

Decision 12-02-032 February 16, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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)

**MODIFIED PRESIDING OFFICER'S DECISION FINDING
TRACFONE WIRELESS, INC. ACTED UNLAWFULLY BY
FAILING TO PAY TELECOMMUNICATION USER FEES AND
PUBLIC PURPOSE PROGRAM SURCHARGES**

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1. Summary

The evidence establishes that TracFone Wireless, Inc. (TracFone) operates within California as a public utility and a telephone corporation under Cal. Const., art. XII, § 3; Pub. Util. Code §§ 216, 233, and 234.¹ The evidence further establishes that the user fees and the public purpose program surcharges² apply to the prepaid wireless services provided by TracFone and that TracFone is ultimately responsible for the payment of these user fees and surcharges. As such, we find that TracFone violated statutory law and Commission decisions in failing to ensure the payment of these surcharges. We will consider the issue of whether a penalty is appropriate and the amount owed, if any, in past due surcharges as a result of TracFone's violations in phase 2 of this proceeding. The proceeding remains open for consideration of phase 2.

¹ All statutory references are to the Public Utilities Code unless otherwise stated.

² As used herein, the user fees are described in §§ 401-410, 431-435 and the public purpose program 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.; California Advanced Services Fund § 281.

2. Issues

In accordance with § 1701.1(b), a scoping memo ruling was issued in this proceeding. The first scoping memo ruling was dated August 25, 2010³ and defined the scope as follows:

1. Whether PPP [public purpose program] surcharges and user fees are applicable to TracFone's prepaid wireless services.
2. If so, whether TracFone Wireless, Inc. (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.
3. If found in violation, whether TracFone should be subject to penalties pursuant to the provisions of Pub. Util. Code §§ 2100, et seq. for failure to pay PPP surcharges and user fees on its prepaid wireless services.⁴

An amended scoping memo was issued on September 30, 2010, which clarified, among other things, that the third issue set forth above would be addressed, if needed, after a decision is adopted by the Commission on the first and second issues above.⁵

3. Jurisdiction

The Commission may at any time institute an investigation on its own motion.⁶ On December 17, 2009, the Commission issued this investigation into

³ An amended scoping memo was issued on September 30, 2010 but did not modify the scope of the issues defined in this proceeding.

⁴ August 25, 2010 scoping memo ruling at 5-6.

⁵ September 30, 2010, I.09-12-016, amended scoping memo ruling at 6.

⁶ Rule 5.1 of the Commission's Rules of Practice and Procedure.

the alleged failure of TracFone to collect and remit user fees and PPP surcharges in violation of the laws, rules and regulations of this State. Pursuant to Ordering Paragraph 12 of this investigation, the Commission provided TracFone with notice of the issuance of this investigation on or about December 22, 2009.

4. Standard of Review and Burden of Proof

In this Commission investigation, the Commission's Consumer Protection and Safety Division (CPSD) has the burden of establishing by a preponderance of the evidence that TracFone has committed the alleged violations. CPSD does not have the burden to refute defenses as the respondent assumes the burden of proof as to its defenses.⁷ This is the usual practice in Commission adjudicatory proceedings, including investigations.⁸ 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 he is asserting.⁹ CPSD also filed a motion for summary adjudication.¹⁰ We review CPSD's motion for

⁷ *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. App. 4th 714, 725 (1st Dist. 2004) (when charged with wastewater permit violations, alleged polluter has burden of proving that statutory exceptions are available).

⁸ *Investigation on the Commission's owe motion into the operations, practices, and conduct of Qwest Communications Corporation*, Decision (D.) 03-01-087 at 8-9; *Investigation on the Commission's own motion into the operations, practices and conduct of the Communication Telesystems International*, D.97-05-089, 1997 Cal. PUC LEXIS 447 *66-67.

⁹ Evidence Code § 500.

summary adjudication under a higher standard of review. A motion for summary adjudication essentially requires the Commission to determine whether the party bringing the motion prevails based solely on undisputed facts and on matters of law. The Commission treats such motions as a court would treat motions for summary judgment or summary adjudication in civil practice.¹¹

5. Procedural History

At the Commission's public meeting on December 17, 2009, the Commission voted to issue Resolution T-17235, which, among other things, denied TracFone's request to be designated as an Eligible Telecommunications Carrier¹² (ETC) 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, and expressly had refused to collect and remit, PPP surcharges and user fees.¹³

¹⁰ CPSPD's motion for summary adjudication was originally filed on September 17, 2010 and amended to include additional citations on September 28, 2010. The amended document was referred to by CPSPD as a brief rather than a motion. All references to CPSPD's motion or brief will be to the September 28, 2010 version and referred to herein as "motion for summary adjudication."

¹¹ *State of California Department of Transportation v. Crow Winthrop Development*, D.01-08-061 at 7.

¹² TracFone sought designation as an ETC in its Advice Letter Number 1 filed on August 20, 2008. Section 214 (e)(2) of the Communications Act of 1934, as amended, and section 47 C.F.R. § 54.202, provides state commissions with the primary responsibility for designating ETCs. Only carriers that have been designated as ETCs are eligible to receive federal universal service support. Section 214(e)(2) of the Act gives state commissions the primary responsibility for granting ETC designations.

¹³ Resolution T-17235 at 29.

On December 17, 2009, the Commission also issued the above-captioned Order Instituting Investigation (December 17, 2009 OII). The December 17, 2009 OII sought to determine whether TracFone violated any provision of the Public Utilities Code, or our general orders (GO), other rules, or requirements by, as established by Resolution T-17235, failing and refusing to pay PPP surcharges and user fees on its intrastate telephone revenues.¹⁴

In response to the issuance of the December 17, 2009 OII, TracFone filed a motion for stay of the OII. TracFone also filed an application for rehearing of Resolution T-17235.¹⁵ The motion for stay argued that the potential scope of the proceeding overlapped with a Petition (P.) 09-12-018, filed on December 11, 2009 pursuant to § 1708.5 by Verizon Wireless.¹⁶ Verizon Wireless' petition sought Commission review of, among other things, the obligations of prepaid wireless carriers, generally, with respect to the user fees and PPP surcharges. TracFone and others commented that foundational legal issues set forth in the December 17, 2009 OII were more properly addressed on an industry-wide basis under the process outlined in Verizon Wireless' petition, P.09-12-018. The Commission eventually denied this petition. This occurred on July 29, 2010, by D.10-07-028. In the interim, however, other pertinent events occurred.

¹⁴ December 17, 2009 OII at 7.

¹⁵ Application 10-01-015 (Application of TracFone Wireless, Inc. (U4231C) for Rehearing of Resolution T-17235) filed January 19, 2010.

¹⁶ The following entities are doing business as Verizon Wireless in California: Cellco Partnership, California RSA No. 4 Limited Partnership, Fresno MSA Limited Partnership, GTE Mobilnet of California Limited Partnership, GTE Mobilnet of Santa Barbara Limited Partnership, Los Angeles SMSA Limited Partnership, Modoc RSA Limited Partnership, Sacramento Valley Limited Partnership, and Verizon Wireless LLC.

TracFone's application for rehearing of Resolution T-17235 essentially argued that the Commission committed legal error by finding that TracFone acted unlawfully without providing TracFone with an opportunity to be heard in an evidentiary hearing regarding the alleged violations of law.

On May 7, 2010, the Commission issued D.10-05-021. D.10-05-021 vacated Resolution T-17235. In vacating the resolution, the Commission also modified the December 17, 2009 OII to, among other things, include as allegations certain findings made in Resolution T-17235 regarding TracFone's failure to collect and remit the PPP surcharges and user fees. The Commission's order to vacate this resolution was made in response to the application for rehearing of the resolution filed by TracFone.

In modifying the December 17, 2009 OII, D.10-05-021 specifically added the following factual and legal allegations to this proceeding:

- a. Whether TracFone failed to collect and remit PPP surcharges and user fees, and if so, for what period of time, and the laws, rules, orders and directions that were impacted?
- b. If found in violation, should TracFone be fined pursuant to provisions of Public Utilities Code Section 2101, et seq.?¹⁷

In adding these two additional questions to this proceeding, D.10-05-021 also functioned to amend the preliminary scoping memo previously set forth in the December 17, 2009 OII.

Accordingly, as directed by Ordering Paragraph 8 of D.10-05-021, the assigned Administrative Law Judge (ALJ) held a prehearing conference on July 20, 2010 to inquire into the need for additional comments on the preliminary

¹⁷ D.10-05-021 at 2.

scope of the December 17, 2009 OII, as amended by D.10-05-021. During the prehearing conference, TracFone requested the opportunity to comment on the preliminary scoping memo, as amended by D.10-05-021. TracFone's request was granted and it filed opening comments on August 3, 2010.¹⁸ CPSD subsequently filed timely reply comments on August 13, 2010.

In comments on the scope of the OII, TracFone urged the Commission to delay issuing a scoping memo in this proceeding until, at a minimum, such time as the Commission identifies the scope of any potential rulemaking to be issued in response to above-referenced P.09-12-018, which addressed prepaid wireless issues on an industry-wide basis. However, on July 29, 2010, by D.10-07-028, the Commission denied P.09-12-018.¹⁹ In denying the petition, the Commission expressed an intent to issue a rulemaking in the near future on topics related to, but broader than, those set forth in the petition of Verizon Wireless. To date, no industry-wide rulemaking has been issued.

On August 25, 2010, the assigned Commissioner issued a scoping memo ruling in this OII and an amended scoping memo ruling on September 30, 2010.

CPSD filed a motion for summary adjudication on September 28, 2010. A response in opposition to the motion was filed by TracFone, and Verizon Wireless sought permission to appear as amicus curiae and for leave to file a brief. On January 11, 2011, the ALJ denied Verizon Wireless' request as premature. On January 26, 2011, the ALJ issued a ruling granting, in part, the motion for summary adjudication by CPSD.

