

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Decision _____

Order Instituting Investigation on the Commission's own Motion into the alleged failure of TracFone Wireless, Inc. (U4321C) to collect and remit public purpose program surcharges and user fees on revenue from its sale of intrastate telephone service to California consumers, in violation of the laws, rules and regulations of this State; Order to Show Cause why Respondent should not immediately be ordered to pay all such outstanding sums plus interest, and be subject to penalties for such violations.

Investigation 09-12-016
(Filed December 17, 2009)

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**MODIFIED PRESIDING OFFICER'S DECISION ORDERING PAYMENT OF
PAST DUE AMOUNTS AND INTEREST**

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MODIFIED PRESIDING OFFICER'S DECISION ORDERING PAYMENT OF PAST DUE AMOUNTS AND INTEREST

1. Summary

This decision finds that TracFone Wireless, Inc. (TracFone) must pay \$24,397,441.17 which equals the full amount of user fees¹ and public purpose program surcharges² (PPP surcharges), including interest, accrued prior to February 24, 2012.³ This decision finds that penalties are not warranted.

TracFone is a prepaid wireless carrier operating in California. To use its service, customers must purchase a TracFone handset and minutes. Minutes are purchased prior to use, and can be purchased online, through the handset, or from a third party retailer. In order to fund important Commission programs, all telecommunications companies regulated by the Commission are required to pay user fees and PPP surcharges on all intrastate call revenue. Generally, user fees and PPP surcharges are collected from the end-user by the carrier and then remitted to the Commission. TracFone did not collect user fees (from 2004 through 2012) or PPP surcharges (from at least 2000 through 2012). For these

¹ As used herein, the "user fees" refers to the amounts described in California Public Utilities Code §§ 401-410, 431-435.

² As used herein, "PPP surcharges" include the Universal Lifeline Telephone Service § 879 and §§270 et seq.; the Deaf and Disabled Telecommunications Program § 2881 and §§ 270 et seq.; California High Cost Fund-A § 275, § 739.3 and §§ 270 et seq.; California High Cost Fund-B § 276, § 739.3 and §§ 270 et seq.; California Teleconnect Fund § 280 and §§ 270 et seq.; and California Advanced Services Fund § 281.

³ The exact amount, separated by year, of user fee and PPP surcharge, is set forth in a Confidential Appendix by Administrative Law Judge (ALJ) Ruling. Because the information in the Confidential Appendix includes market sensitive information, it has not been included in the Decision.

same periods, TracFone did not remit user fees or PPP surcharges to the Commission.

In 2009, the Commission initiated this investigation into TracFone's failure to pay user fees and PPP surcharges. TracFone relied primarily on two arguments: (1) that it is not a utility and that its revenues fell under an exemption to PPP surcharges, and (2) that it could not collect or remit user fees and PPP surcharges because the Commission had not prescribed methods for prepaid carriers to collect these amounts from customers or for prepaid carriers to determine the portion of revenue related to intrastate (rather than interstate) calls. In Decision (D.) 12-02-032 (Phase 1 Decision), the Commission confirmed that TracFone is indeed required to pay user fees and PPP surcharges on all intrastate call revenue. The Phase 1 Decision also made it clear that it is TracFone's responsibility to figure out how to collect user fees and PPP surcharges and to figure out how to determine intrastate revenue on prepaid sales. Following the issuance of the Phase 1 Decision on February 24, 2012, TracFone began paying user fees and PPP surcharges.

In Phase 2 of this proceeding, we find that TracFone must pay all user fees and PPP surcharges for the period prior to February 24, 2012. TracFone argues that the Phase 1 Decision created new law regarding what revenue is subject to fees and surcharges. This decision finds that the Phase 1 Decision did not create new law, but merely confirmed that, under existing law, user fees and PPP surcharges do apply to TracFone's intrastate call revenue. Therefore, TracFone is obligated to pay the full amount of past due user fees and PPP surcharges, including interest.

We also determine that it is not necessary to impose penalties on TracFone for its failure to pay user fees and PPP surcharges prior to 2012. Although

non-payment has continued for at least ten years, there are several mitigating factors, such as TracFone's good faith efforts to confirm its interpretation of the law with Communications Division staff. In addition, because it did not collect user fees and PPP surcharges from customers up front, TracFone will have to bear the entire cost of past due amounts. Therefore, it is not necessary to add penalties to the amount due. To ensure that California ratepayers are made whole, the past due amounts are, however, subject to the 10 percent annual interest charge required under General Order 153. All amounts remitted by TracFone pursuant to this decision will be applied to the budget for the corresponding program fund.

This proceeding is closed.

2. Statement of Facts

2.1. TracFone's Wireless Service

TracFone Wireless, Inc. (TracFone) describes its services as prepaid wireless services, meaning that customers purchase specific quantities of wireless services in advance; no bill is rendered to the customer after TracFone provides services. (D. 12-02-032 (Phase 1 Decision or D.12-02-032) at 11; D.12-10-018 (denying rehearing of Phase 1 Decision.)) TracFone resells the wireless services of other carriers, including Verizon Wireless (Verizon), AT&T Mobility and T-Mobile. (*Id.*) TracFone's California customers consider TracFone, not the underlying carriers such as Verizon or T-Mobile, their wireless carrier for customer service issues. (*Id.* at 45, Finding of Fact 10.) TracFone's prepaid wireless service is marketed and sold under the "TracFone," "Net10," and "SafeLink" brands and, in each case, the customer is required to purchase and activate a TracFone handset (mobile phone). (*Id.*, Finding of Fact 11.) TracFone customers must load or purchase usage minutes for their TracFone mobile

phones, either on-line through TracFone's website, or via prepaid cards purchased at retail outlets that are then used to re-load the mobile phones with additional usage minutes. (*Id.*, Findings of Fact 12, 13.) TracFone sells handsets and airtime at many different retailers, including Wal-Mart and RadioShack. (*Id.* at 46, Finding of Fact 17; Exhibit TR-201 at 5.)

TracFone operates as a subsidiary of America Telecom, S.A.B. de C.V. (América Móvil), a telephone company based in Mexico City.⁴ As of June, 2010, TracFone had approximately 16 million subscribers nationwide,⁵ including three separate brands, and described *itself* as "the largest operator in the U.S. prepaid cellular market."⁶

2.2. User Fees and PPP Surcharges

This investigation concerns failure to pay (1) user fees⁷ and (2) public purpose program surcharges (PPP surcharges).⁸

The legislature authorized collection of user fees from public utilities as a means of ensuring the Commission is adequately staffed and funded. (Public

⁴ Declaration of F.J. Pollak in Support of Response of TracFone Wireless, Inc. to the Motion of Consumer Protection & Safety Division for Summary Adjudication at 3:9-10.

⁵ CPSD Exhibit 1, Attachment (Att.) K.1, Annual Report at 26.

⁶ CPSD Exhibit 1, Att. L.1, Form 20-F at 57.

⁷ As used herein, the "user fees" refers to the amounts described in California Public Utilities Code §§ 401-410, 431-435.

⁸ As used herein, "PPP surcharges" include the Universal Lifeline Telephone Service § 879 and §§270 *et seq.*; the Deaf and Disabled Telecommunications Program § 2881 and §§ 270 *et seq.*; California High Cost Fund-A § 275, § 739.3 and §§ 270 *et seq.*; California High Cost Fund-B § 276, § 739.3 and §§ 270 *et seq.*; California Teleconnect Fund § 280 and §§ 270 *et seq.*; and California Advanced Services Fund §281.

Utilities Code § 401.)⁹ The law governing user fees for public utility telephone corporations, such as TracFone, is set forth in sections 401-410, 431-435.

The legislature has also authorized the collection of PPP surcharges to fund various public purpose programs related to telecommunications service such as programs to provide service to high cost areas and the Deaf and Disabled Telecommunications Program. The law governing PPP surcharges is set out in the applicable statutes, as well as in General Order (GO) 153.

Both user fees and PPP surcharges are calculated by applying a percentage (determined periodically by the Commission) to the carrier's intrastate telecommunications revenues. The carrier is to collect the applicable user fee or PPP surcharge from the customer making the intrastate call and then remit that amount to the Commission.

User fees and PPP surcharges are subject to different statutory requirements and Commission orders. Generally, PPP surcharges are funded through an "All End-User Surcharge" (AEUS) mechanism. (See, e.g., *Re Universal Service and Compliance with the Mandates of Assembly Bill 3643*, D.96-10-066 at 674-76, Appendix B.) The charges are to appear as a separate line item on the customers' bills. (*Id.*) Revenue generated from "debit cards" is excluded from the PPP surcharge calculation. (*Id.*) User fees, on the other hand, do not have the same line itemization requirement and there is no exemption from user fees for debit card revenue.

⁹ Unless otherwise indicated, all subsequent section references are to the California Public Utilities Code.

By letter dated July 18, 1997 (the Registration Letter), the Commission gave TracFone's predecessor, Topp Telecom, Inc., Wireless Registration Identification number U4321C. (Exhibit CPSD-1 Att. B.) At some point between 1999 and 2001, Topp Telecom, Inc. began operating under the name "TracFone Wireless, Inc." (D.12-02-032 at 44, Findings of Fact 1, 2.)

The Registration Letter listed some of the requirements which the registrant must comply with, including the requirement to pay user fees and PPP surcharges. The Registration Letter described user fees by reference to section 401, *et seq.*, pertaining to "the collection of user fees to fund the costs of regulating public utilities." The Registration Letter listed three surcharges: the D.E.A.F. Trust surcharge,¹⁰ the California High Cost Fund (CHCF) B surcharge, and the California Teleconnect Fund (CTF) surcharge. The Registration Letter noted that two of the surcharges -- CHCF B and California Teleconnect Fund -- should appear as separate line items on the customer's bill, and that "debit card messages" are excluded. (Exhibit CPSD-1 Att. B.) Subsequent to issuance of the Registration Letter, the following additional PPP surcharges were instituted: Universal Lifeline Telephone Service (ULTS) under section 879; CHCF A under section 275; and California Advanced Services Fund (CASF) under section 281.

TracFone began paying user fees in 1999. TracFone did not pay PPP surcharges.

¹⁰ Today, telecommunication programs for the deaf are funded by the Deaf and Disabled Telecommunication Program (DDTP) which is designated as CA Relay Service and Communications Devices Fund.

In 2003, a series of communications between TracFone and Commission staff lead TracFone to assert in a letter to the Commission that TracFone's revenues are exempt from PPP surcharges. The communications began with a letter dated February 28, 2003, in which the Commission requested information on projected revenue subject to surcharges for fiscal year 2004 - 2005 and identified Mr. Hassan Mirza in the Commission's Communications Division as the person to contact for questions. (Exhibit TR-203 Att. 4.) The letter noted that "debit card calls" are excluded from surcharge. (*Id.*) Shortly thereafter, TracFone reportedly contacted Mr. Mirza, stating that because TracFone services are debit card calls TracFone "does not render any 'billings'" which would be reportable. (Exhibit TR-203 at 15:21-31.) TracFone engaged in one, possibly two, telephone conversations with Commission staff. TracFone alleges that Mr. Mirza agreed that TracFone was exempt from payment under the then-existing forms used to report and calculate user fees and PPP surcharges. (Reporters Transcript (RT) 557:2-12; 569:7-10.) Following these conversations, in a March 24, 2003 letter to Mr. Mirza (Salzman Letter), TracFone described its services as "more in the nature of 'debit card' services which are not subject to the surcharge." (Exhibit TR-203, Att. 13.) The content of Mr. Mirza's statements, as reported by the Salzman Letter, was never adopted by the Commission. (D. 12-02-032 at 46, Findings of Fact 18 - 24.) Additionally, the Commission never contacted TracFone with questions regarding the Salzman Letter. (Exhibit TR-203 at 17:10-16.)

Based on these communications, TracFone continued to not pay PPP surcharges. In addition, starting in 2004, TracFone stopped paying user fees.

Aside from this contact with Mr. Mirza, TracFone did not seek clarifications from the Commission of the terms or requirements of its wireless Registration in this regard, including its obligation to collect and remit user fees or PPP surcharges. (Phase 1 Decision at 46, Finding of Fact 20.)

By electronic mail dated May 1, 2009, Commission staff informed TracFone that the user fees and PPP surcharges did apply to TracFone's services.¹¹ (Phase 1 Decision at 47, Finding of Fact 26.) A series of emails and letters discussing user fees and PPP surcharges followed.

