



**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO**

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Apr-17-2009 2:42 pm

Case Number: CGC-06-455982

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**ORDER**

**SPRINT COMMUNICATIONS COMPANY LP VS. STATE BOARD OF EQUALIZATION**

001C02469101

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**FILED**  
San Francisco County Superior Court

APR 17 2009

GORDON PARK-LI, Clerk

BY:  Deputy Clerk 

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10 SUPERIOR COURT OF CALIFORNIA  
11 COUNTY OF SAN FRANCISCO

12 SPRINT COMMUNICATIONS  
13 COMPANY, L.P.,

14 Plaintiff,

15 vs.

16 STATE BOARD OF EQUALIZATION,

17 Defendant.

) Case No.: CGC-06-455982

) <sup>HK</sup>  
) ~~PROPOSED~~ ORDER AMENDING THE  
) FEBRUARY 18, 2009 DECISION AFTER  
) NONJURY TRIAL

) Date: April 17, 2009

) Time: 9:00 A.M.

) Place: Department 604

) Judge: Harold E. Kahn

) Action Filed: September 7, 2006

21  
22 The following amendments are made to the Court's February 18, 2009 Decision After  
23 Nonjury Trial:

24  
25 1. The sentence beginning on page 14, line 3, is amended to read:

26 **IV. Charges for Intrastate Long Distance Telephone Calls that do not Vary by Distance,**  
27 **Including Charges Whose Only Distance Variation is that they are IntraLATA or**  
28 **InterLATA, Are Not Subject to the 911 Tax Prior to the May 21, 2008 Effective Date of the**  
29 **Amendment of § 41016 by Statutes of 2008, Chapter 17 (S.B. 1040).**  
30

1           2.       The sentence beginning on page 15, line 12, is amended to read:

2       **III. Sprint's Administrative Claim Sufficiently Raised the Issue that the 911 Tax does not**  
3       **Apply to Intrastate Long Distance Toll Charges that do not Vary by Distance, Including**  
4       **Charges Whose Only Distance Variation is that they are IntraLATA or InterLATA, for**  
5       **this Court to Address that Issue.**

6           3.       New sections are added at page 19, line 14, to read:

7       **VIII. The Court remands this matter to the SBE for post trial redetermination of Sprint's**  
8       **liability for 911 taxes during the relevant time period, to be computed using the same audit**  
9       **methodology used by the SBE to determine Sprint's 911 tax liability, insofar as that**  
10       **method is not inconsistent with the following:**

11           A.       After all of the charges subject to the Emergency Telephone Users Surcharge  
12       ("911 tax") have been redetermined, the SBE is to redetermine, pursuant to section 41025, the  
13       amount of 911 tax due based upon the sum of all charges on each bill that are subject to the 911  
14       tax.

15           B.       Sprint's refund of 911 taxes paid on a bill will not include any 911 taxes collected  
16       by Sprint from the service user, or any amounts unreturned to the service user which were not  
17       911 taxes but were collected by Sprint from the service user as representing 911 taxes.

18           C.       The charges the parties have stipulated are not subject to the 911 tax in their Joint  
19       Stipulation of Facts and Exhibits, at paragraphs 33 (Federal Universal Service Charges), 34  
20       (private communication service), and 35 (interstate usage posted as intrastate), together with  
21       duplicate charges identified at paragraph 36, are to be excluded from the redetermined 911 tax  
22       base.

23           D.       The four CPUC-mandated charges in dispute – the universal lifeline telephone  
24       service surcharge (ULTS), the California high-cost fund-A and fund-B surcharges, and the  
25       California teleconnect fund surcharge (CTF) – are to be excluded from the redetermined 911 tax  
26       base.

27           E.       A default apportionment percentage will be calculated and applied to the  
28       Presubscribed Line Charges and monthly recurring charges on the bills at issue here, whether  
29       they include long distance call charges or not, based on the cumulative results of summing,  
30

1 separately, all of the intrastate and interstate call charges on those bills that include long distance  
2 call charges, and calculating the percent of intrastate call charges versus interstate call charges.  
3 Applying the intrastate percentage so calculated to the amount of these charges would produce  
4 the intrastate portion of these charges to which the 911 tax will be applied; and conversely, the  
5 interstate portion that will be excluded from the redetermined 911 tax base.

