

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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Order Instituting Investigation on the  
Commission's Own Motion into  
MetroPCS California LLC (U3079C)  
Failure to Remit Prepaid Mobile  
Telephony Service Surcharges and User  
Fees.

Investigation 22-04-005

**REPLY BRIEF OF THE  
CONSUMER PROTECTION AND ENFORCEMENT DIVISION**

**RODERICK HILL  
CATHERINE RUCKER**  
Attorneys

Consumer Protection and Enforcement Division  
California Public Utilities Commission  
505 Van Ness Avenue  
San Francisco, CA 94102  
Telephone: (415) 703-4478  
Email: [roderick.hill@cpuc.ca.gov](mailto:roderick.hill@cpuc.ca.gov)

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## **I. INTRODUCTION**

Pursuant to Rule 13.12 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure (Rule(s)), the Consumer Protection and Enforcement Division (CPED) submits this Reply Brief. As provided by the August 16, 2022, *Assigned Commissioner's Scoping Memo and Ruling* (Scoping Memo), and as amended by Administrative Law Judge Robert Mason on September 14, 2022, Opening Briefs were due on September 22, 2022, with Reply Briefs due 20 days after filing of Opening Briefs, or by October 12, 2022.

## **II. BACKGROUND**

On September 30, 2014, the Prepaid Act was enacted by Assembly Bill 1717.<sup>1</sup> As of September 30, 2014, the law added Public Utilities Code (Pub. Util. Code) § 319, amended and added to Pub. Util. Code § 431, as well as numerous Revenue and Taxation Code Sections.<sup>2</sup> Pursuant to Pub. Util. Code § 319,<sup>3</sup> the Commission issued Resolutions T-17542 and T-17579.<sup>4</sup> On April 22, 2022, the Commission opened an Order Instituting Investigation and Order to Show Cause (OII) for MetroPCS California LLC's failure to remit its surcharges and user fees under the Prepaid Act.

Following the July 25, 2022, Prehearing Conference the Assigned Commissioner issued her Scoping Memo on August 16, 2022. The Scoping Memo set out the issues to be addressed in the OII and divides them into two "tracks". Track 1 includes four issues that are addressed in this briefing, and Track 2 includes two issues that the Commission

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<sup>1</sup> CPED Staff Report, April 14, 2022 (Staff Report), at p. 3.

<sup>2</sup> Staff Report at p. 3.

<sup>3</sup> Pub. Util. Code § 319(e); "The commission shall have enforcement authority to ensure the proper remittances over retail transactions of a prepaid MTS provider pursuant to the Prepaid Mobile Telephony Services Surcharge Collection Act. ..."

<sup>4</sup> Staff Report at pp. 4, 6. Pub. Util. Code § 319; *Resolution T-17542, Approval of the MTS surcharge rates to be assessed on the total sales price of prepaid wireless telephone service effective January 1, 2017* (Nov. 16, 2016); *Resolution T-17579, Approval of the CPUC's user fee rate and telecommunications public purpose programs surcharge rates as required by Pub. Util. Code § 319, for the calculation of the prepaid MTS surcharge rate, which must be imposed on the sales price of each prepaid wireless telephone service retail transaction occurring in California, effective January 1, 2018.*

will resolve after the federal litigation is complete.<sup>5</sup> The Track 1 issues will be resolved independently of the federal litigation since they address MetroPCS's failure to comply with Pub. Util. Code § 314 and Rule 1.1 of the Commission's Rules of Practice and Procedure, while the remaining Track 2 issues will be determined once the federal litigation concludes in 2023.<sup>6</sup>

### **III. CPED'S REPLY TO METROPCS'S OPENING BRIEF**

#### **A. MetroPCS's reliance on the Federal Litigation as an injunction against the OII runs afoul of the Commissioner's Scoping Memo and the Ninth Circuit Opinion allowing Commission enforcement of the Prepaid Act.**

MetroPCS's Opening Brief details its continuing refusal to respond to the CPED's September 27, 2021, data requests (data requests) by using the current federal litigation of *MetroPCS Cal., LLC v. Alice Reynolds*, Case No. 3:17-cv-05959-JD (federal litigation), as a tool to pre-empt CPED's investigation of whether MetroPCS has paid the proper surcharges/remittances under the Prepaid Act for 2017 and 2018.

MetroPCS claims that its objections were reasonable and relevant to the ongoing federal litigation and sought to preserve these objections as it related to discovery and admissibility in the federal litigation.<sup>7</sup> This argument is without merit. The federal litigation is not an injunction which prevents the Commission from exercising its statutory authority to enforce its resolutions and investigate MetroPCS's compliance with the Prepaid Act. MetroPCS cannot use the federal litigation to choose whether it responds to Commission inquiries.

Much of MetroPCS's Opening Brief rehashes its federal injunction arguments and objections which were summarily rejected by the Scoping Memo and Ninth Circuit opinion.<sup>8</sup> Not only does MetroPCS not explain why these arguments and objections

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<sup>5</sup> *Assigned Commissioner's Scoping Memo and Ruling* (Scoping Memo), issued August 16, 2022, pp. 2-3.

<sup>6</sup> Scoping Memo, pp. 2-3.

<sup>7</sup> MetroPCS Opening Brief, pp. 6-8.

<sup>8</sup> Staff Report, pp. 11-13, citing *MetroPCS California, LLC v. Picker*, 970 F. 3d 1106 - Court of Appeals, 9th Circuit 2020.

should be considered anew, but it also continues to threaten an injunction from the Federal District Court against the OII and CPED's investigation.<sup>2</sup> MetroPCS's assertions fail to acknowledge a basic fact – Pub. Util. Code § 314 and Rule 1.1 applies to “any public utility” or telephone corporation. It makes no distinction between prepaid or postpaid carriers. Thus, even if MetroPCS provides postpaid services, which are not under the jurisdiction of the Prepaid Act, the Commission, whether Communications Division (CD) or CPED, may similarly choose to investigate MetroPCS's revenues and MetroPCS would be required to provide any information the Commission may deem necessary. As such, MetroPCS's withholding of information to CPED constitutes a violation of Commission rules.