On December 22, 2009, the Commission issued the above-captioned Order Instituting Investigation (the December 2009 OII) to investigate TracFone's failure to pay user fees and PPP surcharges. Throughout Phase 1 of the December 2009 OII, TracFone asserted that it is not required to pay user fees because TracFone is not a utility and that it is not required to pay PPP surcharges because its services fall under the debit card exemption.

The Phase 1 Decision found (a) that TracFone is a public utility obligated to pay user fees and (b) that TracFone's prepaid service does not constitute a debit card and therefore is not exempt from PPP surcharges. The Phase 1 Decision explained that there are material differences between the services TracFone provides and a debit card service. For example, TracFone's prepaid wireless services include an assigned telephone number and must be used with a TracFone handset. (Phase 1 Decision at 50, Conclusion of Law 27.) TracFone's prepaid wireless service is equivalent to dial tone access and a full

¹¹ TracFone opening brief at 3, referring to Exhibit TR-116 Att. 11 at 1 and Exhibit CPSD-1 Att. F.

service telephone offering while, in comparison, debit cards provide a very limited type of telecommunications service. (*Id.*, Conclusion of Law 28.)

2.3. December 2009 Order Instituting Investigation (OII)

On September 9, 2009, the Commission mailed Resolution T-17235 denying TracFone's request to be designated as an Eligible Telecommunications Carrier (ETC)¹² for the purpose of being deemed eligible to receive federal universal support for its services. Resolution T-17235 found that it would not be in the public interest to designate TracFone as an ETC because TracFone had failed to collect and remit PPP surcharges and user fees on its intrastate telephone revenues. (Resolution T-17235 at 29.)

On December 11, 2009, while Resolution T-17235 was pending, Verizon filed a petition to address the obligations of prepaid wireless carriers with respect to user fees and PPP surcharges on an industry-wide basis, including methods for collecting surcharges. (Petition (P.) 09-12-018). Verizon argued that in order for prepaid wireless service providers to consistently collect PPP surcharges, the Commission must identify how the PPP surcharges are to be collected from end-users. (P.09-12-018 at 3.)

On December 17, 2009, the Commission voted to issue Resolution T-17235, denying TracFone's request to be designated an ETC.

¹² TracFone sought designation as an ETC in its Advice Letter Number 1, filed on August 20, 2008. To receive federal universal service support, a carrier must be designated an ETC. Section 214(e)(2) of the Communications Act of 1934, as amended, and section 47 C.F.R. § 54.202, provide state commissions with the primary responsibility for designating ETCs.

At the same Commission meeting, the Commission issued the December 2009 OII. The December 2009 OII sought to determine whether TracFone violated any provisions of the Public Utilities Code, or the Commission's general orders, or other rules or requirements by failing and refusing to pay user fees or PPP surcharges. (December 2009 OII at 7.)

In response, TracFone filed a motion for stay of the December 2009 OII and an application for rehearing of Resolution T-17235. In the motion for stay, TracFone argued that the potential scope of the December 2009 OII would overlap with P.09-12-018. In the application for rehearing, TracFone argued that it must be given an opportunity to be heard in an evidentiary hearing regarding the alleged violations of law. In May 2010, the Commission issued D.10-05-021 which vacated Resolution T-17235 and added issues related to the alleged violations of law to the December 2009 OII.

On July 29, 2010, the Commission denied P.09-12-018, stating that the Commission intended to issue a rulemaking related to, but broader than, the topics set forth in Verizon's petition. To date, no such industry-wide rulemaking has been issued.

The Assigned Commissioner's Scoping Memo and Ruling, dated August 5, 2010, stated that the Commission would first resolve the issues of whether user fees and PPP surcharges are applicable to TracFone's prepaid wireless services, and, if so, whether TracFone violated specific laws, rules, orders or directions of the Commission in failing to collect and remit the PPP surcharges and user fees applicable to its prepaid wireless services. Phase 1 of this proceeding examined those issues, and left the matter of past amounts due and penalties, if any, for this Phase 2.

2.4. Phase 1 Decision

On September 28, 2010, the Consumer Protection and Safety Division (CPSD)¹³ filed a motion for summary adjudication. On January 26, 2011, the assigned ALJ issued a ruling granting, in part, the motion for summary adjudication. The January 26, 2011 ruling also found that TracFone operated as a public utility and telephone corporation under California law and that therefore this issue would not be addressed at the evidentiary hearing. The ALJ's ruling was confirmed in D.12-02-032.

In February 2011, three days of evidentiary hearings were held for Phase 1. During the hearings, CPSD presented its witness, Ms. Tan-Walsh, and TracFone presented its witnesses, Mr. Pollak and Mr. Salzman. In addition, both sides introduced prepared testimony and other exhibits.

The Presiding Officer's Decision issued on November 18, 2011. TracFone filed an appeal on December 19, 2011. CPSD filed a response. The final decision issued on February 24, 2012. The Phase 1 Decision found that:

TracFone is a California public utility and a telephone corporation under the California Constitution and the Public Utilities Code. (D.12-02-032 at 47, Conclusion of Law 2 (citing Cal. Const., art. XII, § 3 and Pub. Util. Code sections 216, 233, and 234.)) TracFone services do not fall under the debit card exemption. (*Id.* at 50, Conclusion of Law 25.) TracFone must therefore collect and remit user fees and PPP surcharges. (*Id.* at 55, Ordering Paragraph 2.)

¹³ At the time this proceeding began, the division was called the Consumer Protection and Safety Division (CPSD). CPSD was renamed Safety and Enforcement Division (SED) on January 1, 2013. For clarity, where possible this decision refers to the division as CPSD.

The Phase 1 Decision ordered TracFone to “immediately begin collecting and remitting” user fees and PPP surcharges on its prepaid wireless services provided after the effective date of the Phase 1 Decision. (*Id.*)

Following the issuance of the Phase 1 Decision, on March 26, 2012, TracFone filed an Application for Rehearing and Request for Oral Argument and a Motion for Stay of Decision 12-02-032. The application for rehearing and the motion for stay were denied in D.12-10-018. TracFone then filed a petition for writ of review with the California Court of Appeal, First District, Division 4. (Case No. A137100.) On March 13, 2013, the court summarily denied the petition.

3. Phase 2

3.1. Phase 2 Issues

The issues for Phase 2 were put forth in the Phase 1 Decision, and revised slightly for the Scoping Memo. Issue 1 is as follows:

1. The amount of user fees and surcharges owed by TracFone. This issue includes determining what reasonable methodologies are available for calculating the user fees and surcharges. Evidence regarding what methodologies have been accepted by the Commission in the past is within the scope of this issue. However, evidence regarding the content of Commission communications with other prepaid wireless carriers is not within the scope of this issue.

On April 16, 2013, the Assigned Commissioner issued a Ruling Amending Scope and Inviting Additional Briefing (April 2013 Ruling). Pursuant to the April 2013 Ruling, Phase 2 issue 2 was revised slightly to read as follows:

2. Whether TracFone is subject to penalties pursuant to the provisions of Pub. Util. Code §§ 2100, et seq. or other Commission order or statute for failure to pay the user fees and surcharges on its prepaid wireless services

provided prior to the effective date of the Phase 1 Decision, and, if so, the amount of penalties. This issue includes identifying any mitigating factors. However, evidence regarding whether other prepaid wireless carriers paid user fees and surcharges is not within the scope of this issue.

3.2. Phase 2 Procedural Background

The ALJ convened a prehearing conference (PHC) in connection with the Phase 2 scope and schedule on July 3, 2012. The Scoping Memo was issued on August 2, 2012.

On September 11, 2012, the ALJ issued a ruling confirming various e-mail rulings regarding changes to the procedural schedule and discovery disputes. This ruling also set a second PHC for September 18, 2012 at which the parties discussed discovery disputes and various motions.

CPSD served opening testimony on September 21, 2012, TracFone served reply testimony on November 2, 2012, and CPSD served rebuttal testimony on November 27, 2012. In November 2012, following a series of discovery disputes and motions to strike, the procedural schedule was further adjusted to allow TracFone additional time to respond to CPSD's rebuttal testimony.

The ALJ held three days of evidentiary hearings from January 7, 2013 through January 9, 2013. In February 2013, TracFone and CPSD each filed opening and reply briefs (Phase 2 Opening and Phase 2 Reply). Consistent with the Scoping Memo and its revisions, this proceeding was submitted on February 26, 2013.

On April 10, 2013, TracFone filed a Motion to Reopen the Evidentiary Record for Admission of Affidavits of Jon Paul Dowdy and Phillip C. Graves. On April 16, 2013, CPSD filed an opposition to the motion, and on April 22, 2013,

TracFone filed a reply. On July 9, 2013, the assigned ALJ issued a ruling denying the motion.

Pursuant to the April 2013 Ruling, on April 16, 2013, submission was set aside and the record was reopened to allow the parties to brief revised issue 2. On April 30, 2013, TracFone submitted an opening brief regarding revised issue 2 (April 30, 2013 Opening), and on May 7, 2013, CPSD submitted a reply brief (May 7, 2013 Reply). TracFone filed a response to the reply on May 14, 2013 (May 14, 2013 Response). This proceeding was resubmitted as of May 14, 2013.

The ALJ's Presiding Officer's Decision (POD) in Phase 2 of this proceeding mailed on July 11, 2013. On July 15, 2013, the assigned ALJ issued a ruling containing the confidential Appendix to the POD. On August 5, 2013, the assigned ALJ notified parties that because of an error in the calculation of User Fees the total amount due should be reduced by \$27,821.31, for a corrected total of \$24,397,441.17.

On August 12, 2013, TracFone and CPSD each filed an appeal. On August 27, 2013, TracFone filed a response to CPSD's appeal and CPSD filed a response to TracFone's appeal. On August 28, 2013, TracFone filed a motion for oral argument. On August 29, 2103, CPSD filed a response to the motion for oral argument.

4. Burden of Proof

CPSD has the burden to establish by a preponderance of the evidence that TracFone owes past due amounts, the amount owed, if any, and the amount of penalties, if any, in connection with violations set forth in the Phase 1 Decision.

CPSD does not have the burden to refute defenses as the respondent assumes the burden of proof as to its defenses.¹⁴ This is the usual standard in Commission adjudicatory proceedings such as this investigation.¹⁵ In applying the burden of proof to the parties in this proceeding, we consider the circumstances associated with affirmative defenses and the rule that, except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that she is asserting.

(Evidence Code § 500.)

5. Summary of Phase 2 Evidentiary Record

Briefly, the highlights of the evidentiary record developed through written testimony and three days of evidentiary hearings are as follows:

The evidentiary record includes different methods for calculating TracFone's intrastate call revenues. Prior to 2012, the Commission did not provide public guidance on which methods of allocation prepaid carriers should use,¹⁶ but the Commission has always expected carriers to use reasonable methods such as those prescribed by other agencies including the Federal Communications Commission (FCC) and the California Board of Equalization (BOE). After the Phase 1 Decision, Communications Division provided public

¹⁴ *Utility Consumers' Action Network v. SBC Communications, Inc. dba SBC Pacific Bell Telephone Company*, 2008 Cal. PUC LEXIS 302 *9, citing to Evidence Code § 500 and *City of Brentwood v. Central Valley Regional Water Quality Control Bd.*, 123 Cal. Appl. 4th 714, 725 (1st Dist. 2004) (when charged with violations, alleged violator has burden of proving that statutory exceptions are available.)

¹⁵ See *In Re CTS*, D.97-05-089, (1997) 72 CPUC2d 621, 642, Conclusion of Law 1, 2; *In Re Qwest*, D.03-01-087 at 8-9.

¹⁶ The Commission did provide guidance for all carriers (including prepaid carriers) but this guidance was not tailored specifically for prepaid carriers.

guidance to prepaid wireless carriers on allocation of intrastate and interstate revenues and collection of user fees and PPP surcharges. (Exhibit TR-203, Atts. 10-11.) As part of discovery, CPSD provided a matrix listing communications between Communications Division staff and carriers on the subject of allocation of revenues. (*Id.*, Att. 19.) The matrix revealed that Communications Division has generally not provided written confirmation to carriers that their methodology is acceptable. In the period after the December 2009 OII started, the Communications Division did provide written confirmation to carriers on at least two occasions. In addition to setting forth different allocation methodologies, the evidentiary record includes several different sources of revenue numbers such as TracFone's FCC and BOE filings, and hypothetical revenue numbers provided by TracFone to CPSD. (*See, e.g.*, Exhibits CPSD 15, 16.)

