BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider Whether Text Messaging Services Are Subject to Public Purpose Program Surcharges.	Rulemaking 17-06-023 (Filed June 29, 2017)

COMMENTS OF CTIA AND CARRIER PARTIES ON PROPOSED DECISION

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CTIA and its members AT&T Mobility,[1] Sprint,[2] and T-Mobile[3] ("Carrier Parties") respectfully submit these Comments in response to the California Public Utilities Commission's ("Commission's") *Proposed Decision of Cmmr. Peterman: Decision Determining Text Messaging Services Revenue Should Be Subject to Public Purpose Program Surcharges and Fees*, R.17-06-023 (mailed Nov. 9, 2018) ("PD").[4]

I. INTRODUCTION AND SUMMARY

The PD relies on fundamental misstatements of federal and state law and is outside the range of issues originally contemplated in this rulemaking proceeding.[5] Accordingly, the PD cannot be adopted.

CTIA has demonstrated repeatedly throughout this proceeding that, as a matter of federal law, text messaging is an information service.[6] This regulatory status is determinative, as the PD itself acknowledges that the "Commission's jurisdiction over communications services does not, and has not extended, to 'information services,' *except as authorized by the FCC*, because the

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[1] AT&T Mobility refers to the following entities: New Cingular Wireless PCS, LLC (U 3060 C); AT&T Mobility Wireless Operations Holdings, Inc. (U 3021 C); and Santa Barbara Cellular Systems, Ltd. (U 3015 C).

[2] Sprint refers to the following entities: Sprint Communications Company, L.P. (U 5112 C); Sprint Spectrum L.P. (U 3062 C); and Virgin Mobile USA, L.P. (U 4327 C).

[3] T-Mobile West LLC d/b/a T-Mobile (U 3056 C).

[4] These Comments are timely filed in accordance with Chief ALJ Anne E. Simon's November 9, 2018 email to parties of record in Rulemaking 17-06-023, and with CAL. CODE REGS. tit. 20, § 14 ("Comments on Proposed or Alternate Decision").

[5] *Petition to Adopt, Amend, or Repeal a Regulation et al.*, Order Regarding Petition 17-02-006 and Order Instituting Rulemaking to Consider Whether Text Messaging Services Are Subject to Public Purpose Program Surcharges, Order Instituting Rulemaking, R.17-06-023 (July 7, 2017) ("OIR").

[6] *See, e.g.*, Petition of CTIA to Adopt, Amend, or Repeal a Regulation Pursuant to Pub. Util. Code § 1708.5, P.17-02-006, at 4-16 (filed Feb. 27, 2017) ("CTIA Petition"); Comments of CTIA and Carrier Parties, R.17-06-023, at 6 (filed Mar. 23, 2018) ("CTIA Comments") ("Specifically: (1) data storage is a key feature of text messaging, as messages are stored on the network if they cannot be delivered to a device immediately; (2) text messaging involves "processing" and "transforming" information, as messages are re-formatted and converted to different protocols in order for different messaging platforms to communicate with one another; and (3) text messaging involves "retrieving" information and "making information available" as users can retrieve a variety of information such as sports scores and weather reports by sending text messages to short codes provided for this purpose." (internal citations omitted)); *see also id.* at n. 24-26 (citing both to CTIA filings and filings by T-Mobile and Verizon indicating the length of time both carriers store messages on their respective servers).

authority for the Commission to enact universal service is granted by the [federal Communications] Act."[7] Significantly, CTIA's demonstrations that text messaging is an information service are borne out by the Federal Communications Commission's ("FCC's") recently released draft *Declaratory Ruling*.[8] If adopted at the FCC's Open Meeting on December 12, 2018, the draft *Declaratory Ruling* will affirm that text messaging is indeed an information service for all of the same reasons established by CTIA in this proceeding. This declaration that text messaging is an information service undercuts and renders void the PD's analysis, which rests on the dual incorrect premises that text messaging is an "unclassified service" and that the Commission has the authority to assess "unclassified services."[9] The FCC has explicitly stated that "revenues from information services … have never been included in the contribution base,"[10] and states may surcharge information service revenues *only* if the FCC has specifically authorized such surcharges and prescribed a jurisdictional allocation methodology for the service at issue.[11] Because text messaging is an information service as to which the FCC has never authorized state surcharges nor prescribed an allocation methodology, the surcharges contemplated in the PD are contrary to federal law.

