

COM/CAP/jt2

**PROPOSED DECISION** Agenda ID #17106 (Rev. 1)

Quasi-legislative

1/31/2019 Item 14

Decision **PROPOSED DECISION OF COMMISSIONER GUZMAN ACEVES**  
(Mailed 12/21/2018)

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

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

Rulemaking 17-06-023

**DECISION DETERMINING THAT PUBLIC PURPOSE PROGRAM  
SURCHARGES AND USER FEES WILL NOT BE ASSESSED ON TEXT  
MESSAGING SERVICES REVENUE**

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**DECISION DETERMINING THAT PUBLIC PURPOSE PROGRAM  
SURCHARGES AND USER FEES WILL NOT BE ASSESSED ON TEXT  
MESSAGING SERVICES REVENUE**

**Summary**

In this decision, the California Public Utilities Commission declines to require surcharge contribution of text messaging services revenue to the Public Purpose Program budget or to assess user fees on text messaging services revenue. This proceeding is closed.

**1. Factual Background**

The Federal Communications Act of 1934 (the Act) established universal service in order to create widespread and affordable voice service in the United States. The Act established the Federal Communications Commission (FCC) and charged it with regulating telecommunications carriers and managing the implementation of universal service.

The 1996 Telecommunications Act amended the Act, requiring the FCC to establish support mechanisms to ensure that schools, libraries, health care providers and low-income, rural, insular, or residents in high-cost areas receive access to affordable telecommunications services.<sup>1</sup> At the time the Act, as amended, was adopted, “only 23% of Americans had dial-up Internet access at home, and virtually no one had broadband.”<sup>2</sup> In response to the 1996 Act, the FCC created new programs funded by the universal service fund to universalize voice service and increase broadband in schools, libraries and rural health care providers’ facilities.<sup>3</sup>

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<sup>1</sup> 47 U.S.C. § 254.

<sup>2</sup> National Broadband Plan at 140.

<sup>3</sup> *Id.*

Federal universal service is funded by a surcharge assessed on the interstate and international component of all applicable communications services. Interstate means that the communication originates in one state and terminates in another. Under the 1996 Telecommunications Act, the Universal Service Administrative Company was charged with managing and collecting surcharges to fund federal universal service programs.

The Act also preserved state authority to implement universal service, which they could do through state programs funded by surcharges on the intrastate component of applicable communications services.<sup>4</sup> Intrastate means that the communication originates and terminates within the boundaries of the state.

The Act also preserved states' ability to impose requirements "necessary to preserve and advance universal service, to protect safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of customers" in the state on a competitively neutral basis.<sup>5</sup>

In addition, the Act required every telecommunications carrier providing intrastate telecommunications services to contribute to the state's universal service in a manner the state determined, on an equitable and nondiscriminatory basis.<sup>6</sup> The Act's requirements to apply universal service on an equitable, nondiscriminatory, and competitively neutral basis are echoed in enabling statutes for implementing California's universal service mandate.<sup>7</sup>

Universal service in California means that a minimum level of telecommunications services is available to everyone in the state at a reasonable rate.<sup>8</sup>

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<sup>4</sup> The 1996 Telecommunications Act did not amend §§ 253(b) or 254(f) of the Act. (47 U.S.C §§ 253(b) and 254(f).)

<sup>5</sup> 47 U.S.C. § 253.

<sup>6</sup> 47 U.S.C. § 254(f).

<sup>7</sup> See Pub. Util. Code § 871.5.

<sup>8</sup> D.95-07-050 at 8.

Universal service has evolved over time to keep pace with customer expectations of what communications technology is necessary to participate in society, also called basic service.<sup>9</sup> Over time, the Commission adopted six Public Purpose Programs to implement California's universal service, which are 1) California High Cost Fund A (CHCF-A),<sup>10</sup> 2) California High Cost Fund B (CHCF-B),<sup>11</sup> 3) Universal Lifeline Telephone Services Act (ULTS or Lifeline),<sup>12</sup> 4) Deaf and Disabled Telecommunications Program Administrative Commission Fund (DDTP),<sup>13</sup> 5) the California Advanced Services Fund (CASF), and 6) the California Teleconnect Fund (CTF).<sup>14</sup>

The Commission employs the All End User Surcharge (AEUS) to collect surcharges to fund Public Purpose Programs. The AEUS, a historical funding mechanism established in 1994,<sup>15</sup> requires all end users of telecommunications services to pay Public Purpose Programs surcharges, with the exception of Universal Lifeline Telephone service billings, coin-sent paid calling, debit card messages, one-way radio paging, usage charges to coin operated paid telephones and customers receiving services under existing contracts that were executed on or before September 15, 1994 and directory advertising.<sup>16</sup> The Commission's Communications Division (CD) staff enforces the AEUS by conducting audits on telecommunications carriers.