As reflected in its Opening Comments, MetroPCS's attitude towards the Commission, the OII and the Ninth Circuit Court opinion is one of contempt and bad faith. MetroPCS continues to ignore the clear meaning of the Scoping Memo and the Ninth Circuit opinion which allowed the CPED to pursue enforcement of the Prepaid Act. Accordingly, MetroPCS's reliance on the federal litigation as an injunction against this enforcement proceeding is misplaced.

**B. MetroPCS's objections to CPED's data requests are without merit.**

MetroPCS raises various objections regarding CPED's data requests. Most of these objections are considered boilerplate objections and are not legally supportable. While the Commission's Rules are silent as to the legal sufficiency of discovery objections, the California Code of Civil Procedure (CCP) and its related case law, specifically CCP §§ 2016.010 - 2036.050 (Civil Discovery Act), has long addressed these issues in civil proceedings. Much of the Civil Discovery Act is similar to the Federal

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<sup>2</sup> MetroPCS's Opening Brief, p. 7.

Rules of Civil Procedure.<sup>10</sup> Although the Commission utilizes its own Rules which address discovery,<sup>11</sup> it may refer to federal and state statutes for guidance.

The Civil Discovery Act allows the Commission to review and consider this established statutory and case law which provides long standing legal authority regarding discovery and admissibility under the C.C.P. and the Evidence Code, specifically section 353.<sup>12</sup> It also illuminates MetroPCS's Opening Brief's misrepresentation and bad faith legal assertion that somehow these boilerplate objections are allowed and valid in California Courts, and ironically, in the Federal Courts,<sup>13</sup> which they are not.

**1. MetroPCS improperly asserts CPED's data requests are vague and ambiguous.**

MetroPCS claims that various CPED data requests were vague and assumed incorrect facts, thus requiring further clarification from CPED.<sup>14</sup> MetroPCS's reliance on vagueness and ambiguity is not a legally viable objection in Federal and State courts without clear specificity.

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<sup>10</sup> Blanket, unsupported objections that a discovery request is "vague, overly broad, or unduly burdensome" are, by themselves, meaningless, and disregarded by the Court. A party objecting on these bases must explain the specific and particular ways in which a request is vague, overly broad, or unduly burdensome. *See* Fed. R. Civ. P. 33(b)(4) and 34(b)(2)(B); *Panola Land Buyers Ass'n. v. Shuman*, 762 F.2d 1550, 1559 (11th Cir. 1985) (citing *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982)) ("the party resisting discovery 'must show specifically how . . . each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive.'"). If a party believes that the request is vague, that party shall attempt to obtain clarification prior to objecting on this ground.

<sup>11</sup> Public Utilities Code Section 322(b)(6).

<sup>12</sup> Evidence Code Section 353(a), requiring that every objection to evidence be based on specific grounds.

<sup>13</sup> To show that the requested discovery is objectionable, the burden is on the objecting party to demonstrate with specificity how the objected-to request is unreasonable. *Rosbach v. Rundle*, 128 F. Supp. 2d 1348, 1354 (S.D. Fla. 2000); *Dunkin' Donuts Inc. v. Mary's Donuts, Inc.*, No. 01-0392-CIV-GOLD, 2001 WL 34079319, at \*3 (S.D. Fla. Nov. 1, 2001); *Milinzazzo v. State Farm Ins. Co.*, 247 F.R.D. 691, 695 (S.D. Fla. 2007). Failure to satisfy this burden will result in entry of an order compelling discovery under Rule 37. Failure to show that the objecting party's position was substantially justified will result in entry of monetary sanctions under that Rule. If the burden to sustain an objection is satisfied, the requesting party will have to show with specificity how the information is relevant and necessary, and proportional to the particular needs of the case. *Lombardi v. NCL (Bahamas) Ltd.*, No. 15-20966-CIV-COOKE/TORRES, 2015 WL 12085849, at \*1 (S.D. Fla. Dec. 11, 2015).

<sup>14</sup> MetroPCS Opening Brief, pp. 8-9.

MetroPCS used this objection to claim various terms were vague and ambiguous, including as to “temporal scope”, despite the fact that each request was limited to a specific timeframe. MetroPCS also objected to phrases and terms as vague and ambiguous despite the fact they are commonly used and understood in the telecommunications industry and in its regulation.

MetroPCS’s vague and ambiguous objection is valid only if the question is totally unintelligible. A party has a duty to answer if “the nature of the information sought is apparent.”<sup>15</sup> None of the data requests propounded by CPED were unintelligible, in fact, they were well written, specific, understandable, and utilized language and terms customarily used and understood in the telecommunications industry.

MetroPCS’s Opening Brief shows that its claims of vagueness have not only concealed information from CPED, but also frustrated CPED’s investigation. For example, MetroPCS asserts CPED’s Data Request #5.c is vague and assumes “incorrect facts” because it requested sample customer invoices, which MetroPCS claims it does not use or issue.<sup>16</sup> However, MetroPCS then states that online account statements are available to its customers instead and references prior submissions to CD and Audit, Finance and Compliance Branch (UAFCB) for a sample of such documents.<sup>17</sup> Data request #5.c specifically requested samples for the periods December 2016, December 2017, and December 2018.<sup>18</sup> The documents MetroPCS referenced in its response however, included account statements dated June 2016.<sup>19</sup>

Additionally, in response to Data Request #4, MetroPCS had previously only provided its objections and stated, “No further response will be provided.”<sup>20</sup> However, in its Opening Comments, MetroPCS states for the first time, “Request 4 sought copies of

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<sup>15</sup> Deyo v. Kilbourne (1978), 84 CA 3d 771, 783.

<sup>16</sup> MetroPCS Opening Brief p. 8.