¹⁸ July 20, 2010 (OII prehearing conference) Reporter's Transcript (RT) 55:5-8.

¹⁹ D.10-07-028 at 1-2.

In that January 26, 2011 ruling the ALJ found TracFone operated as a public utility telephone corporation under California law and determined that the issue of whether TracFone operates as a public utility and telephone corporation under California law would not be addressed at evidentiary hearing. By this decision, we confirm the ALJ's ruling.

Evidentiary hearings were held from February 1, 2011 through February 3, 2011. During the hearings, CPSD presented its witness, Ms. Tan-Walsh and TracFone presented Mr. Pollak and Mr. Salzman. In addition, both sides introduced prepared testimony and other exhibits.

TracFone and CPSD filed timely opening briefs in March 2011 and timely reply briefs in April 2011. TracFone's February 22, 2011 motion to admit the affidavit of Warren Townsend into evidence is granted. Verizon Wireless filed a motion for leave to appear as amicus curiae and for leave to file an amicus brief on March 16, 2011. The motion is denied today on the basis that Verizon Wireless' motion seeks to expand the scope of this proceeding. On March 16, 2011, CPSD filed a motion for official notice the December 21, 2009 testimony of Mr. Pollak before the Indiana Utility Regulatory Commission. This motion is denied. The parties filed various other motions ruled on separately by the ALJ and not specifically identified here. We adopt the all the rulings of the ALJ.

The Presiding Officer's Decision (POD) issued on November 18, 2011. TracFone filed an appeal on December 19, 2011. CPSD filed a response to the appeal on January 6, 2012. TracFone filed a motion for oral argument on January 12, 2012.

This proceeding remains open for consideration of the issues in phase 2.

6. Statement of Facts

On July 18, 1997, the Commission gave to TracFone's predecessor, Topp Telecom, Inc., a Wireless Registration Identification number, U4231C.²⁰ At some point between 1999 and 2001, Topp Telecom, Inc., began operating under the name TracFone Wireless, Inc.²¹ TracFone operates as a subsidiary of América Telecom, S.A.B. de C.V. (América Móvil), a telephone company based in Mexico City.²² TracFone describes itself as a reseller of telecommunication service, specifically of Commercial Mobile Radio Service (CMRS).²³ TracFone does not dispute that its wireless telecommunication services include California intrastate wireless calls.²⁴ TracFone also describes its services as prepaid wireless services,

²⁰ Exhibit TR-116 (Salzman), Att. 1 at 2; Exhibit CPSD-1 (Tan-Walsh,) Att. B at 2.

²¹ D.04-09-023, 2004 Cal. PUC LEXIS 607 *2-3: "In D.99-10-053, the Commission authorized Topp Telecomm [sic], Inc. (Topp), to acquire control of Comm South. Topp subsequently changed its name to TracFone ... On May 9, 2001, Comm South filed an advice letter in accordance with the procedures established by D.98-07-094 for authority to transfer control of Comm South from TracFone to Arbros."

²² CPSD Exhibit-1, Tan-Walsh at Atts. K.1 (Annual Report) and L.1 (Form 20-F of América Móvil, S.A.B. de C.V., filed with the Securities and Exchange Commission May 25, 2010, for fiscal year ended December 31, 2009.

²³ Declaration of F.J. Pollak in support of response of TracFone Wireless, Inc. to the motion of Consumer Protection & Safety Division for summary adjudication November 17, 2010 (herein Pollak Declaration November 17, 2010) at 3:9-10. Pollak's declaration is contained within the document submitted in support of TracFone's opposition to the Motion for Summary Adjudication and entitled Declaration of F.J. Pollak in Support of Response of TracFone Wireless, Inc. to the Motion of Consumer Protection & Safety Division for Summary Adjudication.

²⁴ CPSD's Motion for Summary Adjudication, Attachment Q-1 – Petition by TracFone for Designation as ETC in State of California dated August 7, 2008 at 9 and 16. TracFone states at 9 that "TracFone provides its subscribers with the ability to send and receive local phone calls wherever it provides service" and at 16 that "TracFone, through its resale of wireless services provided by its underlying vendors in California, provides service in every Zip Code in the State of California."

meaning that customers purchase specific quantities of wireless service in advance; no bill is rendered to the customer after TracFone provides service.²⁵ TracFone also describes its services as debit card services.²⁶

TracFone states it resells the wireless services of Verizon Wireless, AT&T Mobility, and T-Mobile²⁷ and that Verizon Wireless, AT&T Mobility, and T-Mobile are all telephone corporations and public utilities under California law.²⁸

TracFone explains that it uses the term “resale” to mean that, among other things, under its business model, it purchases wireless telecommunication services at wholesale prices from the above-noted companies²⁹ and, in what TracFone describes as a classic example of arbitrage, it resells these wireless services in the retail market.³⁰ Under its arbitrage business model, TracFone sets its own rate structures and, as such, does not offer its customers the exact rate structures of TracFone’s underlying carriers, Verizon Wireless, AT&T Mobility, and T-Mobile.³¹

²⁵ Exhibit TR-111 (Pollak) at 5:3-22.

²⁶ TracFone opening brief at 29, referring to February 2, 2011 RT 388:13-16 (Pollak).

²⁷ Pollak Declaration November 17, 2010 at 3:20-22.

²⁸ *Id.* at 4:6-8.

²⁹ *Id.* at 4:9.

³⁰ *Id.* at 4:15-17.

³¹ Pollak Declaration November 17, 2010 at Att. 1 (stating the customer’s terms and conditions of service and rates established by TracFone); CPSD motion for summary adjudication, Confidential Attachments S and U - Resale Service Agreements at “Resellers Obligation;” F31F Response of TracFone to motion for summary adjudication, Exhibit A at 6.

In reselling its wireless services, TracFone's California customers³² consider TracFone, not the underlying carriers, such as Verizon Wireless, AT&T Mobility, and T-Mobile, as their wireless carrier for customer service issues.³³

TracFone's prepaid wireless service is marketed and sold under the "TracFone," "Net10," and "SafeLink" brands.³⁴ In each case, the customer is required to purchase and activate a TracFone handset (a mobile phone).³⁵ Customers must load minutes onto the handset and are able to purchase additional minutes either on-line through TracFone's website or via prepaid cards.³⁶ As of June, 2010, TracFone had approximately 16 million subscribers nationwide,³⁷ including all three brands, and describes itself as "the largest operator in the U.S. prepaid cellular market."³⁸

According to TracFone, its "customer usage" is controlled using patented, proprietary software installed in each phone TracFone sells, and TracFone provides customer service and manages customers as though it were a

³² Pollak Declaration November 17, 2010 at 5:8.

³³ Pollak Declaration November 17, 2010 at Attachment 1 (stating the customer's terms and conditions of service and rates established by TracFone); CPSD motion for summary adjudication, Confidential Attachments S and U - Resale Service Agreements at "Resellers Obligation;" .³³ . Response of TracFone to motion for summary adjudication, Exhibit A at 6.

³⁴ CPSD Exhibit 1 (Tan-Walsh), Att. L.1 at 57. Safelink is TracFone's Lifeline brand, and not sold in California.

³⁵ Exhibit TR-111 at 7:18-23.

³⁶ *Id.* at 9-10.

³⁷ CPSD Exhibit 1, Att. K.1, Annual Report at 26.

³⁸ CPSD Exhibit 1, Att. L.1, Form 20-F at 57.

network-based carrier.³⁹ TracFone sells both its handsets (phones) and airtime (sometimes packaged as “monthly plans”) online⁴⁰ and through a variety of U.S. retail stores, including Mollie Stone’s and Walmart.⁴¹

In 2003, TracFone informed a Commission staff person, Mr. Hassan Mirza, in the Commission’s Telecommunications Division, of its understanding that TracFone “does not render any ‘billings’” which would be reportable on the then-existing forms used to report and calculate the user fees and PPP surcharges.⁴² Mr. Mirza is no longer employed by the Commission. TracFone did not seek clarification from the Commission of the terms or requirements of its Wireless Registration in this regard, including its obligation to collect and remit public purpose surcharges and user fees.⁴³ Instead, TracFone sought clarification exclusively through Commission staff.⁴⁴ TracFone engaged in one, possibly two, telephone conversations with Commission staff.⁴⁵

TracFone claims that the Commission’s staff stated that TracFone was exempt from payment of the user fees and public purpose surcharges.⁴⁶

³⁹ *Id.*, compare Exhibit TR-111 at 11.

⁴⁰ Exhibit TR-111 at 9-10.

⁴¹ *Id.* at 5.

⁴² TracFone opening brief at 3-4; Exhibit CPSD-1 (Tan-Walsh) March 24, 2003 letter from TracFone counsel to staff person Hassan Mirza (Att. C), attached to April 22, 2009 (Att. E).

⁴³ TracFone opening brief at 4.

⁴⁴ *Id.*

⁴⁵ February 3, 2011 RT 557:2-12, 569:7-10.

⁴⁶ Exhibit TR-116:10-13 (Salzman).

TracFone further claims that the Commission's staff statements are equivalent to the positions adopted by the Commission.⁴⁷

However, the content of the staff's statements were never adopted by the Commission.⁴⁸ Additionally, TracFone never requested that the Commission adopt the staff's statements via, for example, approval of a waiver of the user fees or surcharges.⁴⁹

By electronic mail dated May 1, 2009, the Commission staff informed TracFone that the user fees and surcharges did apply to TracFone's services.⁵⁰ The Commission subsequently issued this Investigation proceeding, as described in more detail above, to determine whether the user fees and surcharges apply to TracFone's service and the extent of TracFone's obligation to pay. The amount of past due surcharges owed by TracFone and an appropriate penalty, if any, is the subject of phase 2 of this proceeding.