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<sup>9</sup> *Id.* at 21 (defining basic service as the minimum level of service customers have come to expect, or what services are essential to all residential telephone customers.)

<sup>10</sup> Pub. Util. Code § 275.

<sup>11</sup> Pub. Util. Code § 276.

<sup>12</sup> Pub. Util. Code § 277.

<sup>13</sup> Pub. Util. Code § 281.

<sup>14</sup> Pub. Util. Code § 280.

<sup>15</sup> D.94-09-065, in I.87-11-033, the CPUC's Implementation and Rate Design in the Alternative Regulatory Frameworks docket.

<sup>16</sup> D.94-09-065, D.96-10-066.

In 2016, the Commission staff updated the Surcharge Directive on the CD website to state that text messaging was a form of two-way messaging, and therefore was subject to Public Purpose Program surcharges.<sup>17</sup> CD staff's website update prompted CTIA-The Wireless Association's (CTIA) petition,<sup>18</sup> which led to the opening of this rulemaking to consider whether text messaging should be subject to Public Purpose Program surcharges and user fees.

A second funding mechanism that the Commission used to collect surcharges was the Point-of-Sale surcharge.<sup>19</sup> In 2014, the Prepaid Mobile Telephony Services Surcharges Collection Act (MTS Act) created this Point-of-Sale surcharge for the collection and remittance of surcharges and user fees assessed on prepaid wireless service, including communications services that were bundled with information services for a single price, which was to be effective from January 1, 2016 to January 1, 2020.<sup>20</sup> The Commission collected surcharges and user fees on prepaid wireless service under the MTS Act from January 2016 to November 2018. Pursuant to Resolution L-574, effective November 29, 2018, the Commission discontinued collection of surcharges and user fees under the MTS Act following a federal district court decision enjoining the Commission from enforcing or implementing the MTS Act because the court determined that FCC orders preempted the MTS Act.<sup>21</sup>

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<sup>17</sup> ALJ's Ruling Revising Communications Division Staff Paper and Public Purpose Program Financial Data, and Updating the Procedural Schedule, Appen. A.

<sup>18</sup> Petition to Adopt, Amend, or Repeal a Regulation Pursuant to Pub. Util. Code § 1708.5.

<sup>19</sup> On November 5, 2018, the United States District Court for the Northern District of California issued Order Regarding Cross Motions for Summary Judgment (Order) in *MetroPCS Cal., LLC. v. Michael Picker, et al.* (Case No. 17-cv-05959-SI), (The Court concluded that the Prepaid Mobile Telephony Services Surcharge Act conflicts with federal law and is therefore preempted and unconstitutional.).

<sup>20</sup> Pub. Util. Code § 319.

<sup>21</sup> See *MetroPCS Cal. v. Picker*, No. 17-cv-05959-SI, at 17 (N.D. Cal. Nov. 5, 2018).

California's Public Purpose Program budget is collected by assessing a Public Purpose Program surcharge as a percentage of the total intrastate revenue on eligible communications services (e.g., intrastate telecommunications services or unclassified communications services). The total industry revenue reported by communications carriers declined between 2011 and 2017 as a result of shrinking market share for Public Purpose Program surcharge-eligible communications services, even as subscribership for wireless customers increased over the same period.

Between 2011 to 2017, the universal service program budgets steadily increased. As shown in tables 1 to 3, declining industry revenue and rising Public Purpose Program budgets resulted in a total Public Purpose Program surcharge rate increase of 4.80% between 2011 and 2017, from 1.88% in 2011 to 6.68% in 2017.

**Table 1. Total Reported Industry Revenue Subject to Public Purpose Program Surcharges and Public Purpose Program Budgets Over Time (\$ United States Dollars (USD) Million).**

Year	Total Industry Revenue	Total Public Purpose Program Budget
2011	\$16,527	\$670
2012	\$15,405	\$649
2013	\$14,437	\$609
2014	\$13,620	\$545
2015	\$12,307	\$620
2016	\$12,000	\$862
2017	\$11,296	\$998

**Table 2. Total Intrastate Wireless, Wireline and Voice over Internet Protocol (VoIP) Industry Revenue over time (\$ USD million).**

