

**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)

**REPLY COMMENTS OF CTIA<sup>®</sup>**

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Pursuant to the Order Regarding Petition 17-02-006 and Order Instituting Rulemaking to Consider Whether Text Messaging Services Are Subject to Public Purpose Program Surcharges, R. 17-06-023 (July 7, 2017) (“Order”), CTIA – The Wireless Association<sup>®</sup> (“CTIA”) respectfully submits these reply comments in the above-captioned proceeding<sup>1</sup> in response to the Opening Comments of the Center for Accessible Technology, the Greenlining Institute, and The Utility Reform Network (“Joint Commenters” or “Joint Comments,” as applicable).

## **I. INTRODUCTION AND SUMMARY**

As discussed in more detail below, the Joint Commenters’ efforts to deny that text messaging includes classic characteristics of an information service, including information storage, net protocol conversion, and retrieving and making available of information, are unavailing. The record in this proceeding overwhelmingly demonstrates that all of these functionalities are integral parts of text messaging service. Given that the Commission consistently has applied public policy program (“PPP”) surcharges and user fees obligations on telecommunications services only, there is no basis to the Joint Commenters’ arguments that the imposition of surcharges on text messaging – an information service – is consistent with Commission precedent, policy, or other law.

The Joint Commenters also urge the Commission to seek a great deal of information related to whether wireless carriers have assessed surcharges on text messaging, and on potential impacts on the funding of the PPPs, but none of these issues are relevant to the sole issue to be addressed in this proceeding: whether text messaging service is an information service. The Joint Commenters suggest that the Commission currently imposes surcharges on text messaging

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<sup>1</sup> Pursuant to the July 17, 2017, Email Ruling of ALJ DeAngelis and ALJ *Pro Tem* Kline, reply comments are due August 28, 2017. This reply is timely filed.

revenue, which is incorrect. The record already shows that at minimum, the four national wireless carriers have consistently treated text messaging as an information service. Also, the Commission is well aware that surcharge levels are set based on the budgetary needs of the programs, so that the programs always will be fully funded. Thus, there is no need for additional data requests, workshops, or joinder of wireless carriers as parties.

The Joint Commenters suggest in several instances that Staff could have legitimately interpreted or implemented the statute or rules to impose surcharges on text messaging revenue. This issue is outside the scope of the Order, which acknowledges that the regulatory categorization of text messaging is a question of first impression that neither the Commission nor the Federal Communications Commission (“FCC”) have ever determined and limits the scope of the proceeding to that question. The Commission should not consider this issue unless it expands the scope of this proceeding and seeks further briefing on the delegation and due process issues raised in CTIA’s Petition for Rulemaking.

Finally, the Order’s classification of this proceeding as quasi-legislative is correct and should not be modified. The legislature just recently reaffirmed that rulemaking proceedings should be subject to quasi-legislative *ex parte* rules, and the Joint Commenters have offered no valid reasons to disturb this determination.

## II. THE JOINT COMMENTERS FAIL TO REFUTE TEXT MESSAGING'S CLASSIFICATION AS AN INFORMATION SERVICE

### A. The Joint Comments Fail to Refute the Key Information Service Characteristics of Text Messaging

Contrary to the suggestions of the Joint Commenters, “SMS and MMS are not merely the transmittal of data, untouched, directly from one user to another.”<sup>2</sup> As explained in further detail below and in the CTIA Opening Comments, sending and receiving a text message (Short Message Service (“SMS”) and Multimedia Messaging Service (“MMS”) messages are collectively referred to as “text messages” or “text messaging”) involves the routing, storage, processing, transformation, retrieval, and making available of network packets of data.<sup>3</sup> Those packets are comprised of standardized “control information,” such as the source and destination network addresses, error detection codes, and sequencing information, and the “payload,” which is the user-generated content.<sup>4</sup> This content is transmitted via a complex process from the moment when a network packet is initially received and stored at a Short Message Service Center (“SMSC”) server or a Multimedia Messaging Service Center (“MMSC”)<sup>5</sup> server to when the control information and payload are distinctly processed and transformed across protocols and platforms to be eventually received on the recipient’s device. In this manner, text messaging is a “store and forward” service akin to e-mail, which the FCC has conclusively defined as an “information service.”<sup>6</sup>

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<sup>2</sup> Opening Comments of CTIA (“CTIA Opening Comments”) (Aug. 18, 2017), Declaration of Jerry Kupsh, Dir., Product Development (Messaging), Verizon Wireless at 1 (Aug. 15, 2017) (“Kupsh Declaration”).

<sup>3</sup> See *id.* at 1; 47 U.S.C. § 153(24) (defining an information service) (emphasis added).

<sup>4</sup> Kupsh Declaration at 2.

<sup>5</sup> SMSCs and MMSCs collectively are referred to herein as “Messaging Service Centers”).

<sup>6</sup> Report to Congress, 13 FCC Rcd 11501, 11539 ¶ 78 (1998) (“*Report to Congress*”).