7. TracFone is a Public Utility and Telephone Corporation Under the Public Utilities Code

The Commission confirms the ALJ's ruling issued in this proceeding and dated January 26, 2011. In adopting the ALJ's ruling, we reviewed the record, the applicable law, and applied the standard of review set forth in Code of Civil Procedure Section 437c. Under this code section and related Commission decisions, the moving party in a summary adjudication motion bears the initial

⁴⁷ TracFone opening brief at 4; February 3, 2011 RT 557:2-12, 569:7-10.

⁴⁸ *Id.*

⁴⁹ TracFone opening brief at 4.

⁵⁰ TracFone opening brief at 3, referring to Exhibit TR-116 (Salzman), Att. 11 at 1 and Exhibit CPSD-1 (Tan-Walsh), Att. F.

burden of proving that there are no triable issues regarding any material facts and that the moving party is entitled to a judgment as a matter of law.⁵¹

The January 26, 2011 ALJ's ruling found no triable issues on any material facts as to whether TracFone operates in California as a public utility and a telephone corporation. The ruling further found that, as a matter of law, TracFone is a California public utility and a telephone corporation under Cal. Const., art. XII, § 3; Pub. Util. Code §§ 216, 233, and 234. We agree with the conclusions of in the ALJ's ruling and adopt it today.

The ALJ's ruling indicated that TracFone's public utility status would be addressed in more detail in the final decision. Today we strengthen the findings set forth in the ALJ's ruling by including an analysis of TracFone's services within California under the dedication requirement.⁵²

The California Supreme Court has determined that "the essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character."⁵³ As long as its services are made available on the same terms (*Thayer v. California Development Company*, 164 Cal. 117, 128), and to substantially all who have sought such use, dedication to public use may be implied.⁵⁴ TracFone's services are sold at many retail establishments throughout

⁵¹ *State of California Department of Transportation, Cox California Telecom dba Cox Communications, et. al., v. Crow Winthrop Development and Pacific Bell*, D.01-08-061 at 7, citing to *Westcom Long Distance v. Pacific Bell*, D.94-04-082.

⁵² *Thayer v. California Development Company*, 164 Cal. 117 (1912).

⁵³ *Id.* 164 Cal. 117, 127.

⁵⁴ *Western Canal Co. v. Railroad Commission*, 216 Cal. 639, 289 U.S. 742, cert. denied.

California,⁵⁵ via the internet,⁵⁶ and by calling TracFone's customer care center.⁵⁷ As such, TracFone's services are open to the public and available to substantially all who seek such service. Accordingly, TracFone's telecommunication services are dedicated to the public use and, under this dedication test, TracFone operates as a public utility in California.

TracFone filed testimony and legal briefing on whether it operated as a public utility on November 18, 2010 in response to a CPSD's Motion for Summary Adjudication.⁵⁸ The facts and legal arguments presented by TracFone in these pleadings were addressed in the January 26, 2011 ruling. We now address the additional legal arguments and facts presented by TracFone after January 26, 2011 regarding its public utility status. TracFone submitted additional information in prepared testimony prior to the February 2011 evidentiary hearings. TracFone's brief addresses the legal argument related to public utility status at footnote 19 in its March 16, 2011 opening brief. Footnote 19 refers to Exhibit TR-111 (Pollak).⁵⁹ TracFone asserts that the testimony referenced at footnote 191 presents "evidence demonstrating that it

⁵⁵ Exhibit TR-111 at 5:7-8.

⁵⁶ February 2, 2010 RT 324:25.

⁵⁷ February 2, 2010 RT 327:10.

⁵⁸ CPSD's motion was originally filed on September 17, 2010 and amended to include additional citations on September 28, 2010. The amended document was referred to by CPSD as a brief rather than a motion. All references to CPSD's motion or brief will be to the September 28, 2010 version and referred to herein as Motion for Summary Adjudication.

⁵⁹ TracFone opening brief at 56, fn. 191 provides in full as follows: "See e.g., Exh. TR-111 (Pollak), pp. 10:21-11:11 and 13:16-15:5."

did not fit within the statutory definition of a California public utility.”⁶⁰ We address this argument below.

In prepared testimony, TracFone’s principle argument against finding it a public utility is based the language in §§ 233 and 234. Referring to the relevant material cited in footnote 191, TracFone’s witness Pollak summarizes the argument that TracFone is not a public utility as follows:

...in California, companies who are telephone corporations are deemed to be public utilities, and that ‘telephone corporation’ is defined by the Public Utilities Code as entities which own, control, operate, or manage lines for compensation within California. Even though the term ‘lines’ has been broadly defined to include conduits, ducts, poles, wires, cables, instruments, and appliances, and other real estate, fixtures, and personal property managed in connection with or to facilitate communication by telephones, TracFone does not own, control, operate or manage anything in California in connection with or to facilitate communication by telephones.⁶¹

Based upon TracFone’s analysis of §§ 233 and 234, TracFone concludes that it is not a public utility under California law.⁶²

TracFone’s interpretation of this statutory language is incorrect. First, it is well-established that resellers of telecommunication services operate as public utilities in California.⁶³ TracFone’s business model is consistent with a reseller of

⁶⁰ TracFone opening brief at 56.

⁶¹ Exhibit TR-111 13-14 (Pollak).

⁶² Exhibit TR-111 14 (Pollak).

⁶³ The January 26, 2011 ruling provides, “Commission precedent establishes that telecommunications entities that operate on a non-facilities basis and that resell telecommunications services to end user customers under their own name and rate

Footnote continued on next page

facilities-based service and TracFone fails to provide any reasons why its resale operation should not be deemed a public utility.

Second, TracFone's argument fails to address the definition of public utility status as set forth in *Thayer v. California Development Company*, 164 Cal. 117. As explained in the ALJ's Ruling, the Commission has interpreted the language "owning, controlling, operating or managing any line in California," to mean entering into an arrangement with facilities-based carriers to operate on a non-facilities basis and resell the telecommunications services to end user customers under their own name and rate structure to fall within the definition of public utility and telephone corporation.⁶⁴ Thus, ownership of property is not the sole defining characteristic of public utility status. Public utility status has routinely been established upon lease arrangements. In the classic resale arrangement, an entity leases equipment (rather than obtaining ownership rights) and uses this leased property to provide services to the general public. In the case of TracFone, it relies upon lease arrangements to provide wireless telecommunication services to customers. From the customer's perspective, TracFone provides telephone service to its customers.

Accordingly, TracFone's additional testimony and legal arguments fail to refute the finding of the ALJ that TracFone operates as a public utility and telephone corporation under applicable California law.

structure fall within the definition of public utility and telephone corporation. D.92-06-069, 1992 Cal. PUC LEXIS 972 *9, 44 CPUC2d 747; *see also* D.95-01-044."

⁶⁴ D.92-06-069, 1992 Cal. PUC LEXIS 972 *9, 44 CPUC2d 747; *see also* D.95-01-044.

8. All Public Utility Telephone Corporations, Including TracFone, Must Pay the User Fees Set Forth in Pub. Util. Code §§ 401-410, 431-435

Public utility telephone corporations are obligated to pay the user fees set forth in §§ 401-410, 431-435. The statutory law provides, in pertinent part, “The Legislature further finds and declares that funding the commission by means of a reasonable fee imposed upon each common carrier and business related thereto, each public utility that the commission regulates, ...is in the public interest.”⁶⁵

The statutory law contains many other references to confirm this conclusion. For example, § 431 provides that the user fee is “to be paid by every” telephone corporation and other public utility providing service directly to customers.⁶⁶ Commission decisions and resolutions lend further support to this conclusion.

The Wireless Registration Letter dated July 18, 1997, which authorized TracFone⁶⁷ to resell cellular service to the public in California states that TracFone “shall comply with PUC Code Section 401, *et seq.*,”⁶⁸ The July 18, 1997 letter further provides that TracFone’s failure to remit the fees referenced in the letter, including the §§ 401 *et seq.* user fees, may result in revocation of TracFone’s authority to provide resold wireless services within California.⁶⁹

⁶⁵ § 401.

⁶⁶ § 431.

⁶⁷ Exhibit CPSD-1, Att. A, July 18, 1997 Wireless Registration Letter states that “Topp Telecom, Inc. may begin to resell cellular service to the public in California.”

⁶⁸ CPSD Exhibit-1, Att. A, July 18, 1997 Wireless Registration Letter.

⁶⁹ *Id.*

In presenting its argument in support of finding TracFone's services subject to §§ 401 et seq., CPSD states that "California law makes it clear that all telephone corporations must pay a small percentage of their intrastate revenue as a user fee to finance the Commission's oversight of all utilities."⁷⁰ Indeed, TracFone seems to concede that the obligation for an entity to pay the user fee may follow from a determination of that entity's status as a public utility. TracFone states "...the obligation to pay the user fee, unlike the obligation to pay the PPP surcharges, more closely follows from an entity's public utility status."⁷¹ Nevertheless, TracFone also suggests that it is unclear whether the user fees apply to its services because, according to TracFone, it does not fit within the definition of a public utility.⁷²

In response to TracFone's suggestion that its obligation to pay is unclear, we revisit our discussion above and the findings in the ALJ's January 26, 2011 ruling. As our discussion above indicates, we find TracFone a public utility telephone corporation in California. In reviewing the application of §§ 401 et seq. to TracFone and its prepaid wireless services, we are guided by a principal rule of statutory construction, that in examining and interpreting the words of a statute, courts are guided by the plain meaning of the statutory language and courts will adopt a literal interpretation unless it is repugnant to the obvious

⁷⁰ CPSD opening brief at 11.

⁷¹ TracFone opening brief at 57.