<sup>17</sup> MetroPCS Opening Brief p. 8.

<sup>18</sup> Staff Report, Attachment A, p. 5.

<sup>19</sup> Staff Report, Attachment M, Exhibit D **Confidential**.

<sup>20</sup> MetroPCS Response to CPED’s Data Request November 4, 2021 p. 9.

all audit reports issued by the Universal Service Administrative Company ("USAC") of MetroPCS California, LLC. To our knowledge, however, USAC has not issued any report on an audit of that entity for the requested years.”<sup>21</sup> Hence, staff reasonably assumed that a follow up would be impractical and serve no purpose

**C. MetroPCS did not respond to CPED's data requests when it referenced documents provided to other Commission divisions or in other venues.**

MetroPCS claims that it “included specific references to responsive materials” to past productions made to UAFCB and in the federal litigation.<sup>22</sup> However, the only time this objection is valid is if a party has to respond to the request by procuring public records.<sup>23</sup> A defendant is not entitled to refuse to answer an interrogatory simply upon the ground that the answer is known to the parties seeking the information.<sup>24</sup>

MetroPCS was well aware that CPED did not have access to the information it was referencing because it had previously been advised by Commission counsel Enrique Gallardo about the separation in Commission divisions, “there is a separation between Commission Advisory Staff and its Enforcement Staff.”<sup>25</sup> Hence, MetroPCS knew that its continued assertion that various Commission divisions share the same information and database<sup>26</sup> was incorrect and hindered CPED’s investigation. Moreover, even if CPED did have access to this information, CPED should not be sorting through the large amount of data and documents that MetroPCS provided to UAFCB, CD and to the federal litigation team to identify those documents that would be responsive to its data requests.

Furthermore, the “*see federal docket*” type of response is not proper. “Answers must be complete and responsive. Thus, it is not proper to respond by stating, “See my

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<sup>21</sup> MetroPCS Opening Brief p. 9.

<sup>22</sup> MetroPCS Opening Brief p. 10.

<sup>23</sup> Bunnell v. Sup. Ct. (1967), 254 CA2d 720, 723-724.

<sup>24</sup> Singer v. Superior Court of Contra Costa County (1960), 54 Cal.2d 318.

<sup>25</sup> Staff Report, Attachment B, p. 2.

<sup>26</sup> MetroPCS Opening Brief p. 9 states that MetroPCS, “reasonably expected that this information was accessible to CPED”.



deposition," "See my pleading," or "See the financial statement." Indeed, if a question does require the responding party to refer to a pleading or document, the pleading or document should be identified and summarized so the answer is fully responsive to the request.<sup>27</sup>

MetroPCS notes that it responded to CPED's Data Request #7 seeking MetroPCS' audited financials for 2017 and 2018 by providing links to the financial statements of T-Mobile, its parent company. MetroPCS claims this is sufficient since "its financials are included in the consolidated financial statements of T-Mobile"<sup>28</sup>, and "there are no separate financial statements specifically for MetroPCS".<sup>29</sup> However, the links to T-Mobile's financials provided by MetroPCS were inaccessible to staff. More importantly, T-Mobile's consolidated financial statements, without MetroPCS's separate financial records attached, serve no purpose to staff because MetroPCS is the sole subject of this investigation, and its figures could not be derived from the consolidated financial statements of T-Mobile.

**1. MetroPCS has failed to demonstrate that CPED's data requests were unduly burdensome.**

MetroPCS claims in its Opening Brief that it justifiably objected to CPED's Data Requests on the grounds of undue burden because it had already produced voluminous information to the Commission in connection with audits and the federal litigation.<sup>30</sup> As with the vague and ambiguous objections, undue burden requires specific facts as to what specific undue burden MetroPCS would be subject to by responding to the data requests. The showing required to sustain this objection is that the intent of the party was to create an unreasonable burden, or that burden created does not weigh equally with what requesting party is trying to obtain from it.<sup>31</sup> In *Mead*, the objecting party showed that it

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<sup>27</sup> Deyo v. Kilbourne (1978), 84 CA 3d 771, 784.

<sup>28</sup> Staff Report, Attachment B, p. 15.

<sup>29</sup> MetroPCS Opening Brief p. 9.

<sup>30</sup> MetroPCS Opening Brief, p. 9.

<sup>31</sup> Mead Reinsurance Co. v. Superior Court (1986), 188 CA3d 313.

would require the review of over 13,000 claims files requiring five claims' adjusters working full time for six weeks.

MetroPCS's objections are unsupported. In this matter, discovery is closed in the federal litigation and the information sought in the data requests should be readily available to MetroPCS. Moreover, by refusing to provide this information, and representing that CPED staff could find the responses to its data requests in the voluminous records already provided to the Commission, MetroPCS is, instead, placing an undue burden on staff and impeding CPED's investigation.

**D. MetroPCS has the legal duty to meet and confer with CPED Staff and to resolve any legitimate disputes regarding data requests pursuant to ALJ 195.**

MetroPCS claims that it had no notice that it was in violation of Pub. Util. Code § 314 and Rule 1.1 because CPED had not informed it that the data responses were unsatisfactory.<sup>32</sup> MetroPCS improperly claims that Resolution ALJ 195 and Decision (D.) 08-04-062 imposes the legal duty on CPED to resolve discovery disputes.<sup>33</sup> To the contrary, ALJ 195 places the burden squarely on the utility or responding party to identify and resolve all disputes regarding the data requests before responding and before the "meet and confer" process outlined in ALJ 195 comes into play. MetroPCS's misinterpretation of ALJ 195 makes its notice and due process arguments equally unsustainable.<sup>34</sup> MetroPCS had the legal duty to reach out to CPED and attempt to resolve any questions or initial concerns about the timing, scope, format, or burden of the request pursuant to ALJ 195.<sup>35</sup>

MetroPCS's claim of "good faith efforts" to respond to the data requests and "good faith" interaction with CPED staff is simply not supported by facts.<sup>36</sup> MetroPCS's

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<sup>32</sup> MetroPCS Opening Brief, p. 12.