Year	Total Wireless Revenue	% Wireless Revenue	Total Wireline Revenue	% Wireline Revenue	Total VoIP Revenue	% VoIP Revenue
2011	\$10,157	61%	\$6,355	38%	\$14	0%
2012	\$9,096	59%	\$5,990	39%	\$320	2%
2013	\$8,369	58%	\$5,675	39%	\$394	3%
2014	\$7,664	56%	\$5,554	41%	\$403	3%
2015	\$6,493	53%	\$5,490	45%	\$324	3%
2016	\$6,418	53%	\$5,296	44%	\$286	2%

2017	\$6,121	54%	\$4,875	43%	\$301	3%
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**Table 3. Total Industry Revenue, Public Purpose Program Budgets, and Total Surcharge Rates over Time (\$ USD millions).**

Year	Total Industry Revenue	Total Wireless Revenue	Total Public Purpose Program Budget	Total Surcharge Rate
2011	\$16,527	\$10,157	\$670	1.88%
2012	\$15,405	\$9,096	\$649	1.87%
2013	\$14,437	\$8,369	\$609	2.78%
2014	\$13,620	\$7,664	\$545	2.58%
2015	\$12,307	\$6,493	\$620	4.34%
2016	\$12,000	\$6,418	\$862	7.89%
2017	\$11,296	\$6,121	\$998	6.68%

Text messaging services consist of both Short Message Service (SMS) and Multimedia Messaging Service (MMS). SMS allows a cellular customer to send and receive messages of up to 160 characters to and from another cellular service customer.<sup>22</sup> MMS is a newer service a customer can use to send text, photos and other information along with the message.<sup>23</sup> Formerly unclassified under the Act, on December 12, 2018, the FCC classified text messaging services, including SMS and MMS, as “information services” (FCC Declaratory Ruling).<sup>24</sup> The FCC’s order was effective upon the date of its release.

<sup>22</sup> ALJ’s Ruling Revising Communications Division Staff Paper and Public Purpose Program Financial Data, and Updating the Procedural Schedule, App. A at 2.

<sup>23</sup> *Id.*, App. A at 3.

<sup>24</sup> Fed. Comm. Comm’n, *Declaratory Ruling*, FCC 18-178, WC Docket No. 08-7 (Dec. 12, 2018).

**2. Procedural Background**

This rulemaking was opened pursuant to Public Utilities (Pub. Util.) Code § 1708.5 and proceeded by notice, comment and briefing. On June 29, 2017, the Commission granted Petition 17-02-006 and issued an Order Instituting Rulemaking and a preliminary scoping memo to consider whether text messaging services should be subject to Public Purpose Program surcharges and user fees. On July 17, 2017, the assigned Administrative Law Judges (ALJs) (ALJ DeAngelis and ALJ Kline) issued an email ruling revising and clarifying the preliminary schedule for the proceeding. On August 18, 2017, The Utility Reform Network, The Greenlining Institute and Center for Accessible Technology (collectively, the “Joint Consumers”), CTIA and the California Cable & Telecommunications Association (CC&TA) filed comments in response to the questions in the preliminary scoping memo.

On August 24, 2017, the assigned ALJs set a prehearing conference (PHC) by ruling. On September 8, 2017, the assigned ALJs revised the commencement time for the PHC by ruling. On September 13, 2017, the assigned ALJs held a PHC to determine parties, discuss the scope, the schedule, and other procedural matters. At the PHC, the assigned ALJs granted motions for party status made by AT&T Mobility,<sup>25</sup> Sprint,<sup>26</sup> Verizon<sup>27</sup> and T-Mobile<sup>28</sup> (collectively, the “Carrier Parties”). On October 17, 2018, the assigned Commissioner (Commissioner Peterman) issued a scoping memo.

On February 21, 2018, ALJ Kline issued a ruling setting a schedule for comments on a Commission Communications Division staff paper and setting a briefing schedule

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<sup>25</sup> AT&T Mobility refers to the following entities: New Cingular Wireless PCS, LLC (U3060C); AT&T Mobility Wireless Operations Holdings, Inc. (U 3021 C); and Santa Barbara Cellular Systems, Ltd. (U3015C).

<sup>26</sup> Sprint refers to the following entities: Sprint Communications Company, L.P. (U5112C); Sprint Spectrum L.P. (U3062C); and Virgin Mobile USA, L.P. (U4327C).

<sup>27</sup> Cellco Partnership d/b/a Verizon Wireless (U3001C).

<sup>28</sup> T-Mobile West LLC d/b/a T-Mobile (U3056C).