## 1. Text Messaging is an Information Service Because Data Storage Is an Integrated Feature

The law is clear that “the offering of a capability for ... storing ... information” is a definitional trait of an information service.<sup>7</sup> The Joint Commenters’ attempt to argue that “the transmission of text messages [is] separate from the storing of text messages” in the same way that voicemail is separate from voice telephone service<sup>8</sup> is contrary to both the law and the facts. First, the analogy is factually inaccurate because telephone service and voicemail can be (and sometimes are) sold separately from one another, while the transmission and storage of text messages is a single, integrated offering. Even a passing familiarity with text messaging offerings makes this clear – the ability to store text messages is part of the service and, unlike voicemail, is not sold separately.<sup>9</sup> The only record evidence in this proceeding also bears this out uniformly. As Jerry Kupsh, the director of Product Development (Messaging) at Verizon Wireless explains:

“When the sender generates an SMS or MMS message and hits “send,” Verizon does not deliver the packet directly to the recipient. Instead, the message is routed through various networks to servers [Messaging Service Centers] ... that handle[] operations such as routing, forwarding, processing, and storing incoming SMS messages on their way to desired endpoints.”<sup>10</sup>

Thus, even messages destined for a recipient who is simultaneously connected to the mobile network are stored in the Messaging Service Centers.<sup>11</sup> Indeed, as discussed further below, this

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<sup>7</sup> 47 U.S.C. § 153(20). *See also Report to Congress*, 13 FCC Rcd at 11538-39 ¶ 78.

<sup>8</sup> Joint Comments at 5-6.

<sup>9</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>10</sup> Kupsh Declaration at 2-3. For a detailed description of the mechanics of carrier text messaging, *see id.* at 2-4; Fahmy Declaration at 4-10.

<sup>11</sup> *See* Kupsh Declaration at 2-4. *See also Report to Congress*, 13 FCC Rcd at 11539 n.161 (“Particular users may not exploit this [storage] feature of the service offering; indeed, two users with direct Internet

is because all text messages must undergo at least some form of protocol processing before they reach their ultimate destination on a user's device. As such, the Joint Commenters' argument that the "transmission of text messages" is somehow separable or "separate from the storing of text messages" is flatly, unvaryingly contradicted by the weight of technological expertise on the record in these proceedings, which constitutes the only record evidence before the Commission.<sup>12</sup> Contrary to the Joint Commenters' contention, the storage of text message content at Messaging Service Centers is integral to text messaging service, as it is integral to other "store and forward" services, like email,<sup>13</sup> voicemail, and voice storage and retrieval services, all of which the FCC has long held to be information services.<sup>14</sup>

A comparison of text messaging and email, another "store and forward" service, is particularly illustrative of why text messaging is properly classified as an "information service." The FCC, in finding email to be an information service, reasoned that email was "more than a simple transmission path" because "[t]he [email] sender's Internet service provider does not send [a] message directly to the recipient. Rather, it conveys it to a 'mail server' computer owned by

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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>12</sup> Compare Joint Commenters at 5 with Fahmy Declaration at 17 ("Text messaging is a store-and-forward service...."); Yang Declaration at 2 ("an SMS message does not provide a real-time service between the sender and the recipient"); Kupsch Declaration at 4-5 ("Data storage is a key feature of both SMS and MMS. ... [A] subscriber can send a message to another person without any need for the other person to be available to receive it at that time").

<sup>13</sup> *Report to Congress*, 13 FCC Rcd at 11501, ¶ 78 n. 162, (1998).

<sup>14</sup> *Id.* at 11538-39 (concluding that email is an information service); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21975 (1996) (subsequent history omitted) (concluding that tele-messaging is an information service) ("*Non-Accounting Safeguards Order*"); *United States v. Western Electric Co., Inc.*, 627 F. Supp. 1090, 1110 n. 89 (D.D.C. 1986) (subsequent history omitted) (noting that voice storage services are features that allow subscribers to store, retrieve, and send messages).

the recipient’s Internet service provider, which stores the message until the recipient chooses to access it.”<sup>15</sup> Likewise, a text message is always sent to a Messaging Service Center – where it is stored - whether for milliseconds or for weeks – before it is forwarded to the recipient. This component of text messaging and email services enables “asynchronous” communication, which allows “one to send a message ... without any need for the other person to be able to receive it at that time.”<sup>16</sup> As with email, the storage and transmission aspects of text messaging are inherent and interdependent components of the service, not mere features for the purposes of user convenience or network management that can be separately packaged and sold.

## **2. Text Messaging is an Information Service Because it Involves Net Protocol Conversion**

Text messaging service also includes the “processing” and “transforming” of information, which may include dividing, truncating, or converting messages into different formats, languages, or protocols to be viewed on different devices. The Joint Commenters’ unsupported attempts to oversimplify the underlying technology behind SMS also contradict the only evidence on the record, which demonstrates how network packets are transformed and processed at every stage of the of “store and forward” process.

The Joint Commenters allege that a customer receiving an SMS message “sees nothing more than the original text written by the sender,”<sup>17</sup> and on that basis argue that “the protocol processing that takes place” in sending a text message is merely “incident to transmission” and “results in no net protocol conversion to the end user”<sup>18</sup> under the *IP-in-the-Middle Order*.<sup>19</sup> The

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<sup>15</sup> *Report to Congress*, 13 FCC Rcd at 11538-39, ¶ 78 & n. 161.