<sup>33</sup> MetroPCS Opening Brief, pp. 12-14.

<sup>34</sup> MetroPCS Opening Brief, pp. 15-19.

<sup>35</sup> ALJ 195, p. 9.

<sup>36</sup> MetroPCS Opening Brief, pp. 19-22, 24-27.

actions were in “bad faith” as demonstrated in its liberal use of improper boilerplate objections and failure to resolve its data request concerns pursuant to ALJ 195.

ALJ 195, which specifically addresses data requests to telecommunications entities outside of a proceeding, states, “*So long as privilege and confidentiality claims are respected, information requests (which are often quite preliminary) do not deprive the respondent of a property interest, entitlement, or other protectable interest that would require resolution by an impartial decisionmaker.*”<sup>37</sup>

ALJ 195 also states that the duty to meet and confer is on the respondent to fully respond to the data request.

“Utilities and other respondents must review staff information requests promptly and, generally within five business days, contact the staff member with any questions or initial concerns about the timing, scope, format, or burden of the request.”<sup>38</sup>

MetroPCS never gave notice to CPED that it had concerns about the data requests before it responded/objected. The data request set a deadline to respond by October 12, 2021.<sup>39</sup> After failing to receive a timely response, on October 21, 2022, CPED staff reached out to MetroPCS’s attorney Stephen Kukta seeking the overdue responses. CPED offered MetroPCS an extension to respond to the data request by November 4, 2021. Mr. Bloomfield provided MetroPCS’s response on November 4, 2021 but at no time did he or Mr. Kukta or anyone representing MetroPCS and its parent T-Mobile, raise any concerns related to the data requests prior to responding/objecting.<sup>40</sup>

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<sup>37</sup> ALJ 195, *Resolution Establishing a Process for Resolving Timing, Format, Scope, and Burden Concerns Regarding Commission Staff’s Access to Information Outside a Formal Proceeding* (ALJ-195) (Dec. 4, 2016) p. 15.

<sup>38</sup> ALJ 195, p. 6.

<sup>39</sup> Staff Report – Attachment A, p. 1.

<sup>40</sup> Attachment A – CPED and MetroPCS emails regarding CPED Data Request and an extension to respond.

MetroPCS’s November 4, 2021 response, which it calls “responses and objections”, summarily requested that the data requests be withdrawn.<sup>41</sup> MetroPCS summed up its attitude towards CPED’s data requests, by stating:

“Any such requests would constitute an evasion of the discovery process in the *MetroPCS Litigation* and seeking to enforce resolutions that are preempted by federal law, as MetroPCS contend, would exceed the Commission’s jurisdiction.”<sup>42</sup>

ALJ 195 specifically addresses the continuing duty of the responding party to meet and confer with the Commission agency issuing the data requests.

**Continuing Obligation of Disclosure.** As previously discussed, public utilities and other persons or entities subject to Commission inquiries have the continuing, paramount obligation to respond forthrightly to Commission staff inquiries. If a dispute develops about the timing, format, scope, and burden of a staff information request, the utility or other respondent has the continuing obligation to suggest, in good faith, ways to alleviate the specific concern and to respond forthrightly to the unobjectionable portions of the request, thereby narrowly withholding only the information in dispute. Also, if a utility or other respondent does not respond, or responds insufficiently, to an information request (original or as modified), the Division initiating the request will inform appropriate Commission personnel, and the Commission may proceed as provided by Commission rules, orders, and otherwise as provided by law to enforce the information request (emphasis added).<sup>43</sup>

MetroPCS’s attorney Leon Bloomfield, with 25 years of legal experience, did have a duty to resolve these issues a year ago. In fact, if MetroPCS intended to provide responses to the data requests they could have easily done so even after the OII was issued.

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<sup>41</sup> Staff Report, Attachment B, p. 1.

<sup>42</sup> Staff Report, Attachment B.

<sup>43</sup> ALJ 195, pp. 7-8.

ALJ 195 is clear that the Commission has an absolute right (Pub. Util. Code §§710, 314), to collect information for enforcement proceedings as CPED attempted to do with its data requests to MetroPCS.

The resolution describes the many purposes for which information is gathered outside formal proceedings, ranging from information to help understand industry trends to information to prepare for enforcement proceedings. The statutes, upon which our information-gathering authority is based, impose few limits on the type of information that may be requested. While we have slightly altered the text to recognize our ability to obtain information from other entities, we believe that the “rationally related” standard appropriately circumscribes staff inquiries.<sup>44</sup>

MetroPCS further contends that its “good faith willingness to engage with CPED staff” justifies its argument that no penalty should be assessed.<sup>45</sup> CPED disagrees. D.15-08-032 states, “*The defense of good faith is not a defense to the charge of contempt before the Commission.*” This is also true for contempt proceedings in superior court. (See Conn, supra, 196 Cal.App.3d, at 788 [“While petitioners’ defense of good faith is not a defense to the charge of contempt, it must be considered in determining the appropriateness of requiring petitioners to accumulate an enormous fine while awaiting adjudication of the contempt.”].) (emphasis added)<sup>46</sup> Even if good faith were a defense, which it is not, MetroPCS actions are insufficient to avoid a finding of contempt. As discussed, it is MetroPCS’ obligation to review the data request promptly and raise questions regarding timing, scope, format, or burden of the request according to Resolution ALJ-195. MetroPCS failed to perform its obligation and even failed to respond to the data request’s original deadline of October 12, 2021. CPED staff reached out to MetroPCS to extend the deadline, and even then, MetroPCS did not raise any

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<sup>44</sup> ALJ 195, p. 10.

<sup>45</sup> MetroPCS Opening Brief, p. 22.

<sup>46</sup> D.15-08-032 p. 26.

questions or concerns about the data request.<sup>47</sup> With its actions, or lack thereof, MetroPCS exhibited contempt and caused delay to CPED’s investigative authority.