6 **IX. The Following Technical Corrections are Made to the Decision.**

7 (1) Decision Page 1:22 should read: ...and are collected by companies such as Sprint  
8 who provide intrastate telephone services and who are liable to the SBE for the 911 taxes,  
9 including any uncollected 911 taxes, all in accordance with...

10 (2) Decision Page 4:16 should read: The Federal Communications Agency  
11 Commission...

12 (3) Decision Page 4:19 should read: ...is a regulatory agency established by the  
13 California legislation Constitution...

14 (4) Decision Page 8:15 should read: ...included within the phrase "intrastate...  
15 [rather than interstate]"

16 ~~X. Sprint is awarded prejudgment interest.~~

17 **XI. The Court will retain jurisdiction over all appropriate matters within its judicial**  
18 **purview with respect to any further disputes between the parties that the parties are unable**  
19 **to resolve themselves regarding the redetermination and the final resolution of this matter.**

20  
21 Dated: 4/17/09

22  
23   
24 Harold E. Kahn  
25 Judge of the Superior Court

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**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO**

**Document Scanning Lead Sheet**

Dec-14-2009 10:20 am

Case Number: CGC-06-455982

Filing Date: Feb-18-2009 9:37

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STATEMENT OF DECISION

SPRINT COMMUNICATIONS COMPANY LP VS. STATE BOARD OF EQUALIZATION

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Prepared by the Court

**FILED**  
San Francisco County Superior Court  
FEB 18 2009  
GORDON PARK-LI, Clerk  
BY: [Signature] Deputy Clerk

**SUPERIOR COURT OF CALIFORNIA**  
**County Of San Francisco**  
Department No. 604

SPRINT COMMUNICATIONS CO., L.P.,  
Plaintiff,  
vs.  
STATE BOARD OF EQUALIZATION,  
Defendant.

Case No.: CGC 06-455982

DECISION AFTER NONJURY TRIAL

In this tax refund action plaintiff Sprint Communications Company, L.P. (Sprint) seeks a refund of some of the "911 tax" it paid for the period December 1, 1997 through April 30, 2000. 911 taxes are imposed on every person in California for intrastate telephone services within California and are collected from companies such as Sprint who provide intrastate telephone services, all in accordance with the Emergency Telephone Users Surcharge Act, Cal. Rev. &

1 Tax. Code §41001 et seq. (the Act). Hereafter all code sections refer to the Revenue and  
2 Taxation Code unless otherwise indicated.

3 The case was assigned to me for trial. Sprint appeared by its counsel Richard Wiley.  
4 Defendant State Board of Equalization (SBE), the entity that determined that Sprint owed the  
5 911 taxes which are the subject of this action, appeared by its counsel Deputy Attorney General  
6 Lucy Wang and SBE tax counsel Carolee Johnstone. The parties informed me that, in their view,  
7 resolution of the issues in dispute did not depend on live testimony and thus none was provided.  
8 Instead, the parties submitted a Joint Stipulation of Facts, which served the dual purpose of  
9 setting forth certain facts and authenticating 56 exhibits. The parties stipulated that all 56  
10 exhibits were admissible, and thus all of them were admitted in the trial. The parties also  
11 submitted supplemental joint exhibit 1, consisting of 977 pages of legislative history materials  
12 relating to the Act. The parties filed three rounds of briefs: opening trial briefs, reply trial briefs,  
and supplemental briefs on the legislative history of the Act.

13 Two hearings were held. The first on July 25, 2008 was essentially an educational session  
14 to assist me in understanding and framing the issues in dispute. The second on November 14,  
15 2008 where the parties elaborated on the arguments they had previously made in their briefs. At  
16 the conclusion of the second hearing the parties submitted the case for my decision. The parties  
17 agreed that my role is limited to deciding specified issues of whether certain charges appearing  
18 on Sprint bills are or are not subject to the 911 tax and that, regardless of my rulings, I am not  
19 asked nor expected to make any calculations of either taxes or interest owed or to be refunded.  
20 Moreover, the parties agreed that because the SBE now acknowledges that one charge (the  
21 Federal Universal Service Charge) which it previously determined was subject to the 911 tax is  
22 not covered by the tax, regardless of how I decided the disputed issues, I should remand the case  
23 to the SBE for a redetermination of the 911 taxes and interest during the relevant time period.  
24  
25

1 This decision is the result of a full review of all the exhibits, legislative history materials,  
2 briefs, and the statements and arguments of counsel at the two hearings, as well as my own  
3 independent legal research.

