

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

Petition to Adopt, Amend, or Repeal a Regulation  
Pursuant to Pub. Util. Code § 1708.5

Petition No. 17-02-006  
(Filed February 27, 2017)

**REPLY OF CTIA TO JOINT RESPONSE TO PETITION OF  
CTIA TO ADOPT, AMEND, OR REPEAL A REGULATION  
PURSUANT TO PUB. UTIL. CODE § 1708.5**

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Pursuant to Rule 6.3 (d) of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), CTIA hereby replies to the March 29, 2017 Joint Response of The Greenlining Institute, The Utility Reform Network, and the Center for Accessible Technology (“Joint Responders”) to CTIA’s above-captioned petition (“Petition”).

**I. INTRODUCTION AND SUMMARY**

The Joint Response is based on a fundamental misunderstanding of CTIA’s Petition. The Joint Responders assert that, “[o]n a basic level, CTIA argues that it is burdensome and unreasonable to collect fees on [text messaging] services to fund telecommunications access for low-income communities and other vulnerable populations.”<sup>1</sup> The Joint Response cites no language in the Petition to support this assertion, because no such language exists and, indeed, it is a complete distortion of CTIA’s position. CTIA contends that text messaging is not a telecommunications service and thus is not subject to surcharge, not that it is “burdensome and unreasonable to collect fees on [text messaging] services.” The Petition simply seeks to ensure that any decision to surcharge revenues from wireless consumers’ text messaging service is legally appropriate and made after due consideration by the full Commission with input from all interested stakeholders.

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<sup>1</sup> Joint Response at 1.

To be clear, CTIA and its members support, and have long supported, the Commission's efforts to advance universal service in a technology-neutral manner and to improve the lives of Californians through the California LifeLine program, the Deaf and Disabled Fund, and other Public Purpose Programs ("PPPs"). Moreover, wireless consumers have directly funded these programs since long before they were eligible to benefit from the programs themselves. In fact, surcharges imposed on intrastate wireless telecommunications revenues are currently the largest source of funding for the PPPs.

How mandatory surcharges are assessed, and the revenue base on which they are applied, has a direct and immediate impact on the consumers who are required to pay them and the carriers that are required to properly collect and remit them. Altering how those surcharges are applied without full Commission consideration of whether the change is appropriate or lawful should be a matter of concern to all stakeholders. Carriers, the administrators and beneficiaries of the programs, and all stakeholders need administrative consistency, which can best be provided through a rulemaking.

Regardless of what the Commission ultimately determines with respect to surcharging text messaging services, it will have *no impact on the funding of the PPPs*. The budgets for those programs are set based on the programs' needs, not on the source(s) of the surcharge. The Commission always sets (and adjusts where necessary) the surcharge rate to fully fund the PPP budgets. Nothing in CTIA's Petition would change this.

As a result, it is striking that the Joint Response gives short shrift to the issue that *is* fundamental to CTIA's Petition – the need for the full Commission to address whether text messaging revenues are subject to PPP surcharges. The Joint Response bats away the Petition's primary issue – whether it was appropriate for this policy decision to be made by staff via a

wording change on the Commission’s Telecommunications and User Fee Filing System (“TUFFS”) website without notice or opportunity for comment – with nothing more than a spurious question about whether CTIA has met its factual pleading burden in the context of a petition for a rulemaking.

The Joint Response devotes the balance of its 19 pages to an effort to refute CTIA’s demonstration that text messaging is not a telecommunications service and thus not subject to surcharges under current Commission rules. The fact that the Joint Responders attempt to debate this issue simply reinforces that this classification is an important question and that a rulemaking to resolve it is appropriate.

Because this stage of the proceeding is not the appropriate moment to engage on the merits of the questions that will be before the Commission once the Petition is granted and the rulemaking commenced, CTIA does not attempt in this Reply to refute all of the errors of law, policy, and fact in the Joint Response. Rather, this Reply briefly addresses why the Joint Response fails in its effort to explain away the significant storage component of text messaging service, how it mischaracterizes and misapplies the FCC’s *IP-in-the-Middle Order*, and how it significantly misstates the law regarding the scope of state authority to impose universal service obligations on services other than telecommunications services. The following discussion of these issues, standing alone, provides more than a sufficient justification for the Commission to commence a rulemaking. CTIA reserves a more fulsome discussion of these and other substantive issues for a later, more appropriate stage of this proceeding.