MetroPCS cites to the Meet and Confer process outlined in ALJ 195 and amended in D.08-04-062,<sup>48</sup> however, MetroPCS and its experienced attorneys, failed to take the first step in resolving these discovery disputes with CPED before the “meet and confer” process was necessary and appropriate. Mr. Bloomfield’s self-serving declaration as attached to MetroPCS’s Opening Brief, admits to one significant fact, contrary to the requirements of ALJ 195, Mr. Bloomfield never attempted to resolve MetroPCS’s issues regarding the data requests, especially as it relates to providing written documentation showing anticipated burden or unavailability before responding/objecting on November 4, 2021.<sup>49</sup>

**E. MetroPCS’s claim that a penalty will violate the First and Eighth Amendments are unsupported.**

MetroPCS claims that imposing a penalty for failing to comply with Pub. Util. Code §314 and Rule 1.1 would infringe on its First and Eighth Amendment rights. First, MetroPCS claims the Commission should not retaliate against MetroPCS for exercising its first amendment right to challenge the legality of the Commission’s implementation of the Prepaid Act in federal court.<sup>50</sup> Second, it claims that the penalty sought by CPED is excessive and in violation of the Eighth Amendment excessive fines clause and due process principals.<sup>51</sup>

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<sup>47</sup> Attachment A – CPED and MetroPCS emails regarding CPED Data Request and an extension to respond.

<sup>48</sup> D.08-04-062, April 24, 2008, Ordering Paragraph 2, pp. 18-19. “a “meet and confer” opportunity is available only when (a) the dispute has not been previously resolved by Commission precedent (including decisions, orders, resolutions, or rulings in formal proceedings) or prior, documented staff dispositions, (b) the requested information is not readily available or routinely collected by the utility or other respondent, and the utility or other respondent has provided written documentation of the anticipated burden of providing the requested information, or (c) as otherwise required by due process.

<sup>49</sup> MetroPCS Opening Brief, Declaration of Leon Bloomfield, p. 3., para 14.

<sup>50</sup> MetroPCS Opening Brief, pp. 23-24.

<sup>51</sup> MetroPCS Opening Brief, pp. 25-26.

Contrary to the allegations made in its Opening Brief, MetroPCS presents no facts that the OII or CPED’s investigation interferes with its First Amendment rights as a corporation.

Courts evaluate First Amendment privilege claims in two steps. First, “[t]he party asserting the privilege ‘must demonstrate ... prima facie showing of arguable first amendment infringement.’” (*Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147, 1160, internal quotation marks and citation omitted.) “This *prima facie* showing requires appellants to demonstrate that enforcement of the [discovery requests] will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or ‘chilling’ of, the members’ associational rights.” (*Ibid.*, citation omitted.) Second, if the objector can make prima facie showing, “the evidentiary burden ... shift[s] to the government ... [to] demonstrate that the information sought through the [discovery] is rationally related to a compelling government interest ... [and] the ‘least restrictive means of obtaining the desired information.’” (*Id.* at p. 1161, citation omitted.)

The mere existence of an ongoing, five-year-old, federal litigation, does not, by itself, demonstrate a violation of MetroPCS’s First Amendment rights. If MetroPCS’s arguments were followed, it would mean that a regulated utility could evade a Commission enforcement action merely by filing a petition in federal court. This is simply not the case. Additionally, the Ninth Circuit opinion in the federal litigation saw no such infringement to enforcement.<sup>52</sup> Almost one year after the Ninth Circuit opinion, CPED submitted data requests that were rationally related and narrowly tailored to MetroPCS’s revenue reporting under the Prepaid Act.

D.21-03-001, which expressly addressed First Amendment rights related to Commission discovery requests, concluded that a utility may not unilaterally designate certain topics off limits to Commission oversight.<sup>53</sup> Additionally,

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<sup>52</sup> Staff Report, pp. 11-13.

<sup>53</sup> D.21-03-001, March 21, 2021, p. 31.

“[i]t is well-settled that state regulatory agencies, such as the Commission, can request information to fulfill their regulatory mandate, even when doing so may potentially impact First Amendment rights.”<sup>54</sup>

As to MetroPCS’s Eighth Amendment argument, again MetroPCS presents no facts to support its claim. Its argument that the penalty sought by CPED is unconstitutional under the Eighth Amendment is premature since no fines or penalties have been imposed by the Commission. The Commission has the authority to impose such penalties and has done so in the millions of dollars within its constitutional authority.<sup>55</sup>

MetroPCS’s due process arguments are equally lacking in facts. MetroPCS failed to engage CPED and alert them that MetroPCS had objections about the timing, format, scope, and burden of the data requests, a continuing burden under ALJ 195, as noted above.

D.21-03-001, expressly reserved any procedural due process arguments related to Commission fines, to the U.S. Supreme Court decision in *Mathews v. Eldridge*. In *Mathews*, the sufficiency of due process is case-specific and rarely requires trial-type hearings: “due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands.”<sup>56</sup>

MetroPCS failed to make any effort to engage in the process it was afforded under ALJ 195 before responding/objecting on November 4, 2021.

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<sup>54</sup> Res. ALJ-391, p. 16.

<sup>55</sup> *Pacific Bell Wireless, LLC v. Public Utilities Comm*, 140 Cal.App.4th 718(2006), p. 740. The Commission imposed a penalty of \$10,000 per day for the first violation of law, for a total penalty of \$8.49 million, and a penalty of \$10,000 per day for the second violation of law, for a total penalty of \$3.65 million. (*Id.*, 2004 WL 2268537, \*38, 2004 Cal.P.U.C. Lexis 453 at pp. \*125-126.)

<sup>56</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976), p. 334.