⁷² Exhibit TR-111 (Pollak) 16:13-15. "In the early years of the company, TracFone did pay user fees to the Commission. In 2003, as part of an overall review of our tax programs, TracFone determined that it should not have paid these fees because it was not a California public utility."

purpose of the statute.⁷³ The plain language of the statute, as quoted above, applies to all telephone corporations. We have found that TracFone operates as a public utility telephone corporation within California. No exceptions to the application of the user fees to public utilities are found in the statute. Furthermore, no exceptions are found in Commission decisions.

Accordingly, we find that TracFone, as a public utility telephone corporation, is obligated to remit the user fees set forth in §§ 401-410, 431-435 and that TracFone is in violation of state law for failure to pay the user fees set forth in §§ 401-410, 431-435.

9. The Universal Lifeline Surcharge Set Forth in Pub. Util. Code §§ 871 et seq. Applies to TracFone's Prepaid Wireless Services

CPSD asserts that TracFone violated §§ 871 et seq. and related Commission decisions by failing to remit the universal lifeline surcharge.⁷⁴ TracFone responds that the surcharge is not applicable to its prepaid wireless service and, as a result, it has no obligation to remit the surcharge. For the reasons set forth below, we find that the surcharge applies to TracFone's services and that TracFone is ultimately responsible for payment of this surcharge.

⁷³ Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735.

⁷⁴ The briefs filed by CPSD and TracFone address all of the Commission surcharges at issue in this proceeding concurrently and collectively refers to these surcharges as the public purpose program surcharges. The discussion below focuses solely on §§ 871 et seq. In subsequent sections of this decision, we address the remaining public purpose program surcharges at issue in this proceeding. They are addressed individually here because the statutory language, while similar, is not always exactly same.

9.1. Section 871 et seq. Delegates to the Commission the Power to Establish a Funding Mechanism for the Universal Service Surcharge

Our analysis starts with statutory law. Section 871 et seq., known as the Moore Universal Telephone Service Act, creates the statutory framework for the universal lifeline surcharge, providing, in pertinent part, that “The furnishing of lifeline telephone service is in the public interest and should be supported fairly and equitably by every telephone corporation”⁷⁵

TracFone asserts it is not responsible for the universal lifeline surcharge because, first, the statute delegates to the Commission authority to define, among other things, who has to pay the surcharge and the types of services applicable to the surcharge and, second, based on this authority, the Commission has adopted exclusions that extend to wireless prepaid calls.⁷⁶ CPSD asserts that the language of §§ 871 et seq. is clear -- all telecommunication services, including prepaid wireless, are subject to the surcharge under the statutory language, unless specifically excluded by the Commission.⁷⁷ To resolve the parties’ conflicting interpretation of the statute, we turn to the rules of statutory construction.

As noted above, it is well-established that in examining and interpreting the words of a statute, courts are guided by the plain meaning of the statutory language and courts will adopt a literal interpretation unless it is repugnant to

⁷⁵ § 871.5(d).

⁷⁶ TracFone opening brief at 21-23: “From our review of the statutes creating the California public purpose programs, however, it is clear that there is no specific legislative mandate on how the public programs are to be funded.”

⁷⁷ CPSD opening brief at 11-12: “The law is clear: *all* telephone corporations have this duty.” (Italics in original.)

the obvious purpose of the statute.⁷⁸ The plain language of the statute does not specifically identify either the types of public utilities that must collect the surcharges or the types of utility services to which the surcharges apply.

The statute, instead, provides the Commission with the authority to implement the program⁷⁹ and to develop a funding mechanism for the program.⁸⁰ As such, we find that the statutory language does not fully address the question of whether TracFone is subject to the surcharge. As suggested by TracFone, the statute delegates to the Commission the authority to decide these matters. Accordingly, we now turn to the decisions of the Commission implementing funding for the surcharge for further guidance on the question of whether TracFone is obligated to pay this surcharge.

9.2. Commission Decisions Establish that the Universal Lifeline Surcharge Applies to Cellular Services, such as TracFone's

The first Commission decision to implement the funding for the universal lifeline surcharge was D.84-04-053.⁸¹ In D.84-04-053, the Commission clarified that the purpose of the surcharge is to provide affordable local telephone service

⁷⁸ Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735.

⁷⁹ § 871.5(d): "...the commission, in administering the lifeline telephone service program, should implement the program in a way that is equitable, nondiscriminatory, and without competitive consequences for the telecommunications industry in California."

⁸⁰ § 879.5: "...the commission shall issue its initial order adopting required rates and funding requirements not later than October 31, 1987...."

⁸¹ D.84-04-053 implemented the Moore Universal Telephone Service Act (Assembly Bill 1348, ch. 1143, Stats. 1983) which became law in September 1983 and described the Act as the legislature's response to potential increases in telephone bills due to the breakup of American Telephone and Telegraph Company's Bell System.

for the needy, the invalid, the elderly, and rural customers and, in describing its responsibilities under statutory law, the Commission found that the statute mandated the Commission to establish a subsidized telephone service and to fund the subsidized service with what the Commission described as a “limited tax on suppliers of intrastate telecommunications service.”⁸² Importantly, for purpose of the issues presented here, the Commission further found that its responsibility to establish a funding mechanism reasonably included the identification of the services subject to the surcharge.⁸³ Accordingly, in this 1984 decision, the Commission made it clear that it acted within its authority under the statute when deciding the types of public utilities or the specific utility services subject to the surcharge.

In addressing this matter further, the Commission in 1984 determined that all interLATA intrastate telecommunication services were subject to the surcharge. In 1984, the Commission also acknowledged that it had the discretion under statutory law to apply the surcharge more broadly to all intrastate services. The Commission would later expand the scope of telecommunication services subject to the surcharge⁸⁴ but, at least in 1984, no need existed for a

⁸² D.84-04-053, 1984 Cal. PUC LEXIS 1314 *1.

⁸³ *Id.* *3.

⁸⁴ *Id.* *22-24: “The Act defines intrastate telecommunications service as primarily service for which there is a toll charge plus certain limited telecommunications between exchanges. From information filed with us by the telephone companies, primarily Pacific Bell, General Telephone, and Continental, it appears that Moore Act services can be financed with a tax on only interLATA intrastate services plus intrastate services not defined by LATA boundaries. During the first year, however, we will set the tax at the maximum 4% so that we can be reasonably assured the program will support itself. We recognize that we may later have to include intraLATA intrastate services if the tax does not generate enough to fund the program.”

broad application because the then-incumbent local exchange carriers provided their own subsidized local service to lower income customers.⁸⁵ D.84-11-028 also served to adopt Commission's GO 153, where the Commission described the services subject to the surcharge as "suppliers of intrastate interLATA telecommunications services."⁸⁶

Since the Commission's initial implementation order in 1984, the types of telecommunication services subject to the surcharge have evolved as technology has changed. In D.94-09-065, issued approximately 10 years later, the Commission extended the application of the surcharge to include all intraLATA services and other services, stating that the surcharge applied to "All end-users of every [Local Exchange Carrier] LEC, [Interexchange Carrier] IEC, cellular, and paging company in the state, including basic exchange customers...."⁸⁷ The Commission explicitly included cellular service, such as TracFone's, as one of the services subject to the surcharge. The Commission confirmed this determination in D.96-10-066.⁸⁸

Thus, based on the language in D.94-09-065 and D.96-10-066 pertaining to cellular service, we find that the surcharge applies to TracFone's cellular service, unless one of the exceptions discussed below applies.

⁸⁵ D.84-04-053, 1984 Cal. PUC LEXIS 1314 *22-24.

⁸⁶ *Id.* 897 *6-7.

⁸⁷ *Id.* 681.

⁸⁸ *Id.* 1046 *289.

9.3. Commission Decisions Establish Narrow Exceptions to the Application of the Universal Lifeline Surcharge to Cellular Service

In D.94-09-065, the Commission adopted certain exceptions to the application of the surcharge.⁸⁹ The exceptions included coin-sent paid calling, one-way radio paging, Universal Lifeline Telephone Service (ULTS) billing, and then-existing contracts.⁹⁰ Our discussion here will focus on the “coin-sent paid calling” and the later adopted “debit card” exceptions because TracFone’s argument first relies upon an analogy between the coin-sent paid calling services (excepted in D.94-09-065) and its wireless prepaid services,⁹¹ and then focuses on another exception adopted a few years later in 1996, the debit card exemption.⁹² These exceptions are memorialized in the Commission’s GO 153.⁹³ As a result, we also address GO 153 below.

9.4. The Commission’s Coin-Sent Paid Calling Exception is Narrow and does not Exempt all Unbilled Services from the Universal Lifeline Surcharge

TracFone asserts that the coin-sent paid calling exception supports the exception of its wireless service from the application of the surcharge because, in D.94-09-065, D.96-10-066, and GO 153, the Commission intended to draw a distinction between revenue derived from billed services and revenue derived

⁸⁹ D.94-09-065, 1994 Cal. PUC LEXIS 681 *131.

⁹⁰ *Id.*

⁹¹ TracFone opening brief at 26-29.

⁹² D.96-10-066, 1996 Cal PUC LEXIS 1046 *289.

⁹³ D.84-11-028, 1984 Cal. PUC LEXIS 897.

from unbilled services, including services such as its prepaid wireless service.⁹⁴ TracFone's argument rests, in part, on the Commission's statement in D.94-09-065 that "[i]t is reasonable to exempt from the surcharge coin-sent paid calling, because no bills are rendered for those calls."⁹⁵ TracFone reasons that, because its prepaid wireless services are similar to coin-sent paid calling and the later-adopted debit card exception in that no bills are rendered for any of these services, its prepaid wireless services are exempt from the surcharge as well.⁹⁶

The Commission did, as TracFone points out, refer to the non-billed nature of the coin-sent paid calls in adopting this exemption in D.94-09-065.⁹⁷ However, we find no support in our prior decisions for TracFone's assertion that the Commission intended in 1994 to draw a distinction for purposes of applying the surcharge between intrastate revenue derived from billed services and intrastate revenue derived from unbilled services.