## **II. CTIA SUPPORTS THE CALIFORNIA LIFELINE PROGRAM AND OTHER PUBLIC PURPOSE PROGRAMS, AND GRANTING THE PETITION WILL NOT AFFECT FUNDING FOR THESE PROGRAMS**

There is no basis for the Joint Responders’ assertion that, “[o]n a basic level, CTIA argues that it is burdensome and unreasonable to collect fees on [text messaging] services to fund

telecommunications access for low-income communities and other vulnerable populations.”<sup>2</sup>

The Joint Response cites no language in the Petition for this proposition because the Petition does not make or imply this point. In fact, CTIA and its members support the Commission’s efforts to advance universal service through the California LifeLine program, the Deaf and Disabled Fund, and other PPPs designed to advance universal service in a technology neutral manner and improve the lives of Californians. Wireless revenues have long been the largest source of surcharges to fund the PPPs, and they will remain so whether or not the Petition is granted.<sup>3</sup>

More importantly, granting CTIA’s Petition will not affect the amount of funding available to the PPPs. As the Commission is well aware, the budgets for the PPPs are set before the Commission determines the surcharge percentage. After those budgets are set, the Commission sets the surcharge amount in order to fully fund the PPPs. CTIA does not propose any change to this approach.

Rather, as discussed below and in the Petition, CTIA simply asks that the Commission open a rulemaking in order to provide certainty to all stakeholders about whether text messaging is a service subject to surcharges, and to make clear that such a significant decision must be made by the full Commission after appropriate notice and opportunity for parties to be heard. The Joint Responders’ attempt to diminish issues regarding the types of services assessed and the due process concerns surrounding those assessments should be rejected.

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<sup>2</sup> Joint Response at 1.

<sup>3</sup> See Resolution T-17542, *Approval of the Mobile Telephony Services surcharge rates to be assessed on the total purchase price of prepaid wireless telephone service effective January 1, 2017* (November 10, 2016), at 9 (showing \$6.6 billion in California intrastate telecommunications revenue subject to surcharge in 2016, compared to \$5.7 billion in non-wireless revenues.).

### III. THE JOINT RESPONSE DOES NOT REFUTE CTIA'S SERIOUS DUE PROCESS ARGUMENTS

The Joint Response barely addresses the most important argument in the Petition – that applying PPP surcharges to text messaging revenues would require full Commission action after notice and an opportunity to be heard, so the staff's TUFFS website change was inappropriate.<sup>4</sup> Oddly, the Joint Response's only claim is that CTIA has not made adequate *factual allegations* to support the notion that wireless carriers do not currently consider text messaging to be an "intrastate telecommunications service" subject to surcharge.<sup>5</sup> As the Joint Response notes, however, the Petition specifically stated that "the Commission has never directed the industry to include text messaging revenues in their LifeLine or Universal Service fund ... assessments nor has it issued a formal ruling to do so,"<sup>6</sup> and that CTIA and its members were "taken by surprise" by the website change indicating that text messaging revenues were subject to PPP surcharges.<sup>7</sup> The Petition clearly satisfies the requirements of Rule 6.3.

Meanwhile, the Joint Response does not even attempt to argue that staff has the authority to modify the types of revenues that are subject to surcharge, let alone that it could do so without any notice or opportunity for affected parties to be heard.<sup>8</sup> As the Petition demonstrates, these are significant questions that require a thorough airing, and the Petition's proposed rulemaking is the appropriate forum to do so. Even at the most basic level, it is troubling that California wireless consumers' PPP surcharge burden could increase, or that carriers could be required to alter the revenue base on which they assess surcharges, without full Commission consideration

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<sup>4</sup> Petition at 16-24; Joint Response at 2-3.

<sup>5</sup> Joint Response at 3.

<sup>6</sup> *Id.* at 2-3, quoting Petition at 20.

<sup>7</sup> *Id.* at 2, quoting Petition at 1.

<sup>8</sup> *See* Joint Response at 2-3.

of whether such change is appropriate and lawful. All stakeholders in this process need administrative consistency and legal certainty, which can best be provided through a rulemaking where the legality of the staff's action can be vetted. The Joint Response leaves this fundamental point unchallenged.