(February Joint Ruling). On March 2, 2018, ALJ Kline granted CTIA's unopposed request for an extension of time to file comments and briefs by e-mail ruling. On March 23, 2018, parties filed opening comments to the February Joint Ruling.

On March 28, 2018, the Joint Consumers filed a motion to suspend the procedural schedule and shorten the response time to the same. On March 29, 2018, CTIA filed a response opposing the Joint Consumer's motion to shorten time to respond to the Joint Consumer's motion to suspend the procedural schedule. On March 30, 2018, ALJ Kline denied the Joint Consumer's motion to shorten time to respond to the motion to suspend the procedural schedule by email ruling. On April 6, 2018, parties filed reply comments to the February Joint Ruling.

On April 20, 2018, ALJ Kline denied the Joint Consumer's motion to suspend the procedural schedule and added additional information on Public Purpose Program financial data to the record. On April 25, 2018, ALJ Kline issued the Revised CD Staff Paper and Revised Public Purpose Program financial data. On May 4, 2018, parties filed comments on the revised CD staff paper and revised Public Purpose Program financial data.

On May 11, 2018, parties filed opening briefs. On May 17, 2018, the Joint Consumers filed a motion to strike portions of CC&TA's opening brief. On May 18, 2018, ALJ Kline set a shortened response time to respond to CC&TA's May 17, 2018 motion by email ruling, then subsequently granted CC&TA's request for an extension of time to respond to the Joint Consumer's motion by email ruling. On May 23, 2018, CC&TA submitted a response to the Joint Consumer's motion.

On May 23, 2018, ALJ Kline extended the deadline to file reply briefs in order to consider CC&TA's response. On May 25, 2018, ALJ Kline granted the Joint Consumer's motion to strike portions of CC&TA's opening brief. Parties filed reply briefs on June 5, 2018 and the matter was submitted.

The Commissioner Peterman issued a proposed decision on November 9, 2018, determining text messaging services should be subject to Public Purpose Program

surcharges and user fees based on the Commission's existing statutory authority. Parties filed comments and reply comments on the proposed decision on November 29, 2018 and December 4, 2018, respectively.

On December 12, 2018, the FCC Declaratory Ruling classified text messaging services an information services under the Act. On December 13, 2018, Commissioner Peterman issued an Order Extending Statutory Deadline which extended the statutory deadline from December 29, 2018 to June 29, 2019. On December 14, 2018, the Commissioner Peterman withdrew the November 9, 2018 proposed decision to consider the FCC's Declaratory Ruling. On January 7, 2019, the proceeding was reassigned from Commissioner Peterman to Commissioner Guzman Aceves.

The Commission has jurisdiction to proceed by notice and comment pursuant to Pub. Util. Code § 1708.5. Any rule adopted in this rulemaking will apply prospectively, consistent with Rule 6.3(a)<sup>29</sup> of the Commission's Rules of Practice and Procedure.<sup>30</sup>

### **3. Issues Before the Commission**

The scope of this proceeding is to determine whether text messaging services should be subject to Public Purpose Program surcharges and user fees, as set forth in the Order Instituting Rulemaking (OIR) for this proceeding.<sup>31</sup> The assigned Commissioner's October 10, 2017 scoping memo refined the scope of the proceeding pursuant to Rule 7.3(a) to consider the following sub-issues:

1. Whether the Commission may impose user fees on text messaging under the Commission's existing user fee collection mechanisms;

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<sup>29</sup> All references to "Rule" or "Rules" shall hereafter refer to the Commission's Rules of Practice and Procedure.

<sup>30</sup> Order Regarding Petition 17-02-006 and Order Instituting Rulemaking to Consider Whether Text Messaging Services are Subject to Public Purpose Program Surcharges (OIR) at 5.

<sup>31</sup> OIR at 5.

2. Whether the Commission may impose surcharges and user fees on text messaging under state law; and
3. Whether the Commission may impose surcharges and user fees on text messaging under federal law including §§ 253(b) and 254(f) of the Act, and current FCC regulations.

#### **4. Discussion**

In this Decision, the Commission declines to require the contribution of text messaging services revenue, including SMS and MMS, to the Public Purpose Program budget through assessment of surcharges, or to assess user fees on text messaging services revenue. First, this Decision discusses the Commission’s existing statutory jurisdiction with respect to assessing surcharges and user fees. Then, it discusses the impact of the FCC Declaratory Ruling’s classification of text messaging services as an “information service.”