4 **I. Factual Background and a Brief Glossary.**

5 This case only concerns “wireline” telephone services, meaning telephone services for  
6 the purpose of allowing persons to make telephone calls over telephone lines. By way of  
7 contrast, this case does not concern wireless or cellular telephone services.

8 During the relevant period Sprint was a long distance telephone company, meaning that it  
9 provided services to its customers to allow them to make international, interstate and intrastate  
10 calls originating in one local calling area and terminating in another. Significantly, Sprint was  
11 not a local telephone company, in the sense of owning telephone lines within a local calling area.  
12 The owners of those lines, referred to herein as local telephone companies, such as Pacific Bell,  
13 sold access to their local lines to Sprint to enable Sprint’s customers to make long distance calls.  
14 Apparently Sprint owned long distance lines. Any long distance call made by a Sprint customer  
15 travelled along the local lines originating at the caller’s location to Sprint’s long distance lines  
16 and then to the local lines terminating at the recipient’s location. Thus, for Sprint to provide long  
17 distance services it purchased access to local lines.

18 I use the terms “long distance telephone company” and “local telephone company”  
19 because those are familiar to me as a long-time consumer of wireline telephone services,  
20 notwithstanding my awareness that the technically more correct terms are “interexchange  
21 carriers” and “local exchange” carriers respectively. The term “local calling area,” another term  
22 from my own experience as a consumer, is perhaps more accurately referred to as a “local  
23 exchange” area or just an “exchange.”

24 There are three types of long distance calls that need to be distinguished for purposes of  
25 this case. The first is a call made from one point to another point within a single Local Access  
and Transport Area (LATA). These calls are referred to as intraLATA and, while not always, are

1 usually intrastate. A LATA is an artifice of the telephone world that was developed after the  
2 breakup of the AT&T/Bell monopoly in the early 1980s. The United States is divided into 161  
3 LATAs, 10 of which are in California. The boundaries of a LATA do not conform to any  
4 existing state or area code boundaries. Because a LATA is typically, if not always, larger than a  
5 local calling area, calls made entirely within one LATA, i.e. intraLATA calls, can be long  
6 distance calls, i.e. beginning in one local calling area and terminating in another. The second  
7 type of long distance call germane to this case is an intrastate interLATA call, i.e. a call from one  
8 point in California to another point in California but beginning and ending in different LATAs.  
9 The third long distance call is an interstate or international interLATA call, i.e. a call from one  
10 point in California to a point outside California, either in another part of the United States or  
outside the United States.

11       The relevant distinction in this case is between intrastate services and non-intrastate  
12 services. The latter consists of services used to make both interstate and international calls.  
13 However, since “non-intrastate” is not a particularly pleasing word and, for all issues in dispute,  
14 interstate and international calls and services are treated alike, hereafter the term “interstate” will  
15 include international.

16       The Federal Communications Agency (FCC) is a regulatory agency established by  
17 federal legislation which is responsible for regulating long distance telephone companies  
18 providing interstate telephone services including the access to local telephone lines used to make  
19 interstate long distance calls. The California Public Utilities Commission (CPUC) is a regulatory  
20 agency established by California legislation which is responsible for regulating both long  
21 distance and local telephone companies providing intrastate telephone services including access  
22 local telephone lines used to make intrastate long distance calls.

23       Sprint has filed lengthy documents called tariffs with both the FCC and the CPUC which,  
24 among other things, when approved by those agencies, establish the rates Sprint charges to its  
25 customers.

1 **II. 911 Taxes Apply Only to the Portion of the Presubscribed Line Charges and Monthly**  
2 **Recurring Charges that are Attributable to Intrastate Calls, which should be Calculated**  
3 **based on an Allocation between Intrastate Calls and Interstate Calls Made During Any**  
4 **Billing Period with a Default Amount Fixed in the Event No Long Distance Calls are Made**  
5 **during the Billing Period.**

6 Some or all of Sprint's bills to its customers include fixed flat-rate charges that the parties  
7 have called "presubscribed line charges" and "monthly recurring charges." As used in the  
8 preceding sentence, a fixed flat-rate charge is a charge imposed by Sprint on its customer in each  
9 billing period that does not vary based on the number, length or time elapsed of any calls made  
10 during the billing period. Presubscribed line charges are intended, in the aggregate, to reimburse  
11 Sprint for the amounts it pays to local telephone companies for access to and use of local  
12 telephone lines so that its customers can make all three types of long distance calls. "Monthly  
13 recurring charges" are fees imposed as part of a particular Sprint calling plan which enable its  
14 customers to use some or all of Sprint's services.