<sup>16</sup> *Id.* at 11501 ¶ 78 n. 162.

<sup>17</sup> Joint Comments at 5.

<sup>18</sup> *See id.* at 5, 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, 7458 ¶ 5 (2004) (“*IP-in-the-Middle Order*”).

Joint Commenters’ overbroad interpretation of the *IP-in-the-Middle Order* –which is addressed in greater detail at Section II.B. *infra* – is contrary to well-established classifications of communications services and decisions. Consider that email – well-established as an information service<sup>20</sup> – requires a mail client and a mail server to exchange user-generated content in HTML or plain text across a myriad of protocols (IMAP, POP3, SMTP, or HTTP) in order for a sent message to be viewable on the recipient’s computer or mobile device. Likewise, net protocol processing and conversion permits text messages to be transmitted to and received from users of other mobile carriers, email services, over-the-top applications, or computer-based IM accounts.<sup>21</sup> An email recipient, like a text message recipient, is not privy to these net protocol conversions and “sees nothing more than the original text written by the sender,”<sup>22</sup> and so the Joint Commenters’ incorrect interpretation of the *IP-in-the-Middle Order* would overturn well-established precedent regarding the classification of information services.<sup>23</sup> Regardless, the determining factor behind the classification of an information is not what the consumer sees on their screen, but the technology underlying it.

Further, the record overflows with testimony as to the processing of control information and user-generated payload data that “enhance[s] and add[s] to the quality of the transmission” and the user experience.<sup>24</sup> “Processing” a text message also continues after the message has

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<sup>19</sup> *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, Order, 19 FCC Rcd 7457, 7458 ¶ 5 (2004) (“*IP-In-the-Middle Order*”).

<sup>20</sup> *See, e.g., Report to Congress*, \_\_\_ FCC Rcd at 11538-39 ¶ 78.

<sup>21</sup> *See, e.g., Fahmy Declaration* at 2.

<sup>22</sup> *See Joint Commenters* at 5.

<sup>23</sup> Even if the Commission were to accept the Joint Commenters’ misunderstanding of the technology underlying text messaging and their flawed argument based on misapplication of the test espoused in the *IP-in-the-Middle Order*, text messaging would still appropriately be categorized as an information service because of its other attributes, such as store-and-forward and retrieving and making available information.

<sup>24</sup> *Joint Commenters* at 5.

undergone net protocol conversion. Email (SMTP), instant-messaging (TCP/IP), and multimedia messaging (MM7) protocols transform, modify, and display messaging content in a manner different from SMPP, the traditional Short Message Service (“SMS”) text messaging protocol. These other protocols use different fields and formats than SMS messages, among many other technical differences.<sup>25</sup> SMS messages also often contain additional headers designed for wireless use, such as callback numbers, which must be modified or stripped when the content is sent to an email or IM platform. Likewise, an email contains a “Subject” line that is absent from a text message. To make the two systems compatible, a carrier’s SMS platform must remove this information from an email message as it converts the message into SMPP.

Moreover, significant processing can even occur to the user-generated payload data, such that the recipient does not receive the “original text” or other content as it was initially created by the sender.<sup>26</sup> For example, some phones are capable of displaying characters that other phones cannot receive or display, such as a euro symbol (€), a c-cedilla (ç), or accent marks over letters, like an “e” with an accent aigu (é).<sup>27</sup> When a Messaging Service Center receives a message, it consults the recipient device to determine what character set the device supports, and translates the SMS message into a character set that will be deliverable and readable. In some cases, the SMSC will remove certain characters that are not supported by the recipient device or substitute

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<sup>25</sup> See, e.g., Fahmy Declaration at 6; Yang Declaration at 3; Kupsh Declaration at 5-6.

<sup>26</sup> CTIA has previously discussed how text messaging providers must reformat and even subdivide messages that exceed the number of characters the recipient’s network or device is able to accept.<sup>26</sup> For example, if a text message includes more than 160 characters, the sender’s wireless device will subdivide that message into several shorter messages and send those messages to the SMSC. Kupsh Declaration at 5. If the recipient’s device is capable of receiving text messages that exceed 160 characters, the SMSC will forward the subdivided message with metadata that instructs the recipient’s device how to reconstruct the message. The recipient’s device will then combine the segments and the message will appear, to the recipient, as a single message. *Id.*

<sup>27</sup> Kupsh Declaration at 5-6.

the unsupported characters with a character that closely resembles the original character. Examples include the SMSC removing the euro symbol (€) or changing a c-cedilla (ç) into an ordinary “c.”<sup>28</sup> In these and other ways, the SMSC alters the “payload” of the network package and transforms or transcodes messages to achieve formatting satisfactory to the recipient device and network.<sup>29</sup>

Likewise, MMS messages also require extensive processing and transformation of data. Images, videos, and songs must often be modified to ensure that the recipient device can receive and view the file by altering the overall file size, color profile, resolution, or format of the multimedia. For example, when an MMS message contains an audio file, the MMSC must check the profile of the recipient’s device to determine which file formats it can receive. If the recipient’s device cannot receive the relevant file format, the MMSC triggers a transcoder within Verizon’s networks to modify the format of the audio file. For example, if user attempts to send a song to a recipient as an MP3, but the recipient device can only receive AMR files, Verizon’s network services will transcode that audio file from MP3 to AMR.<sup>30</sup> Again, this involves an alteration of the packet payload.