##### **4.1 The Commission’s Jurisdiction Extends to “Telecommunications Services”**

We first consider the Commission’s existing statutory authority to collect Public Purpose Program surcharges on text messaging services revenue. Prior to the FCC’s Declaratory Ruling, the parties disagreed with regard to the Commission’s authority to collect surcharges on text messaging services revenue. CTIA and the Carrier Parties argue that the Commission’s general authority under Pub. Util. Code §§ 701, 451 and 709 do not empower the Commission to take action inconsistent with specific grants of authority provided by statutes related to the collection of Public Purpose Program surcharges. They argue that specific grants of authority to collect Public Purpose Program surcharges only authorize surcharges to be assessed on “intrastate telecommunications services.”<sup>32</sup>

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<sup>32</sup> Opening Brief of CTIA and Carrier Parties at 8-10.

CTIA also argues that assessing Public Purpose Program surcharges on text messaging would violate Pub. Util. Code § 871.5(d) because it would cause inequity, discrimination and competitive harm to text messaging providers in the “much larger messaging marketplace.”<sup>33</sup> CTIA compares traditional text messaging to over-the-top (OTT) messaging applications, such as Facebook Messenger, WhatsApp, Snapchat, Kik, Wickr, YikYak, Whisper and Google Hangouts.<sup>34</sup> CTIA also compares the competition between traditional text messaging and OTT applications to the competition between VoIP and traditional telephone service. CTIA cites to the FCC and California’s decision to impose universal surcharge obligations on VoIP in arguing that the obligations to contribute to universal service “should not fall differently on providers that compete with one another.”<sup>35</sup>

The Joint Consumers comment that the Commission has a broad grant of authority to regulate public utilities pursuant to Pub. Util. Code §§ 701<sup>36</sup> and 451.<sup>37</sup> They also argue the Commission has broad authority to “to assure the continued affordability and widespread availability of high-quality telecommunications services to all Californians” pursuant Pub. Util. Code § 709 by imposing Public Purpose Program surcharges on intrastate services provided by telecommunications carriers regardless of classification.

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<sup>33</sup> Opening Comments of CTIA (Aug. 18, 2017) at 16.

<sup>34</sup> *Id.* at 17.

<sup>35</sup> *Id.* at 18; see *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7541 ¶ 44 (2006); see A.B. 841 (2011), Bill Analysis, Senate Rules Committee, available at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0801-0850/ab\\_841\\_cfa\\_20110712\\_174315\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0801-0850/ab_841_cfa_20110712_174315_sen_floor.html).

<sup>36</sup> Pursuant to Pub. Util. Code § 701, “[t]he Commission may supersede and regulate every public utility in the State and may do all things, whether specifically designated in this part or in additional thereto, which are necessary and convenient in the exercise of such power and jurisdiction.”

<sup>37</sup> Pursuant to Pub. Util. Code § 451, the Commission has authority to ensure that “[a]ll charges should be just and reasonable.”

Joint Consumers point to Pub. Util. Code §§ 275, 276, 276.5, 285 and 879(b)<sup>38</sup> to argue that none of the statutes authorizing the Commission to collect surcharges for Public Purpose Programs limits the collection to a specific set of services.<sup>39</sup>

CC&TA points out that the Joint Consumers erroneously cite to Pub. Util. Code § 285 as evidence that the Commission may collect surcharges on other non-telecommunications services.<sup>40</sup> They argue that Pub. Util. Code § 285 is a grant of legislative authority to the Commission authorizing collection of surcharges on VoIP and no such statutory authorization is allowed for text messaging services.<sup>41</sup> CC&TA also echoes CTIA's comments with regard to funding under Pub. Util. Code § 879(b), by stating that this statute authorized Commission funding to provide text messaging services in Public Purpose Program but does authorize the collection of surcharge revenue from text messaging services.<sup>42</sup>

The Commission begins its review by examining the statutes authorizing the Commission's collection of surcharges for Public Purpose Programs, which include the CHCF-A, CHCF-B, Lifeline, CTF, CASF, and DDTP Fund. The statutes enabling the CHCF-A<sup>43, 44</sup> and the CHCF-B<sup>45, 46</sup> both have general language regarding the source of

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<sup>38</sup> Opening Comments of Joint Consumers (Aug. 18, 2017) at 10.

<sup>39</sup> Opening Brief of Joint Consumers at 16.

<sup>40</sup> Reply Comments of CC&TA (Aug. 28, 2017) at 4.

<sup>41</sup> *Id.* at 4.

<sup>42</sup> *Id.* at 5.