15 Three key facts apply to both of these charges. The first key fact is that, when charge by  
16 Sprint, payment of the presubscribed line charges and monthly recurring charges is a pre-  
17 condition for the customer to make any long distance calls at all, either interstate or intrastate.  
18 The second key fact is that, when charged by Sprint, both presubscribed line charges and  
19 monthly recurring charges are charged in the exact same amount to a customer, whether or not  
20 the customer makes any long distance calls during a billing period and whether or not all long  
21 distance calls made during the billing period are intrastate or interstate or some combination of  
22 each. The third key fact is that both presubscribed line charges and monthly recurring charges are  
23 set forth in tariffs that Sprint filed with and were approved by the FCC and are not included in  
24 tariffs that Sprint filed with the CPUC. Since these three key facts apply equally to both  
25 presubscribed line charges and monthly recurring charges, and no further facts are necessary to  
decide whether these charges are or are not subject to the 911 tax, hereafter I do not make any

1 distinction between presubscribed line charges and monthly recurring charges and refer to both  
2 as “monthly recurring charges.”

3 The SBE contends that monthly recurring charges are subject to the 911 tax because  
4 those charges are “charges for services” as that phrase is defined in §41011. Sprint makes two  
5 arguments in support of its contrary view. Sprint’s first argument is that monthly recurring  
6 charges are charges for interstate services and thus fall outside the purview of the Act, which  
7 limits the 911 taxes to intrastate services. Sprint supports this first argument by pointing out that  
8 monthly recurring charges are set forth in FCC tariffs, which Sprint contends, without more,  
9 makes those charges interstate, not intrastate. Sprint’s second argument is that because, as SBE  
10 concedes, monthly recurring charges are not covered by the definitions for “local telephone  
11 service” in §41015 or “toll telephone service” in §41016, monthly recurring charges are not  
12 subject to the 911 tax. Both of Sprint’s arguments lack merit.

13 Because monthly recurring charges must be paid before a Sprint customer is able to make  
14 either an interstate or an intrastate long distance call, those charges are **both** “interstate charges”  
15 and “intrastate charges,” as those terms are commonly understood and not just one or the other.  
16 To label such charges as either interstate or intrastate is to ignore that the charges serve the dual  
17 purpose of enabling a customer to make both interstate and intrastate long distance calls. Nothing  
18 in the Act or its legislative history states or suggests that a charge that has such dual  
19 interstate/intrastate character is, for purposes of the Act, either interstate or intrastate and thus  
20 wholly within or outside the Act. Rather, construing the word “intrastate” for purposes of the Act  
21 in its normal everyday meaning as covering matters occurring wholly within California, which I  
22 am required to do in the absence of any indication in the Act to the contrary, the monthly  
23 recurring charges are charges for both interstate and intrastate services.

24 The fact that the monthly recurring charges are included in FCC tariffs does not require a  
25 different result. Nothing in the Act states or suggests that the phrase “intrastate telephone  
communication service(s)” as used in the Act excludes services that are covered in FCC tariffs.

1 Had the Legislature intended such a result, it could have easily said so. (*Compare* §§41010,  
2 41011, 41015, 41016 and 41020 (not defining or limiting “services” to those covered by a  
3 particular tariff) *with* §41007(a) (defining “service supplier” as a person who supplies services  
4 pursuant to California intrastate tariffs).) Further, as the SBE points out, case law on the contours  
5 of FCC jurisdiction makes clear that the FCC is empowered to regulate – and thus tariffs filed  
6 with it can cover – telephone services that are almost wholly intrastate in character as long as the  
7 services have some interstate aspect. (*See, e.g. National Assn. of Regulatory Utility*  
8 *Commissioners v. FCC* (D.C. Cir. 1984) 746 F.2d 1492, 1498; *California v. FCC* (D.C. Cir.  
9 1977) 567 F.2d 84, 86.) I also reject Sprint’s position that the filed tariff doctrine or contract law  
10 principles have any application to this issue. The question of whether a charge is for interstate or  
11 intrastate services as those terms are used in a state tax statute is wholly independent of and not  
12 governed by the terms of any particular tariff or contract law rules.