**F. The Commission may pursue enforcement actions and penalties against MetroPCS for its continuing harm to the regulatory process.**

MetroPCS relies on Resolution M-4846, which adopted the Commission's Enforcement Policy, for the proposition that CPED's "failure to notify" or "provide any prior warning" is inconsistent with the Commission's progressive enforcement provisions.<sup>57</sup> Contrary to this claim, however, Resolution M-4846 clearly states that nothing in this Enforcement Policy restricts or reduces the Commission's, and its staff's, ability to use its existing enforcement tools and procedures.<sup>58</sup> Resolution M-4846 Section III. Enforcement states:

In carrying out the Commission's mandate, staff may pursue different levels of enforcement action. In some cases, an enforcement response, such as an oral communication followed by a Warning Letter or Email or a Notice of Violation, will be enough to notify a regulated entity that staff identified an issue or violation that requires corrective action. Other cases may warrant a stronger enforcement action in lieu of or in addition to a warning or other initial enforcement response. All enforcement actions shall be designed and implemented to ensure that timely action is taken to avoid or correct a violation and return to compliance.<sup>59</sup>

MetroPCS also argues that even if the Commission finds it in violation of Pub. Util. Code §314 and Rule 1.1, imposing a penalty would be "unconstitutional" and "would conflict with Commission precedent", as MetroPCS was "unable locate any past decisions imposing a penalty for [the alleged violations] outside of a formal proceeding without any subsequent meet-and-confer".<sup>60</sup> Prior practices cannot bind the Commission as to future conduct and the Commission cannot be estopped from finding MetroPCS in contempt based on Commission's prior actions under similar circumstances. The SFMTA decision addressed the issue of precedent and estoppel, and stated,

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<sup>57</sup> MetroPCS Opening Brief, p. 19.

<sup>58</sup> Resolution M-4846, November 6, 2020, pp. 2 and 16.

<sup>59</sup> Resolution M-4846, p. 5.

<sup>60</sup> MetroPCS Opening Brief, p. 20.

First, prior practices cannot bind the Commission as to future conduct. The California Supreme Court made this clear in [\*Sale v. Railroad Commission\* \(1940\) 15 Cal.2d 612](#), where in the context of Commission decisions and orders, the Court states that prior Commission decisions and orders are not “*res judicata* in the sense in which that doctrine is applied in the law courts.” The Court went on to state that the Commission “has continuing jurisdiction to rescind, alter or amend its prior orders at any time.” It would be inconsistent that the Commission can change its prior orders, yet Commission staff could not act in a way contrary to a prior pattern of conduct.

Second, invoking and applying an estoppel argument would conflict with the Commission's continuing duty to protect the ratepaying public. In *Order In the Matter of the Application of San Diego Gas & Electric Company for Authority to Increase its Rates and Charges for Electric and Gas Service*, Decision 82-12-058, 1982 Cal. PUC LEXIS 1307, the Commission stated that it “can never be estopped from acting fairly and reasonable, balancing the interests of utility customers, investors, and employees, all of whom are entitled to rely on the Commission's acting fairly and rationally, using the best information available.” How can the Commission be expected to fulfill its public safety duties if it does not obtain the records responsive to the subpoena *duces tecum*? Thus, regardless of what may have occurred in those prior instances, the Commission's duty to conduct a complete investigation into a transit accident trumps any attempt by the SFMTA to rely on prior instances to avoid producing unredacted accident and training records to the Commission's staff.<sup>61</sup>

Additionally, MetroPCS contends that “there was no harm” to the regulatory process because the information requested by CPED are relevant to calculating surcharges that MetroPCS owes under the Prepaid Act, an issue subject to Track 2 of this investigation.<sup>62</sup> MetroPCS seems to argue that the Commission is not entitled to certain information because the validity of the Prepaid Act is in question. This is incorrect. As previously explained, the Commission may choose to investigate any utility or carrier,

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<sup>61</sup> D.15-08-032, pp. 28-29.

<sup>62</sup> MetroPCS Opening Brief, p. 21.

regardless of the Prepaid Act's validity. The Commission is entitled to inspect a carrier's records under PU Code § 314, regardless of whether that carrier was under the jurisdiction of the Prepaid Act or not.

CPED's request that the Commission open an OII and recommendation of penalties for MetroPCS's violations are consistent with Resolution M-4846, and the Commission should penalize MetroPCS's conduct for its violation PU Code § 314 and Rule 1.1.

As discussed in CPED's Opening Brief, the Commission should look to D.16-01-014, where the Commission found Raiser-CA, LLC in violation of Rule 1.1, for guidance on whether to penalize or how much to penalize MetroPCS.<sup>63</sup>

As previously explained, CPED's data request seeks information already available to MetroPCS.<sup>64</sup> MetroPCS simply did not want to provide the requested information and instead hid behind other various objections to the data request.<sup>65</sup> MetroPCS's actions are similar to those of Rasier-CA, who had the requested information all along and was offering to provide the information to SED on Rasier-CA's own terms.<sup>66</sup> Rasier-CA's actions, which are similar to MetroPCS, were found to be not in compliance.<sup>67</sup>

For these reasons, MetroPCS should be found in violation of Pub. Util. Code § 314 and Rule 1.1. This is further supported by D.13-12-053 which states "We have previously held that Rule 1.1 violations have occurred where there has been a lack of candor, withholding of information, or failure to correct information or respond fully to data requests."<sup>68</sup>

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<sup>63</sup> CPED Opening Brief p. 13.

<sup>64</sup> CPED Opening Brief p. 15

<sup>65</sup> CPED Staff Report p. 39 – Table 17.

<sup>66</sup> D.16-01-014 p. 123.

<sup>67</sup> Id.

<sup>68</sup> D.13-12-053, Final Decision Imposing Sanctions for Violation of Rule 1.1 of the Commission's Rules of Practice and Procedure, p. 21.