To evaluate the strength of TracFone's argument which rests, in part, on D.94-09-065, we first turn to the Commission's description in this 1994 decision of the scope of the customer base subject to the surcharge. The Commission describes the scope of its preferred customer base as the "widest possible customer base" and stated that narrowly applying the surcharge would be unfair

⁹⁴ TracFone opening brief at 25.

⁹⁵ TracFone opening brief at 29, *quoting from* D.94-09-065, 1994 Cal. PUC LEXIS 681 *130-131.

⁹⁶ *Id.* at 26-29.

⁹⁷ No similar statement was made in adopting the debit card exemption. The debit card exemption is discussed in more detail herein.

to competitors.⁹⁸ In seeking to act consistent with the Commission's preferred "widest possible" scope for the customer base, we find TracFone's argument unconvincing that the Commission intended the coin-sent paid calling exception to extend to all unbilled or prepaid services. If the Commission intended such a result regarding "unbilled" services, the Commission would have simply stated that intent.

We find that the Commission carved out a single exception and stated its intent to apply the surcharge to a broad billing base. TracFone's interpretation of the Commission language in D.94-09-065 to apply to all unbilled services is based on conjecture and not consistent with Commission's explicit directives in that decision to broadly apply the surcharge.

Furthermore, TracFone's reliance on the Commission's coin-sent paid calling exemption to exempt all unbilled service leads to absurd results. For instance, a carrier or customer could arrange for paying for all its telecommunication service without bills simply to avoid the surcharge. While TracFone asserts it did not engage in such conduct,⁹⁹ such a strategy would diminish the scope of the customer base, a result directly contrary to the Commission's intention of avoiding a narrowly applied surcharge. We seek to interpret Commission decisions to avoid absurd result.

⁹⁸ D.94-09-065, Conclusion of Law 230, 1994 Cal. PUC LEXIS 681 (Part Two) *130, *192-193.

⁹⁹ TracFone reply brief at 35; Exhibit TR-111, 14-15; Pollak explains that TracFone did not structure its business to avoid surcharges.

9.5. The Commission's Debit Card Exemption is Narrow and does not Exempt All Prepaid Wireless Svcs from the Universal Service Surcharge

TracFone relies on the later-adopted debit card calling exemption to bolster its argument that the Commission intended to exempt all unbilled services from the surcharge. The debit card exemption first appeared in D.96-10-066.¹⁰⁰ At that time, the Commission provided no explanation for the rationale for this additional exemption.¹⁰¹ Nevertheless, TracFone argues that the Commission's rationale for exempting debit card services is that no bills are rendered for these calls.¹⁰² We disagree with TracFone's conclusion.

While the Commission in D.94-09-065 provided some, albeit minimal, insight into the rationale for the coin-sent paid exclusion as being related to the absence of billed services, it provided no rationale for the debit card exclusion which was first announced in D.96-10-066.¹⁰³ As such, in the absence of any statements by the Commission on this topic, TracFone's assertion that the debit card exemption is within TracFone's rationale - no bills - for the coin-sent paid calling exemption fails.

Moreover, in the absence of explicit Commission rationale for the debit card exemption, TracFone's assertions that the Commission intended to include its prepaid wireless services within the debit card exception is also unconvincing. As TracFone points out, similarities exist between its prepaid wireless service

¹⁰⁰ D.96-10-066, 1996 Cal PUC LEXIS 1046 *289.

¹⁰¹ *Id.*

¹⁰² TracFone opening brief at 26.

¹⁰³ D.96-10-066, 1996 Cal PUC LEXIS 1046 *289.

and debit card service but differences exist as well. Regarding the similarities, TracFone states that:

TracFone airtime cards are debit cards, and in all critical respects, operate in the same manner as other providers' debit cards. (Footnote omitted.) Most importantly, like all debit card services, TracFone's prepaid wireless is not a service for which bills are sent to the consumer subsequent to use. As explained above, the lack of billing subsequent to use is the only salient feature of debit cards identified by the Commission in carving out the exclusion for coin-sent paid telephone calls (coin in box) and debit card calls in 10.5.1.3 of GO 153.¹⁰⁴

TracFone also points out that its prepaid services are sold at the same retail vendors of many debit card services.¹⁰⁵ Regarding the differences, TracFone acknowledges that its services are sold with a handset (a phone) and each handset is assigned a telephone number to use with its prepaid airtime.¹⁰⁶ In addition, unlike debit cards, which can be used from any phone, TracFone's wireless prepaid cards only function from a TracFone handset.¹⁰⁷

TracFone concludes that the similarities justify its reliance on the debit card exception as the basis for the same exemption for its prepaid wireless service. We disagree. The differences between the two types of services are material. As noted above, TracFone's prepaid wireless services include a telephone number and must be used with a TracFone handset. Essentially, the result is equivalent to a dial tone access and a full service telephone offering. In

¹⁰⁴ TracFone opening brief at 34.

¹⁰⁵ *Id.* at 35.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 35 and fn. 114; CPSD opening brief at 19-21.

comparison, debit cards provide a very limited type of telecommunications service. As such, TracFone's service fails to fall within the debit card exemption to the universal lifeline surcharge.

For all these reasons, we find that the universal lifeline surcharge set forth in §§ 871 et seq. and related Commission decisions applies to TracFone's prepaid wireless services, and that TracFone acted unlawfully by failing to pay this surcharge.

9.6. Regulated Utilities, not Customers, are Ultimately Responsible for Payment of the Universal Lifeline Surcharge

TracFone claims that, even if the universal lifeline surcharge applies to its prepaid wireless services, that its customers, not TracFone, are ultimately responsible for payment. TracFone's argument rests on D.94-09-065. TracFone claims that in this 1994 decision, the Commission adopted a shift from the telecommunication carriers being responsible for the funding of the surcharge to end-users being responsible for this funding.¹⁰⁸ TracFone argues that, based on this shift in 1994 to end-user responsibility, the surcharge cannot apply to its prepaid service because there is "no way to collect the end-user surcharge"¹⁰⁹ from the customer without a physical bill of some sort. Essentially, TracFone argues that the Commission needs to collect these amounts from the customers because TracFone is unable to.

TracFone does not provide a specific quote nor does TracFone cite to a conclusion of law from D.94-09-065 to support its assertion that the Commission

¹⁰⁸ TracFone opening brief at 26.

¹⁰⁹ *Id.*

adopted a shift for responsibility of the surcharge from the telecommunication carriers to end users. Instead, TracFone bases its argument on the Commission's discussion in D.94-09-065 on preserving the future funding of certain surcharges,¹¹⁰ including ULTS, as the scope of the billing base changes under the newly authorized competition in the local exchange market.¹¹¹ TracFone points to the language in GO 153 to support its conclusion.¹¹² CPSD points to different language pointing to the opposite conclusions.¹¹³

The issue presented here for resolution is whether carriers or customers have ultimate responsibility for ensuring that the surcharge is paid. This question is slightly different than the question posed by TracFone. TracFone questions whether, from an administrative perspective, the surcharge is calculated based on a customer's usage and paid for by the customer (and subsequently remitted by the carrier) or whether the surcharge is calculated based on the carrier's total intrastate revenues and paid for and remitted by the carrier. For the reasons presented below, we find that, regardless of how the surcharge is calculated, collected, and remitted, the carrier, not the customer, is ultimately responsible for payment of the surcharge.

Neither GO 153 nor the Commission decisions are dispositive on the question of ultimate responsibility for the surcharge. Instead, we look to the language of the statutes and find the utility is ultimately responsible for ensuring payment of the proper surcharge amount. It is the utility, not customers, over

¹¹⁰ Exhibit TR-105; TracFone opening brief at 26.

¹¹¹ D.94-09-065, 1994 Cal. PUC LEXIS 168 *124-132.

¹¹² TracFone opening brief at 28.

¹¹³ CPSD opening brief at 12-13.

whom the Commission exerts jurisdiction. We find that the Legislature did not intend to extend the Commission's jurisdiction to include all utility customers in the event of failure to pay surcharges and, as a result, we conclude that ultimate responsibility for payment of the surcharge must necessarily rest with the utility. TracFone supports its position by citing to D.94-09-065, GO 153 and actions by the Federal Communication Commission. However, TracFone's arguments fail to address the central issue here – ultimate responsibility for payment of the surcharge. Instead, TracFone addresses administrative matters that have no bearing on the question of TracFone's ultimate responsibility regarding the surcharge.

For these reasons, we find that, regardless of how the Commission designed the actual administration of the collection and remittance of this surcharge, TracFone is ultimately responsible for ensuring the payment of the surcharge to the appropriate fund; not customers. TracFone's failure to pay the universal lifeline surcharge is a violation of state law and Commission decisions, including, §§ 871 et seq.

10. Deaf and Disabled Telecommunications Program Fund

Similar to the statutory framework for §§ 871 et seq., discussed above, the statutory language for the Deaf and Disabled Telecommunications Program Fund delegates to the Commission the responsibility to develop a funding mechanism for this program. In § 2881(d), the Legislature directs the Commission to “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.” As a result, the Legislature left the funding mechanism for the Commission to develop.

The Commission, in turn, developed this funding mechanism in D.94-09-065, where the Commission stated that the surcharge applied to “All end-users of every LEC, IEC, cellular, and paging company in the state, including basic exchange customers....”¹¹⁴ The Commission explicitly included cellular service, such as TracFone’s, as one of the services subject to this surcharge. The Commission confirmed this determination in D.96-10-066.¹¹⁵ The Commission has also memorialized its determination in GO 153.¹¹⁶

TracFone argues that it is not responsible for the payment of the Deaf and Disabled Telecommunications Program surcharge for the same reasons that it is not responsible for the universal lifeline surcharge. TracFone’s central argument is that the debit card exemption, discussed above, serves to exempt its prepaid wireless services from the Deaf and Disabled Telecommunications Program surcharge. TracFone makes other more minor arguments as well. These arguments are all addressed above. We disagree with TracFone’s reasoning.