<sup>43</sup> The CHCF-A provides universal service support to small, independent telephone corporations to promote affordability and widespread availability of safe, reliable, high-quality communications services in rural areas of the state, including advanced services and broadband-capable facilities. Pub. Util. Code §§ 275.6(a) and 275.6(b)(5).

<sup>44</sup> Pub. Util. Code § 275 ("All revenues collected through surcharges by the Commission to fund the program specified in subdivision (a) shall be submitted to the commission pursuant to a schedule established by the Commission.")

funding for the programs, stating that “[a]ll revenues collected through surcharges authorized by the commission to fund the program specified in subdivision (a) shall be submitted to the commission pursuant to a schedule established by the commission.”

Similar to the CHCF-A and CHCF-B, the enabling statute for Lifeline<sup>47</sup> and the CTF<sup>48</sup> make no specific reference to the collection of funds through surcharges, both stating that “[a]ll revenues collected by telephone corporations in rates authorized by the commission to fund the program specified in subdivision (a) shall be submitted to the commission pursuant to a schedule established by the commission.”<sup>49</sup> The Lifeline enabling statute additionally states that “the Commission may change rates, funding requirements, and funding methods proposed by the telephone corporations in any manner necessary, including reasonably spreading the funding among the services offered by the telephone corporations, to meet the public interest.”<sup>50</sup>

Likewise, the CASF<sup>51</sup> enabling statute makes only a general reference to the surcharges used to fund the account, stating that “[t]he commission shall transfer the moneys received by the commission from the surcharge imposed to fund the accounts to

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<sup>45</sup> CHCF-B provides universal service support to telephone corporations where the cost of providing service exceeds rates charged by providers. (Pub. Util. Code §§ 276.5(a).) (This statute will expire effective January 1, 2019.)

<sup>46</sup> Pub. Util. Code § 276.

<sup>47</sup> Lifeline promotes “universal service by making basic telephone service affordable to low-income households through the creation of a lifeline class of service.” Pub. Util. Code § 871.5.

<sup>48</sup> CTF advances universal service by providing discounted rates to qualifying schools, community colleges, libraries hospitals, health clinics and community organizations. Pub. Util. Code § 280(a).

<sup>49</sup> Pub. Util. Code §§ 277, 280.

<sup>50</sup> Pub. Util. Code § 879(b).

<sup>51</sup> CASF encourages the “deployment of high-quality advanced communications services to all Californians.” Pub. Util. Code § 281.

the Controller for deposit in the California Advanced Services Fund.”<sup>52</sup> Finally, VoIP providers must submit surcharges on California intrastate revenues to support all six of the Commission’s Public Purpose Programs, with no limitation on the source of funding to intrastate telecommunications services since VoIP is an IP-enabled service which is unclassified under the Act.<sup>53</sup>

Only the DDTP Fund’s<sup>54</sup> enabling statutes limit the funding source to intrastate telecommunications services, stating that “[t]he commission shall establish a rate recovery mechanism through a surcharge not to exceed one-half of 1 percent uniformly applied to a subscriber’s intrastate telephone service, other than one-way radio paging service and universal telephone service, both within a service area and between service areas . . . .”<sup>55</sup>

Therefore, of the six Public Purpose Programs’ enabling statutes, only the DDTP statutes limit the payment of surcharges to “telephone services.” The term “telephone service” is broadly defined as any service provided by a telecommunication provider. A specified set of user-information transfer capabilities provided to a group of users. The telecommunication service provider has the responsibility for the acceptance, transmission, and delivery of the message.<sup>56</sup>

The Commission first compiled a comprehensive list of basic service elements in its universal service decision, D.95-07-052, later adopted by D.96-10-066, which were

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<sup>52</sup> Pub. Util. Code § 281.

<sup>53</sup> Pub. Util. Code § 285.

<sup>54</sup> DDTP is a program to provide a telecommunications device capable of serving the needs of customers who are deaf or hard of hearing. Pub. Util. Code § 2881(a).

<sup>55</sup> Pub. Util. Code §§278, 2881(g).

<sup>56</sup> Newton, Harry Newton’s Telecom Dictionary, 31st Updated and Expanded Edition (2018) at 1252.

not exclusive to “telecommunications services” as defined in the Act.<sup>57</sup> Subsequent updates to the Commission’s list of telephone services continue to include services unclassified under the Act.<sup>58</sup> Therefore, the limitation of the enabling statute for the DDTP does not define whether surcharges must be limited solely to intrastate “telecommunications services,” and not unclassified services, under the Act.

