State of California

Board of Equalization
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Memorandum

To: Ms. Debbie Kalfsbeek
Chief
Special Taxes Audit and Carrier Division (MIC:62)

Date: September 19, 2014

From: Andrew J. Kwee
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Subject: Applicability of Emergency Telephone Users Surcharge to the Access Recovery Charge
Assignment No. 13-332

This is in response to your request for a legal opinion regarding the application of the Emergency Telephone Users Surcharge Law (911 Surcharge Law) to an access recovery charge that certain Local Exchange Carriers (local telephone companies)[1] charge their customers.

Specifically, you ask, first, whether the access recovery charge is subject to the 911 Surcharge. Second, you ask, with respect to the decision by the State Board of Equalization (Board) in the *Roseville Telephone Company* case (decided Feb. 2, 1994) (*Roseville Telephone*) that interstate access charges[2] which local telephone companies charge their customers are not subject to the 911 Surcharge, if that decision has been overruled in light of the decision in *Sprint Communications Co., L.P. v SBE* (Super Ct. San Francisco County, 2009, No. CGC 06-455982) (*Sprint*), which involved flat rate and monthly recurring service charges.

As discussed in depth below, first, it is our opinion that the access recovery charge is not subject to the 911 Surcharge. Second, it is our opinion that the Board's decision in *Roseville Telephone* was not impacted by *Sprint* and, therefore, that interstate access charges which local telephone companies charge their customers are not subject to the 911 Surcharge.

DISCUSSION

Applicable Law

As relevant here, the 911 Surcharge Law imposes a surcharge on amounts paid by every person in the state for intrastate telephone communication service in this state. (Rev. & Tax. Code, § 41020, subd. (a).) The measure of the 911 Surcharge includes all charges billed by a service

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[1] We understand the term "local exchange carrier" is an industry term used to refer to a telephone company which operates exclusively within a specific local area and provides telecommunications services within that area. (See The Free On-line Dictionary of Computing. Retrieved August 05, 2014, from Dictionary.com: http://dictionary.reference.com/)

[2] You state that this charge is also commonly described as a Subscriber Line Charge, Interstate Access Charge, FCC Charge for Network Access, Federal Line Cost Charge, Federal Access Charge, Interstate Single Line Charge, Customer Line Charge, or FCC-Approved Customer Line Charge. For purposes of this letter, we refer to these charges collectively as an interstate access charge.

supplier to a service user for *intrastate* telephone communication services; however, it does not include any tax imposed by the United States. (Rev. & Tax. Code, § 41011, subds. (a), (b)(1) [Italics added].) Thus, for example, we previously opined that an interstate access charge mandated by the Federal Communications Commission (FCC) for interstate service is not subject to the surcharge because it is *interstate* in nature. (Rev. & Tax. Code, § 41020, subd. (a); see, e.g., Business Taxes Law Guide Annotation (Annot.) "Interstate Access Charge Not Subject to 911 Surcharge" 5/3/94, 7/25/94. (Am 2003-1).) As you note, this annotation was drafted in response to the Board's decision in 1994 regarding *Roseville Telephone,* wherein the Board determined that the disputed interstate access charges are not subject to the 911 Surcharge.

For ease of analysis, we address your second question first.

I. Why does tax apply differently to "interstate access charges" (*Sprint*) than it does to "flat rate and monthly recurring service charges" (*Roseville Telephone*)?

Interstate Access Charges (*Roseville Telephone*)

As relevant background information, in 1974 the United States Department of Justice filed a federal antitrust lawsuit against AT&T Corporation (AT&T), who, at the time, was the sole provider of telephone service throughout most of the United States. Ultimately, the parties entered into a consent decree whereby AT&T relinquished control of its Bell Operating Companies, through which it had provided local telephone service up until January 8, 1982. That is why, today, local telephone companies operate exclusively within a local area and are not allowed to handle long-distance calls (including, as relevant, interstate calls).

Instead, when such a "long distance call" is made to a location outside the local area operated by the local telephone company, the FCC explains that the local telephone company may collect an access charge from the customer for the cost of accessing a network operated by a different carrier. Thus, the FCC explains:

> **Interstate access charges** apply to calls that originate and terminate in different states, and **intrastate access charges** apply to calls that originate and terminate in different local calling areas within the same state. The [FCC] oversees interstate access charge rates, and the states oversee intrastate access charge rates.[3]

(Emphasis added.) As you correctly assert, the purpose of the *interstate* access charges which were at issue in *Roseville Telephone* is to "be kept by the carriers as recovery of reduced revenues caused by the decentralization of the telephone industry" that I just described. Further, the federal courts have concluded that the FCC has jurisdiction to authorize[4] a telephone corporation to recover interstate access charges from subscribers because such a charge "reflects costs caused . . . by the subscriber's connection into the *interstate network*, which enables the

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[3] http://www.fcc.gov/encyclopedia/intercarrier-compensation. (Accessed 8/6/14.)