As CTIA previously noted, many carriers also offer other “processing” capabilities that occur even after a message has been delivered.<sup>31</sup> Sprint, for example, has offered a service whereby text messages sent from a mobile phone to a wireline phone are converted, i.e., “transformed,” to voice messages and automatically read to the recipient when he or she answers

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<sup>28</sup> See Kupsh Declaration at 6.

<sup>29</sup> See *Id.* at 6; Yang Declaration at 3. See also Fahmy Declaration at 14-16.

<sup>30</sup> See *id.*

<sup>31</sup> See *Universal Service Contribution Methodology A National Broadband Plan for Our Future*, Comments of Sprint, WC Docket No. 06-122 at 3 (filed June 6, 2001), <https://ecfsapi.fcc.gov/file/7021685859.pdf>.

the phone. Another example is that some carriers permit mobile message senders to request a message delivery confirmation, which may require “processing” data concerning the status of the delivery and “generating” a confirmation message for the sender once the message has been identified as delivered.<sup>32</sup>

In these ways, wireless providers’ servers regularly store, process, and transform text messages. As T-Mobile aptly observed in comments before the FCC: “The fact that an SMS message begins and ends as text says nothing about whether it has undergone a net change in form along the way.”<sup>33</sup> Thus, from initiation to reception, protocol conversion is *essential* to the transmission of text messages.

### **3. Text Messaging Allows “Retrieving” and “Making Available” Information**

The Joint Commenters do not refute that text messaging services, as demonstrated in the CTIA Opening Comments, enable users to query other applications and electronic databases to “retrieve” stored information, consistent with the definition of an information service.<sup>34</sup> Through text messaging, a user can send a text message to five- or six-digit short codes to retrieve information on sports scores, flight times, weather reports, movie showings, stock alerts, or other topics, receiving in return a standard text message containing information from the queried database. Short codes can also be used by wireless consumers to make charitable donations, ask questions on a conference call, or register a vote in a designated poll.<sup>35</sup>

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<sup>32</sup> See Fahmy Declaration at 10;

<sup>33</sup> *Universal Service Contribution Methodology A National Broadband Plan for Our Future*, Comments of T-Mobile, FCC, WC Docket No. 06-122, at 5 (June 6, 2011) (“T-Mobile FCC Comments”).

<sup>34</sup> 47 U.S.C. § 153(24) (defining “information service”).

<sup>35</sup> Yang Declaration at 4; *see also* Kupsh Declaration at 7.

These services are comparable to a “Talking Yellow Pages” service that permitted users to place a call and hear a recorded advertisement. The FCC found that the Talking Yellow Pages service “involves ‘subscriber interaction with stored information,’ and falls neatly within the definition of ‘enhanced service.’”<sup>36</sup> The FCC has long considered such information-retrieval capabilities to be a hallmark of an enhanced or information service.<sup>37</sup> Likewise, by sending information to, and receiving information from, the SMSC or MMSC, text messaging users are interacting with stored data. Like the Talking Yellow Pages, text messaging must therefore be categorized as an “information service.”

**B. The *IP-in-the-Middle Order* Test Was Designed to Distinguish Interconnected VoIP Services, Not Information Services**

The Joint Commenters rely extensively—and mistakenly—on a 2004 FCC decision addressing interconnected VoIP services, attempting to adapt an FCC test for discerning an interconnected VoIP service to an analysis for which it was never intended. Even using this ill-adapted test, the Joint Commenters’ argument that text messaging is an information service fails. In its *IP-in-the-Middle Order*, the FCC held that AT&T’s “phone-to-phone” Internet protocol (IP) telephony service and any analogous services are equivalent to traditional circuit-switched interexchange service for the purposes of assessing interstate access charges.<sup>38</sup> To provide regulatory guidance to other providers, the FCC outlined a three-part test for assessing whether

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<sup>36</sup> *Northwestern Bell Tel. Co.*, Memorandum Opinion and Order, 2 FCC Rcd 5986, 5988 ¶ 20 (1987).

<sup>37</sup> See, e.g., *U.S. WEST Communications, Inc., Petition for Computer III Waiver*, 11 FCC Rcd 7997, 8003 ¶ 12 (CCB 1996) (finding that providing “access to a database for purposes other than to obtain the information necessary to place a call will generally be found to be an enhanced service”); *Northwestern Bell Tel. Co.*, Petition for Declaratory Ruling, 2 FCC Rcd 5986, 5988 (1987) (concluding that a “Talking Yellow Pages” offering is an enhanced service).

<sup>38</sup> See *IP-in-the-Middle Order*, 19 FCC Rcd at 7457 ¶ 1.