The PD is also contrary to state law and beyond the Commission's authority. First, the PD's conclusions are well beyond the issues contemplated in this rulemaking proceeding. Moreover, the PD's conclusion that text messaging is subject to surcharge is contrary to longstanding Commission precedent. Third, the PD exceeds the Commission's authority with

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[7] PD at 32 (emphasis added).
[8] *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, Draft Declaratory Ruling, FCC-CIRC1812-04, WT Docket No. 08-7 (published Nov. 21, 2018) ("draft *Declaratory Ruling*") (available at https://docs.fcc.gov/public/attachments/DOC-355214A1.pdf).
[9] *Cf., e.g.*, PD at 32.
[10] *Universal Service Contribution Methodology et al.*, Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357, 5364 ¶ 10 (2012).
[11] *Infra* Section II.A.

regard to Deaf and Disabled Fund surcharges and the Commission's user fees, which cannot be collected on non-telecommunications services. Also, the PD's analysis of why surcharging text messaging is "equitable" is arbitrary and capricious, given that the justifications the PD puts forth differ profoundly from earlier Commission discussions of this principle. Finally, the PD's discussion of the prepaid point-of-sale collection mechanism is invalid because the California statute in question, as well as the Commission's implementation of it, have been invalidated by a federal court.

CTIA also concurs with Cellco Partnership d/b/a Verizon Wireless's ("Verizon's") comments in this docket discussing why the Commission cannot impose retroactive liability for Public Purpose Program and User Fee contributions.

II. SUBJECTING TEXT MESSAGING TO CALIFORNIA PUBLIC PURPOSE PROGRAM SURCHARGES OR USER FEES IS PREEMPTED BY FEDERAL LAW

Text messaging is an information service, as a pending draft *Declaratory Ruling* from the FCC confirms, and any attempt by a state to surcharge text messaging is preempted by federal law.

A. The FCC's Draft *Declaratory Ruling* Affirms that Text Messaging Is an Information Service, Which Precludes California Surcharges on Text Messaging Revenues

The FCC's draft *Declaratory Ruling*, if adopted, will affirm that text messaging is an information service,[12] confirming CTIA's advocacy in this proceeding.[13] As the FCC has made

[12] Draft *Declaratory Ruling* at 3 ¶ 2 ("In this Declaratory Ruling, we find that two forms of wireless messaging, Short Message Service (SMS) and Multimedia Messaging Service (MMS), are information services, not telecommunications services under the Communications Act, and that they are not commercial mobile services, nor their functional equivalent."). As described below, even without the draft *Declaratory Ruling*, the PD would still be preempted by federal law. At a minimum, the Commission should defer acting in this docket until after the FCC considers the draft *Declaratory Ruling*, which is on the agenda for the FCC's December 12, 2018 open meeting (https://www.fcc.gov/document/fcc-announces-tentative-agenda-december-open-meeting-4).

clear, "revenues from information services (including broadband Internet access services) have never been included in the [USF] contribution base."[14] The PD correctly acknowledges this, noting that the "Commission's jurisdiction over communications services does not, and has not, extended to 'information services,' except as authorized by the FCC, because the authority for the Commission to enact universal service is granted by the [federal] Act."[15] As a result, if the FCC's draft *Declaratory Ruling* is adopted, it will clarify that text messaging is an information service, confirming that the Commission has no authority to impose surcharges on text messaging.

The fact that wireless carriers typically sell text messaging services bundled with surchargeable telecommunications services does not grant the Commission the authority to surcharge text messaging revenue.[16] The PD asserts that "[s]ince the FCC has a safe harbor method which allows utilities to treat the interstate portion of all bundled services as telecommunications services, including text messaging services, for the purpose of determining universal service obligations, it is 'not inconsistent' for the Commission to determine the same for the inverse of federal safe harbor method when assessing the intrastate component of bundled service that includes text messaging service."[17] This conclusion is incorrect for two reasons.