We find that TracFone is ultimately responsible for payment of the surcharge to fund the Deaf and Disabled Telecommunications Program set forth in §§ 2881 et seq. The relevant statutory framework for the Deaf and Disabled Telecommunications Program surcharge and the universal lifeline surcharge, above, are the same. As a result, our decision finding TracFone’s service subject to the universal lifeline surcharge and finding TracFone responsible for payment of the Deaf and Disabled Telecommunications Program surcharge is based on the same reasoning set forth above regarding the universal lifeline surcharge.

¹¹⁴ D.94-09-065, 1994 Cal. PUC LEXIS 681 *130.

¹¹⁵ D.96-10-066, 1996 Cal. PUC LEXIS 1046, App. B.

¹¹⁶ GO 153 at 10.1 and 10.5.

We further find TracFone acted unlawfully by failing to pay the Deaf and Disabled Telecommunications Program surcharge.

11. California High Cost Fund-A

Section 275 creates, among other things, a committee to advise the Commission on the development, implementation, and administration of a program to provide for transfer payments to small independent telephone corporations providing local exchange services in high-cost rural and small metropolitan areas.¹¹⁷ The program is referred to as the California High Cost Fund-A. Section 275 also delegates to the Commission the responsibility to develop a funding mechanism for this program.

The pertinent statutory language provides as follows: “[a]ll revenues collected by telephone corporation in rates authorized by the commission to fund the program...shall be submitted to the commission pursuant to a schedule established by the commission.”¹¹⁸

In D.94-09-065, the Commission found that “The funding for the CHCF [California High Cost Fund] will be by use of a surcharge on all end-users as adopted by this decision.”¹¹⁹ In D.94-09-065, the Commission explained that it adopted an “all end-user” base to include to the following: “All end-users of every LEC, IEC, cellular, and paging company in the state, including basic exchange customers....”¹²⁰

¹¹⁷ § 275(a).

¹¹⁸ § 275(b).

¹¹⁹ D.94-09-065, 1994 Cal. PUC LEXIS 681 *82.

¹²⁰ *Id.* *130.

Similar to the universal lifeline surcharge, discussed above, the Commission in D.94-09-065 explicitly included cellular service, such as TracFone's, as one of the services subject to the California High Cost Fund or CHCF, including the California High Cost Fund-A.

TracFone argues that it is not responsible for the payment of the California High Cost Fund-A surcharge for the same reasons that it is not responsible for the universal lifeline surcharge. TracFone's central argument is that the debit card exemption, discussed above, serves to exempt its prepaid wireless services from the California High Cost Fund-A surcharge. TracFone makes other more minor arguments as well. These arguments are all addressed above. We disagree with TracFone's reasoning.

We find that TracFone is ultimately responsible for payment of the surcharge to fund the California High Cost Fund-A set forth in §§ 275 et seq. The relevant statutory framework for the California High Cost Fund-A surcharge and the universal lifeline surcharge are the same. As a result, our decision finding TracFone's service subject to the California High Cost Fund-A surcharge and responsible for payment of the surcharge is based on the same reasoning set forth above regarding the universal lifeline surcharge. We further find TracFone acted unlawfully by failing to pay the California High Cost Fund-A surcharge.

12. California High Cost Fund-B

Section 276 creates, among other things, a committee to advise the Commission on the development, implementation, and administration of a program to provide for transfer payments to telephone corporations providing

local exchange services in high-cost areas.¹²¹ The program is referred to as the California High Cost Fund-B. Section 276 also delegates to the Commission the responsibility to develop a funding mechanism for this program.

The pertinent statutory language provides as follows: “[a]ll revenues collected by telephone corporations in rates authorized by the commission to fund the program...shall be submitted to the commission pursuant to a schedule established by the commission.”¹²²

In D.96-10-066, the Commission implemented a funding mechanism for the California High Cost Fund-B, finding that “all end-users of every LEC, IEC, cellular, and paging company in the state...” (including all CMRS providers, except for one way paging) should be included in the billing base....¹²³

Similar to the universal lifeline surcharge and the other surcharges, discussed above, the Commission in D.96-10-066 explicitly included cellular service, such as TracFone’s, as one of the services subject to the California High Cost Fund-B.

TracFone argues that it is not responsible for the payment of the California High Cost Fund-B surcharge for the same reasons that it is not responsible for the universal lifeline surcharge. TracFone’s central argument is that the debit card exemption, discussed above, serves to exempt its prepaid wireless services from the California High Cost Fund-B surcharge. TracFone makes other more minor arguments as well. These arguments are all addressed above. We disagree with TracFone’s reasoning.

¹²¹ § 276(a).

¹²² § 276(b).

¹²³ D.96-10-066, 1996 Cal. PUC LEXIS 1046 *288.

We find that TracFone is ultimately responsible for payment of the surcharge to fund the California High Cost Fund-B set forth in §§ 276 et seq. The relevant statutory framework for the universal lifeline surcharge and the California High Cost Fund-B are the same. As a result, our decision finding TracFone's service subject to the California High Cost Fund-B surcharge and responsible for payment of this surcharge is based on the reasoning set forth above regarding the universal lifeline surcharge. We further find TracFone acted unlawfully by failing to pay this California High Cost Fund-B surcharge.

13. California Teleconnect Fund

Section 280 requires the Commission to, among other things, "develop, implement, and administer a program to advance universal service by providing discounted rates to qualifying schools...libraries, hospitals, health clinics, and community organizations, consistent with Chapter 278 of Statutes of 1994."¹²⁴ This program is referred to as the California Teleconnect Fund. Section 280 also delegates to the Commission the responsibility to develop a funding mechanism for this program. The pertinent statutory language provides as follows: "[a]ll revenues collected by telephone corporations in rates authorized by the commission to fund the program...shall be submitted to the commission pursuant to a schedule established by the commission."¹²⁵

In D.96-10-066, the Commission implemented a funding mechanism for the California Teleconnect Fund and found that, similar to the California High

¹²⁴ § 280(a), referring to Chapter 278 of Statutes of 1994, which was AB 3643. AB 3643, chaptered on July 21, 1994, required the Commission to institute an investigation and open a proceeding to examine the current and future definitions of universal service.

¹²⁵ § 280(c).

Cost Fund-B “all end-users of every LEC, IEC, cellular, and paging company in the state...” (including all CMRS providers, except for one way paging) should be included in the billing base....”¹²⁶

Similar to the universal lifeline and the other surcharges, discussed above, the Commission in D.96-10-066 explicitly included cellular service, such as TracFone’s, as one of the services subject to the California Teleconnect Fund.

TracFone argues that it is not responsible for the payment of the California Teleconnect Fund surcharge for the same reasons that it is not responsible for the universal lifeline surcharge. TracFone’s central argument is that the debit card exemption, discussed above, serves to exempt its prepaid wireless services from the California Teleconnect Fund surcharge. TracFone makes other more minor arguments as well. These arguments are all addressed above. We disagree with TracFone’s reasoning.

We find that TracFone is ultimately responsible for payment of the surcharge to fund the California Teleconnect Fund surcharge set forth in §§ 280 et seq. The relevant statutory framework for the universal lifeline surcharge and the California Teleconnect Fund surcharge are the same. As a result, our decision finding TracFone’s service subject to the California Teleconnect Fund surcharge and responsible for payment of this surcharge is based on the same reasoning set forth above regarding the universal lifeline surcharge. We further find TracFone acted unlawfully by failing to pay this California Teleconnect Fund surcharge.

¹²⁶ D.96-10-066, 1996 Cal. PUC LEXIS 1046 *123, stating that The California Teleconnect Fund shall be funded in the same manner and upon the same billing base as the CHCF-B, as discussed later in this decision and *288.

14. California Advanced Services Fund

Section 281 requires the Commission to, among other things, “develop, implement, and administer the California Advanced Services Fund to encourage deployment of high-quality advanced communications services to all Californians that will promote economic growth, job creation, and substantial social benefits of advanced information and communications technologies....”¹²⁷

This program is referred to as the California Advanced Services Fund.

Section 281 also delegates to the Commission the responsibility to develop a funding mechanism for this program. The pertinent statutory language provides as follows: “[a]ll moneys collected by the surcharge authorized by the commission pursuant to Decision 07-12-054, whether collected before or after January 1, 2009, shall be transmitted to the commission pursuant to a schedule established by the commission.”¹²⁸

In D.07-12-054, the Commission implemented a funding mechanism for the California Advanced Services Fund and found that “All telecommunications carriers are required to charge all end users, the California Advanced Services Fund surcharge, as set by the Commission, except for ULTS billings, coin-sent paid calling, debit card messages, one-way radio paging, usage charges to coinless customer-owned pay telephones (COPTs), customers receiving services under existing contracts, and directory advertising.”¹²⁹ Because this surcharge applies to all end users of all telecommunications carriers and TracFone is a telecommunications carrier, the surcharge applies to TracFone’s end users.

¹²⁷ § 281(a).

¹²⁸ § 281(b)(1).

¹²⁹ D.07-12-054 at Ordering Paragraph 3(a).

TracFone argues that it is not responsible for the payment of the California Advanced Services Fund surcharge for the same reasons that it is not responsible for the universal lifeline surcharge. TracFone's central argument is that the debit card exemption, discussed above, serves to exempt its prepaid wireless services from the California Advanced Services Fund surcharge. TracFone makes other more minor arguments as well. These arguments are all addressed above. We disagree with TracFone's reasoning.

