



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

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March 27, 2012

**Re: Tax Opinion Request 11-571
Request for Legal Opinion Regarding the Emergency Telephone Users Surcharge and
Certain Surcharges Imposed by the California Public Utilities Commission**

Dear :

This is in response to your letter of December 28, 2011, requesting a legal opinion from the Board of Equalization (BOE) staff as to the application of the Emergency Telephone Users (911) Surcharge to certain surcharges imposed by the California Public Utilities Commission (CPUC). Specifically, you ask:

1. Are customer charges for the California Relay Service and Communications Devices Fund (CA Relay SVC/Comm), also known as the Deaf and Disabled Telecommunications Program (DDTP), excluded from the charges for communications services that are subject to the 911 Surcharge under Revenue and Taxation Code section 41020?
2. Are customer charges for the California Advanced Services Fund (CASF) excluded from the charges for communication services that are subject to the 911 Surcharge under Revenue and Taxation Code section 41020?

As discussed in detail below, we conclude that the surcharges billed for both the DDTP and the CASF are excluded from the charges for communications services that are subject to the 911 Surcharge under Revenue and Taxation Code¹ section 41020. Accordingly, the 911 Surcharge does not apply to these charges.

Please note, however, that, since your request is not on behalf of an identified taxpayer, you may not rely on this opinion for purposes of Revenue and Taxation Code section 41098 or California Code of Regulations, title 18, section 4902.

¹ All future statutory references will be to the Revenue and Taxation Code unless indicated otherwise.

BACKGROUND

As you recount, the BOE published an annotation pertaining to the Emergency Telephone Users Surcharge Law² (911 Surcharge Law) and CPUC-mandated charges on its Web site in November 2011. This annotation, based on a legal opinion dated January 8, 2010, stated, in relevant part, that, of the charges and surcharges mandated by the CPUC:

The charges that are subject to the 911 Surcharge are: the California Public Utilities Commission Reimbursement (or PUC) Fee and the California Relay Service and Communications Devices Fund (CA Relay SVC/Comm) Surcharge. The charges that are not subject to the 911 Surcharge are: the Universal LifeLine Telephone Service (ULTS) Surcharge; the High-Cost Fund-A and Fund-B Surcharges; and the California Teleconnect Fund (CTF) Surcharge. (At www.boe.ca.gov/lawguides/business/current/btlg/vol4/etusa/etusa-ca-public-utilities-charges.html, as of 2/22/2012 [emphasis added].)³

Prior to 2010, it had been the BOE's position that all CPUC-mandated charges and surcharges were subject to the 911 Surcharge. However, it was explained in the Current Legal Digest (CLD), in which the draft annotation was circulated for comment, that the BOE had amended its position with respect to four of these surcharges, and this annotation was added (and others were deleted), as a result of the BOE's acquiescence in a California Superior Court decision, *Sprint Communications Co., L.P., v. State Bd. of Equalization* (Super. Ct. S.F. County, 2009, No. CGC 06-455982) (*Sprint Decision*). (Special Taxes & Fees CLD No. 2011-1, Oct. 4, 2011, at p. 2.

After Sprint withdrew its arguments in this case with respect to several of the CPUC-mandated surcharges, only four surcharges remained in dispute: the Universal LifeLine Telephone Service (ULTS); the California High-Cost Fund-A (CHCF-A); the California High-Cost Fund-B (CHCF-B); and the California Teleconnect Fund (CTF). (*Sprint Decision*, at pp. 15-17.) The *Sprint* court stated that, "based on the language of the authorizing statutes and the cited PUC orders, and further confirmed by the rule that ambiguity in tax legislation favors the taxpayer, I have determined that the four CPUC-mandated charges in dispute are not subject to the 911 tax." (*Id.* at p. 17.)

The parties in the *Sprint* case had agreed, as do you, that the CPUC Reimbursement Fee (or User Fee, as you refer to it) is subject to the 911 Surcharge, so the *Sprint* court did not consider it, nor did the court consider, for reasons that are not presently clear, the DDTP (or CA Relay SVC/Comm) surcharge. The court also did not consider the CASF surcharge because this surcharge was not effective until January 1, 2009, several years after the *Sprint* case was filed, on September 7, 2006.

² Part 20 (commencing with section 41001) of division 2 of the Revenue and Taxation Code.