Next, we turn to the Commission’s broader enabling statutes, including Pub. Util. Code §§ 701, 709 and 451, to consider whether the Commission has discretionary authority to impose surcharges on unclassified services when enacting the AEUS. In examining these statutes, we note that “[the Commission] is not an ordinary administrative agency, but a constitutional body with broad legislative and judicial powers.”<sup>59</sup>

Pub. Util. Code § 701 grants the Commission sole authority to regulate intrastate telecommunications in California, stating:

The Commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part, or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.<sup>60</sup>

Pub. Util. Code § 451 creates a general obligation and authority for the Commission to keep consumer rates reasonable.

Under Pub. Util. Code § 709, the Commission is also tasked with encouraging the development and deployment of new technologies and the equitable provision of services in a way that efficiently meets consumer need and encourages the ubiquitous availability

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<sup>57</sup> D.96-06-066 at 18-20.

<sup>58</sup> See e.g., D.12-12-038 at App. A.

<sup>59</sup> *Wise v. Pacific Gas & Electric Co.* (1999) 77 Cal.App.4<sup>th</sup> 287, 300.

<sup>60</sup> Pub. Util. Code § 701.

of a wide choice of state-of-the art services as well as to assist in bridging the state's digital divide.

The Act, however, is silent regarding unclassified services telecommunications carriers offer. Until the FCC's December 12, 2018 Declaratory Ruling described below, text messaging was such an unclassified service.

With respect to user fees, public utilities are obligated to pay the user fees set forth in Pub. Util. Code §§ 401-410 and 431-435. These statutes provide, in pertinent part, that user fees are based on the gross intrastate revenues of the utility. Gross intrastate revenues are defined as "those revenues from a public utility subject to the jurisdiction of the commission and accounted for according to the uniform system of accounts maintained by the commission."

#### **4.2 The Commission Declines to Assess Surcharges or User Fees on Text Messaging Services Revenue**

On December 12, 2018, the FCC Declaratory Ruling classified text messaging, including SMS and MMS, as an "information service" and not a "commercial mobile service" (a form of "telecommunications service") under the Act.<sup>61</sup> The FCC described text messaging services as "a critical communications option for consumers. For many under 50, it is their main method of communicating."<sup>62</sup> The FCC Declaratory Ruling determined that classifying text messaging as an "information service" was in the public interest on the basis of protecting customers from unwanted text messages, and promoting innovation and investment in text messaging, without considering the impacts of the classification on federal and state universal service support.<sup>63</sup> In light of the FCC's

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<sup>61</sup> Declaratory Ruling at 1 para. 2.

<sup>62</sup> FCC Declaratory Ruling at 5, para. 12.

<sup>63</sup> Declaratory Ruling at 21 - 28, ("[T]he scope of contribution requirements to the Universal Service Fund is not within the scope of this proceeding. In any event, we reject the argument

*Footnote continued on next page*

ruling, the Commission declines to include text messaging among the services subject to surcharges and user fees at this time.

## 5. Comments on Proposed Decision

As provided by Rule 14.3 of the Commission's Rules of Practice and Procedure and Pub. Util. Code § 311(g)(1), the draft decision of the ALJ in this matter was mailed to the parties on December 21, 2018. Comments were filed on

January 10, 2019 by CTIA and the Carrier Parties (jointly), CC&TA and the Joint Consumers. Reply comments were filed on January 15, 2019 by CTIA and the Carrier Parties (jointly), CC&TA and the Joint Consumers.

Parties request the Commission adopt several revisions to the Proposed Decision (PD) in comments. First, the Joint Consumers urge the Commission to reopen the record and take additional comment on the impact of the FCC Declaratory Ruling, including the impact of this decision on carriers who failed to remit surcharges or user fees on text messaging services revenue prior to the FCC Declaratory Ruling.<sup>64</sup> CTIA and the Carrier Parties, and CC&TA support this decision's determination to close the proceeding.<sup>65</sup>

This decision does not adopt the Joint Consumer's recommendation to reopen the record to take additional comment on the FCC Declaratory Ruling or impacts on carriers who failed to remit surcharges or user fees on text messaging revenue in the past. The Commission gave judicial notice of the FCC Declaratory Ruling in the PD and provided parties sufficient opportunity to comment on the FCC Declaratory Ruling in comments

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that classifying wireless messaging services as information services will have a 'devastating' impact on the financial stability of the Universal Service Fund given that the Commission has not required text messaging revenues to be subject to federal universal service contribution requirements.")

<sup>64</sup> *Id.* at 3.