First, the fact that the FCC provides universal service contributors with the *option* to include the non-surchargeable, non-telecommunications-service portion of revenues when determining universal service obligations provides no basis for a state to *require* universal service contributors to submit to surcharges on such revenues. A universal service contributor's

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[13] *See*, *e.g.*, *supra* note 6.
[14] *Universal Service Contribution Methodology et al.*, Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357, 5364 ¶ 10 (2012) ("*2012 FCC Notice*").
[15] PD at 32.
[16] *Id.* at 20-21, 38.
[17] *Id.* at 21.

election to employ the FCC's bundling safe harbor does not transform a non-surchargeable information service into a surchargeable telecommunications service. It simply means that the contributor has elected not to determine what portion of the bundled revenues are non-surchargeable and to treat all revenues, including non-surchargeable revenues, as surchargeable telecommunications revenues. Such elections may be made because the cost of the allocation process would exceed the amount of the surcharge that would be imposed, or for other reasons. It is merely an option available to carriers and states are required to respect the optional nature of that methodology.[18] The fact remains that states lack the authority to apply surcharges to information services, and carrier elections regarding how to treat bundled revenues for the limited purpose of applying surcharges do not change that fact.

Second, as the PD correctly notes, "the FCC held it impossible for states to collect surcharges on a service that the FCC had not yet determined to have an intrastate component or determined the percentage of such component."[19] The FCC has never determined that text messaging has an intrastate component, nor has it ever established a methodology for how to determine the amount of any such component (nor could it given the inherently interstate nature of text messaging). For example, the FCC's safe harbor for allocating mobile wireless revenues between intrastate and interstate jurisdictions applies by its own terms only to mobile wireless revenues from "telecommunications services."[20] Even if the FCC's safe harbor applied (which it does not), the Commission could not require carriers to use it.[21]

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[18] *See MetroPCS California LLC v. Picker,* Case 17-cv-05959-SI, Order re: Cross Motions for Summary Judgment at 18 (Nov. 5, 2018) ("Summary Judgment Order").
[19] PD at 18, citing *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004).
[20] *See, e.g.,* FCC Form 499-A (2018), Instructions at 40 & n.73.
[21] Summary Judgment Order.

In sum, the FCC's draft *Declaratory Ruling,* if adopted, will affirm that the characteristics of text messaging make it an information service, consistent with evidence presented by CTIA in this proceeding. As an information service, text messaging is beyond this Commission's authority to surcharge, even when sold as part of a bundle. The PD's assertions to the contrary are erroneous. Thus, the PD cannot be adopted.

B. Even Without the FCC Draft *Declaratory Ruling*, California Surcharges on Text Messaging Would Be Preempted

Even without an explicit affirmation by the FCC, the characteristics of text messaging—including information storage and processing—make clear that it is an information service, as CTIA has shown throughout this proceeding.[22] Thus, *regardless* of whether the FCC adopts the draft *Declaratory Ruling,* text messaging is an information service, and as such, the Commission may not surcharge it.

The PD's attempt to sidestep this issue by proposing to surcharge text messaging without grappling with its regulatory classification—that is, to surcharge it as a so-called "unclassified service"—is also in error. First, telecommunications services and information services are mutually exclusive categories[23] and, as the PD itself rightly notes, "the Commission's jurisdiction does not, and has not, extended to 'information services,' except as authorized by the FCC, because the authority to enact universal service is granted by the [federal] Act."[24] As discussed above, states' ability to impose universal service surcharges on services depends on the FCC's determining that the service in question has an intrastate component and then establishing

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[22] *See, e.g.*, *supra* note 6.
[23] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11523 ¶ 43 (1998) ("[T]elecommunications services and information services are mutually exclusive categories."); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24029 para. 34, n. 50 (1998) ("Under the 1996 Act, any service with a communications component must be either a 'telecommunications service' or an 'information service' (but not both).").
[24] PD at 32.

allocation rules for determining the amount of revenue that is intrastate.[25] Although states may lawfully impose surcharges on revenue from VoIP, an unclassified service, that is so only because the FCC expressly authorized such surcharges *and* established an allocation methodology.[26] The FCC has done neither in the case of text messaging, and therefore states are prohibited from imposing surcharges on text revenues.

As a result, even if the FCC's draft *Declaratory Ruling* is not adopted, the PD's determination that text messaging is subject to surcharges is still preempted by federal law.

III. THE PD IS CONTRARY TO CALIFORNIA LAW

In addition to reaching conclusions that are preempted by federal law, the PD is also contrary to state law in a number of respects.