The evidentiary record for Phase 2 documents some of the difficulties of collecting user fees and PPP surcharges from customers on sales by third party retailers such as Wal-Mart. Phase 1 of the proceeding already determined that lack of a collection method does not excuse TracFone from paying user fees and PPP surcharges. In Phase 2, the parties provided evidence to be used in assessing whether the lack of prescribed collection methodology is a mitigating factor when assessing penalties. To demonstrate the collection difficulties, TracFone sent letters to various third party retailers asking them to collect the user fees and PPP surcharges. Each third party retailer responded with a written communication refusing to assist in collection of user fees and PPP surcharges. (Exhibit TR 201.) The record also contains a copy of a Transaction Processing Agreement with a personal identification number (PIN) activation company called AirTime Technologies, Inc. (Airtime Technologies). (Exhibit CPSD-22C.)

CPSD asserts the agreement is evidence that TracFone can exercise control of customer charges at the point of sale.

6. Are Amounts Due for PPP Surcharges and User Fees on Past Services?

Before determining the amount, if any, for past user fees and PPP surcharges, we must first consider if TracFone is obligated to pay any amounts in connection with services offered prior to D.12-02-032. TracFone asserts that D.12-02-032 articulated new law, and that prior to D.12-02-032 prepaid wireless service was not subject to user fees and PPP surcharges. TracFone also asserts that before TracFone could become liable for user fees and PPP surcharges, the Commission was obligated to notify TracFone that its failure to remit these amounts was a violation of Commission law. (Exhibit TR-203 at 6:6-42; 7:1-10.)

6.1. PPP Surcharges: Debit Card Exemption

Under law, all providers must pay PPP surcharges on revenues from California intrastate phone service, other than “coin-sent paid telephone calls” (calls by pay phone) and “debit cards.” (D.96-10-066 at 622 and GO 153 at § 10.5.1.3.) As confirmed by the Phase 1 Decision, the type of cards issued by TracFone have never qualified as “debit cards” and therefore TracFone’s intrastate phone service revenue is not exempt from surcharges. (Phase 1 Decision at 50 - 51.)

TracFone asserts that prior to the Phase 1 Decision, no Commission order or guidance was available indicating that revenue from wireless debit card service did not fall within the categorical exemption for debit card services. (Exhibit TR-203 at 9:1-13; 12:27-31; 13:1-2 (“D.12-02-032 is a new law which cannot reasonably be applied retroactively.”)) TracFone implies that the Phase 1 Decision distinguished between cards issued by wireless carriers and cards issued by wireline carriers. (TracFone Phase 2 Opening at 1.)

TracFone is incorrect. The distinguishing feature of a telephone card is not the entity issuing the telephone card but the attributes of the service being sold. In TracFone's case, the service offered is tied to a TracFone handset, gives the customer their own phone number, and is equivalent to giving the customer a dial tone. (D.12-02-032 at 30.)¹⁷ In contrast, a debit card provides a more limited service that allows calls on any phone but does not include an assigned phone number.

Because TracFone has been obligated to pay PPP surcharges, there is no merit to TracFone's argument that this is a "retroactive" law. Further, TracFone's error in interpreting GO 153 and related Commission decisions does not relieve TracFone of the obligation to pay past due PPP surcharges.

6.2. User Fees: Definition of a Public Utility

The legislature authorized collection of user fees from public utilities as a means to ensure that the Commission is appropriately funded and staffed. (§ 401.) The law governing user fees for public utility telephone corporations, including TracFone, is set forth in §§ 401-410, 431-435. The Commission calculates the user fees based on the revenue necessary to fund the Commission and each public utility telephone corporation pays user fees based on that utility's "gross intrastate revenues."

TracFone argues that it should not be required to pay user fees on revenue earned prior to the Phase 1 Decision because it made a "good faith and reasonable determination, that it is not a public utility as defined in the Public

¹⁷ This list of service attributes is not exclusive; there may be other distinguishing features between TracFone's prepaid service and debit card service, but these key service attributes were specifically cited in the Phase 1 Decision.

Utilities Code,” and because when TracFone stopped paying user fees in 2004, the Commission did not notify TracFone that it must pay user fees. (TracFone Phase 2 Opening at 37.)

The Phase 1 Decision confirmed that TracFone is a public utility and that it is required to pay user fees. TracFone’s error in interpreting the law does not relieve it of the obligation to pay past due user fees.

6.3. Reliance on Staff Advice

TracFone contends that the Salzman Letter documenting the conversation with Mr. Mirza is sufficient to relieve it of the obligation to pay user fees and PPP surcharges for services prior to the Phase 1 Decisions. The existence of the letter in TracFone’s files, but not the Commission’s files, underscores the tenuous nature of this evidence. Without additional supporting evidence, we cannot find that TracFone has provided clear and convincing evidence to show that the letter was delivered to the Commission, let alone that the contents of the letter accurately describe the conversation with Mr. Mirza.¹⁸

Nonetheless, for purposes of this decision, we will treat TracFone’s assertion as true – that Mr. Salzman spoke to Commission staff and obtained verbal confirmation that TracFone’s use of the debit card exemption was correct. This still does not provide sufficient evidence to demonstrate that TracFone reliance was reasonable. Although we have a copy of the Salzman Letter sent from TracFone to the Commission documenting the conversation, we do not know if TracFone’s interpretation of the discussion was accurate. Mr. Salzman states that he “explained to Mr. Mirza that TracFone provides a prepaid wireless

¹⁸ Mr. Mirza no longer works for the Commission.

service, does not send bills, and therefore does not seem to be required to collect these surcharges from customers and remit them to the Commission.” (Exhibit TR-203 at 15:22-24.) Based on this description, this was a good faith discussion in which Mr. Salzman reasonably believed that Mr. Mirza understood how TracFone operates and agreed with TracFone’s interpretation of the debit card exemption. However, without further evidence confirming that there was no misinterpretation of the conversation by either party, we cannot say that the communication constitutes staff advice that could reasonably be relied on.

More importantly, staff advice is not binding on the Commission. Assuming for the purposes of this decision that there was no miscommunication between Mr. Mirza and Mr. Salzman, Mr. Mirza did not have authority to set or change the law.

Reliance on staff advice does not change the fact that TracFone’s interpretation of the debit card exemption was incorrect and thus does not relieve TracFone of the obligation to pay past due amounts.

Although TracFone is still obligated to pay past due amounts, evidence regarding reasonable, good faith reliance on staff advice may be considered in determining the amount of penalties, if any.

6.4. Lack of Revenue Allocation Methodology

Prepaid phone service is purchased by consumers in advance of usage. At the time of sale, there is no way for TracFone to determine how much of the service will be used for intrastate calling, if any. (Exhibit TR-203 at 21:15-30; 22:1-2. (TracFone describing difficulties in determining intrastate revenues.)) With post-paid services, customers are billed in arrears, and the appropriate user fees and PPP surcharges can be added to their next bill.

Although the Commission has not developed its own allocation methodology, other agencies have developed viable methodologies for allocating prepaid telecommunications revenue between intrastate and interstate. For example, both FCC and BOE set forth specific methodologies.¹⁹ At the Commission, the selection of a methodology has been left open, giving the telecommunications companies more discretion. Prepaid wireless carriers can look to other agencies for methodologies and guidance. Moreover, because the carrier must apply a methodology in these other jurisdictions, it is more efficient to not require the carrier to use a different methodology here at the Commission.

Nonetheless, TracFone asserts that it should not have to pay for user fees and PPP surcharges because the Commission did not prescribe a methodology of its own. TracFone points out that prior to the issuance of the Phase 1 Decision, Communications Division provided little, if any, publicly-available guidance on allocation of revenues from prepaid service. After the Phase 1 Decision, the Commission, aware that viable allocation methodologies had been developed at other agencies, expressly stated that it accepts “any reasonable methodology.”²⁰ TracFone would have us believe that it

¹⁹ We discuss methodologies for allocating prepaid telecommunications revenue between intrastate and interstate in more detail in Section 7.2 below.

²⁰ First, on March 6, 2012, shortly after issuance of the Phase 1 Decision, Communications Division sent a letter to TracFone regarding payment of user fees and PPP surcharges stating that “The Communications Division accepts ‘any reasonable method’ applied in good faith for deriving intrastate revenues and the calculation of such surcharges. TracFone could use, for example, the inverse of the federal ‘safe harbor’ method to calculate intrastate revenue.” On March 22, 2012, in a letter from President Peevey to Assemblywoman Fiona Ma, the Commission reiterated that it accepts “any reasonable method applied.” (CPSD Exhibit 18 Att. F.)

could not use a reasonable methodology prior to this express statement from the Commission.

In July 2012, Communications Division provided additional, more specific, guidance by revising its Instructions for CPUC Telephone Surcharge Reporting and Payment Filing (Instructions) to address methodologies for allocating revenue from prepaid service between intrastate and interstate. (Exhibit TR-203 at 21:4-14 and Atts. 10 and 11. Attachment 11 to Exhibit TR-203 is referred to herein as the July 11, 2012 Instructions.) The July 11, 2012 Instructions expressly state that reasonable methodologies include the inverse of the FCC safe harbor percentage and traffic studies.²¹

Regardless of what TracFone perceived as lack of clear guidance on available methodologies for allocating revenue, TracFone is still obligated to pay user fees and PPP surcharges on intrastate revenue from past sale of services.

²¹ “The Commission does not have a prescribed methodology on how to determine intrastate revenues subject to Universal Service program charges. Telephone Corporations and VOIP providers that are required to assess universal service surcharges on intrastate telephone service revenues from end-user customers may use any reasonable method to determine the intrastate revenues. Examples of reasonable methods to determine intrastate revenues include, but are not limited to: (i) FCC Safe Harbor Percentage . . . (ii) Traffic Study.” (July 11, 2012 Instructions.) The July 11, 2012 Instructions describe application of the “FCC Safe Harbor Percentage” as follows: “Carriers can apply to their California revenues the inverse of the Federal Interstate Safe harbor percentage adopted by the FCC to fund federal universal service programs for the respective type of carrier” and describe application of a “Traffic Study” as follows: “Through traffic studies the carrier can develop a jurisdictional allocation factor representing the average usage patterns of the carrier’s own customs, and then apply this to their California revenues.” (*Id.*)

Although TracFone is still obligated to pay the past due amounts, evidence regarding the lack of specific Commission-approved methodologies may be considered in determining the amount of penalties, if any.

6.5. Lack of Collection Mechanism

Similarly, TracFone asserts that it should not be obligated to pay user fees and PPP surcharges because the Commission has not provided a specific mechanism or methodology to allow prepaid wireless carriers to collect user fees and PPP surcharges on sales made by third party retailers. TracFone's argument has two prongs: (1) that prior to the Phase 1 Decision, pursuant to D.96-10-066 and GO 153, the PPP surcharge could only be collected as a line item on the customer's bill; and (2) that if third party retailers refuse to collect PPP surcharges from customers the surcharge amount cannot be included as a line item.

First, TracFone argues that the adoption of AEUS in D.96-10-066 means that PPP surcharges can only be collected if they appear as a line item on the customer's bill. D.96-10-066 discussed two funding mechanisms for collecting PPP surcharges: AEUS (end-user pays the charge) and "net-trans" (carrier pays the charge after netting it against any amount due from the Commission as part of the surcharge-supported program.) In either case, the carrier is ultimately responsible for making sure that the amount is remitted to the fund. (Phase 1 Decision at 51, Conclusion of Law 31.) D.96-10-066 identified three principles for evaluating funding mechanisms: "(1) that it is competitively neutral; (2) that it clearly identifies the source of the subsidy; and (3) that consumers have the

information they need to make informed choices.”²² (D.96-10-066 at Conclusion of Law 117.) AEUS is “a more competitively neutral method of funding than the net trans account method because it is imposed on virtually all telecommunications services and customers.” (*Id.* at Conclusion of Law 120.) In addition, the AEUS allows for greater transparency because the PPP surcharge appears as a separate line item on the bill and “customers can see how much they are paying into the fund.” (*Id.* at Conclusions of Law 118, 119.)