13 Sprint’s second argument is seductively simple and, at first glance, seems correct. The  
14 argument begins with §41020, which provides that the 911 tax is imposed on “intrastate  
15 telephone communication service.” Sprint then points out that §41010 defines “intrastate  
16 telephone communication services” as either “local or toll telephone services...” Next Sprint  
17 says, and with this point SBE agrees, that monthly recurring charges are not for either “local  
18 telephone service” or “toll telephone service,” as those terms are defined in §41015 and §41016  
19 respectively. Stated another way, under Sprint’s view, the only services that are subject to the  
20 911 tax are the services covered by §41015 and §41016 and, since SBE agrees that monthly  
21 recurring charges are not covered by those sections, monthly recurring charges are not subject to  
22 the 911 tax.

23 While it is a seductive argument, it is mistaken. As an initial matter, I have some trouble  
24 understanding why SBE conceded that monthly recurring charges are not covered by the  
25 definition of “local telephone service” in §41015. I agree that monthly recurring charges do not  
fit within §41015(a) because that subdivision includes only services where a caller is afforded

1 the "privilege" to communicate with all or substantially all others located within the same local  
2 calling area, a service that requires at least the potential for a customer to call all or nearly all  
3 others with telephones within a local area. (*See Comcation, Inc. v. United States* (Fed. Cl. 2007)  
4 78 Fed. Cl. 61, 64-65 (discussing definition of "local telephone service" in 26 USC 4242(a)(1).)  
5 On the other hand, §41015(b) quite clearly expands "local telephone service" beyond §41015(a)  
6 and includes "Any facility or service provided in connection with a service described in"  
7 §41015(a). It is at least arguable that access to local telephone lines for the purpose of making  
8 long distance calls is a service that is provided "in connection with" the ability to make local  
9 telephone calls.

10 Assuming without deciding that monthly recurring charges are not covered by §41015(b),  
11 I agree with the SBE that §41011 provides that monthly recurring charges are subject to the Act.  
12 §41011 defines "charges for services" as charges for "interstate telephone communications  
13 services and shall mean local telephone service and include monthly flat-rate charges for usage."  
14 Since monthly recurring charges are "monthly flat-rate charges for usage," which Sprint appears  
15 to acknowledge, a plain reading of §41011 establishes that monthly recurring charges are  
16 included within the phrase "interstate telephone communication services," the phrase used in  
17 §41020 to express what matters are covered by the 911 tax.

18 Sprint's has two responses to the argument that §41011 provides that monthly recurring  
19 charges are subject to the 911 tax. First, Sprint says that §41011 is not meant to determine what  
20 services are covered by the 911 tax, but rather applies to the calculation of the 911 tax once it is  
21 determined what services are covered by the tax. Reading the Act as a whole and giving meaning  
22 to all of its language, as I am required to do, this argument does not withstand scrutiny. Each  
23 time the terms "charge for services" or "charges for services" is used in non-definitional sections  
24 of the Act, those terms are used synonymously with the charges on which the 911 tax is imposed.  
25 Moreover, Sprint's position is not logically sound. If particular charges were excluded from the  
911 tax, then those charges should not be considered in calculating the amount of the 911 tax.

1 Second, Sprint says that interpreting §41011 as including charges subject to the 911 tax  
2 that are not subject to the 911 tax per §§41015 and 41016 creates an ambiguity in the Act and,  
3 under well-established rules, an ambiguity in tax legislation must be construed in favor of the  
4 taxpayer. I don't think there is any ambiguity, albeit there is arguably poor legislative  
5 draftsmanship. In my view both the Act, read as a whole, and its legislative history evince a clear  
6 intent to tax flat-rate charges for access to local lines which are used for intrastate calls.

7 The legislative history reveals that §41011, which was written specifically for the Act,  
8 was, along with §§41010 and 41020, included in early drafts of the legislation, and only later  
9 were §§41015 and 41016, which were taken from 26 USC 4252, added to the draft legislation.  
10 This drafting sequence shows that the Legislature wrote §41011 as a definitional section to  
11 explain what matters were covered by the 911 tax and strongly negates the inference that  
12 §§41015 and 41016 were intended to be the only sections stating what services are subject to the  
13 911 tax. Certainly there is nothing in §§41015 and 41016 that says either or both of those  
14 sections should be construed to limit any of the language in §41011 or that the matters covered  
15 by those sections are the exclusive matters subject to the 911 tax.

