lead to both discontinuity between different providers and either over- or under-attributing subscribers to California for the purposes of PPP contributions.

[25] PD at 49.

[26] Under the industry consensus, "place of purchase" would be defined as per California Rev. & Tax Code Section 41028(e).

[27] PD at 52.

[28] *See* Comments of CTIA on Staff's Revised Access Line Definition (filed on Apr. 29, 2022) at 4.

***Avoidance of Confusion and Inconsistency in Application.*** The Commission's unexplained decision not to adopt the industry consensus definitional framework also creates other concerns. First, the Commission should not include "other unique identifiers" as an alternative to a ten-digit North American Numbering Plan ("NANP") telephone number.[29] As CTIA and other parties have pointed out, the inclusion of "other unique identifiers" as an alternative to a ten-digit NANP telephone number is likely to lead to problems because there is no indication of what "other unique identifiers" would be used.[30] Consistent with the industry consensus proposal, "access lines" should be defined exclusively based on association with ten-digit NANP telephone numbers.

The Commission also should clarify that PBX and Centrex lines are "access lines" for purposes of this definition. The revised Staff proposal following comments on Staff Report 2 and the industry consensus included a specific notation clarifying that PBX and Centrex lines are "access lines."[31] However, the PD's proposed definition omits this notation,[32] and the PD provides no explanation for the omission. For avoidance of confusion, this provision should be included in any definition of "access line" that the Commission adopts.

[29] PD at 52.

[30] Comments of CTIA on Staff's Revised Access Line Definition (filed on Apr. 29, 2022) at 5.

[31] Administrative Law Judge's Ruling, R. 21-03-002 (Mar. 30, 2022) at 2.

[32] PD at 52.

## VI. BECAUSE THE PD IS AT ODDS WITH THE RECORD AND UNSUPPORTED BY THE FACTS FOUND, THE COMMISSION MAY NOT ADOPT IT.

The Commission may not adopt the PD because it is at odds with the record and unsupported by the Findings of Fact.[33] As discussed above, the conclusions underlying the rule changes proposed in the PD are entirely unsupported by the record.

More significantly, the PD's Findings of Fact fail to support its conclusions. The PD contains only eleven Findings of Fact, most of which recite provisions of federal and state law that do not support the purported advantages of a per-connection mechanism over the current revenue-based system.[34] Several of the proposed Findings of Fact are merely historical,[35] while others have no apparent relevance to the docket whatsoever.[36] Only proposed Finding of Fact Five—that the intrastate revenue billing base declined fifty-eight percent between 2012 and 2020—is potentially relevant to the PD's conclusions,[37] but it is wholly insufficient to support them for the reasons discussed in Section IV above. Because the PD's conclusions are unsupported by the record or by the PD's Findings of Fact, the PD may not be adopted.

## VII. CONCLUSION

The PD's adoption of a per-connection methodology to fund the PPPs would harm Californians by increasing inequity and discriminatory outcomes in the application of PPP

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[33] *See* Pub. Utils. Code § 1705; *see also* Pub. Utils Code § 1757(a) (Commission decisions subject to reversal if the "decision of the Commission is not supported by the findings" or the "findings of the decision of the Commission are not supported by substantial evidence in light of the whole record"); *Greyhound Lines v. Pub. Utils. Comm'n*, 65 Cal.2d 811, 813 (1967) ("findings are required of the basic facts upon which the ultimate finding is based").

[34] *See* PD at 65-66.

[35] *See, e.g.,* PD at 65, Findings of Fact One and Four.

[36] *See, e.g.*, PD at 65, Findings of Fact Six–Eight.

[37] PD at 65.

surcharges, to the particular detriment of lower-income and wireless consumers. Legally, the Commission may not adopt the PD because its conclusions are both unsupported by the record and its own Findings of Fact. However, if the Commission adopts the PD, it should also adopt the industry consensus on the definition of "access line" and other key terms to provide clarity and guidance to providers.

Respectfully submitted September 22, 2022, at San Francisco, California.

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