TracFone argues that it is Commission policy to require line item transparency for these charges. TracFone cites a Commission filing in a recent FCC proceeding in which the Commission argued against a rule that would prohibit providers from listing line items showing Universal Service Fund (USF) contributions on customer bills. (Exhibit TR-203 at 30:15-31, 31:1-7, Att. 18.) Although TracFone is correct that the Commission does seek maximum transparency for customers, line item transparency is not always a Commission requirement and the Commission has never advocated a policy that allows carriers to avoid responsibility for PPP surcharges by simply not including these charges on a customer’s bill.

In a related argument, TracFone points out that in a post-paid transaction the carrier is not responsible for PPP surcharges if the customer does not pay her bill. (TR 203 at 24:23-25.) In contrast to a carrier in a post-paid transaction, it is axiomatic that the carrier receives payment from the customer in a pre-paid transaction. Therefore, this exception from carrier responsibility

²² These principles come from Assembly Bill 3643 (Stats. 1994, Chapter 278) which provided guidance to the Commission on establishing universal service in a competitive telecommunications environment.

cannot logically be applied to a carrier such as TracFone that requires payment from customers in advance.

The July 11, 2012 Instructions now provide specific examples of acceptable collection methods such as adding the PPP surcharge to the cost of service at the point of sale.²³

TracFone also states that third party retailers refuse to collect and remit the PPP surcharges and user fees. (Exhibit TR-201 at 4:20 – 8:22.) To support this assertion, TracFone provided letters from numerous third party retailers stating that they would not collect user fees and PPP surcharges. (For example, Heather Bell, Assistant General Counsel of Wal-Mart Stores, Inc. writes “Because Wal-Mart Stores, Inc. is not required by law to collect [user fees and PPP surcharges] at point of sale, Walmart will not be collecting such Fees . . .” (Exhibit TR-201, Att. 7.)) Although the letters clearly demonstrate that under current contractual and technological circumstances these third parties are not willing to collect user fees and PPP surcharges, it does not answer the question of whether there are other options for achieving collection at the point of sale. For example, perhaps further negotiations with the third parties could result in new contractual arrangements that include collection of user fees and PPP surcharges.

CPSD asserts that TracFone currently has sufficient technology at the point of sale to allow TracFone to add the user fees and PPP surcharges. CPSD bases this theory on CPSD’s interpretation of TracFone’s contract with Airtime

²³ The specific examples are as follows: “(i) Include surcharges on customer’s bill, invoice, or statement of charges. (ii) Collect at point of sale as an addition to the cost of service purchased. (iii) Build surcharges into the cost per minute of service that the 3rd party retailer pays the carrier and include the surcharge amounts into [sic] the price the end-user customer pays at the point of sale.” (July 11, 2012 Instructions at 2 of 4.)

Technologies. Airtime Technologies provides PIN activation service when TracFone telephone cards are sold by third party retailers.²⁴ TracFone has repeatedly stated that this is an inaccurate conclusion unsupported by any record evidence, and offered by motion to provide additional evidence establishing that there is no direct electronic link between TracFone and the third party retailer at the location of the retailer. (Motion of TracFone to Reopen the Evidentiary Record for Admission of Affidavits of Jon Paul Dowdy and Phillip C. Graves, April 10, 2013.) CPSD's interpretation of the contract is not sufficient to establish that TracFone has the technology or is even close to having the technology to allow it to add user fees and PPP surcharges at the point of sale. Regardless of whether the current software can or can't handle adding a surcharge, however, it remains TracFone's responsibility to find a way to make collection of user fees and PPP surcharges possible.

In sum, it is TracFone's responsibility to find a mechanism that will allow it to comply with the law. If it is necessary to develop new software to accomplish this, then TracFone must do so. If it is necessary for TracFone to renegotiate contracts with third party retailers to include collection of user fees and PPP surcharges, then TracFone must do so. The obligation to collect and remit user fees and PPP surcharges has always been a compliance requirement for TracFone. TracFone is not excused from paying user fees and PPP surcharges during the period of time when it has not set up a mechanism to collect these amounts from third party retailers.

²⁴ TracFone telephone cards do not have value while on display. When a card is purchased, Airtime handles the necessary technical steps to activate the card. (RT at 1158:20-28 - 1159:1-22.)

6.6. Notice of the Requirement to Pay PPP Surcharges

TracFone asserts that under GO 153, the Commission was obligated to give TracFone notice of the fact that the Commission believed that TracFone was not paying required PPP surcharges. GO 153 does have a notice requirement – but it applies only to circumstances where the Commission intends to revoke a carrier’s certificate of public convenience (CPCN) for failure to pay surcharges. Section 11.5.1 of GO 153 states that the Communications Division shall send two written notices if a provider is late in remitting surcharges. The purpose of these notices is to “warn the California Lifeline Service Provider that it will lose its Certificate of Public Convenience and Necessity if it fails to remit past-due surcharge revenues and associated interest.” (GO 153 at 11.5.1.) Until such notices are given, TracFone’s license could not be revoked for failure to pay surcharges. The fact that TracFone received notices in 2012 related to its failure to remit PPP surcharges past due for March 2012 (Exhibit TR-203 at 11:2-31) does not impose a new obligation on the Commission to provide notice in the form of an individualized letter before requiring payment of PPP surcharges or before imposing the interest charges required under Section 11.4 of GO 153.

The Commission did provide notice to TracFone that it was required to collect and remit user fees and PPP surcharges. This notice was part of the Registration Letter. Moreover, the requirement to collect and remit these amounts is included in many Commission orders, instructions, and decisions. (See, e.g., GO 153, D.98-12-075, §§ 270 *et. seq.*, Instructions for the Combined California PUC Telephone Surcharge Transmittal (Exhibit TR-203 Att. 5.)) Where a requirement is set forth in law, the Commission is not required to provide additional, individualized, notice to the utility that it must comply with the law before the law can be applied to the utility.

It is the responsibility of the regulated utility, not the Commission, to make sure that the utility has identified and properly complied with all legal requirements. While the Commission tries to assist in compliance by identifying legal requirements (for example, the Registration Letter lists some legal requirements), it is up to the regulated entity to make sure that the utility gets it right.

Quite simply, there is no requirement for the Commission to tell a utility that it is not in compliance. When the Commission is enforcing a failure to comply, it must, of course, inform the utility and provide adequate due process prior to revoking a license or otherwise reducing the utility's rights. But, until such time as the Commission has determined that an enforcement action is necessary, the utility must act reasonably and in good faith to ensure it complies with Commission orders and law.

7. Amount of User Fees and Surcharges Owed by TracFone

7.1. Time Period at Issue

The December 2009 OII does not specify a time period for the investigation and each party suggests a different start date: CPSD uses year 2000 as the start date. TracFone asserts that because the December 2009 OII referred to the year 2004, 2004 should be the start date for the period covered. (TracFone Phase 2 Opening at 39, citing "OII p. 8; Commission Staff Report dated December 17, 2009 Appendix A.") A third option would be 1997 - the year that TracFone was first authorized to provide service.

The December 2009 OII does not limit the time period to 2004. The December 2009 OII referred to 2004 when it stated that Communications Division staff discovered that TracFone "had apparently never collected or remitted State universal service surcharges, and has not paid required user fees

since at least 2004.” (December 2009 OII at 3.) The Commission 2009 Staff Report²⁵ (2009 Staff Report) states that “TracFone has failed to collect from end users and remit to the Commission public purpose surcharges and user fees since at least 2004, and may never have collected and remitted the surcharges.” (2009 Staff Report at 1.) Neither document in any way suggests that the enforcement action should be limited to the time period starting in 2004. More importantly, the ordering paragraphs of the December 2009 OII do not limit the time period of the investigation. CPSD has elected not to investigate past due amounts for any period prior to 2000. Therefore, we will use January 1, 2000 as the starting point for calculating amounts due.

The time period after issuance of D.12-02-032 is also excluded from the calculation of amounts due. As required by D.12-02-032, TracFone has already begun paying user fees and PPP surcharges on a going forward basis.²⁶

7.2. Methodology for Calculating User Fees and PPP Surcharges

7.2.1. General Formula

User fees and PPP surcharges are calculated by applying a Commission-determined percentage to the utility’s California intrastate telecommunication revenue.

²⁵ The Commission 2009 Staff Report is included in the evidentiary record as Exhibit CPSD-1.

²⁶ At various times in this proceeding, CSPD has asserted that TracFone is refusing to comply with the Phase 1 Decision requiring payment of user fees and PPP surcharges on a going forward basis (*see, e.g.*, CPSD Phase 1 Opening at 24). However, CPSD has not provided evidence to support this allegation and TracFone has provided evidence to the contrary (TracFone Phase 1 Opening at 37 and Appendix A (email from Communications Division staff dated February 26, 2013.))

The first variable, the percentage, is determined by the Commission based on the expected cost of the program to be funded and the utility revenues that are expected to be subject to the user fee or surcharge. The percentages are updated periodically. The parties do not dispute the percentage figures used by CPSD to calculate user fees and PPP surcharges.²⁷

The second variable, California intrastate call revenue, is considerably more complex, and requires one to determine: (1) what part of revenue was generated by California customers, and (2) what part of revenue relates to sale of telecommunication services subject to user fees and PPP surcharges.²⁸

Determining California revenue associated with intrastate call service is a key issue for this Phase 2. GO 153 defines intrastate service as “All telecommunications services that both originate and terminate within the State of California, whether tariffed or detariffed, that are used by and billed to, the final user of the service.” (GO 153 § 23.3.) For user fees, the fee is based on gross intrastate revenues, defined as “those revenues from a public utility subject to the jurisdiction of the commission . . .” (Section 435(c).) Because TracFone’s customers prepay for phone service, there is no way to know the customer’s intrastate usage at the time the customer pays the bill.

The Commission is not the only agency to require a determination of intrastate call revenue. Both the FCC and the BOE require carriers to allocate revenues between interstate and intrastate. TracFone has made the required

²⁷ The percentages are set forth in Exhibit CPSD-15 Att. D.

²⁸ The method for identifying California customers is not in dispute in the proceeding.

filings with both agencies. The FCC sets forth several methods for carriers to calculate interstate revenue: books and records, traffic studies, and a “safe harbor” percentage set by the FCC. The BOE requires carriers to pay fees on intrastate calls. The methods available for prepaid service providers to calculate intrastate revenues for the BOE are set forth in statute and regulation. (Rev. & Tax Code § 41020(b)(1); Title 18 section 2401, 2403, and 2432 “Emergency Telephone Users Surcharge Regulations.”) In addition to these methods, the inverse of the FCC interstate revenue percentage could be used to determine the intrastate revenue percentage.

All of these methods are examined in more detail below.

Although the Commission does not prescribe a specific calculation methodology, it does require all carriers to pay user fees and PPP surcharges. In analogous situations, the Commission has adopted FCC regulations as models for calculation methodologies (*See, e.g.,* Exhibit CPSD 18 at 2 – 6 (discussing the Commission’s adoption of certain FCC regulations in D.87-12-063.))²⁹ TracFone already calculates California intrastate revenue for the BOE and interstate revenue for the FCC. Based on this, it would have been reasonable for TracFone to try to comply with Commission orders and statute using one of the above methodologies.

²⁹ It is important to note that the FCC regulations adopted by D.87-12-063 do not necessarily address allocation of revenue between intrastate and interstate revenue.

7.2.2. Methodologies Accepted by the Commission for Determining Intrastate Revenue

The Commission has not prescribed a specific allocation method for prepaid carriers. In fact, until issuance of D.12-02-032, the Commission had not published any instructions specifically for prepaid phone service.

Today, the Commission expressly directs prepaid service providers to use “any reasonable method,” but “allows the companies to determine the best practices and reasonable methods to meet their obligations regarding the assessment and collection of fees and surcharges. This approach is consistent with the CPUC’s efforts to reduce the regulatory burden on telecommunications providers.” (Exhibit CPSD-18 Att. F.)

As part of the inquiry into what methodologies are “reasonable,” TracFone requested information on what methods the Commission has previously accepted from other prepaid carriers. The response provided by CPSD is noteworthy primarily for the lack of useful information it contains.

First, the response states that “[t]he Commission typically does not explicitly “accept” much less “approve” a calculation methodology for a carrier. There may be *ad hoc* communication between staff and a carrier about this methodology, when (for instance) a carrier requests advice on whether a particular calculation methodology is acceptable.” (Exhibit TR-203 Att. 19.)