We find that TracFone is ultimately responsible for payment of the surcharge to fund the California Advanced Services Fund surcharge set forth in § 281. The relevant statutory framework for the universal lifeline surcharge and the California Advanced Services Fund surcharge are the same. As a result, our decision finding TracFone's service subject to the California Advanced Services Fund surcharge and finding TracFone responsible for payment of this surcharge is based on the same reasoning set forth above regarding the universal lifeline surcharge. We further find TracFone acted unlawfully by failing to pay this surcharge.

15. Conclusion

TracFone operates in California as a public utility telephone corporation. We find TracFone in violation of state law and Commission rules for failure to remit the user fees and PPP surcharges. The amount owed in past due surcharges, if any, and the appropriate penalty, if any, will be determined in the next phase of this proceeding.

16. Appeal of Presiding Officer's Decision

On December 19, 2011, pursuant to Rule 14.4 of the Commission's Rules of Practice and Procedure, TracFone filed an appeal of the POD alleging numerous factual and legal errors. Based on the alleged errors, TracFone argues that the

POD should be modified to find that TracFone does not operate as a public utility under the California Public Utilities Code and, as such, has violated no laws by not collecting and remitting user fees and public purpose surcharges. To the extent the Commission continues to find TracFone a public utility, TracFone further argues that the POD should be modified to find TracFone in compliance with all rules and regulations governing user fees and public purpose surcharges as TracFone is exempt from such fees and surcharges under GO 153. On January 6, 2011, CPSD filed a response to TracFone's appeal requesting the Commission adopt the POD.¹³⁰

TracFone's appeal raises many of the same arguments it made throughout the proceeding. The POD already addressed these arguments and that discussion need not be repeated here. To the extent that TracFone makes new legal arguments, those arguments are addressed below. We affirm the POD with a few minor changes to improve the discussion and correct typographical errors.

The following is a summary of TracFone's arguments on appeal with, if applicable, citations where the arguments are addressed in the POD:

TracFone argues that the POD erroneously limits the procedural background and ignores key procedural events. The procedural history at pages 5-9 of the POD is sufficient for purposes of addressing the issues presented.

TracFone argues that the POD misstates the facts of the case. The POD does not misstate the facts of the case. As the statement of facts at pages 9-13 indicates, the POD appropriately weighs the evidence presented by the parties.

¹³⁰ By e-mail dated December 22, 2011, the ALJ granted a 3-day extension of time for filing the response.

TracFone argues that the POD erroneously shifts the burden of proof to TracFone by relieving CPSD of the burden to establish that TracFone is subject to the user fees and public purpose surcharges. The POD at pages 14-18 does not require TracFone to establish, by the preponderance of evidence, that the surcharges and user fees are not applicable.

TracFone argues that the POD incorrectly finds that TracFone does not provide “debit card calling” services. The POD at pages 28-30 correctly applies the facts to the law and finds that TracFone is not a provider of “debit card calling” services.

TracFone argues that the POD errs by retroactively applying the user fees and public purpose surcharges to TracFone and by imposing potential penalties. The POD does not direct the payment or collection of past user fees or public purpose surcharges and the POD does not assess penalties. As noted at page 52, Ordering Paragraph 3, the amount of fees and surcharges owed, if any, and penalties, if any, will be the subject of Phase 2.

TracFone argues that the POD relies on a flawed analysis of relevant statutory law and Commission decisions to find TracFone a California public utility. The POD at pages 14-18 analyzes the public utility question and correctly finds TracFone a public utility under California law.

Section 1701.2 provides, in part, that a POD shall be filed and served without undue delay, not later than 60 days after the matter has been submitted. This matter was submitted on April 13, 2011, the same day reply briefs were filed. The POD was issued on November 18, 2011. TracFone argues that the time that elapsed between submission and the issuance of the POD exceeded 60 days and constituted undue delay under the statute. This argument is not directly addressed in the POD. Therefore, we address it now. We find that, while the POD did issue beyond the 60 days noted in the statute, TracFone was not harmed by this delay.

TracFone argues that the POD unfairly and unreasonably precludes a full investigation of the allegations against TracFone by excluding from the evidentiary record information concerning the practices and views of other service providers. This argument is not directly addressed in the POD. Therefore, we address it now. We find that evidence concerning other carriers or of the wireless industry in general is not determinative nor required when addressing the alleged violations of law by an entity regulated by the Commission. *People v. Casa Blanca Homes, Inc.*, 159 C.A.3d 509, 532.

This completes the analysis of the issues presented in TracFone's appeal and CPSD's response.

While the Commission was considering TracFone's appeal, TracFone filed a motion requesting an oral argument. We hereby deny this motion.

17. Assignment of Proceeding

Michel P. Florio is the assigned Commissioner and Regina M. DeAngelis is the assigned ALJ in this proceeding.

Findings of Fact

1. On July 18, 1997, the Commission gave to TracFone's predecessor, Topp Telecom, Inc., a Wireless Registration Identification number, U4231C.
2. At some point between 1999 and 2001, Topp Telecom, Inc., began operating under the name "TracFone Wireless, Inc."
3. TracFone operates as a subsidiary of América Telecom, S.A.B. de C.V., a telephone company based in Mexico City.
4. TracFone describes itself as a reseller of telecommunication service, specifically of CMRS.
5. TracFone does not dispute that its wireless telecommunication services include California intrastate wireless calls.

6. TracFone also 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 service. TracFone also describes its services as debit card services.

7. TracFone states it resells the wireless services of Verizon Wireless, AT&T Mobility, and T-Mobile and that Verizon Wireless, AT&T Mobility, and T-Mobile are all telephone corporations and public utilities under California law.

8. TracFone explains that it uses the term “resale” to mean that, among other things, under its business model, it purchases wireless telecommunication services at wholesale prices from other public utility telephone corporations and, in what TracFone describes as a classic example of arbitrage, it resells these wireless services in the retail market.

9. Under its arbitrage business model, TracFone sets its own rate structures and, as such, does not offer its customers the exact rate structures of TracFone’s underlying carriers, Verizon Wireless, AT&T Mobility, and T-Mobile.

10. In reselling its wireless services, TracFone’s California customers consider TracFone their wireless carrier for customer service issues.

11. 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 (a mobile phone).

12. TracFone customers must load or purchase usage minutes for their handsets (mobile phone).

13. TracFone customers either purchase usage minutes on-line through TracFone’s website or via prepaid cards purchased at retail outlets that are then used to re-load the handsets (mobile phone) with additional usage minutes.

14. As of June 2010, TracFone had approximately 16 million customers/subscribers nationwide, including all three of its brands, and describes itself as “the largest operator in the U.S. prepaid cellular market.”

15. According to TracFone, its “customer usage” is controlled using patented, proprietary software installed in each mobile phone TracFone sells.

16. TracFone provides customer service and manages customers as though it were a network-based carrier.

17. TracFone sells both its handsets (mobile phones) and airtime (sometimes packaged as “monthly plans”) online and through a variety of U.S. retail stores, including Mollie Stone’s and Walmart.

18. In 2003, TracFone informed a Commission staff person, Mr. Hassan Mirza, in the Commission’s Telecommunications Division of TracFone’s understanding that TracFone “does not render any ‘billings’” which would be reportable on the then-existing forms used to report and calculate the user fees and PPP surcharges.

19. 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 public purpose surcharges and user fees.

20. TracFone sought clarification of its responsibilities related to the user fees and public purpose surcharge exclusively through Commission staff.

21. TracFone engaged in one, possibly two, telephone conversations with Commission staff.

22. TracFone claims that the Commission’s staff stated that TracFone was exempt from payment of the user fees and public purpose surcharges.

23. TracFone further claims that the Commission’s staff statements are equivalent to positions adopted by the Commission.

24. The content of the Commission's staff statements were never adopted by the Commission.

25. TracFone never sought a waiver of the user fees or surcharges from the Commission.

26. By electronic mail dated May 1, 2009, the Commission staff informed TracFone that the user fees and surcharges did apply to TracFone's services.

27. The Commission issued this Investigation proceeding to determine whether the user fees and surcharges apply to TracFone's service and the extent of TracFone's obligation to pay.

28. Similarities exist between TracFone's prepaid wireless service and debit card service but differences exist as well.

29. The amount of past due surcharges owed by TracFone and an appropriate penalty, if any, are the subject of phase 2 of this proceeding.

Conclusions of Law

1. Consistent with the January 26, 2011 ALJ's ruling, no triable issues on any material facts exist as to whether TracFone operates in California as a public utility and a telephone corporation.

2. Consistent with the January 26, 2011 ALJ's ruling, TracFone is a California public utility and a telephone corporation under Cal. Const., art. XII, § 3; Pub. Util. Code §§ 216, 233, and 234.

3. Because TracFone's services are sold at many retail establishments throughout California, via the internet, and may be purchased by calling TracFone's customer care center, TracFone's services are open to the public and available to substantially all who seek such service.

4. TracFone's telecommunication services are dedicated to the public use and, under the dedication test, TracFone operates as a public utility in California.

5. It is well-established that resellers of telecommunication services operate as public utilities in California and, therefore, TracFone's analysis of §§ 233 and 234 that it is not a public utility under California law is incorrect.

6. The language set forth in § 234 stating that a telephone corporation includes "owning, controlling, operating or managing any line in California," includes entering into an arrangement with facilities-based carriers to operate on a non-facilities basis and resell the telecommunications services to end user customers under a carrier's own name and rate structure.

7. Ownership of property is not the sole defining characteristic of public utility status. Public utility status has routinely been established upon lease arrangements.

8. Pursuant to statutory law, including §§ 401 and 431, public utility telephone corporations are obligated to pay the user fees set forth in §§ 401-410, 431-435.

9. In examining and interpreting the words of a statute, courts are guided by the plain meaning of the statutory language and courts will adopt a literal interpretation unless it is repugnant to the obvious purpose of the statute.