A. The Legal Conclusions in the PD Go Beyond the Intended Issues in This Rulemaking Proceeding

The Commission initiated this rulemaking proceeding because it determined that "the proper classification of text messaging is sufficiently ambiguous as to justify granting the petition to open a rulemaking to resolve that ambiguity and determine whether we should impose PPP surcharges on text messages."[27] The Commission also acknowledged that whether text messaging is a telecommunications service or an information service—the "question presented" in this proceeding—"is one of first impression before this Commission."[28] Consistent with California law and principles of due process, the Commission therefore stated that "any rule

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[25] *See supra* Section II.A., *citing* PD at 18.
[26] *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n,* 564 F.3d 900, 905-06 (8th Cir. 2009); *Universal Service Contribution Methodology; Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, Declaratory Ruling, 25 FCC Rcd 15651, 15658 ¶ 17 (2010) ("VoIP Declaratory Ruling").
[27] OIR at 4.
[28] *Id.*

adopted in this rulemaking proceeding will apply prospectively."[29] In addition, the Commission "recognize[d], as pointed out by Petitioner, that text messaging is either a telecommunications service or it is an information service…."[30] The OIR included a finding of fact that the "Commission imposes Public Participation [*sic*] Program surcharges and user fees on telecommunications services *but not on information services*."[31] The OIR in no way suggested that the Commission might consider altering the surcharge base to include non-telecommunications services or departing from the established telecommunications service/information service dichotomy to determine the surchargeability of "unclassified" services.

The Scoping Memo did not fundamentally change the question before the Commission in this proceeding.[32] Given the Commission's long history of reiterating that it surcharges only telecommunications services, the sole question posed in the Scoping Memo—"[w]hether text messages are subject to public purpose program surcharges and user fees"[33]—is simply a restatement of the question of how text messaging should be classified. The Scoping Memo lists issues to be considered under that question, but these simply recite core provisions of federal and state law and precedent[34] and in no way presage the novel conclusions in the PD. In particular, the Scoping Memo did not in any way provide notice of any intention to change the surcharge base or to create a new classification of services subject to surcharge.

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[29] *Id.* at 5; *see also* Comments of Verizon (explaining why the Commission cannot retroactively impose surcharge on text messaging revenues).
[30] *Id.* at 4.
[31] *Id.* at 12 (emphasis added).
[32] *Scoping Memo and Ruling of Assigned Commissioner*, Order Instituting Rulemaking to Consider Whether Text Messaging Services are Subject to Public Purpose Program Surcharges, R. 17-06-023 (October 11, 2017) ("Scoping Memo").
[33] *Id.* at 2.
[34] *Id.* at 2-3 (citing 47 U.S.C. §§ 253(b), 254(f); FCC regulations; state law; the Commission's existing surcharge mechanism; and the Commission's existing user fee collection mechanism.).

Thus, neither the OIR nor the Scoping Memo provided any indication to the parties to this proceeding (or to the other utilities that would be affected by the PD, if adopted) of any intention to take any of the unprecedented actions proposed in the PD. Neither parties nor utilities were put on notice that the Commission might disavow its long-standing and oft articulated practice of surcharging only telecommunications services, or define and create a new category of surchargeable services known as "unclassified services." As a result, adopting the PD would constitute legal error under state, as well as federal, law.

B. The PD's Conclusion that Text Messaging Is Subject to Surcharge Is Unreasonable in Light of Decades of Commission Precedent

Decades of Commission precedent clearly hold that surcharges apply only to telecommunications services, and the PD offers no explanation for its sudden break with that precedent. For example, the Commission has stated that "the Commission in 1984 determined that all interLATA intrastate *telecommunications services* were subject to the surcharge," and that, since then, "the types of *telecommunications services* subject to the surcharge have evolved."[35] CTIA cited many other examples of this precedent in its Brief in this proceeding.[36] Thus, subjecting text messaging to surcharge as an "unclassified service" would be contrary to existing Commission precedent (and inaccurate because text messaging is an information service).

The PD's suggestion that the Commission's use of "the term 'telecommunications services' is not exclusive to 'telecommunications services' under the Act"[37] is not based on any

[35] *Order Instituting Investigation on the Commission's own motion into the alleged failure of TracFone Wireless, Inc. et al.,* Modified Presiding Officer's Decision et al., I.09-12-016, D.12-02-023, at 24-25 (Feb. 24, 2012).
[36] *See Opening Brief of CTIA and Carrier Parties*, Order Instituting Rulemaking to Consider Whether Text Messaging Services are Subject to Public Purpose Program Surcharges, R.17-06-023, at 9-10 (filed May 11, 2018).
[37] PD at 37.