Next, CPSD provided a matrix listing carriers,³⁰ and quoted any relevant written communication between the Communications Division and a carrier regarding a proposed methodology. The matrix identified only two

³⁰ Identifying information was removed to address concerns about carrier confidentiality.

instances where Communications Division sent a written response to a carrier's proposed methodology for calculating intrastate revenue. The two written responses were sent in 2010 and 2011 – well after the December 2009 OII commenced. There were also several communications from carriers to the Communications Division describing allocation methodologies, but these did not include any acknowledgment or approval from the Communications Division. (*Id.*)

Based on the record evidence, the degree to which a carrier could obtain clear advice and certainty about allocation methodologies for intrastate revenues, especially prior to the institution of the December 2009 OII, appears to be very limited.

CPSD describes various possible methodologies that it believes are reasonable for calculating California intrastate call revenue: “books and records” (also known as “call detail records” or CDR); traffic studies; and the inverse of the FCC’s “safe harbor.” In addition, for purposes of this proceeding, CPSD proposes that regardless of the method used to calculate the California intrastate call revenues, the revenues should be adjusted to reflect the revenue numbers filed with the BOE.

TracFone, on the other hand, did not put forth any allocation methodology for consideration.

7.2.3. FCC Methodologies

TracFone contributes to the federal Universal Service Fund (USF). The program, under the auspices of the FCC, collects a surcharge based on interstate and international phone service. Universal Service Administrative Company (USAC) administers the program. According to the 2009 Staff Report, the FCC Consumer Fact webpage on the Universal Service Support Mechanism

states that telephone carriers contribute to the USF based on a percentage of the amount billed to their residential and business customers for interstate and international calls. Methodologies for determining how much revenue resulted from interstate and international calls, as opposed to intrastate calls, are discussed in FCC Form 499-A Telecommunications Reporting Worksheet Instructions (Form 499-A Instructions) (2012 version is available as Exhibit TR-209.) The FCC has identified three allocation methods: (a) safe harbor, (b) call detail records, and (c) traffic studies. (Exhibit TR-203 at 23:5-7; Exhibit CPSD-17 at 4-5.)

7.2.3.1. Books and Records (CDR)

Form 499-A requires carriers to identify the parts of gross revenues that arise from interstate and intrastate services. (Form 499-A Instructions at 23). Filers are instructed to report their revenues by intrastate, interstate and international by using information “from their books of account and other internal data reporting systems.” This is commonly called the “books and records” or “CDR” method. The FCC allows filers to use a “good-faith estimate” if books and records are not sufficient. In that case, the filer must make information supporting the good-faith estimate available to the FCC upon request.

7.2.3.2. Safe Harbor

Alternatively, the filer can rely on the FCC’s “safe harbor” percentages. Under this method, the FCC specifies a percentage which the carrier then applies to their revenues. For the 2012 Form 499-A Instructions, the safe harbor interstate percentage for cellular PCS telecommunications revenues was 37.1 percent. The inverse of the safe harbor interstate percentage could then

be used to calculate the intrastate portion of revenue. For 2012, that percentage was 62.9 percent.

7.2.3.3. Traffic Study

As a third option, wireless telecommunication providers may use a traffic study to come up with their own estimated percentage. (Form 499-A Instructions at 24.) A traffic study relies on statistical sampling to estimate the proportion of minutes that are interstate and international. Form 499-A provides minimum standards for the sampling techniques. (Form 499-A Instructions at 25.) If requested, carriers must submit the traffic studies to the FCC and USAC for review. (Form 499-A Instructions at 25.)

7.2.3.4. Inverse of FCC Calculation

The FCC has accepted all three of these methodologies, and there is no practical reason why the same methodologies could not be used to calculate intrastate revenues. An alternative is to use the inverse of the interstate percentage used in TracFone's actual FCC filing. This can be accomplished by taking the interstate percentage identified on Form 499-A, calculating the inverse percentage, and then applying that inverse percentage to the California revenue base. (*See, e.g.*, Exhibit CPSD-15C Att. C; Exhibit CPSD-16 Att. H.)

TracFone's only argument against using this methodology is that the FCC methodologies were never adopted or approved by the Commission.

7.2.4. BOE Methodology for Determining Intrastate Revenue

The BOE requires telecommunications carriers to assess a surcharge on customers to fund Emergency (E)-911 services. (Rev. & Tax Code §§ 41001 - 41176.) The base for calculating the E-911 surcharge is California intrastate revenues. (*Id.*) By statute, carriers can "choose a reasonable and verifiable methodology" of either of books and records, or traffic or call pattern studies.

(Rev. & Tax Code § 41020(b)(1).) In addition, the BOE has specific regulations addressing collection of the emergency telephone surcharge by prepaid carriers. (Title 18 section 2401, 2403, and 2432 “Emergency Telephone Users Surcharge Regulations.”)

CPSD obtained copies of TracFone’s BOE filings which showed revenue amounts for the three year period from 2009 through 2011 that were significantly greater than the amounts obtained using the FCC inverse methodology. However, when examined over a longer period of time, the numbers were only somewhat larger. (Exhibit TR-204 at 13:22-28.) TracFone attributes the difference to inclusion of other revenue sources, such as internet access, data and ring tones, in the BOE intrastate numbers. (*Id.* at 11:14-22.) With these other revenue sources included, the BOE revenue numbers do not accurately reflect the California intrastate call revenue to which user fees and PPP surcharges apply.

While the BOE numbers are interesting, and provide evidence that TracFone can calculate intrastate revenues, they are of limited use. TracFone has persuasively shown that the BOE numbers may not accurately reflect intrastate call revenue subject to user fees and PPP surcharges.

7.2.5. FCC Inverse is the Best Methodology for Purposes of this Proceeding

For purposes of determining intrastate revenues for the 12 years at issue in this proceeding, the best methodology is to take the inverse of the percentages used for the FCC filings (FCC Inverse). The FCC Inverse works regardless of whether the FCC interstate revenue number was calculated using the FCC safe harbor percentage, a traffic study, or some other method vetted by the FCC.

The FCC Inverse is arrived at for a given year by reviewing Form 499A which sets forth the percentage of calls attributable to interstate and international calls. The calls not attributable to interstate or international are attributable to intrastate. This gives us the formula $1 - (\text{interstate} + \text{international percentage}) = \text{intrastate percentage}$. The resulting percentage is then applied to the total California call revenue for the year.

Using this method, the percentage of service attributable to intrastate calls has decreased over the last ten years, from 96.65 percent in 2004 to 83.96 percent in 2011. (Exhibit CPSD -15C Att. C.)

The FCC Inverse has a number of important benefits:

1. The FCC Inverse has already been accepted by Communications Division.³¹
2. The intrastate revenue numbers arrived at using the FCC Inverse will be consistent with the revenue numbers filed at the FCC.

³¹ Communications Division accepted the FCC Inverse methodology for calculation of intrastate revenues earned after the Phase 1 Decision. (Exhibit TR-203 at Att. 27 (Communications Division accepts TracFone's proposed methodology where "TracFone's intrastate allocation factor will be the reciprocal of the allocation factor . . . filed with the FCC through Form 499 to determine TracFone's interstate allocation factor" and the following specific services are assigned jurisdiction as follows: Services including Toll Free (Assign to the extent known to be intrastate, interstate or international), Voice Mail (excluded from intrastate), Unknown Minutes (Excluded from Intrastate), and Abbreviated Dialing (intrastate).)

3. Using the FCC Inverse, the California intrastate call revenue can be easily calculated using existing evidence.

Because the FCC Inverse is a reasonable methodology, acceptable to the Commission and easy to calculate using existing information, the FCC Inverse is the best methodology for calculating intrastate call revenue during the disputed period.

7.3. Application of Methodology to Revenue

In the first part of this Section 7 we examined what methodology to use in this proceeding to calculate California intrastate call revenue. We now apply that methodology to the numbers provided by TracFone.

In 2009, prior to the start of this OII, in response to a staff request for information, TracFone reported the California intrastate revenues for 2006, 2007 and 2008. (2009 Staff Report.) According to TracFone, these numbers were calculated by applying the FCC Inverse to California call revenue. (2009 Staff Report at 8.)

On August 10, 2012, in response to a data request asking TracFone to provide “total California telecommunications services revenues for each year from 2003 to 2011 and from January 1, 2012 through February 24, 2012 using the definitions and methodologies for calculating total telecommunications revenues in the FCC Form 499 instructions” TracFone provided figures on a “hypothetical basis.” (Exhibit CPSD-16C Att. H.) By hypothetical, TracFone meant that because, in TracFone’s view, there was not a Commission established methodology for revenue allocation, the figures must be considered to be “based on a hypothetical scenario.” (Exhibit CPSD-16C Att. J.) TracFone states that intrastate percentages were “derived from the applicable FCC Form 499A by applying the inverse of the interstate percentage number used in determining the

interstate figures for Form 499 purposes if such calculation was made using FCC methodology.” (*Id.*)

The FCC Inverse methodology was then applied to the total California call revenue to determine the portion attributable to intrastate service.

7.4. Amount of PPP Surcharges and User Fees Due

Using the California intrastate call revenue numbers for each year calculated as set forth above, and the user fee and PPP surcharge percentages provided by CPSD, the total amount owed for the period from the year 2000 to the issuance of the Phase 1 Decision in February 2012 is approximately \$24.4 million dollars, including interest. A Confidential Appendix issued by separate ruling in this proceeding includes a breakdown by year and program fund.

8. Penalties and Interest

8.1. The Law on Penalties

Ten percent annual interest is charged on all late PPP surcharges. (GO 153 at § 11.4.1; July 11, 2012 Instructions at 4.) D.00-10-028 makes it clear that the 10 percent interest is an annual payment, but neither D.00-10-028 nor GO 153 specify if the annual interest payment should be compounded.³² After initially arguing for compound interest, CPSD has conceded simple interest is sufficient, and we agree. (May 7, 2013 Reply at 9.)³³

³² Simple interest is computed by adding 10 percent of the past due amount each year that the past due amount is owed. Compound interest takes the additional step of adding the annual interest to the past due amount and charging interest on it the next year.

³³ It should be noted that although CPSD dropped its argument for compound interest, CPSD continues to argue for a monetary penalty.

Before proceeding, we must also consider if ten percent annual interest is a “penalty.” If the interest is not a penalty, then we must consider if a penalty is due under Section 2107. Section 2107 penalties are only applied when there is no other applicable penalty provision.³⁴ In limited circumstances, interest charged on an unpaid amount is a penalty. It is not always clear, however, under what circumstances interest is a penalty. Generally, interest is a penalty when the interest is intended to deter or punish non-payment. In determining whether a monetary charge is a penalty, California courts consider whether the charge is intended to make the injured party whole or intended to deter (or punish) the other party.³⁵

To determine the purpose of the 10 percent annual interest charge we must examine the rate and the context in which it is levied. The Commission uses its broad discretion to apply a wide range of interest rates with the intent of making the Commission and ratepayers whole. For example, the Commission routinely uses the three month commercial paper rate³⁶ to true up claims from

³⁴ TracFone, in its April 30, 2013 Opening goes so far as to argue that essentially all aspects of this proceeding are a penalty and that therefore Section 2107 should not be applied. We disagree, and, with the exception of the 10 percent annual interest charge, we find this line of argument does not merit further discussion.

³⁵ See *e.g.*, *James Howard v. American National Fire Ins. Co.*, 187 CA4th 498 (2010), holding that prejudgment interest is not a penalty because its purpose is to compensate the injured party for loss of use of the award during the prejudgment period; *County of San Diego v. Milotz*, 46 Cal. 2d 761, 766 (1956), holding that interest is a penalty when the purpose is to punish a party for nonperformance of an act or for the performance of an unlawful act; *People v. Union Pacific Railroad Co.*, 141 CA4th 1228, 1257-58 (2008), holding that for penalties there does not need to be a relationship to the loss.

³⁶ During the last ten years, the three month commercial rate has consistently been significantly lower than 10 percent. As of April 18, 2013, the rate was .014percent. The historic rates can be found at <http://research.stlouisfed.org/fred2/categories/120>.