AT&T's service was subject to interstate access charges.<sup>39</sup> In doing so, the FCC referred to its then-ongoing proceeding to define interconnected VoIP,<sup>40</sup> and the test it used in the *IP-in-the-Middle Order* closely parallels the definition it later adopted in that proceeding.<sup>41</sup>

Distinguishing an interconnected VoIP service from traditional telephone service may share some common issues with distinguishing an information service from a telecommunications service, but they are not the same inquiry. Moreover, in the *IP-in-the-Middle Order*, the FCC took pains to emphasize that its decision was “specific”<sup>42</sup> and “limited to the type of service described by AT&T in th[e] proceeding.”<sup>43</sup> Thus, the Joint Commenters’ reliance on the *IP-in-the-Middle Order* is misplaced.

In any event, the Joint Commenters’ analysis under the *IP-in-the-Middle Order* mischaracterizes text messaging. First, in the context of the *IP-in-the-Middle Order*, “ordinary customer premises equipment” is used to mean “regular”, “traditional touch-tone telephones” that consumers use to place circuit-switched interexchange calls.<sup>44</sup> In short, the *Order* addressed wireline telephones—not mobile phones or other connected devices with text messaging

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<sup>39</sup> “We emphasize that our decision is limited to the type of service described by AT&T in this proceeding, i.e., an interexchange service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider’s use of IP technology.” *Id.*, ¶ 1-2. In the Order, the FCC noted its then-pending proceeding to define interconnected VoIP. The standards it used in the *IP-in-the-Middle Order* are essentially the same ones it adopted soon after as the definition for interconnected VoIP.

<sup>40</sup> *Id.* at 7458 ¶ 2.

<sup>41</sup> 47 C.F.R. § 9.3 (defining interconnected VoIP as “a service that: (1) Enables real-time, two-way voice communications; (2) Requires a broadband connection from the user's location; (3) Requires Internet protocol-compatible customer premises equipment (CPE); and (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.”)

<sup>42</sup> *IP-in-the-Middle Order*, 19 FCC Rcd 7457, at ¶¶ 2, 10.

<sup>43</sup> *See id.* at ¶ 1.

<sup>44</sup> *Id.* at ¶¶ 18, 24.

capabilities.<sup>45</sup> Because ordinary wireline telephones are not capable of receiving or sending text messages without “enhanced functionality,” the first step of the *IP-in-the-Middle Order* fails. Second, as discussed above, text messaging involves net protocol conversion. Finally, origination or termination of a text message on a wireless device does not constitute origination or termination on the public switched telephone network (“PSTN”), and has never been declared to constitute such in any context. And such a finding would be problematic because origination and termination of text messages off carriers’ networks, to or from e-mail or mobile- or desktop-based over-the-top applications for instance, is commonplace. Text messages cannot, however be originated *or* terminated to the 62 million wireline connections in America,<sup>46</sup> a fact clearly indicating that text messaging is not part of, nor interconnected to, the PSTN.

Further, as CTIA explained to the FCC, “Even though SMS allows customers to use their phone numbers as an address for SMS, those messages are typically carried via private data links to an ENUM address associated with the consumer’s phone number. Thus, SMS messages use a private network separate from the PSTN and do not interconnect with the PSTN.”<sup>47</sup> As indicated in Dr. Fahmy’s Declaration, text messages do not traverse, and are not a part of, the PSTN.<sup>48</sup> Dr. Fahmy illustrates this in Figures 1 and 7, each of which identifies the PSTN as separate from the entirety of the text messaging architecture regardless of protocol or network design.<sup>49</sup>

Accordingly, the Commission should reject the Joint Commenters’ attempts to shoehorn

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<sup>45</sup> At no point in the Order does the Commission discuss mobile devices.

<sup>46</sup> Industry Analysis & Technology Div., FCC, *Voice Telephone Service Status as of June 30, 2016*, at 6 (April 30, 2016) (indicating 62,276,000 traditional switched access lines as of June 30, 2016).

<sup>47</sup> See Opposition of CTIA – The Wireless Association<sup>®</sup> Petition of Public Knowledge *et. Al* for Declaratory Ruling Stating Text Messaging Short Codes are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules, WT Docket No. 08-7, at 43-44 (November 20, 2015).

<sup>48</sup> Fahmy Declaration at 5-16.

<sup>49</sup> Fahmy Declaration at 5 (Figure 1) and 12 (Figure 7).

into this proceeding an irrelevant test from a decade-old decision that was explicitly limited to its facts. A determination of whether text messaging is properly categorized as an information service involves and has always involved an inquiry into whether it has “a capability for generating, acquiring, *storing, transforming, processing, retrieving*, utilizing, or making available information via telecommunications.”<sup>50</sup> For the reasons stated above, the Commission should find that this definition clearly encompasses text messaging services.

### **III. PPP SURCHARGES APPLY ONLY TO “INTRASTATE TELECOMMUNICATIONS SERVICES”**

The Joint Commenters also assert erroneously that “the Commission may not need to reach this regulatory classification issue”<sup>51</sup> to decide whether surcharges apply to text messaging because other authority may permit the Commission to apply surcharges even though text messaging is an information service.<sup>52</sup> This argument, however, has no merit.