³ Annotations do not have the force or effect of law but are intended to provide guidance regarding the interpretation of the Emergency Telephone Users Surcharge Law with respect to specific factual situations. (Cal. Code Regs., tit. 18, § 5700, subds. (a)(1), (c)(2).)

DISCUSSION

As is relevant here, section 41020 presently provides that:

A [911] surcharge is hereby imposed on amounts paid by every person in this state for both of the following:

(1) Intrastate telephone communication service in this state commencing on July 1, 1977.

(2) VoIP service that provides access to the “911” emergency system by utilizing the digits 9-1-1 by any service user in this state commencing on January 1, 2009. . . . (§ 41020, subd. (a) [emphasis added].)⁴

The “amounts paid” by persons in this state for intrastate telephone communication service are for the charges the telecommunications carrier, or service supplier, bills for services provided. “Charges for services” is defined as “all charges billed by a service supplier to a service user for intrastate telephone communication services.” (§ 41011, subd. (a).) The service supplier is required to collect the 911 Surcharge from its service users, or customers, at the time it collects its billings from the service user. (§ 41021, subd. (a).)

The *Sprint* court ruled that the ULTS, CHCF-A, CHCF-B, and CTF surcharges mandated by the CPUC are not subject to the 911 Surcharge, determining, in essence that, for purposes of the 911 Surcharge Law, these surcharges are not “charges for services” under section 41011. (*Sprint* Decision, at pp. 15, 17.) As the court and the parties agreed, “the resolution of this issue depend[ed] on whether these charges are imposed on [the telecommunications carrier] or its customers.” (*Id.* at p. 16.) To resolve this question, the court relied on the statutes that authorized the surcharges and CPUC orders that discuss them. (*Id.* at pp. 16-17.) It would seem reasonable, therefore, to rely on these same sources to determine if the DDTP and the CASF surcharges are “charges for service” under section 41011 and, consequently, subject to the 911 surcharge under section 41020.

However, as the *Sprint* court comments, with respect to the authorizing statutes for all four of the surcharges at issue, the language of these statutes is not “entirely clear” and “leaves some room for dispute” regarding on whom the surcharge is imposed, the telecommunications carrier or the customer. (*Sprint* Decision, at pp. 16-17.) While the language of the statutes authorizing the DDTP and CASF surcharges is similar to one or another of the four authorizing statutes analyzed in *Sprint*, it, also, is not entirely clear and leaves some room for doubt, if not dispute, regarding on whom the surcharges are imposed.

For example, the language cited by the *Sprint* court as relevant to this question with respect to the CHCF-A, CHCF-B, and CTF surcharges is “revenues collected by telephone corporations in rates authorized by the [CPUC].” (Pub. Utilities Code, §§ 275, subd. (b), 276, subd. (b), & 280, subd. (c) [respectively].) The relevant language pertaining to the CASF

⁴ Subdivision (a) of section 41020 read essentially the same in 2006 as subdivision (a), paragraph (1), reads now. The Voice over Internet Protocol (VoIP) language was added and other non-substantive changes were made effective May 21, 2008. (Stats. 2008, ch. 17 (Sen. Bill No. 1040).)

surcharge, “moneys collected by the surcharge authorized by the [CPUC],” makes no mention of “telephone corporations.” (Pub. Utilities Code, § 281, subd. (b)(1).) Similarly, the language cited by the *Sprint* court as relevant to this question with respect to the ULTS surcharge, that the CPUC “shall require telephone corporations . . . to apply the funding requirement in the form of a surcharge to service rates,” comports to some extent with the relevant language pertaining to the DDTP surcharge: “The [CPUC] shall establish a rate recovery mechanism through a surcharge . . . uniformly applied to a subscriber’s intrastate telephone service.” (Pub. Utilities Code, §§ 879, subd. (c), & 2881, subd. (g) [respectively].)