<sup>65</sup> Comments of CTIA and the Carrier Parties on the PD at 1; Opening Comments of CC&TA on the PD of Commissioner Peterman, dated December 21, 2018 (Opening Comments of CC&TA on PD) at 1.

on this decision. Also, the Commission's determination to decline to collect surcharges and user fees on text messaging services applies prospectively.

Second, CC&TA recommends removal of section 4.1 of the PD, including all discussion and analysis of state law related to the Commission's authority to collect surcharges for Public Purpose Programs, as unnecessary and unreasonable.<sup>66</sup> CC&TA also considers the discussion in section 4.1 overly broad, opining that the scope of issues is limited to text messaging services and including section 4.1 constitutes legal error.<sup>67</sup> The Joint Consumers object to removing section 4.1, as properly in the scope of this proceeding and providing history and context to the Commission's past practices of collecting surcharges and user fees on text messaging services.<sup>68</sup>

This decision declines to adopt CC&TA's recommendation to remove section 4.1. The scoping memo in this proceeding includes review of state and federal law related to text messaging services. It also states that "[c]ategorization of other services, such as whether voicemail or directory listing services are subject to public purpose program, is currently within the scope of this proceeding only to the extent it answer questions raised by issue 1 (whether text messages are subject to public purpose programs and user fees....)"<sup>69</sup> The discussion in section 4.1 is consistent with the scope of issues as stated in the scoping memo.

Third, CTIA and the Carrier Parties request the Commission modify the decision to reflect the date of issuance, rather than the date of publication in the federal register, as

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<sup>66</sup> Opening Comments of CC&TA on PD

<sup>67</sup> *Id.*

<sup>68</sup> Joint Consumer's Opening Comments on PD at 2.

<sup>69</sup> Scoping Memo and Ruling of Assigned Commissioner at 3.

the effective date of the FCC's Declaratory Ruling.<sup>70</sup> This decision adopts CTIA's clarification in section 1 (Factual Background) and Conclusion of Law (COL)1.

Finally, CTIA and the Carrier Parties request this decision delete Finding of Fact (FOF) 2 and FOF 3.<sup>71</sup> They argue it is inappropriate to include a factual finding of the Commission's past practices because MTS was subsequently found unconstitutional, and because discussion of the Commission's past practices is unsupported by the record in this proceeding.<sup>72</sup> The Joint Consumers argue FOF 2 and FOF 3 are supported by the record, factually accurate, and provide history and context to the Commission's treatment of text messaging revenue.<sup>73</sup>

This decision declines to delete the FOF 2 and FOF 3, as those FOFs are past Commission practices prior to a federal court finding that MTS was unconstitutional or the FCC Declaratory Ruling classifying text messaging services as "information services," which are currently under appeal. The FOFs are also accurate and supported by sufficient evidentiary record evidence.<sup>74</sup>

## **6. Assignment of Proceeding**

Commissioner Martha Guzman Aceves is the assigned Commissioner and Zita Kline is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. The Commission employs the AEUS to collect Public Purpose Program surcharges.

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<sup>70</sup> Comments of CTIA and the Carrier Parties on the PD at 2-3.

<sup>71</sup> *Id.* at 3-4.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 2-3.

<sup>74</sup> See e.g. ALJ's Ruling Revising Communications Division Staff Paper and Public Purpose Program Financial Data, and Updating the Procedural Schedule, App. A; Comments of the Joint Consumers in Response to Joint Ruling of Assigned Commissioner and ALJ. d

2. The Commission collected surcharges on bundled prepaid wireless services, which included text messaging services, under the MTS Act between January 2016 and November 2018.

3. Prepaid wireless carriers were assessed Public Purpose Program surcharges on the intrastate component of text messaging services through the Point of Sale Surcharge under the MTS Act between January 2016 and November 2018.

4. The Commission adopted six Public Purpose Programs to implement California's universal service, which consist of the following: 1) CHCF-A, 2) CHCF-B, 3) Lifeline, 4) DDTP, 5) CASF and 6) CTF.

5. California's Public Purpose Programs are authorized by Pub. Util. Code §§ 275, 276, 276.5, 285 and 879(b).

**Conclusions of Law**

1. The FCC classified text messaging services as "information services" under the Act, effective on the release date of the FCC Declaratory Ruling (FCC 18-178).

2. The Commission declines to exercise authority under state law to assess surcharges or user fees on text messaging services which are classified as "information services" under the Act.

**ORDER**

1. Text messaging services shall not be subject to Public Purpose Program surcharges and user fees.

2. Rulemaking 17-06-023 is closed.

This order is effective today.

Dated \_\_\_\_\_, at Sacramento, California.