California lifeline service providers. (*See, e.g.*, GO 153 at § 9.10.3.) At the other end of the spectrum, the California Supreme Court has held that a rate of 18 percent charged by the Commission was not a penalty. (*Assembly of the State of California v. PUC*, 12 Cal. 4th 87 (1995), reversing D.94-08-030 and D.95-01-019 on other grounds, and affirming that because 18 percent was the interest rate charged by the utility to ratepayers for late payment it was not a penalty for the same rate to be applied to amounts owed by the utility to the ratepayers.)

The 10 percent annual interest rate falls in between the three month commercial rate and the 18 percent rate. Therefore, the amount of the interest rate itself is not sufficient to find that it is a penalty and we must consider the context in which the interest is levied.

Although the decision adopting GO 153 does not use the word “penalty” when describing the 10 percent annual interest charge, it does describe it as an “enforcement mechanism” intended to give carriers a financial incentive to timely remit surcharge revenues. (D.00-10-028 at 618-19.)³⁷ When truing up under- and over- payments, GO 153 uses a three month commercial paper rate. But the Commission specifically rejected the three month commercial rate for late payments on the basis that it would not be sufficient to deter carriers from

³⁷ “We believe that is both reasonable and necessary to require carriers to pay 10 percent interest on late ULTS surcharge remittances instead of the lower 3 month commercial paper rate. This is because many carriers may be able to invest UTLS surcharge revenues at rates of return much higher than the 3 month commercial paper rate. [footnote omitted] As a result, requiring carriers to pay the 3 month commercial paper rate on the late remittance of UTLS surcharge revenues may not provide a financial incentive for carriers to timely remit the surcharge revenues. Therefore, to discourage carriers from using public moneys for private gain, we shall adopt the OIR proposal to require carriers to pay 10 percent on surcharge revenues that they are late in remitting to the ULTS fund.” (*Id.* at 619.)

making late payments. (*Id.*) The Commission reasoned that carriers could obtain a higher return by investing the surcharge revenues in other ventures. (*Id.*) By setting an interest rate based on possible investment returns, the decision was setting a rate designed primarily to compensate the Commission and ratepayers for the late payment. In addition, by making the rate non-discretionary, the Commission indicated its intention to have a mechanism that could be applied by staff without inquiry into the reasons for the late payment or a penalty analysis under D.98-12-075.

Based on the foregoing, we find that the 10 percent annual interest rate on late PPP surcharges is not a penalty and therefore does not limit the Commission's authority to apply a residual penalty under Section 2107.

8.2. Interest on User Fees

Unlike PPP surcharges, there is not a specific interest rate applicable to late user fees. However, for consistency in this case, we believe it is appropriate to apply the same 10 percent annual simple interest rate to both user fees and PPP surcharges. For user fees, however, pursuant to Section 405 any penalty must be capped at 25 percent of the unpaid amount.³⁸ Although, as discussed above, the 10 percent annual interest rate imposed on late surcharges by GO 153 is not a penalty, in order to avoid a similar discussion of whether interest is a penalty in this circumstance, we will simply cap the amount of interest on late user fees at 25 percent of the total past due amount. The resulting amount is significantly less than 10 percent annual interest over the 12 year period.

³⁸ CPSD contends that the 25 percent should be interpreted as annual interest. We find that CPSD's interpretation does not comport with the clear language of the statute.

Again, it is important to note that because TracFone's services were prepaid, it is not able to collect user fees for services sold prior to the Phase 1 Decision.

8.3. The Law on Penalties

The Commission must consider if penalties are due in addition to the ten percent annual interest for late payment.

Section 2107 provides for penalties *if no other penalty has otherwise been provided*. For continuing violations, Section 2108 states that each day is a separate violation. Penalties can range from a minimum of \$500 per violation to \$50,000 per violation. Calculated at the minimum \$500 per day per violation, counting the user fees and each PPP surcharge separately, the minimum penalty would be over \$13 million.³⁹

The Commission uses the factors set forth in D.98-12-075 to determine the appropriate penalty amount. (D.98-12-075 at § D.2.) "The purpose of a fine is to go beyond restitution to the victim and to effectively deter further violations by this perpetrator or others." (*Id.* at § D.2.b.) A "fine" is paid to the State of California rather than the victim. (*Id.*) D.98-12-075 considers two key areas: (1) severity of offense, and (2) conduct of the utility. Notwithstanding the guidelines set forth in D.98-12-075, the Commission has broad discretion to impose fines and other penalties as part of its enforcement duties. (§ 701 (the Commission is empowered to do "all things, whether specifically designated [in

³⁹ CPSD calculated the days as follows: user fees for 2,884 days, CASF surcharge for 1,515 days, and the remaining PPP surcharges for 4,437 days each. (Exhibit CPSD-17 at 8.)

the code] or in addition thereto, which are necessary and convenient in the exercise of its powers and jurisdiction.”))

8.4. Analysis of D.98-12-075 Penalty Factors Applied to the Evidence

Under D.98-12-075 the purpose of a penalty is deterrence. Pursuant to D.98-12-075, the factors to be considered when evaluating whether a penalty should be issued include the severity of the offense, the conduct of the utility, the financial resources of the utility, and the totality of the circumstances in furtherance of the public interest.

8.4.1. Severity of the Offense

Generally, a violation that actually harms people or property is considered the most severe. This is closely followed by violations that threaten to harm people or property. In this case, as CPSD acknowledges, there was no potential physical harm or safety risk to people or property. (RT at 82:17-883:19; Exhibit CPSD-17 at 9-10; 13-14.)

The parties also did not identify any specific economic harm. The public purpose programs and the Commission were always fully funded. (RT at 883:28 – 884:13.) The amounts owed by TracFone are a relatively small portion of the overall budget of the programs. (RT at 884:15-885:5) Consumers did not pay the fees and surcharges. And likewise, TracFone did not hold on to any funds which would have resulted in economic benefits gained by TracFone. Nonetheless, as CPSD points out, there may still be economic harm to “the public purpose programs, other carriers, the competitive marketplace, and consumers generally” as a result of the unfair competitive advantage held by TracFone because it did not pay surcharges. (CPSD Phase 2 Reply at 17.) CPSD did not, however, provide any evidence of such an economic harm, or attempt to quantify the harm.

The parties disagree on whether TracFone's failure to pay resulted in harm to the regulatory process. Ultimately, CPSD failed to prove by a preponderance of the evidence that the regulatory process had been harmed. Although TracFone could have made a better interpretation of the law earlier in the process, TracFone has provided evidence that it did attempt to comply with the Commission's regulatory process. For example, TracFone did speak with Commission staff regarding TracFone's view that revenue from prepaid service is not subject to PPP surcharges. In addition, TracFone was not the only prepaid wireless carrier that had difficulty understanding how to comply with the collect and remit requirements. (*See, e.g.,* P.09-12-018.) If TracFone had instead shown an intent to disregard the regulatory process altogether, or had attempted to conceal its failure to collect and remit user fees and PPP surcharges, then a finding that TracFone had harmed the regulatory process would be appropriate.

On the other hand, beginning in 2009, Commission staff made it clear to TracFone that staff disagreed with TracFone's interpretation of the debit card exemption and the definition of public utility. At that time, TracFone could have complied with the regulatory process by paying the past amounts due. Nonetheless, this is not a sufficient basis to find that, by a preponderance of the evidence, TracFone harmed the regulatory process.

8.4.2. Conduct of the Utility – Utility's Actions to Prevent, Detect, Disclose or Rectify a Violation

As discussed in Section 6.2 above, TracFone's evidence regarding its reliance on staff advice mitigates the need for penalties in this case. TracFone's arguments that it believed the debit card exemption applied to its prepaid sales and that its operations did not fall within the definition of public utility are plausible.

On the other hand, TracFone was aware for almost three years prior to the Phase 1 Decision that the Commission did not support its interpretations. On April 13, 2009 Mr. Christiansen queried TracFone by email regarding why revenues and fees due were reported as \$0. (Exhibit TR-203 Att. 14.) In a subsequent email, Mr. Christiansen stated that “[n]o carrier has been approved by the Commission to treat prepaid wireless service as debit cards and be excluded from surcharge assessment and payment.” (Exhibit TR-203 Att. 16.)

8.4.3. Financial Resources of the Utility

TracFone’s total United States operating revenue from 2000 to 2011 was approximately \$15,377,000,000 (Exhibit CPSD 17 at 12, based on CPSD’s review of América Móvil’s Securities Exchange Commission filings). In addition, TracFone’s parent, América Móvil had operating revenues of \$252,454,000,000 from 2000 to 2011. (*Id.*) Based on this, if penalties are warranted, only a high penalty would effectively penalize TracFone. For example, if TracFone were assessed the minimum (\$500) per day penalty under Section 2100, the result would be less than 0.09 percent of TracFone’s United States operating revenues.

8.4.4. Totality of the Circumstances in Furtherance of the Public Interest

There is a significant public interest in making sure that the Commission’s programs are fully funded. Here, the evidence shows that the programs were fully funded. There is also significant public interest in making sure that rates are just and reasonable. Although the Commission does not set the rates for communications carriers, the current regulatory structure of the industry relies on all carriers and customers contributing on an equitable and non-discriminatory basis to Commission programs such as universal service. (*See, e.g.*, Section 739.3 requiring programs to be “competitively neutral and broad-based.”) Here, TracFone’s failure to charge its customers these amounts

may have had a negative effect on competitive market. CPSD did not provide evidence, however, of any link between TracFone's failure to charge customers user fees and PPP surcharges and the competitive market or the rates available to customers. It is a fact that because TracFone did not collect user fees and PPP surcharges from customers, TracFone was able to charge less for services. However, it appears that other prepaid carriers may have similarly failed to charge user fees and PPP surcharges. Thus more evidence would be needed to establish the extent of any negative impact on the competitive market resulting from TracFone's actions.

In addition to the significant mitigating factors discussed above, TracFone's conduct following issuance of the Phase 1 Decision was cooperative. TracFone in good faith began consultation with the Communications Division to determine how best to make payment going forward.

Finally, it is important to note that TracFone will not be able to collect the past due amounts from the customers who made the intrastate calls associated with the past due user fees and PPP surcharges or by incorporating the amounts into regulated rates.. Instead, TracFone will be solely responsible for paying twelve years of past due amounts at one time out of the company's resources as they exist at the time this decision is issued. Thus payment of past due amounts will itself have a significant impact on TracFone.

8.4.5. Role of Precedent

Neither party identified cases with comparable factual circumstances.

8.4.6. Summary of Penalty Factors

TracFone has demonstrated that it made at least some effort to try to understand the law. Based on the analysis above, particularly the severity of the

offense and the conduct of the utility, it is not appropriate to apply a penalty to TracFone.

8.5. Payment to Program Funds

In order to make the Commission and ratepayers whole, the amounts owed by TracFone, including interest, should be applied to the applicable Commission program funds, thereby reducing the amount of user fees and PPP surcharges that need to be collected to operate the programs in the following year.

9. Conclusion

For the reasons set forth above, the total amount owed by TracFone, including interest, is approximately \$24.4 million. A detailed breakdown by year and program fund is included in a confidential Appendix issued by separate ALJ ruling on this proceeding.

10. Documents Filed Under Seal

During evidentiary hearings, the ALJ conditionally granted TracFone's motion to admit a number of exhibits into evidence under seal, contingent on TracFone filing additional, detailed information establishing that the documents were entitled to such confidential treatment. On February 14, 2013, TracFone filed details supporting its motion to retain confidential treatment of the exhibits. On February 20, 2013, CPSD filed an opposition to the motion and, on March 7, 2013, TracFone filed a reply to CPSD's opposition.

TracFone argues that that Section 583 and GO 66-C establish its right to confidential treatment of the exhibits. To the contrary, neither Section 583 nor GO 66-C are authority for confidential treatment in a Commission proceeding.

Section 583 says:

No information furnished.....*except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding.*

Section 583 does not create a substantive right to confidential treatment for information furnished in the course of a Commission proceeding. Rather, “the statute provides a process for handling information a party believes is confidential [...] so that its claims about confidentiality may be tested.” (D.06-06-066 at 29.)

GO 66-C does not govern Commission proceedings. Rather, GO 66-C identifies the types of Commission records, reports and information that will not be produced pursuant to the Public Records Act, which is expressly inapplicable to judicial records or litigants’ rights, including those in administrative proceedings. (Gov. Code § 6260.)