Commission precedent, and is contrary to logic. First, the PD's invocation of the FCC's bundling safe harbor to support this notion is erroneous, as discussed above.[38] Further, the PD's attempted reliance on the surchargeability of interconnected VoIP to support the notion that services other than telecommunications services are subject to surcharge in California[39] is without merit. As discussed above, states may assess surcharges on VoIP revenues only because the FCC has expressly authorized such surcharges and has established an allocation methodology, neither of which has occurred in the case of text messaging. Further, the assessment of surcharges on VoIP revenue is also dependent on state legislation. The Legislature, by statute, [40] specifically authorized the Commission to assess VoIP following the FCC's decision to permit state assessment of interconnected VoIP.[41] There is neither an FCC order nor state legislation authorizing surcharges on text messaging revenues. VoIP is therefore a unique case and cannot be used as precedent for surcharging text messaging. Further, the PD's suggestion that "the Commission intended to surcharge unclassified services offered by telecommunications carriers"[42] is demonstrably inaccurate given the Commission's own frequent reiteration that it surcharges *intrastate telecommunications* services only.

C. The PD Conflicts with the Statutory Limitation that Surcharges Supporting the Deaf and Disabled Fund Can Only Come From Telecommunications Services and the Statutory Definition of the Revenue Base for the User Fee

The PUC's precedent limiting surcharges to telecommunications revenues is reflected in the state statute authorizing the Deaf and Disabled Fund, which clearly permits surcharges only on telecommunications services,[43] and the Commission's unified surcharge collection

[38] *See supra* Section II.B.
[39] PD at 38.
[40] CAL. PUB. UTIL. CODE § 285.
[41] *See generally VoIP Declaratory Ruling*.
[42] PD at 36.
[43] CAL. PUB. UTIL. CODE § 2881(g).

methodology must be construed to harmonize to this limitation. The PD acknowledges that the "Deaf and Disabled Fund's enabling statutes limit the funding source to intrastate telecommunications services,"[44] but then attempts to explain that limitation away by arguing that the term "telephone service" used in the PD could refer to "unclassified services."[45] As discussed above, the Commission cannot surcharge a service, however it is classified, without specific authorization and a jurisdictional allocation methodology provided under federal law.[46] The PD also appears to suggest that, under a definition in Newton's Telecom Dictionary, text messaging might constitute "telephone service."[47] To the extent the PD takes this position, it is in error as there is no authority under California law for this proposition.

Rather, given the clear limit on the Commission's ability to surcharge telecommunications services to support the Deaf and Disabled Fund,[48] and the Commission's longstanding policy of assessing surcharges through a uniform mechanism, surcharge obligations for the other Public Purpose Programs should be construed to conform to this limitation.

The Commission's authority to assess user fees is also limited. Text messaging revenues, as information service revenues, are not "subject to the jurisdiction of the commission" or "accounted for according to the uniform system of accounts maintained by the commission."[49] Accordingly, the Commission cannot apply user fee surcharges on text messaging revenues.

[44] PD at 29.
[45] *Id.* at 30.
[46] *See supra* Section II.
[47] PD at 30.
[48] CAL. PUB. UTIL. CODE § 2881(g).
[49] CAL. PUB. UTIL CODE § 435(c); *see also* PD at 41-42.

D. The PD's Analysis of Equitable Considerations Under the Moore Act Is Arbitrary and Capricious

The Moore Universal Telephone Service Act requires that the Commission's Public Purpose Programs "should be supported fairly and equitably by every telephone corporation."[50] But the PD concludes, without citation or explanation, that "[e]quity requires that [the] Public Purpose Program fund burden correlates with the customers receiving the benefit."[51] The PD provides no analysis or citation for this definition of equity, and indeed this approach is fundamentally at odds with the Commission's longstanding conclusion that equity is served by spreading the obligation to support the Commission's universal service programs broadly because of the benefits to all of increasing the number of consumers connected to the network.[52] Under the PD's new definition of equity, wireless carriers should not have contributed to the Commission's universal service programs until at least 2014 when the first wireless carrier was approved to participate in a Public Purpose Program (LifeLine).