#### IV. CONCLUSION

CPED requests that the Commission adopt its responses to the Track 1 issues as presented in its Opening Brief and impose the monetary penalties, fines, and other remedial measures the Commission deems proper for MetroPCS's violations of Pub. Util. Code § 314 and Rule 1.1. The Commission has an absolute constitutional and statutory right to pursue its investigation as to MetroPCS's compliance with Pub. Util. Code § 314 and Rule 1.1, as outlined in the Track 1 scoping issues. MetroPCS has clearly violated these provisions, and the Commission should impose the penalty of \$10 million, as proposed by CPED. In addition, MetroPCS should be ordered to fully respond to the data requests within the Track 1 issues.

Respectfully submitted,

/s/ RODERICK HILL  
Roderick Hill  
Attorney

Consumer Protection and Enforcement Division  
California Public Utilities Commission  
505 Van Ness Avenue  
San Francisco, CA 94102  
Telephone: (415) 703-4478  
Email: Roderick.Hill@cpuc.ca.gov

October 12, 2022

## ATTACHMENT A

CPED and MetroPCS emails regarding CPED Data Request and an extension to respond.

**From:** Leon Bloomfield <[lmb@wblaw.net](mailto:lmb@wblaw.net)>  
**Sent:** Thursday, November 4, 2021 4:57:52 PM  
**To:** Zhong, Vicky <[Vicky.Zhong@cpuc.ca.gov](mailto:Vicky.Zhong@cpuc.ca.gov)>  
**Cc:** 'Kukta, Stephen' <[Stephen.H.Kukta@t-mobile.com](mailto:Stephen.H.Kukta@t-mobile.com)>; Gallardo, Enrique <[Enrique.Gallardo@cpuc.ca.gov](mailto:Enrique.Gallardo@cpuc.ca.gov)>  
**Subject:** [EXTERNAL] MetroPCS California, LLC's Response to the Consumer Protection and Enforcement Division's Data Request No. DR-TEL-00687-1

**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Ms. Zhong,

Attached please find a copy of MetroPCS California, LLC's Response to the Consumer Protection and Enforcement Division's Data Request No. DR-TEL-00687-1.

Thank you again for the extension of time to submit this Response. As always, let us know if you have any questions.

Leon Bloomfield

Law Offices of Leon M. Bloomfield  
1901 Harrison Street, Suite 1200 | Oakland, CA 94612  
Mobile: 510.282.6240  
Email: [lmb@wblaw.net](mailto:lmb@wblaw.net)

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents.

**From:** Zhong, Vicky <[Vicky.Zhong@cpuc.ca.gov](mailto:Vicky.Zhong@cpuc.ca.gov)>  
**Sent:** Tuesday, September 27, 2022 5:19 PM  
**To:** Enriquez, Nikka "Nina" <[Nikka.Enriquez@cpuc.ca.gov](mailto:Nikka.Enriquez@cpuc.ca.gov)>  
**Subject:** Fwd: [EXTERNAL] Re: Response Required: October 12, 2021, DR-TEL-00687-1 MetroPCS California, LLC

FYI

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**From:** Kukta, Stephen <[Stephen.H.Kukta@t-mobile.com](mailto:Stephen.H.Kukta@t-mobile.com)>  
**Sent:** Monday, October 25, 2021 11:11:28 AM  
**To:** Zhong, Vicky <[Vicky.Zhong@cpuc.ca.gov](mailto:Vicky.Zhong@cpuc.ca.gov)>  
**Cc:** Kukta, Stephen <[Stephen.H.Kukta@sprint.com](mailto:Stephen.H.Kukta@sprint.com)>  
**Subject:** Re: [EXTERNAL] Re: Response Required: October 12, 2021, DR-TEL-00687-1 MetroPCS California, LLC

**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Thanks Vicky.

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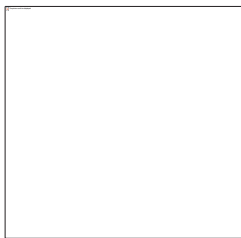
---

**From:** Zhong, Vicky <[Vicky.Zhong@cpuc.ca.gov](mailto:Vicky.Zhong@cpuc.ca.gov)>  
**Sent:** Monday, October 25, 2021 8:26:35 AM  
**To:** Kukta, Stephen <[Stephen.H.Kukta@t-mobile.com](mailto:Stephen.H.Kukta@t-mobile.com)>  
**Cc:** Kukta, Stephen <[Stephen.H.Kukta@sprint.com](mailto:Stephen.H.Kukta@sprint.com)>  
**Subject:** RE: [EXTERNAL] Re: Response Required: October 12, 2021, DR-TEL-00687-1 MetroPCS California, LLC

Good morning Stephen,

For your convenience, I'm reattaching the data request (DR) in both the Word and PDF format and I've updated our system (not the original DRs attached) to reflect an updated due date of November 4, 2021. If you need additional time to prepare the response, please let me know and request an extension no later than October 29, 2021.

Thank you,



*Vicky Zhong*

Senior Regulatory Analyst  
Utility Enforcement Branch  
Consumer Protection Enforcement Division  
California Public Utilities Commission  
505 Van Ness Avenue | San Francisco, CA 94102 | ☎ (415) 703-3036 |  
✉ [vicky.zhong@cpuc.ca.gov](mailto:vicky.zhong@cpuc.ca.gov) | 🌐 [www.cpuc.ca.gov](http://www.cpuc.ca.gov)

---

**From:** Kukta, Stephen <[Stephen.H.Kukta@t-mobile.com](mailto:Stephen.H.Kukta@t-mobile.com)>  
**Sent:** Thursday, October 21, 2021 11:30 AM  
**To:** Zhong, Vicky <[Vicky.Zhong@cpuc.ca.gov](mailto:Vicky.Zhong@cpuc.ca.gov)>; Kukta, Stephen <[Stephen.H.Kukta@sprint.com](mailto:Stephen.H.Kukta@sprint.com)>  
**Cc:** [rbloom@metropcs.com](mailto:rbloom@metropcs.com); Lipper, Susan <[Susan.Lipper@T-Mobile.com](mailto:Susan.Lipper@T-Mobile.com)>

**Subject:** Re: [EXTERNAL] Re: Response Required: October 12, 2021, DR-TEL-00687-1 MetroPCS California, LLC

**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Vicky,

I apologize. Unfortunately this slipped through the cracks. I remember getting the email from Susan and flagging it, but because I received the email as a "reply all" instead of a forward, there was no data request attached and I forgot to follow up.