In the context of public disclosure of the Commission’s records pursuant to the Public Records Act, the burden is on the Commission to demonstrate “the interest protected by [non-disclosure] and the need for protecting that interest.” (Cal. Const. Art. 1 § 3(b)(2).) However, in the context of judicial proceedings including this administrative proceeding and pursuant to the Commission’s policy of openness (see, e.g., *In re Sierra Pacific Power Co.* 28 CPUC2d 3, 11 (1988)), the burden is on the party claiming confidentiality to demonstrate that the information should not be produced or subject to public inspection in the record of the proceeding.

Notwithstanding TracFone’s question of the need to make this motion, TracFone nevertheless presented substantive reasons that sustain its burden of proving that the exhibits should remain sealed.

TracFone seeks confidential treatment of information and documents primarily consisting of revenue numbers, negotiated third-party contracts, and internal company policies. TracFone argues that the information and documents “constitute commercially-sensitive, confidential information concerning the operations of TracFone, the disclosure of which would cause TracFone competitive harm.” (Motion to File Under Seal at 2.) TracFone states that the details of its annual California revenues constitute competitively-sensitive information under GO 66-C Section 2.2(b). TracFone’s revenue is not reported separately in América Móvil’s SEC filings. (Motion to File Under Seal at 5.) Because TracFone is a competitive carrier, it would be placed at an unfair competitive disadvantage if this information is disclosed.

TracFone argues that its contracts with third parties and its internal policies should also remain under seal because of their proprietary nature. The evidentiary record includes a contract with Airtime Technologies. TracFone states that this is a negotiated business agreement which is not otherwise publicly available. Public disclosure of the contract would reveal aspects of TracFone’s operations resulting in an unfair advantage to TracFone’s competitors. (Motion to File Under Seal at 7.)

Similarly, TracFone’s internal policies regarding communications with customers and customer retention are proprietary documents containing commercially-sensitive information.

We agree that these documents contain the type of information that would place TracFone at an unfair competitive disadvantage if the documents are not filed under seal.

CPSD argues that TracFone has not provided enough detail to explain why unsealing these documents will result in a competitive disadvantage. However,

we disagree and find that TracFone has provided sufficient basis necessitating confidential treatment.

On February 6, 2013, CPSD filed three confidential appendices with its Phase 2 Opening, along with a Motion to File Under Seal Confidential Appendices A, D & E. The appendices consist of documents and information that is part of the evidentiary record currently under seal. For the reasons discussed above, we find that these documents should remain under seal and we grant CPSD's Motion to File Under Seal Confidential Appendices subject to the terms set forth herein.

In rebuttal testimony, CPSD included copies of TracFone's Emergency Telephone Users Surcharge returns filed with the BOE. TracFone acknowledges that this information is not considered confidential by the BOE. (Motion to File Under Seal at 6.) Because these forms are publicly available from another source, it is not possible to file them under seal in this proceeding. However, any information or figures derived from these forms is eligible for filing under seal. For example, calculations that use BOE numbers and numbers from non-public sources must remain confidential. This includes the percentage differences between the BOE numbers and the revenue numbers derived from other sources.

Where possible, the evidentiary record contains redacted versions of the documents and/or information that has been aggregated to protect the confidential information.

In light of the foregoing: (a) any revenue numbers from the BOE filings that were entered into evidence are unsealed; (b) the revenue information and company policies will remain under seal for three years; and (c) the third-party contract will be protected for the remaining length of its contract term. The details of the sealed portions of the record are set forth in Appendix 1.

For the sealed documents, TracFone may make a motion to extend the period prior to its expiration. Once the period has expired, the documents and information may be made available to the public on request pursuant to GO 66-C.

As discussed above, TracFone's California revenues set out by year are entitled to confidential treatment. It would be possible to calculate TracFone's annual California revenue using this information. For this reason, a separate ALJ ruling will be issued with this confidential appendix filed under seal. However, it is not possible to calculate annual revenue using the aggregate amount owed. For this reason, the aggregate amount has not been sealed.

11. Appeals; Changes Pursuant to Section 1701.2(a)

On August 12, 2013, pursuant to Rule 14.4 of the Commission's Rules of Practice and Procedure, TracFone and CPSD each filed an appeal of the POD alleging factual and legal errors (TracFone Appeal and CPSD Appeal). TracFone's appeal applies only to determination of past due amounts of the PPP surcharges and not to User Fees. TracFone argues that it should not be required to pay PPP surcharges on service prior to issuance of D.12-02-032.

11.1 Application of the Law is not Retroactive

TracFone argues that prior to D.12-02-032 it could not understand the debit card exemption to PPP surcharges and that therefore TracFone did not have fair notice of its obligation to remit PPP surcharges on intrastate phone calls. TracFone has made this argument repeatedly throughout Phase 2. As the POD explains, and D.12-02-032 affirmed, the law on PPP surcharges clearly applies to all intrastate phone service with the limited exception of debit card and payphone calls. (POD at 18-19.) D.12-02-032 also affirmed that the law cannot be circumvented simply by collecting payment from customers in advance (the

prepaid phone service model) and then claiming that this service should be treated in the same manner as debit card service. The POD acknowledges that TracFone's theory is plausible enough to mitigate the need for penalties in this case. However, TracFone's ability to come up with a creative, self-serving and expansive theory of the debit card exemption does not mean that the law was not already sufficiently clear enough to give TracFone fair notice of its legal obligations. Therefore, as the POD already stated, due process is not implicated by requiring TracFone to pay the PPP surcharges incurred for services before issuance of D.12-02-032.

Similarly, TracFone attempts to link the rationale for the AEUS mechanism for collecting PPP surcharges to TracFone's assumption that their prepaid service should be treated in the same manner as debit card service. The AEUS mechanism and rationale are discussed at 23-24 of the POD. The POD considers the reasonableness of TracFone's theory that it was exempt from PPP surcharges in Section 8 (Penalties and Interest).

11.2 Past Due PPP Surcharge Amount is Calculated in Accordance with Law

TracFone next argues that even if the POD is correct in finding that TracFone must pay PPP surcharges for the period prior to issuance of D.12-12-032, the POD has "supersized" the past due amount. Each of TracFone's arguments are summarized below, along with citations to where TracFone's arguments have already been addressed in the POD:

- (1) TracFone argues that it should only be required to remit PPP surcharges after May 2009 when it received a direct email from the Commission. As has been repeatedly stated in the POD, TracFone is subject to the law whether or not it received an individualized notice of its legal obligations. (*See, e.g.*, POD at 19-21; 27.) The POD also

specifically addresses notice requirements under GO 153 at 27-28 of the POD.

- (2) TracFone argues that the time period prior to 2004 is outside the scope of this proceeding. As discussed on pages 29-30 of the POD, there is no basis for excluding service provided prior to 2004 from the calculation of the past due amount.
- (3) TracFone argues that the 10 percent annual interest required under GO 153 is “punitive” and therefore should not be applied. The POD examines the 10 percent annual interest charge on late payment in detail at pages 40-43 and finds that, given the context in which the interest is to be collected, it is not a punitive charge. Instead, the POD finds that the 10 percent interest charge is intended to compensate the Commission and ratepayers for the late payment.

11.3 The POD Appropriately Determines that Penalties are not Warranted

CPSD appeals the POD’s determination that penalties are not warranted in this case.

As the POD states at 44, the purpose of a penalty is to deter future violations by the perpetrator or others. The Commission has previously stated that “effective deterrence creates an incentive for public utilities to avoid violations.” (CPSD Appeal at 7 citing D.08-09-038.) In light of this, CPSD argues that the decision should include a separate analysis of the deterrent effect that a penalty would have on TracFone and other carriers. It is not necessary to have an independent discussion of deterrence because, although the purpose of a penalty is deterrence, the determination of whether a penalty is warranted is made by applying the principles set forth in D.98-12-075. This analysis is set forth in the POD at 41 – 48.

CPSD argues that the POD should find that economic harm resulted from TracFone's failure to pay PPP surcharges and user fees. CPSD correctly states that economic harm can include "any unlawful benefits gained by the public utility." (CPSD Appeal at 8 citing D.98-12-075.) CPSD argues that economic harm in this case is therefore equal to the past due amount of PPP surcharges and user fees retained by TracFone. Although TracFone undoubtedly benefitted in some way from not paying user fees and PPP surcharges, this benefit was not derived by retaining funds that had been collected from customers. (POD at 45.) Therefore, more information would be needed before the significance of TracFone's benefit (and any commensurate economic harm) could be determined.

CPSD also argues that it is axiomatic that economic harm results when one utility decides not to adhere to a compliance obligation because that utility gains an unfair economic advantage over utilities that continue to comply. (CPSD Appeal at 9.) Although this may be true, information on the extent and nature of that economic harm would be needed in order to determine if the alleged economic harm warrants imposition of a penalty. For example, CPSD could have provided evidence regarding the financial advantage TracFone may have gained over its competitors. The POD discusses economic harm at 45 and finds that the record does not contain evidence supporting imposition of penalties on the basis of economic harm.

CPSD argues that the POD gives short shrift to evaluating potential harm to the regulatory system. The POD addresses potential harm to the regulatory system in sufficient detail at 45.

CPSD argues that the POD gives short shrift to evaluating the totality of the Circumstances and the Public Interest. The POD addresses these principles of penalty analysis in sufficient detail at 47-48.

This completes the analysis of the issues presented by TracFone and CPSD in their respective appeals.

On August 28, 2013, TracFone filed a motion for oral argument. CPSD filed a reply on August 29, 2013. We hereby deny this motion.

11.4 Explanation of Changes Made to the POD Pursuant to Section 1701.2(a)

No changes were made to the POD as a result of the CPSD Appeal or the TracFone Appeal.

The total amount due was corrected to \$24,397,441.17.

12. Assignment of Proceeding

Michel P. Florio is the assigned Commissioner and Jeanne M. McKinney is the assigned ALJ in this proceeding.

Findings of Fact

1. A debit card is distinguished from other types of telephone cards by the attributes of the service provided, not by the entity providing the service.
2. The telecommunication service provided by TracFone is different from the telecommunication service provided by a debit card.
3. TracFone misinterpreted application of the debit card exemption from PPP surcharges.
4. TracFone misinterpreted the definition of utility as it applies to user fees.
5. The Salzman Letter documents Mr. Salzman's understanding of the conversation between Mr. Salzman and Mr. Mirza.

6. No corroborating evidence was provided to confirm whether Mr. Mirza understood TracFone's operations or agreed with TracFone's interpretation of the law.

7. Prior to the issuance of the Phase 1 Decision, Communications Division provided little, if any, publicly-available guidance on allocation of interstate and intrastate revenue.

8. After the issuance of the Phase 1 Decision, the Commission stated that it accepts any reasonable methodology of allocating interstate and intrastate call revenue.

9. The July 11, 2012 Instructions from the Communications Division expressly state that reasonable methodologies include (a) the inverse of the FCC safe harbor percentage and (b) traffic studies.

10. The Commission has not provided a specific mechanism or methodology for prepaid wireless carriers to collect user fees and PPP surcharges on sales made by third party retailers.

11. In a post-paid transaction, if the customer does not pay the PPP surcharges the carrier is not responsible for the PPP surcharges.

12. In a pre-paid transaction, the customer pays all charges in advance and therefore it is not necessary to waive the carrier's responsibility for unpaid PPP surcharges.

13. Third party retailers have told TracFone that they would not assist in collecting user fees and PPP surcharges at the point of sale.

14. There is no evidence in the record that shows TracFone currently has sufficient technology to collect user fees and PPP surcharges at the point of sale on sales by third party retailers.

15. The Commission provided multiple notices to TracFone of the requirement to remit user fees and PPP surcharges, including the Registration Letter, GO 153, D.98-12-075, §§ 270 et. seq., and various iterations of the Instructions.

16. The December 2009 OII does not preclude the enforcement period from extending prior to 2004.

17. To determine intrastate call revenue subject to user fees and PPP surcharges one must know (a) what part of the revenue was generated by California customers, and (b) what part of the revenue relates to sale of telecommunication services subject to user fees and PPP surcharges.

18. Both the FCC and the BOE require telecommunications carriers to allocate revenue between intrastate and interstate.

19. TracFone has filed documents with both the FCC and the BOE that allocated revenue between intrastate and interstate.

20. The Commission does not require telecommunications carriers to use a specific methodology to collect or assess user fees and PPP surcharges.