The Commission has consistently recognized that PPP surcharges apply to “intrastate telecommunications services” and not “information services.” Compellingly, the Order itself acknowledges that text messaging is not subject to surcharges if “text messaging services are ‘information services’ rather than ‘telecommunications services’ as such terms are defined in the Communications Act of 1934, as amended.”<sup>53</sup> This determination is consistent with Commission

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<sup>50</sup> 47 U.S.C. § 153(24) (defining an information service) (emphasis added).

<sup>51</sup> Joint Comments at 1.

<sup>52</sup> Joint Comments at 9.

<sup>53</sup> Order at 1.

precedent such as the *TracFone* decision, where the Commission also found that PPP surcharges and user fees apply to “telecommunications services.”<sup>54</sup>

As discussed below, the Joint Commenters’ arguments that the Commission has extended surcharge obligations beyond telecommunications services revenue are without merit.

**A. Extending PPP Surcharges Beyond Telecommunications Services is Unsupported by Commission Precedent and Policy**

The Joint Commenters are incorrect that subjecting text messaging to surcharges would be consistent with “longstanding Commission policy” favoring the collection of PPP surcharges “from the ‘widest possible customer base.’”<sup>55</sup> No such policy supports the expansion of PPP surcharges beyond telecommunications services, and in any event, imposing PPP surcharges on text messaging would not expand the surcharge customer base because CMRS customers already are subject to surcharges applied to revenue from voice service.

The Joint Commenters proffer a variety of quotes from Commission decisions, all of which specifically indicate that PPP surcharges should be applied to a broad base of *telecommunications services*. For example, as the Joint Commenters note, the Commission in D.96-10-066 “imposed a ‘broad based’ end user surcharge on ‘all *telecommunications services* and customers...”<sup>56</sup> and “further noted that the end user surcharge was competitively neutral, because all *telecommunications services* were subject to the surcharge.”<sup>57</sup> The Joint Commenters further note that D.96-10-066 indicated that CHCF-B surcharges should cover

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<sup>54</sup> See, e.g., D.12-02-032 at 25 (“Since the Commission’s initial implementation order in 1984, the types of *telecommunications services* subject to the surcharge have evolved as technology has changed.”) (emphasis added).

<sup>55</sup> Joint Comments at 11, quoting D.12-02-023 at 27.

<sup>56</sup> Joint Comments at 11, quoting D.96-10-066 at 78 (emphasis added).

<sup>57</sup> Joint Comments at 12.

“other CMRS services except for one-way paging services.”<sup>58</sup> The Joint Commenters ignore that the statement in D.96-10-066 could hardly have intended to include text messaging, because in 1996 CMRS carriers did not offer text messaging services,<sup>59</sup> and that D.96-10-066 did not intend “other CMRS services” to include an information service like text messaging. Thus, this statement does not provide any meaningful guidance on this issue.

Because existing Commission expressions of policy – not to mention underlying law – only support applying surcharges to “telecommunications services,” the Joint Commenters are wrong that the mandate for contributions from the “widest possible base” could support the expansion of surcharges to new services or information services, particularly without Commission approval.<sup>60</sup>

The Joint Commenters therefore also err in suggesting that conflating a telecommunications service of yesteryear – two-way messaging – with today’s text messaging would in any way “uphold the Commission’s intent.”<sup>61</sup> As CTIA has shown in its Comments, the capabilities that differentiate text messaging from two-way messaging are amongst those that clearly demonstrate that text messaging is an information service, and “the Commission’s intent” is not to apply surcharges to an information service.<sup>62</sup>

Further, even if there were a legal basis to extend PPP surcharges to text messaging (which there is not), it would not advance the Joint Commenters’ goal of expanding PPP

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<sup>58</sup> Joint Comments at 12, citing D.96-10-066 at n.61.

<sup>59</sup> See Kupsh Declaration at 1.

<sup>60</sup> Joint Comments at 13-14. See also *infra* Section V (objecting to discussions of the scope of staff’s authority in this proceeding).

<sup>61</sup> Joint Comments at 13.

<sup>62</sup> CTIA Comments at 13-15. See Order, at 1 (The Commission may exempt text messaging from PPP surcharges and user fees “if it concludes that text messaging services are “information services” rather than “telecommunications services.””)

surcharges to a broader base of customers. CMRS customers who purchase text messaging services are already subject to surcharges applied to the voice service segment of their service bundle. If anything, the Joint Commenters' advocacy for a broad, competitively neutral base of contributors merely demonstrates CTIA's point that the Commission cannot consider extending PPP surcharges to text messaging without also including over-the-top messaging platforms that compete directly with text messaging.<sup>63</sup>

**B. The Commission Has Not Treated or Characterized Text Messaging as a Telecommunications Service in the LifeLine Program**

The Joint Commenters are correct that the Commission has allowed wireless carriers providing California LifeLine to meet their service obligations by providing plans including text messaging services,<sup>64</sup> but this does not mean that the Commission has treated or characterized text messaging as a telecommunications service. The California LifeLine program is authorized by statute to fund "electronic information services."<sup>65</sup> Thus, the fact that the Commission has made California LifeLine funds available for text messaging does not mean that the Commission has treated or characterized text messaging as a telecommunications service.