The Joint Response also asserts that CTIA has not made a sufficient showing that the staff's change to the TUFFS website "creates a shift in existing policy,"<sup>9</sup> but this argument is similarly without basis. The Joint Response nowhere asserts that the Commission has decided to impose surcharges on text messaging revenues; the best it can muster is the observation that no Commission decision "explicitly states that text messaging is *not* subject to the revenue assessment."<sup>10</sup> Taken to its logical conclusion, this argument would subject revenues from any and every service to the surcharge unless the Commission specifically exempted the service from assessment. That clearly is not the law. For the sake of argument, even if the Commission accepted all of the Joint Response's assertions regarding the Commission's authority to impose surcharges on information services or other revenues besides the "intrastate telecommunications services revenues" identified in current rules, they would show at best that the Commission *could* impose surcharges on text messaging revenues, *if it chose to do so*. There is no debate that the Commission *has not exercised that authority*, to the extent it exists in the first place.

In sum, the Joint Response has not refuted CTIA's position that the staff's actions raise serious due process and substantive procedural concerns that the full Commission needs to address. The Petition should therefore be granted.

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<sup>9</sup> Joint Response at 3.

<sup>10</sup> *Id.* (*emphasis* in original).

**IV. THE JOINT RESPONSE’S LEGAL AND FACTUAL ARGUMENTS ARE INCORRECT, BUT JOINT RESPONDERS’ DECISION TO MOUNT THEM SIMPLY DEMONSTRATES THE NEED FOR A RULEMAKING**

**A. Joint Responders’ Efforts to Refute the Legal and Policy Arguments in CTIA’s Petition Simply Emphasize the Need for a Rulemaking**

The fact that the Joint Responders attempt to debate the merits of substantive issues raised in the Petition, including the appropriate regulatory classification of text messaging or the scope of the Commission’s authority to order surcharges, simply demonstrates that these are important issues and that the full Commission needs to address them. In fact, this was precisely the reason CTIA brought this Petition before the Commission. In this way, the Joint Responders’ attempts to refute CTIA’s contentions, incorrect though they may be, effectively demonstrate why the Petition should be granted.

**B. Joint Responders’ Legal and Policy Arguments Are Incorrect and Misguided**

Because the Joint Responders’ attempt to debate whether surcharges appropriately could be applied to text messaging revenues simply demonstrates the need for a rulemaking, and this stage of the proceeding is not the appropriate moment to engage on the merits of the questions that will be before the Commission in the rulemaking, CTIA does not undertake in this Reply to address all of the erroneous substantive arguments in the Joint Response. In this section, however, CTIA highlights some of the more salient flaws in the Joint Response’s key contentions. CTIA will present a more fulsome response on the substantive issues once the rulemaking is commenced and comment is sought.

*The Joint Response’s Attempt to Explain Away the Storage Component of Text Messaging is Unavailing.* As CTIA discussed in the Petition, the storage of information is one of the hallmark characteristics distinguishing an information service from a telecommunications service. As a result, because text messaging servers store messages until they can be delivered to

the recipient, just as email servers do, text messaging is squarely an information service, not a telecommunications service, and therefore not covered by the Commission’s current definition of services subject to surcharge.<sup>11</sup> The Joint Response attempts to argue that the storage of text messages is a separate service from delivering them, and that this storage “does not affect the end-user’s experience.”<sup>12</sup> Both arguments fail. First, Joint Responders’ contention that “the transmission of text messages is separate from the storing of text messages”<sup>13</sup> is factually inaccurate. No wireless carrier offers text messaging storage separate from text message transmission.<sup>14</sup> The Joint Responders’ analogy to telephone service and voicemail is inapt because telephone service and voicemail can be (and sometimes are) sold separately from one another. It therefore makes no sense to argue that the storage of text messages alone would constitute an information service,<sup>15</sup> since storage and transmission of text messages is a single, integrated offering. Indeed, Joint Responders inadvertently concede that text messaging is an information service by asserting that the storage feature of text messaging is an information service. Since storage is an integrated part of a text messaging service, Joint Responders effectively posit that the integrated service is an information service. Second, Joint Responders’ argument that the storage capability “does not affect the end-user’s experience” in situations when both users are “active and connected to a compatible network” ignores the fact that the storage *capability* exists whether it is used or not.<sup>16</sup> Indeed, the FCC noted that email users can

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<sup>11</sup> Petition at 7-8.