The PD also ignores the inequity it would create between wireless carriers and other providers of messaging services. The PD's attempt to equate wireless carriers' text messaging offerings to voice service not only ignores fundamental differences between those two offerings, but also ignores the much more apt comparison between wireless carriers' text messaging and unregulated, over-the-top (OTT) messaging services offered by companies like Facebook (Messenger and WhatsApp), Apple (iMessage), and Microsoft (Skype). Year-over-year, the messaging market continues to grow and expand as consumers send more messages and new

[50] CAL. PUB. UTIL. CODE § 871.5(d).
[51] PD at 12.
[52] *See, e.g., Alternative Regulatory Frameworks for Local Exchange Carriers and Related Matters*, Decision 94-090651 1994 Ca. PUC LEXIS 681 *130 (1994) ("We agree with DRA that application of a surcharge to the widest possible customer base is fairer to all competitors than a narrowly applied surcharge. All end-users of every LEC, IEC, cellular, and paging company in the state, including basic exchange customers, receive value from the interconnection of end-users to the switched network.")

service providers enter the ecosystem. In 2018 alone, more than 3 trillion messages were sent, with OTT messaging traffic accounting for almost triple the volume of wireless carriers' text messaging traffic.[53] Subjecting wireless carriers' text messaging traffic to surcharges that cannot be applied to the lion's share of messaging traffic and messaging providers is illogical, anticompetitive, and harmful to consumers.

Because the PD provides no analysis of or evidentiary support for its conclusions regarding equitable considerations, or the unexplained departure from prior practice and precedent, those conclusions are arbitrary and capricious and cannot stand.[54]

E. The PD's Analysis of the Prepaid Point of Sale Surcharge Misstates the Law

The U.S. District Court for the Northern District of California's recent decision declaring that California's Prepaid Mobile Telephony Service Surcharge Collection Act ("MTS Act")[55] is preempted by federal law and unconstitutional invalidates the PD's analysis of the purported assessment of text messaging revenues under the point of sale mechanism. The MTS Act itself was held to be in "conflict with federal law and … therefore preempted and unconstitutional,"[56] rendering invalid all the PD's many citations to and reliance on the MTS Act and the Commission's implementation thereof.[57] Accordingly, the PD's Finding of Fact that "[t]he Commission has collected surcharges on bundled prepaid wireless services, including text messaging services, under [the] MTS [Act]"[58] cannot support the PD's conclusions.

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[53] Pamela Clark-Dickson, Ovum, *Mobile Messaging Traffic and Revenue Forecast Report, 2017-22* (May 30, 2018) (available at: https://ovum.informa.com/resources/product-content/mobile-messaging-traffic-and-revenue-forecast-report-201722).

[54] *See, e.g.*, *Weiss v. State Board of Equalization*, 256 P.2d 1 (Cal. 1953) (an agency may change its mind, but may not do so arbitrarily).

[55] *See* CAL. PUB. UTIL. Code § 871 *et seq.*

[56] Summary Judgment Order at 23.

[57] *See, e.g.*, PD at 39-40 (discussing what the "MTS [Act] authorizes the Commission to collect" despite the law having been struck down).

[58] *Id.* at 43.

The PD asserts that the allocation of intrastate revenues can be achieved "in accordance with the inverse of FCC safe harbor methods,"[59] but the Summary Judgment Order rejected this approach. The Summary Judgment Order found that *all* FCC-approved allocation methodologies must be permitted.[60] "[W]ireless carriers have several options when allocating their interstate and intrastate revenues for federal USF assessments, and [] the states may not adopt methodologies that are inconsistent with the federal rules…. [T]he CPUC has deprived carriers of the ability to rely on alternative allocation methodologies…."[61] Having been found preempted by federal law and unconstitutional, neither the MTS Act nor the Commission's implementation of it is valid or enforceable, and neither can support any of the positions for which they are offered in the PD. For this reason, too, the PD cannot be adopted.

IV. EVEN IF THE COMMISSION POSSESSED THE AUTHORITY TO SURCHARGE TEXT MESSAGING, IT COULD NOT MAKE SUCH SURCHARGES RETROACTIVE

While space limitations prevent a full analysis herein, CTIA concurs with the comments of Verizon in response to the PD, which make clear that the Commission, even if it possessed authority to surcharge text messaging, lacks authority to impose surcharges on text messaging retroactively.

V. CONCLUSION

For the reasons discussed above and in earlier pleadings, CTIA respectfully calls on the Commission to abandon the PD, given its irreconcilable flaws under both federal and state law.

[59] *Id.* at 40.
[60] Summary Judgment Order at 18-19.
[61] *Id.* at 17-18.

Respectfully submitted November 29th, 2018 at San Francisco, California.

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[62] In accordance with Commission Rule 1.8(d), counsel for CTIA is authorized to sign these comments on behalf of the Carrier Parties.