10. The plain language of §§ 401-410, 431-435 obligates all telephone corporations, including TracFone, to pay the user fees.

11. No exceptions to the application of the user fees to public utility telephone corporations are found in the statute. No exceptions are found in Commission decisions.

12. TracFone, as a public utility telephone corporation, is obligated to remit the user fees set forth in §§ 401-410, 431-435 and TracFone is in violation of state law for failure to pay the user fees set forth in §§ 401-410, 431-435.

13. The plain language of §§ 871 et seq. does not specifically identify either the types of public utilities that must collect the universal lifeline surcharges or the types of utility services to which the surcharges applies.

14. Sections 871 et seq. provide the Commission with the authority to implement the program and to develop a funding mechanism for the program, including the types of public utilities that must collect the universal lifeline surcharges and the types of utility services to which the surcharges applies.

15. In D.84-04-053, the Commission confirmed that its statutory responsibility to establish a funding mechanism for the universal lifeline surcharge reasonably included the identification of the services, i.e., the types of public utilities or the specific utility services, subject to the surcharge.

16. In D.94-09-065, the Commission explicitly included cellular service, such as TracFone's services, as one of the services subject to the universal lifeline surcharge and confirmed this determination in D.96-10-066.

17. Based on the language in D.94-09-065 and D.96-10-066 pertaining to cellular service, the universal lifeline surcharge applies to TracFone's cellular service unless an exemption applies.

18. In D.94-09-065, the Commission adopted certain exceptions to the application of the universal lifeline surcharge, including coin-sent paid calling, one-way radio paging, ULTS billing, and then-existing contracts.

19. In D.94-09-065, D.96-10-066, and GO 153, the Commission did not intend to draw a distinction, for purposes of applying the universal lifeline service surcharge, between revenue derived from billed services and revenue derived from unbilled services, including services such as TracFone's prepaid wireless service.

20. The coin-sent paid calling exception to the universal lifeline surcharge does not include all unbilled services.

21. The Commission's preferred customer base for the universal lifeline service surcharge is the "widest possible customer base," and the Commission has expressed a dislike for narrowly applying the surcharge.

22. In seeking to act consistent with the Commission's preferred "widest possible" scope for the customer base, we conclude that the Commission did not intend the coin-sent paid calling exception to the universal lifeline service surcharge to extend to all unbilled or prepaid services.

23. TracFone's interpretation of the Commission's coin-sent paid calling exception in D.94-09-065 to apply to all unbilled services is based on conjecture and is not consistent with Commission's explicit directives in that decision to broadly apply the surcharge.

24. The debit card exemption first appeared in D.96-10-066 and, at that time, the Commission provided no explanation for the rationale for this additional exemption.

25. In the absence of any statements by the Commission on this topic, TracFone's assertion that the debit card exemption falls within TracFone's rationale - no bills - for the coin-sent paid calling exemption fails.

26. In the absence of an explicit Commission rationale for the debit card exemption, TracFone's assertions that the Commission intended to include its prepaid wireless services within the debit card exception is unconvincing.

27. The differences between the TracFone's service and debit card service are material. For example, TracFone's prepaid wireless services include a telephone number and must be used with a TracFone handset (mobile phone).

28. TracFone's prepaid wireless service is equivalent to dial tone access and a full service telephone offering while, in comparison, debit cards provide a very limited type of telecommunications service.

29. TracFone's prepaid wireless service fails to fall within the debit card exemption to the universal lifeline surcharge.

30. The universal lifeline surcharge set forth in §§ 871 et seq. and related Commission decisions applies to TracFone's prepaid wireless services, and TracFone acted unlawfully by failing to pay this surcharge.

31. Regardless of how the universal lifeline and other surcharges are calculated, collected, and remitted, the telecommunications carrier, not the customer, is ultimately responsible for payment of the surcharges.

32. Neither GO 153 nor the Commission's decisions are dispositive on the question of ultimate responsibility for the surcharge, and, therefore, we look to the language of the statutes and find the utility is ultimately responsible for ensuring payment of the proper surcharge amount.

33. TracFone's failure to pay the universal lifeline surcharge is a violation of state law and Commission decision, including §§ 871 et seq.

34. Similar to the statutory framework for §§ 871 et seq., the statutory language for the Deaf and Disabled Telecommunications Program Fund delegates to the Commission the responsibility to develop a funding mechanism.

35. The Commission developed this funding mechanism in D.94-09-065, where the Commission explicitly included cellular service, such as TracFone's, as one of the services subject to this surcharge. The Commission confirmed this determination in D.96-10-066. The Commission also memorialized its determination in GO 153.

36. The relevant statutory framework for the universal lifeline surcharge and the Deaf and Disabled Telecommunications Program surcharge are the same.

37. TracFone is ultimately responsible for payment of the Deaf and Disabled Telecommunications Program surcharge to fund the Deaf and Disabled Telecommunications Program set forth in §§ 2881 et seq.

38. TracFone acted unlawfully by failing to pay the Deaf and Disabled Telecommunications Program surcharge.

39. Section 275 addresses a program referred to as the California High Cost Fund-A and delegates to the Commission the responsibility to develop a funding mechanism for this program.

40. In D.94-09-065, the Commission explicitly included cellular service, such as TracFone's, as one of the services subject to the California High Cost Fund or CHCF, including the California High Cost Fund-A.

41. The relevant statutory framework for the universal lifeline surcharge and the California High Cost Fund-A surcharge are the same.

42. TracFone is ultimately responsible for payment of the surcharge to fund the California High Cost Fund-A set forth in §§ 275 et seq.

43. TracFone's services are subject to the California High Cost Fund-A surcharge and TracFone is responsible for payment of the surcharge.

44. TracFone acted unlawfully by failing to pay the California High Cost Fund-A surcharge.

45. Section 276 addresses, among other things, a program referred to as the California High Cost Fund-B.

46. Section 276 delegates to the Commission the responsibility to develop a funding mechanism for this program.

47. In D.96-10-066, the Commission implemented a funding mechanism for the California High Cost Fund-B and explicitly included cellular service, such as TracFone's, as one of the services subject to the California High Cost Fund-B.

48. The relevant statutory framework for the universal lifeline surcharge and the California High Cost Fund-B surcharge are the same.

49. TracFone is ultimately responsible for payment of the surcharge to fund the California High Cost Fund-B set forth in §§ 276 et seq.

50. TracFone's service is subject to the High Cost Fund-B surcharge and TracFone is responsible for payment of this surcharge.

51. TracFone acted unlawfully by failing to pay the High Cost Fund-B surcharge.

52. Section 280 addresses a program referred to as the California Teleconnect Fund.

53. Section 280 delegates to the Commission the responsibility to develop a funding mechanism for the California Teleconnect Fund.

54. In D.96-10-066, the Commission implemented a funding mechanism for the California Teleconnect Fund and explicitly included cellular service, such as TracFone's, as one of the services subject to the California Teleconnect Fund.

55. TracFone is ultimately responsible for payment of the surcharge to fund the California Teleconnect Fund surcharge set forth in §§ 280 et seq.

56. The relevant statutory framework for the universal lifeline surcharge and the California Teleconnect Fund surcharge are the same.

57. TracFone's services are subject to the California Teleconnect Fund surcharge and TracFone is responsible for payment of this surcharge is based on the same reasoning set forth above regarding the universal lifeline surcharge.

58. TracFone acted unlawfully by failing to pay the California Teleconnect Fund surcharge.

59. Section 281 addresses a program is referred to as the California Advanced Services Fund.

60. Section 281 delegates to the Commission the responsibility to develop a funding mechanism for this program.

61. D.07-12-054 implemented a funding mechanism for the California Advanced Services Fund.

62. D.07-12-054 found that “All telecommunications carriers are required to charge all end users, the California Advanced Services Fund surcharge, as set by the Commission, except for ULTS billings, coin-sent paid calling, debit card messages, one-way radio paging, usage charges to COPTs, customers receiving services under existing contracts, and directory advertising.”

63. The California Advanced Services Fund applies to all end users of all telecommunications carriers.

64. TracFone is a telecommunications carrier and, therefore, the surcharge applies to TracFone’s end users.

65. TracFone is ultimately responsible for payment of the surcharge to fund the California Advanced Services Fund surcharge set forth in § 281.

66. The relevant statutory framework for the universal lifeline surcharge and the California Advanced Services Fund surcharge are the same.

67. TracFone’s service are subject to the California Advanced Services Fund surcharge and TracFone is responsible for payment of this surcharge based on the same reasoning set forth above regarding the universal lifeline surcharge.

68. TracFone acted unlawfully by failing to pay the California Advanced Services Fund surcharge.

O R D E R

IT IS ORDERED that:

1. The Commission adopts the Administrative Law Judge's ruling issued in this proceeding and dated January 26, 2011 finding as follows: TracFone Wireless, Inc. operates within California as a public utility and a telephone corporation under Cal. Const., art. XII, § 3; Pub. Util. Code §§ 216, 233, and 234.

2. TracFone Wireless, Inc. shall immediately begin collecting and remitting the user fees, §§ 401-410, 431-435, and the public purpose program surcharges, 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., California Advanced Services Fund § 281, on its prepaid wireless services provided after the effective date of this decision.

3. In phase 2 of Investigation 09-12-016, the Commission shall determine the amount of user fees and surcharges owed, if any, by TracFone Wireless, Inc. (TracFone) and whether TracFone is subject to penalties pursuant to the provisions of Pub. Util. Code §§ 2100, et seq. for failure to pay the user fees and surcharges on its prepaid wireless services provided prior to the effective date of this decision.

4. Investigation 09-12-016 remains open.

This order is effective today.

Dated February 16, 2012, at San Francisco, California.

MICHAEL R. PEEVEY

President

TIMOTHY ALAN SIMON

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

MARK J. FERRON

Commissioners