**C. The MTS Regime Derives From a Different Authorizing Statute Not Relevant Here**

The Joint Commenters' assertion that the 2014 Prepaid Mobile Telephony Services Surcharge Collection Act ("MTS Act") "indicates that the Legislature intended that the

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<sup>63</sup> CTIA Comments at 3, 17-19.

<sup>64</sup> Joint Comments at 14-15.

<sup>65</sup> P.U. Code § 873(b). *See also* § 883(a)(4) (requiring the Commission's hearings on the definition of universal service to encourage participation by "information service providers").

Commission fund public purpose programs using a funding base far broader than only telephone calls”<sup>66</sup> is entirely inaccurate.

First, the MTS Act was intended “[t]o ensure equitable contributions from end-use customers of postpaid and prepaid mobile telephony services in this state” by creating “standardization with respect to the method used to collect communications taxes, fees and surcharges from end-use consumers of prepaid mobile telephony services.”<sup>67</sup> The MTS Act does not address the issue of broadening the collection base. Indeed, the recently released Draft Resolution provides that “[t]he purpose of the CPUC prepaid MTS surcharge is to recover the California Public Utilities Commission’s Public Purpose Program Surcharges and User Fee, as well as the costs associate with implementing the [MTS] Act...”<sup>68</sup> – it does not indicate any intention to increase the funding base used to assess PPPs.

More importantly, even in implementing the surcharge under the MTS Act (the “MTS Surcharge”), the Commission sets the MTS Surcharge rate with an eye to the amount of prepaid wireless intrastate telecommunications revenues that have been reported. For example, when the Commission first implemented the MTS Surcharge for 2016, it ordered that “[a]ll telephone corporations shall, beginning January 1, 2016, assess the adopted Mobile Telephony Service surcharge on intrastate prepaid wireless *telephone service revenues* subject to surcharge and collected from end-users in California.”<sup>69</sup> Similarly, the recently released Draft Resolution

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<sup>66</sup> Joint Comments at 10.

<sup>67</sup> Rev. & Tax. Code § 42002(e).

<sup>68</sup> Draft Resolution T-17568 at 11.

<sup>69</sup> See Resolution T-175402, OP 2 (emphasis added).

noted: “We do not disagree that the CPUC may not impose a state surcharge on interstate or *non-surchageable revenues*.”<sup>70</sup>

Finally, none of the Commission’s resolutions or rulings with respect to the MTS Surcharge address the jurisdictional nature of text messaging (or any other) service.

For all of these reasons, the Joint Commenters’ arguments regarding the MTS Act are unavailing.

**IV. BECAUSE THE ADDITIONAL INFORMATION THE JOINT COMMENTERS SEEK IS NOT RELEVANT TO THIS PROCEEDING, THERE IS NO REASON FOR DATA REQUESTS, WORKSHOPS, OR JOINDER OF PARTIES**

The Joint Commenters propose extensive data requests, workshops, and the joinder of wireless carriers as parties to this proceeding in order to adduce a variety of information,<sup>71</sup> but none of the information they propose to obtain through these additional processes would be in any way relevant to this proceeding. Thus, there is no need for data requests, workshops to be added to the schedule, or parties to be joined in the proceeding.

Most of the information that the Joint Commenters seek is driven by the Joint Commenters’ incorrect premise that wireless carriers are surcharging text messaging revenues today.<sup>72</sup> As CTIA stated in its comments, “a determination that text messaging is not subject to PPP surcharges and user fees will not affect the funding of these important programs” because the four national carriers and others, comprising “the large majority of the wireless market, do not currently pay surcharges on text messaging, and the revenue base on which surcharges are

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<sup>70</sup> Draft Resolution T-17568 at 10 n.39.

<sup>71</sup> See Joint Comments at 18-20, 22, 23-24.

<sup>72</sup> See, e.g., *id.* at 1 (“whether the Commission should continue to collect surcharge on revenue from intrastate text messaging services”) (emphasis added).

established does not include those revenues.”<sup>73</sup> Wireless carriers have been, are today, and – regardless of the regulatory classification of text messaging – will remain the largest source of surcharges to fund the PPPs.<sup>74</sup>

Recognizing that text messaging is an information service will have no impact on PPP surcharges, and no information is needed on whether this determination will shift the surcharge burden,<sup>75</sup> how much carriers are remitting from surcharges today,<sup>76</sup> whether the staff provided any materials to carriers about the status of text messaging revenues,<sup>77</sup> or whether any of the top wireless remitters of surcharges have surcharged text messaging revenue.<sup>78</sup> And because the scope of this docket is limited to determining whether text messaging is an information service, the Joint Commenters’ questions are moot, and there is no justification for the Joint Commenters’ requested data requests, workshops or the joinder of additional parties.