21. Communications Division staff does not have an official procedure to “accept” or “approve” a carrier’s method for allocation between interstate and intrastate revenue.

22. As of October 2, 2012, Communications Division had record of only two written communications responding to a carrier’s proposed methodology for calculating intrastate revenue. Both communications took place after the December 2009 OII started.

23. TracFone has not put forth any methodology for calculating intrastate call revenue.

24. CPSD describes many different methodologies for calculating intrastate revenue, including FCC Safe Harbor, traffic studies, books and records (CDR), FCC Inverse, BOE, and CPSD's own method using a combination of BOE figures and FCC Inverse.

25. The revenue numbers provided by TracFone to the BOE may not accurately reflect the intrastate call revenue subject to user fees and PPP surcharges.

26. Relying on the FCC Inverse will result in revenue numbers that are consistent with the revenue numbers filed with the FCC.

27. Relying on the FCC Inverse will reduce the need to examine workpapers underlying the calculation of interstate and intrastate revenue.

28. The total revenue numbers given by TracFone as based on the FCC Inverse are reasonable.

29. TracFone's failure to remit user fees and PPP surcharges did not harm or threaten to harm people or property.

30. The amounts owed by TracFone for past user fees and PPP surcharges are small when compared to the funds budgeted for these programs.

31. The programs that were funded by user fees and PPP surcharges were fully funded during the period TracFone did not remit user fees and PPP surcharges.

32. User fees and PPP surcharges fund programs that support the Commission's ability to resolve safety and other issues under Section 451, which requires utilities to take actions "necessary to promote the safety, health, comfort and convenience of its patrons, employees, and the public."

33. The evidentiary record does not show that there was economic harm.

34. The evidentiary record does not show that there was harm to the regulatory process.

35. Beginning in 2009, TracFone knew that Commission did not agree with its interpretation of the debit card exemption and the definition of public utility.

36. TracFone had operating revenues of over \$15 billion during the disputed period.

37. Including the past due amounts in the funding of the applicable Commission programs in the future will reduce the amount of user fees and PPP surcharges that ratepayers are responsible for in the future.

38. The material described in Section 10 above constitutes material that is entitled to confidential treatment.

Conclusions of Law

1. TracFone's service has never been covered by the debit card exemption to PPP surcharges.

2. Since registering with the Commission, TracFone has been a public utility required to remit user fees.

3. The Salzman Letter standing on its own does not constitute sufficient evidence to demonstrate that TracFone reasonably and in good faith relied on the advice of the Commission staff person overseeing the PPP surcharge program.

4. Advice of Commission staff is not binding on the Commission.

5. TracFone's error in interpreting the GO 153 and related Commission decisions does not relieve TracFone of the obligation to pay past due PPP surcharges and user fees.

6. Reliance on advice of Commission staff does not relieve TracFone of the obligation to pay past due PPP surcharges and user fees.

7. Evidence of a reasonable, good faith reliance on advice of Commission staff may be considered when determining the amount of penalties, if any.

8. The Commission accepts any reasonable methodology for calculating intrastate revenue.

9. A perceived lack of clear guidance on available methodologies for allocating revenue between interstate and intrastate and for collecting user fees and PPP surcharges from customers, does not relieve TracFone of the obligation to pay past due user fees and PPP surcharges.

10. Evidence regarding the lack of specific Commission-approved methodologies for allocating revenue and for collecting user fees and PPP surcharges may be considered in determining the amount of penalties, if any.

11. Reasonable methodologies for calculating intrastate revenue include: inverse of FCC safe harbor percentage, traffic studies, books and records, FCC Inverse, and the methods permitted by the BOE.

12. Regardless of how the user fees and PPP surcharges are collected, the carrier is ultimately responsible for paying these amounts to the Commission.

13. It is not necessary to waive a carrier's responsibility for unpaid PPP surcharges in a prepaid transaction.

14. When determining an appropriate funding mechanism for Commission programs, the Commission considers the following principles (1) that it is competitively neutral; (2) that it clearly identifies the source of the subsidy; and (3) that consumers have the information they need to make informed choices.

15. The Commission's goal of maximum transparency does not permit carriers to avoid responsibility for user fees and PPP surcharges by not including these charges on customer bills.

16. TracFone is responsible for developing a mechanism to collect user fees and PPP surcharges from customers.

17. TracFone is not excused from paying user fees and PPP surcharges during times when it does not have a mechanism to collect these amounts from third party retailers.

18. Where a requirement is set forth in law, the Commission is not required to individually notify each utility that it must comply with the law before the Commission can enforce the law.

19. There is no requirement for the Commission to notify a utility that it is not in compliance with the law prior to initiating an enforcement action.

20. Prior to reducing a utility's substantive rights, such as by revoking a CPCN, the Commission must provide the utility with adequate due process.

21. The December 2009 OII does not preclude the enforcement period from extending prior to 2004.

22. The time period for calculating past due user fees and PPP surcharges for the December 2009 OII is from the year 2000 through the date of issuance of Phase 1 Decision.

23. For purposes of determining past intrastate call revenue in this proceeding, the best methodology is FCC Inverse.

24. The FCC Inverse is a reasonable methodology that is acceptable to the Commission.

25. The Commission accepts any reasonable methodology for calculating intrastate revenue.

26. To determine the appropriate penalty amount, the Commission considers the following factors: harm to people and property, economic harm, harm to the regulatory process, the conduct of the utility to prevent, detect, disclose or rectify

a violation, the financial resources of the utility, the totality of the circumstances in furtherance of the public interest, and the role of precedent.

27. The purpose of a penalty is to deter and/or punish violations.

28. The Commission has broad discretion to impose fines and other penalties as part of its enforcement duties.

29. Section 2107 provides for penalties if no other penalty has otherwise been provided.

30. There is a significant public interest in making sure that the Commission's programs are fully funded on an equitable and non-discriminatory basis.

31. Ten percent annual interest is charged on all late PPP surcharges.

32. Generally, interest on an unpaid amount is a penalty when the interest rate is intended to deter or punish non-payment.

33. The Commission has broad discretion to select an appropriate rate of interest.

34. Ten percent annual interest is an appropriate rate to deter late payment.

35. Ten percent annual interest is intended to compensate the Commission and ratepayers for the loss of the time value of money.

36. Ten percent annual interest, capped at 25 percent of the total unpaid amount, is an appropriate rate for late payment of user fees in this proceeding.

37. The 10 percent annual interest rate on late payment is not a penalty and therefore does not limit the Commission's authority to apply a residual penalty under Section 2107.

38. In order to deter and punish continued non-payment, carriers that do not promptly pay past due user fees and PPP surcharges on prepaid intrastate call revenue may be subject to a penalty under Section 2107.

39. Insufficient funding of programs supported by user fees and PPP surcharges could impair the Commission's ability to resolve safety and other issues under Section 451 requiring utilities to take all actions "necessary to promote the safety, health, comfort and convenience of its patrons, employees, and the public."

40. Applying the penalty analysis set forth in D.98-12-075 to the facts of this case, no penalty is warranted.

41. The past due amounts should be returned to ratepayers by setting next year's user fee and PPP surcharge rates to take into account TracFone's payment of eight years of past due user fees and 12 years of past due PPP surcharges.

42. In order to protect customers, provide certainty to the parties and promote an efficient use of the resources of the parties and of the Commission, this decision should be effective immediately.

43. It is reasonable for the material described in Section 10 above to remain under seal for the amount of time set forth in Section 10.

44. The August 28, 2013 Motion of TracFone Wireless, Inc. for Oral Argument should be denied.

O R D E R

IT IS ORDERED that:

1. As payment for user fees under Public Utilities Code sections 401-410, 431-435 and public purpose program surcharges accrued prior to February 24, 2012, including interest, TracFone Wireless, Inc. shall pay \$24,397,441.17 within 30 days of the effective date of this decision by check or money order payable to the California Public Utilities Commission and delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Cashiering Unit, San Francisco, CA 94102. TracFone Wireless, Inc. must write on the face of the check or money order "For deposit to Commission program budgets as set forth in Decision 13- - ", issued in Investigation 09-12-016."

2. The payment made by TracFone Wireless, Inc., pursuant to Ordering Paragraph 1, shall be credited to the following program funds for the next budget year as set forth in the confidential Appendix to the Administrative Law Judge's Ruling issued in this proceeding: Universal Lifeline Telephone Service, Deaf and Disabled Telecommunications Program, California High Cost Fund-A, California High Cost Fund-B, California Teleconnect Fund, and California Advanced Services Fund.

3. TracFone Wireless, Inc. is ordered to preserve all documents now in existence relating to California intrastate revenues calculations from 2000 - 2013 for at least three years from the date of this decision or six years from the date of creation, whichever is longer, so that such documents are available in the event that the Commission elects to undertake an audit of this public utility.

4. The Motion of TracFone Wireless, Inc. to Retain Confidential Treatment of Documents and Information Admitted into the Phase II Administrative Record and Safety and Enforcement Division's Motion to File Under Seal Confidential

Appendices A, D & E are both granted to the extent set forth herein. In addition, the confidential Appendix issued by Administrative Law Judge's (ALJ) ruling is placed under seal. The documents placed under seal shall remain under seal for the applicable period of time set forth in Appendix 1 of this decision and shall not be made accessible or disclosed to anyone other than the Commission and its staff except on the further order or ruling of the Commission, the assigned Commissioner, the assigned ALJ, the Assistant Chief ALJ, the Chief ALJ, or the ALJ then designated as Law and Motion Judge.

5. If TracFone Wireless, Inc. believes it is necessary to keep the confidential data described in Appendix 1 under seal for an additional period, TracFone Wireless, Inc. shall file a new motion to file confidential documents under seal at least 30 days before the expiration of the time period designated in Appendix 1 of this decision.

6. The August 28, 2013 Motion of TracFone Wireless, Inc. for Oral Argument is denied.

7. Investigation 09-12-016 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

Appendix 1
Documents Filed Under Seal

Exhibit	Sealed Pages, Tables, or Attachments	Time
CPSD-15-C (Tan-Walsh)	Page 2, Table 1 Page 5, Table 2 and Text Page 6 Attachment A Attachment B Attachment C	3 years from issuance of decision
CPSD-16-C Tan-Walsh)	Page 4 List of Attachments Attachment A (Amended) Attachment A.1 Attachment B (Amended) Attachment H Attachment J	3 years from issuance of decision
CPSD-17-C (Christiansen)	Page 12, Table 3 Page 13-14 Page 15, Table 5 Attachment B	3 years from issuance of decision
CPSD-18-C (Christiansen)	Pages 12 - 14 Page 17 Page 19 Attachment D Attachment E Attachment G, Tables 3A, 5A, 5B	3 years from issuance of decision
CPSD-20-C Table 5C Summary Calculation of Amounts Owed with Supporting Schedules (Attachments D.1 and A.2)	Table 5C Attachment D.1 Attachment A.2	3 years from issuance of decision
CPSD-22-C Amended/Restated Transaction Processing Agreement between TracFone and Airtime Technologies, Inc.		Duration of current contract term
CPSD-23-C TracFone January 2, 2013	Customer Communication Policy SMS Communication Policy and	3 years from issuance of

Exhibit	Sealed Pages, Tables, or Attachments	Time
Response to Data Request Re Communications with Customers (Customer Communication Policy)	Procedures (TF II 0 000708-719)	decision
CPSD 26-C Surcharge Detail History Report for TracFone Wireless Billing Period: October 2012	Surcharge Detail History Report	3 years from issuance of decision
CPSD-27-C TracFone Response to CPSD's DR 1 Re Tax Partners and TracFone e911 Adjustments for Month 201011	TF II 000651-653	3 years from issuance of decision
TR-204-C (Dillon)	Pages 12-14 Att. F	3 years from issuance of decision
CPSD Opening Post-Hearing Brief	Appendices D and E	3 years from issuance of decision
CPSD Opening Post-Hearing Brief	Appendix A	Duration of current contract term
CPSD Reply to the April 30, 2013 Brief of TracFone Wireless, Inc. in Response to the Revised Issue No. 2 in the Amended Scoping Memo Regarding Interest and Penalties	Appendix E	3 years from issuance of decision
Confidential Appendix issued by ALJ Ruling	All	3 years from issuance of decision

User Fees and Public Purpose Surcharges by Year

(END OF APPENDIX 1)