<sup>12</sup> Joint Response at 16.

<sup>13</sup> *Id.*

<sup>14</sup> Whether a feature is an integrated part of a single service is determined based on what the provider “offers.” *See, e.g., Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 988-91 (2005).

<sup>15</sup> Joint Response at 16.

<sup>16</sup> *Id.*

“communicate via electronic mail in close to real-time,” without the storage of messages, if they are both online, but concluded that email’s storage *capability* nonetheless means that it is an information service.<sup>17</sup> The same is true of text messaging.

*The Joint Response Mischaracterizes and Misapplies the FCC’s “IP-in-the-Middle Order”*. While the *FCC’s IP-in-the-Middle Order* held that incidental protocol conversion that results in no net protocol conversion to the end user does not necessarily make an offering an information service,<sup>18</sup> this conclusion is inapplicable to text messaging. Joint Responders concede that “[p]roviders’ delivery of text messages undoubtedly involves protocol conversion to facilitate delivery,” but argue that there is no net conversion because “when the recipient of a text message receives that text message, he or she sees nothing more than the text as written by the sender.”<sup>19</sup> First, this is factually incorrect. As the Petition observes, protocol processing in the delivery of text messages may result in any number of changes to the “text as written by the sender,” including the addition or removal of headers or the subdivision of single messages into multiple messages.<sup>20</sup> Moreover, text messaging is not analogous to the calling card example offered in the *IP-in-the-Middle Order* because in that case the telephone calls literally began and ended their trajectory through AT&T’s network in the same technical protocol – as TDM voice calls – even though AT&T carried them for the intermediate part of their journey in IP protocol.

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<sup>17</sup> *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11539 n.161 (1998) (“Particular users may not exploit this [storage] feature of the service offering; indeed, two users with direct Internet connections can communicate via electronic mail in close to real-time. Nonetheless, it is central to the service offering that electronic mail is store-and-forward, and hence asynchronous; one can send a message to another person, via electronic mail, without any need for the other person to be available to receive it at that time.”)

<sup>18</sup> Joint Response at 11-15, citing *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (2004) (“*IP-in-the-Middle Order*”).

<sup>19</sup> Joint Response at 15.

<sup>20</sup> Petition at 10-12.

As the Petition makes clear (and the Joint Response does not refute), different carriers use different messaging protocols, and messaging servers convert messaging protocols in order to deliver messages.<sup>21</sup> As a result, a message originated in SMPP protocol may terminate in MM7 protocol or TCP/IP protocol, or vice versa.<sup>22</sup> If the service did not include protocol conversion, consumers would not be able to send messages to the customers of other carriers.<sup>23</sup> This is a significant difference from the example before the FCC in the *IP-in-the-Middle Order*. In fact, text messaging service offerings include net protocol conversion that is more than incidental – it is central to the consumer experience.

*The Joint Response Misstates Federal Law Regarding State Authority to Impose Universal Service Obligations.* Joint Responders’ assertion that “federal law authorizes the imposition of surcharges on both telecommunications and information services”<sup>24</sup> is patently incorrect. As the Joint Response notes, Section 254(f) authorizes states to impose universal service contribution obligations “in a manner determined by the state” on “[e]very *telecommunications carrier* that provides *intrastate telecommunications*.”<sup>25</sup> This hardly justifies the imposition of surcharges on an information service. The Joint Response also incorrectly cites Section 254(f) for the proposition that “states ‘are clearly authorized to . . . build upon the federal program[.]’”<sup>26</sup> Even if this language actually appeared in Section 254(f) (which it does not), it would not justify expanding contribution obligations to information services.

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<sup>21</sup> Petition at 9-10.

<sup>22</sup> *Id.* at 9.

<sup>23</sup> *Id.*

<sup>24</sup> Joint Response at 8.

<sup>25</sup> *Id.* at 9, quoting 47 U.S.C. § 254(f) (emphasis added).

<sup>26</sup> *Id.*, citing 47 U.S.C. § 254(f) [sic].