In addition, the *Sprint* court cited several rulings from CPUC orders that it found to corroborate its determination that the ULTS, CHCF-A, and CHCF-B surcharges were imposed on the customers, not the telecommunications carrier.⁵ (CPUC Dec. 94-09-065, 1994 Cal. PUC LEXIS 681 (56 CPUC2d 117), Sept. 15, 1994 (Order 94-09-065), pt. 4 of 9, at ¶ 71 [misidentified by the court as ¶ 72] [“all certificated telecommunications utilities shall collect a surcharge . . . from the expanded billing base⁶ . . . to fund the CHCF(-A)”⁷ (emphasis added)]; CPUC Dec. 96-10-066, 1996 Cal. PUC LEXIS 1046 (68 CPUC2d 524), Oct. 25, 1996 (Decision 96-10-066), at pp. 424-425, ¶ 7.d. [“all telecommunications carriers are required to charge their end users the ULTS surcharge” (emphasis added)] & p. 427, ¶ 8.g. [“all telecommunications carriers are required to charge all end users the CHCF-B surcharge” (emphasis added)].)

As noted in footnote 5, the billing base for the DDTP surcharge – “all intrastate end-user telecommunications services” – is the same as the billing base for the CHCF(-A), so it may be reasonable to conclude that the DDTP surcharge is also imposed on customers, not on the telecommunications carrier. Similarly, it may also be reasonable to conclude that the CASF surcharge is imposed on customers, not the telecommunications carrier, based on the following: “Beginning January 1, 2008, a 0.25% surcharge will be collected through retail telecommunications customers’ bills to fund the CASF. Funding for the CASF program will not increase customers’ total surcharges, however, since the CASF surcharge will be offset by an equal reduction in the CHCF-B surcharge.” (CPUC Dec. 07-12-054, 2007 Cal. PUC LEXIS 583, Dec. 20, 2007, at p. 3.) In other words, there are CPUC orders that provide some corroboration for a determination that the DDTP and CASF surcharges are imposed on telecommunications customers, not the telecommunications carrier.

In sum, the authorizing statutes for the DDTP and CASF surcharges and the CPUC orders discussing them suggest, but do not definitively affirm, that they are imposed on telecommunications customers, not carriers. Fortunately, the CPUC, which is responsible for regulating privately owned telecommunications companies operating in California and for establishing and enforcing the various CPUC-mandated surcharges, brings clarity to this matter. On its Web site, the CPUC states that all six of the CPUC-mandated surcharges – the ULTS, CHCF-A, CHCF-B, and CTF, along with the DDTP and CASF, are “all-end-user surcharges” (AEUS) that “are assessed on consumers’ intrastate telecommunications services.”

⁵ No CPUC orders were located or cited with respect to the CTF surcharge.

⁶ An “expanded billing base” includes, with respect to the ULTS, DDTP, and CHCF(-A) surcharges, “all intrastate end-user telecommunications services provided by certificated telecommunications companies.” (Order 94-09-065, pt. 3 of 9, at § XIII, ¶ D.2.)

⁷ At the time this decision was issued, in 1994, apparently only one high cost fund surcharge was in effect, referred to only as “CHCF,” without any alpha designation.

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(At www.epuc.ca.gov/PUC/Telco/Consumer+Information/surcharges.htm, as of 2/22/2012 (Exhibit A).) "The all-end-user surcharges are collected by the telecommunications carriers [who], in turn, remit the surcharges as directed by the [CPUC]." (*Ibid.*; see Decision 96-10-066, at pp. 269, 276 & 277 [in deciding to use as a funding mechanism an AEUS, as opposed to a "net trans account method," to fund the CHCF-B, the CPUC noted that "[u]nder a net trans account, the surcharge is collected from carrier contributions," whereas "[w]ith an AEUS, a surcharge is imposed on all customers' expenditures for telecommunications services"; "[t]he net trans account method would impose the funding obligation directly on carriers, rather than on customers" (emphasis added)].)

Accordingly, we acknowledge and defer to the CPUC's knowledge and experience with these surcharges. Consequently, since all six of the surcharges are, according to the CPUC, "all-end-user surcharges," we conclude that all six of the surcharges are imposed on telecommunications customers, not carriers. Furthermore, since the CPUC includes the DDTP and CASF surcharges as AEUSs along with the other four surcharges, we presume that they are similar in nature to the other four surcharges and would therefore likely come within the sphere of the *Sprint* Decision's analysis.

Based on the authorizing statutes, the relevant CPUC orders, and the CPUC classification of these surcharges, we conclude that the DDTP and CASF surcharges are not "charges for services" under section 41011, subdivision (a), and are, therefore, not subject to the 911 Surcharge under section 41020.

Please let me know if you have any further questions regarding this matter.