[4] You express concerns with the Board's decision in *Roseville Telephone* because you state interstate access charges are not mandated by or remitted to FCC. As relevant to our discussion, we do not believe that it is material whether FCC imposes the charges, or merely authorizes and approves local telephone companies to collect and retain the charge from customers. The reason such charges are excluded from the measure of the 911 Surcharge is based on the nature of the charge as interstate or intrastate (and not whether it is a tax imposed by the United States). Thus, we do not address whether any of the subject charges are mandatory charges imposed by the FCC.

subscriber to make *interstate* calls." (*National Association of Regulatory Utility Commissioners v. FCC* (1984) 737 F.2d 1095, 1113. [Italics added.])

In summary, interstate access charges are 100 percent allocable to the cost of providing interstate telephone communications service. Therefore, interstate access charges are interstate in nature and thus excluded from the measure of the 911 Surcharge, which only applies to amounts paid for *intrastate* telecommunication services. Intrastate access charges (charges to access different local networks within this state), on the other hand, are subject to the 911 Surcharge.

Flat Rate and Monthly Recurring Service Charges (*Sprint*)

Unlike an interstate access charge, which only applies to reimburse a carrier's cost of accessing the interstate telecommunications network; flat rate and monthly recurring service charges (collectively, monthly recurring charges) such as those at issue in *Sprint* are charges which apply to all telecommunications service; both intrastate and interstate.[5] The reason they are both intrastate and interstate in nature, the Court in *Sprint* explains, is:

> Some or all of Sprint's bills to its customers include fixed flat-rate charges that the parties have called "presubscribed line charges" and "monthly recurring charges". . . . I refer to both as "monthly recurring charges . . . Because monthly recurring charges must be paid before a Sprint customer is able to make either an interstate or an intrastate long distance call, those charges are both "interstate charges" and "intrastate charges," . . . [therefore] the monthly recurring charges are charges for both interstate and intrastate services [for purposes of the 911 Surcharge].

In concluding that a portion of the monthly recurring charges are intrastate in nature and thus subject to the 911 Surcharge, *Sprint* Court listed three crucial factors: (1) monthly recurring charges must be paid for a subscriber to make any calls, whether intrastate or interstate; (2) the monthly recurring charges are a flat rate regardless of how many interstate or intrastate calls the subscriber makes; and (3) the rates are approved by the FCC. Based on the Court's decision in *Sprint* that a portion of the monthly recurring charges are intrastate in nature, such monthly recurring charges must be prorated to determine the intrastate portion of the total charge, and the 911 Surcharge applies to that portion of the monthly recurring charge which is intrastate in nature. (Rev. & Tax. Code, § 41020, subd. (a); see, e.g., Annot. "Proration of Flat Rate Service Charges or Monthly Recurring Charges" (1/8/10).)

CONCLUSION

To briefly summarize our conclusion, and to answer your question: No, *Sprint* does not impact the Board's decision in *Roseville Telephone* (and the applicable annotation) because *Roseville Telephone* involves interstate access charges which are interstate in nature. On the other hand, *Sprint* involves monthly recurring charges, a portion of which are intrastate in nature and thus (to the extent of the intrastate portion) subject to the 911 charge.

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[5] We note that Sprint is a long distance carrier as opposed to a local telephone company. In other words, unlike local telephone companies, Sprint does not own any local telephone lines to provide local service. Therefore, all calls require Sprint to incur costs to access a line not owned by Sprint in order to provide telecommunications service.

II. How does tax apply to "access recovery charges"?

Access Recovery Charge

You state that the access recovery charge is a new and third type of charge that the FCC authorized on November 18, 2011. You further explain that the access recovery charge is not mandated by the FCC, and is not a government charge or tax; however, you state that it is very similar in nature to the interstate access charge (described above). You also attached a copy of an April 19, 2012, order issued by the FCC (DA 12-575), which further describes the access recovery charge. The FCC order explains that "on November 18, 2011, the Commission . . . adopted a transitional recovery mechanism, including a new tariffed Access Recovery Charge [ ], which is intended to partially mitigate the effect of reduced intercarrier revenues on carriers."

You summarize the pertinent FCC materials, and you state in pertinent part:

> The FCC does regulate the [interstate access charge] and has currently capped the charge at $6.50 a line. The FCC has created/approved a new [access recovery charge], effective July 1, 2012, to allow carriers that are already charging the maximum [interstate access charge] of $6.50 to charge an additional recovery amount under the new [access recovery charge] rather than the FCC increasing the [interstate access charge] limit of $6.50 a line.

In summary, we understand that just like with the interstate access charge, a local telephone company only charges a subscriber an access recovery charge to recover the cost of providing *interstate* telephone communications service (and to the extent it is not fully reimbursed via the interstate access charge). Under these facts, and for the same reasons explained above (under our discussion of interstate access charges), the access recovery charge is 100 percent interstate in nature and thus excluded from the measure of the 911 Surcharge, which only applies to amounts paid for intrastate telecommunication services.

In conclusion, the access recovery charge is not subject to the 911 Surcharge.

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