*The Joint Response's VoIP Analogy Fails.* Although the FCC has authorized states to impose universal service contribution obligations on interconnected VoIP revenues, and also has not decided whether interconnected VoIP is a telecommunications or an information service, it does not follow that a state similarly could impose contribution obligations on text messaging.<sup>27</sup> The FCC made a specific finding that states could impose contribution obligations on interconnected VoIP because interconnected VoIP service is interoperable with traditional telephone service, which is subject to universal service contribution obligations, and therefore both competes with traditional telephone service and benefits from the breadth of the traditional telephone network.<sup>28</sup> This argument does not apply to text messaging, which is not interchangeable with voice telephony and does not utilize the traditional telephone network. Indeed, as CTIA has pointed out, a number of other messaging services compete directly with text messaging, including iMessage (the default messaging platform on over one-third of all handsets sold in the U.S.), Facebook Messenger, WhatsApp, and others – none of which are subject to surcharge.<sup>29</sup> Joint Responders declined to address this issue, yet it is a significant issue that must be considered in the context of any discussion of whether text messaging can be subjected to surcharges.

To be sure, as a matter of due process the VoIP example fully supports the opening of a rulemaking in the instant matter. In 2011, the Commission opened a rulemaking to determine whether to surcharge VoIP in light of the FCC's decision to allow states to surcharge VoIP.<sup>30</sup>

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<sup>27</sup> Joint Response at 10-11.

<sup>28</sup> *Universal Service Contribution Methodology, Petition of Nebraska et al.*, Declaratory Ruling, 25 FCC Rcd 15651, 15658 ¶ 17 (2010). Moreover, the Commission did not surcharge VoIP until after the FCC decision to allow the assessment of VoIP and the California legislature passed a state law authorizing the assessment of these revenues. See discussion below.

<sup>29</sup> Petition at 22.

<sup>30</sup> R.11-01-008 (“VoIP Surcharge Rulemaking”).

The Commission opened the VoIP Surcharge Rulemaking to “add California providers of interconnected Voice over Internet Protocol (VoIP) service to the category of voice service providers who are required to fund California's universal service programs.”

The Commission noted that it initiated the VoIP Surcharge Rulemaking because the FCC “had already determined that interconnected VoIP providers must report and contribute to the federal Universal Service Fund (USF) on all of their interstate and international end user revenues, and had also determined that ‘the application of state universal service contribution requirements to interconnected VoIP providers does not conflict with federal policies, and could, in fact, promote them.’” The Commission further noted that the FCC had also ruled “that states may extend their universal service contribution requirements to future intrastate revenues of nomadic interconnected Voice over Internet Protocol (VoIP) service providers....”<sup>31</sup>

The Commission also noted that at the time the Commission initiated the VoIP Surcharge Rulemaking, “there was no requirement for interconnected VoIP providers offering service in California to contribute to California's universal service public purpose programs.”<sup>32</sup> By invoking VOIP as the appropriate analogy, the Joint Responders squarely make the case for commencing a rulemaking to consider any potential assessment of surcharges on text messaging revenues.

In addition, the California Legislature passed a measure enacting a requirement for such contributions by interconnected VoIP providers (as defined in the legislation in conformity with federal definitions and rules) to each of the required funds.<sup>33</sup> AB 841 also spelled out the

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<sup>31</sup> D.13-02-022, 2013 Cal. PUC LEXIS 58 at 1-2.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> Assembly Bill (AB) 841 by Assemblywoman Joan Buchanan (Ch. 841, Stats. 2011).

methodologies for determining the revenues subject to the individual PPP surcharges.<sup>34</sup> No such legislation has been passed with respect to text messaging.

As noted above, this should not be construed as an exhaustive discussion of CTIA's objections to the Joint Responders' arguments. However, CTIA reserves a more complete discussion of the merits for the appropriate stage of this proceeding when the merits are before the Commission in the context of a rulemaking.

## V. CONCLUSION

For the foregoing reasons, the Commission should grant CTIA's Petition and commence a proceeding to determine whether text messaging revenue is appropriately subject to surcharge.

Respectfully submitted April 7, 2017 at San Francisco, California.

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<sup>34</sup> 2013 Cal. PUC LEXIS 58, \*1-4.