Sincerely,



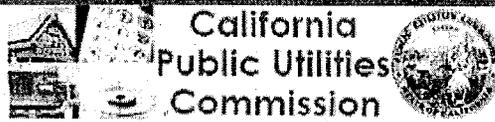
Carolee D. Johnstone
Tax Counsel III (Specialist)

CDJ/mcb

J:/Bus/Finals/Johnstone/911 Surcharge/11-571.doc

Attachment: Exhibit A

cc: Lynn Bartolo (MIC:31)
Lou Feletto (MIC:31)



PUC > Communications > Consumer Programs and Information > Surcharges and Taxes

Surcharges and Taxes

There are a number of surcharges and taxes assessed on telecommunications services by the State of California, city and county governments, and federal agencies. These taxes and surcharges are collected by telecommunications carriers which then remit these funds as directed by the appropriate authorities.

A. CPUC MANDATED TELECOMMUNICATIONS ALL-END-USER SURCHARGES

Currently, there are six CPUC mandated telecommunications all-end-user surcharges supporting various public programs in California. The all-end-user surcharge rates vary from program to program and they are adjusted periodically based on the forecasted demand of the programs. The six all-end-user surcharges and their approved rates since January 1, 2000 are listed below. Access to the resolutions approving these surcharge rates can be found by clicking on the particular surcharge rates. The complete history of surcharges in an Excel spreadsheet is available below:

⇒ History of surcharge rates from inception of program

Effective	ULTS	DDTP*	CHCF-A	CHCF-B	CTF	CASF
11/01/2011	1.150%	0.200%	0.000%	0.300%	0.079%	0.14%
05/01/2011	1.150%	0.200%	0.000%	0.300%	0.079%	0.00%
12/01/2010	1.150%	0.200%	0.000%	0.450%	0.079%	0.00%
05/01/2010	1.150%	0.200%	0.110%	0.450%	0.079%	0.00%
01/01/2010	1.150%	0.200%	0.130%	0.450%	0.079%	0.00%
12/01/2009	1.150%	0.200%	0.130%	0.450%	0.079%	0.250%
06/01/2008	1.150%	0.200%	0.130%	0.250%	0.079%	0.250%
01/01/2008	1.150%	0.200%	0.130%	0.250%	0.130%	0.250%
04/01/2007	1.150%	0.370%	0.210%	1.300%	0.130%	n/a

* DDTP: This surcharge is designated "CA Relay Service and Communications Devices Fund."

The all-end-user surcharges are assessed on consumers' intrastate telecommunications services except for the following:

1. Universal Lifeline Telephone Service (ULTS);
2. Charges to other certificated carriers for services that are to be resold;
3. Coin sent paid telephone calls (coin in box) and debit card calls;
4. Customer-specific contracts effective before 9/15/94;
5. Usage charges for coin-operated pay telephones;
6. Directory advertising; and
7. One-way radio paging.

The all-end-user surcharges are collected by the telecommunications carriers. They, in turn, remit the surcharges as directed by the Commission.

B. PUC REIMBURSEMENT ACCOUNT

A fee, annually established by the California Public Utilities Commission (CPUC or Commission), is levied on all telecommunications carriers (carriers) providing services directly to customers or subscribers within California. For more information, please click here: [PUC User Fee](#)

Exhibit A
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C. EMERGENCY TELEPHONE USERS SURCHARGE TAX

This surcharge tax provides funding for Emergency Telephone Service (911) in California. Every provider providing intrastate telephone communications services in California and subject to the Commission's jurisdiction is required to register with the Board of Equalization. Questions about this surcharge tax and/or registration should be directed to the Board of Equalization, Excise Taxes Division, at 800-400-7115, or P.O. Box 942879, Sacramento, CA 94279-0056.

D. CITY AND COUNTY UTILITY TAXES

Information on local utility taxes and surcharges may be found at: <http://www.uutinfo.org/>. Please note that neither the California Public Utilities Commission nor the Telecommunications Division of the California Public Utilities Commission guarantees or assures the accuracy of the tax/surcharge information presented at this link. This site is provided for general information only.

E. FEDERAL EXCISE TAX

The Federal Excise Tax is administered by the Internal Revenue Service (IRS). Information about this tax can be found at: <http://www.irs.gov/pub/irs-pdf/p510.pdf>. Or, you may contact the IRS at the following address:

*Internal Revenue Service
Excise Tax Branch
1111 Constitution Avenue
Washington, D.C. 20224*

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