As such, I need to ask you if you could please send me the document request to me directly, and I will endeavor to provide a response as quickly as I possibly can.

Thank you for your patience.

Steve.

Stephen Kukta  
Director and Senior Counsel  
[stephen.h.kukta@sprint.com](mailto:stephen.h.kukta@sprint.com)  
415-572-8358  
Sprint-Now Part of T-Mobile

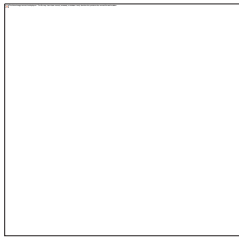
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**From:** Zhong, Vicky <[Vicky.Zhong@cpuc.ca.gov](mailto:Vicky.Zhong@cpuc.ca.gov)>  
**Sent:** Thursday, October 21, 2021 11:18:57 AM  
**To:** Kukta, Stephen <[Stephen.H.Kukta@sprint.com](mailto:Stephen.H.Kukta@sprint.com)>  
**Cc:** [rbloom@metropcs.com](mailto:rbloom@metropcs.com) <[rbloom@metropcs.com](mailto:rbloom@metropcs.com)>; Lipper, Susan <[Susan.Lipper@T-Mobile.com](mailto:Susan.Lipper@T-Mobile.com)>  
**Subject:** RE: [EXTERNAL] Re: Response Required: October 12, 2021, DR-TEL-00687-1 MetroPCS California, LLC

Good morning Mr. Kukta,

CPED issued a data request, DR-TEL-00687-1 MetroPCS California, LLC (MetroPCS) on September 27, 2021, and response from MetroPCS was due on October 12, 2021. CPED has not received a response from MetroPCS to date. Please CPED with an update and a request for extension.

Thank you,



**Vicky Zhong**

Senior Regulatory Analyst  
Utility Enforcement Branch  
Consumer Protection Enforcement Division  
California Public Utilities Commission  
505 Van Ness Avenue | San Francisco, CA 94102 | ☎ (415) 703-3036 |  
✉ [vicky.zhong@cpuc.ca.gov](mailto:vicky.zhong@cpuc.ca.gov) | 🌐 [www.cpuc.ca.gov](http://www.cpuc.ca.gov)

**From:** Lipper, Susan <[Susan.Lipper@T-Mobile.com](mailto:Susan.Lipper@T-Mobile.com)>  
**Sent:** Monday, September 27, 2021 4:38 PM  
**To:** Zhong, Vicky <[Vicky.Zhong@cpuc.ca.gov](mailto:Vicky.Zhong@cpuc.ca.gov)>; Kukta, Stephen <[Stephen.H.Kukta@sprint.com](mailto:Stephen.H.Kukta@sprint.com)>  
**Cc:** [rbloom@metropcs.com](mailto:rbloom@metropcs.com); Ouyang, Ke Hao <[kehao.ouyang@cpuc.ca.gov](mailto:kehao.ouyang@cpuc.ca.gov)>  
**Subject:** [EXTERNAL] Re: Response Required: October 12, 2021 Response Required: Mar 29, 2021 DR-TEL-00687-1 MetroPCS California, LLC

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Hi Ms. Zhong - I am no longer the T-Mobile lead for CPUC matters but I have copied Steve Kukta who can follow up. Thank you.

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**From:** Zhong, Vicky <[Vicky.Zhong@cpuc.ca.gov](mailto:Vicky.Zhong@cpuc.ca.gov)>  
**Sent:** Monday, September 27, 2021 4:09:14 PM  
**To:** Lipper, Susan <[Susan.Lipper@T-Mobile.com](mailto:Susan.Lipper@T-Mobile.com)>  
**Cc:** [rbloom@metropcs.com](mailto:rbloom@metropcs.com) <[rbloom@metropcs.com](mailto:rbloom@metropcs.com)>; Ouyang, Ke Hao <[kehao.ouyang@cpuc.ca.gov](mailto:kehao.ouyang@cpuc.ca.gov)>  
**Subject:** Response Required: October 12, 2021 Response Required: Mar 29, 2021 DR-TEL-00687-1 MetroPCS California, LLC

[External]

Dear Ms. Lipper,

The California Public Utilities Commission's (CPUC) Consumer Protection and Enforcement Division (CPED), requests information as described in the attached document.

Please carefully review the specifics of the attached data request. If you have any questions, do not hesitate to contact me via email ([vicky.zhong@cpuc.ca.gov](mailto:vicky.zhong@cpuc.ca.gov)) or telephone (415) 703-3036.

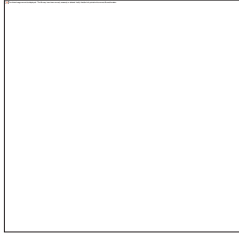
Please submit your responses to DR-TEL-00687-1 electronically, on or before **October 12, 2021**. If you are unable to provide a response by the requested due date of **October 12, 2021**,



please provide a written explanation by **October 7, 2021**, as to why you cannot meet the response dates and when you can provide the information. If you are not the correct personnel for this request, please forward it to the correct people internally and notify UEB who the correct contacts are for any future related Data Requests.

Thank you for your cooperation.

Sincerely,



*Vicky Zhong*

Senior Regulatory Analyst

Utility Enforcement Branch

Consumer Protection Enforcement Division

California Public Utilities Commission

505 Van Ness Avenue | San Francisco, CA 94102 | ☎ (415) 703-3036 |

✉ [vicky.zhong@cpuc.ca.gov](mailto:vicky.zhong@cpuc.ca.gov) | 🌐 [www.cpuc.ca.gov](http://www.cpuc.ca.gov)