The Joint Commenters’ proposed data requests are also unnecessary because, as CTIA discussed in its comments, the “Commission always sets (and adjusts where necessary) the surcharge rate to fully fund the PPP budgets.”<sup>79</sup> As a result, “recognizing that text messaging is

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<sup>73</sup> CTIA Comments at 3-4.

<sup>74</sup> See Resolution T-17542, *Approval of Mobile Telephony Services surcharge rates to be assessed on the total purchase price of prepaid wireless service effective January 1, 2017* (November 10, 2016), at 9 (showing \$6.6 billion in California wireless intrastate telecommunications revenue subject to in 2016, compared to \$5.7 billion in non-wireless revenues.).

<sup>75</sup> Joint Comments at 17-18.

<sup>76</sup> Joint Comments at 18-19, 20, 23.

<sup>77</sup> Joint Comments at 19. Staff materials also are irrelevant because Staff lacks authority to impose surcharges on new services without involvement of the Commission. See *infra* Section V.

<sup>78</sup> Joint Comments at 19.

<sup>79</sup> CTIA Comments at 19.

not subject to PPP surcharges and user fees will maintain the status quo and will not affect the funding of any of the included programs.”<sup>80</sup>

**V. THE SCOPE OF THIS PROCEEDING DOES NOT INCLUDE A DETERMINATION OF WHETHER STAFF COULD HAVE HAD AUTHORITY TO ADD TEXT MESSAGING TO THE LIST OF SERVICES SUBJECT TO SURCHARGES OR USER FEES**

In a number of places in their comments, the Joint Commenters suggest that the staff might have had the authority to “interpret” the statute or the Commission’s intent so as to impose surcharges or user fees on text messaging. For example, the Joint Commenters describe as “faulty” the argument in CTIA’s Petition for Rulemaking that it was improper for staff to add text messaging to the list of surcharged services on the TUFFS website without Commission action,<sup>81</sup> and suggest that staff could reasonably “interpret[] the statute” to add surcharge obligations on new services or determine that text messaging is “the closest analogy to uphold the Commission’s intent” in extending surcharge obligations to two-way paging.<sup>82</sup>

The Order properly identified the issue in this proceeding as “one of first impression” to “determine whether we should impose PPP surcharges on text messages.”<sup>83</sup> Because the Commission has acknowledged that it has never ruled on this question, the Joint Commenters’ suggestion that the staff lawfully could have determined that surcharges or user fees applied to text messaging is erroneous and outside the scope of this proceeding.

As CTIA explained at length in its Petition for Rulemaking, it would be unlawful for staff to attempt to impose surcharges on a service without full Commission consideration of the

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<sup>80</sup> CTIA comments at 19-20.

<sup>81</sup> Joint Comments at 13.

<sup>82</sup> Joint Comments at 13-14.

<sup>83</sup> Order at 4.

issue.<sup>84</sup> To the extent that the Commission wishes to consider this issue, it would need to expand the scope of this proceeding and invite additional briefing on the issues surrounding delegation and due process raised in CTIA’s Petition for Rulemaking (but not addressed in the Order).<sup>85</sup>

**VI. CLASSIFICATION OF THIS PROCEEDING AS QUASI-LEGISLATIVE IS CORRECT AND SHOULD NOT BE MODIFIED**

CTIA disagrees with the Joint Commenters that the Commission should depart from its proposal to treat this proceeding as quasi-legislative by imposing *ex parte* restrictions typical of a ratesetting proceeding.<sup>86</sup> The legislature reviewed the *ex parte* rules only two years ago based on a concern about transparency at the Commission and affirmed that “[e]x parte communications in quasi-legislative proceeding are permitted and not subject to the disclosure requirements of this article.”<sup>87</sup> Allowing an allegation of a “need for transparency” to support more restrictive *ex parte* rules in a rulemaking would vitiate the legislative determination that *ex parte* contacts should be permitted in rulemakings, because such an allegation could be made in any rulemaking proceeding. Particularly where, as here, there is no showing that the “need for transparency” is any greater than in any other rulemaking, the request for greater restrictions must be denied.

As a result, the Commission should retain the categorization of this proceeding as quasi-legislative.

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<sup>84</sup> CTIA Petition to Adopt, Amend, or Repeal a Regulation Pursuant to Pub. Util. Code § 1708.5, P. 17-02-006 (Feb. 27, 2017) at 16-23.

<sup>85</sup> *Id.*

<sup>86</sup> Joint Comments at 21-22.

<sup>87</sup> See S.B. 215 § 5, amending P.U. Code § 1701.4(c). See also *id.* at § 2, amending P.U. Code § 1701.1(d)(1) (“Quasi-legislative cases, for purposes of this article, are cases that establish policy, including, but not limited to, rulemakings and investigations that may establish rules affecting an entire industry.”).

## VII. CONCLUSION

The overwhelming weight of the evidence in this proceeding demonstrates that text messaging is an information service and not a telecommunications service. Nothing in the Joint Comments demonstrates otherwise. The Commission should therefore issue an order concluding that text messaging is not subject to PPP surcharges or user fees.

Respectfully submitted August 28, 2017 at San Francisco, California.

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