16 While there is little doubt that the Act could have been written more clearly on this issue,  
17 I am persuaded from both the language and legislative history of the Act that the four relevant  
18 definitional sections (§§41010, 41011, 41015 and 41016) should be read together and  
19 harmonized rather than any of them read as conflicting with each other. So read, §41011  
20 unambiguously supplements the scope of the services subject to the 911 tax set forth in §§41015  
21 and 41016 (and vice-versa) and thus there is no ambiguity to interpret in favor of Sprint. This  
22 reading also avoids giving no meaning to the phrase "monthly service flat-rate charges for  
23 usage" in §41011, which accords with standard legislative construction rules.

24 My determination that monthly recurring charges are both interstate and intrastate in  
25 character does not end the issue. Perhaps because they were persuaded of the correctness of their  
positions that these charges were all interstate (Sprint's view) or all intrastate (SBE's view), the

1 parties devoted relatively little attention to the issue of whether any apportionment or allocation  
2 should be made in the event that I determined that the charges were for both interstate and  
3 intrastate services. One SBE Annotation states that “Recurring flat rate service charges are  
4 subject to the Emergency Telephone Users Surcharge without proration by intrastate and  
5 interstate calls.” The Annotation is based on a 1993 opinion by the SBE chief counsel that  
6 concludes that allocation is “neither required by the language of” the Act “nor workable  
7 administratively.” Notwithstanding that the Annotation is entitled to some deference, I believe  
8 that it is contrary to California law and the evidence in this case and thus I will not follow it.

9 While they do not concern taxation of telephone services or the distinction between  
10 interstate and intrastate, *Dell, Inc. v. Superior Court* (2008) 159 Cal. App. 4<sup>th</sup> 911 and *Overly*  
11 *Manufacturing Co. v. State Board of Equalization* (1961) 191 Cal. App. 2d 20 strongly suggest  
12 that allocation is appropriate here. These cases teach that where a good, service or combined  
13 good-service has a dual purpose, one of which is taxable and the other is not and neither purpose  
14 is subordinate to the other, in the absence of a statute to the contrary and where administratively  
15 feasible, the taxable purpose should be segregated from the nontaxable and the former taxed per  
16 an allocation method. This rule, as applied to monthly recurring charges, is consistent with the  
17 central distinction in the Act between taxable intrastate services and nontaxable interstate  
18 services and is far more in keeping with the apparent intent of the Act than the positions of the  
19 parties. While there is no indication in either the language or legislative history of the Act that  
20 the Legislature considered how a “bundled” charge such as the monthly recurring charges should  
21 be treated under the Act, the all-or-nothing no-allocation approach advocated by the parties  
22 necessarily results in the taxation of non-taxable interstate services or the non-taxation of taxable  
23 intrastate services.

24 Sprint’s contentions that the monthly recurring charges are for “mixed” rather than  
25 “bundled” transactions and that the “true object” of customers contracting for long distance  
charges “might be interstate service rather than intrastate service” (Sprint reply brief, p. 16) are

1 without merit. As *Dell* makes clear, the difference between a “bundled” and a “mixed”  
2 transaction is that the former combines services that are “inextricably intertwined in a single  
3 sale,” while the latter does not. Yet, even if the monthly recurring charges were characterized as  
4 a “mixed” charge, *Dell* also makes clear that the result here would be the same because both the  
5 interstate and intrastate components of the monthly recurring charges are of major importance to  
6 a telephone customer and neither one obviously or inherently more so than the other. Sprint’s  
7 unsupported speculation to the contrary does not undermine this analysis.

8 Nor do I believe that it is administratively difficult to allocate monthly recurring charges  
9 between interstate and intrastate services. Sprint’s telephone bills that are in evidence show that  
10 Sprint’s bills separately tally intrastate calls from interstate long distance calls. Thus, where a  
11 Sprint customer makes at least one long distance call in a billing period, a determination of the  
12 percentage of the amount charged for the intrastate long distance calls of the total amount  
13 charged for all long distance calls is easily made. A single example, exhibit 12:4 of 22 (also  
14 exhibit 13:188 of 424), illustrates this point. That page shows monthly recurring charges  
15 (identified as “monthly service fee” and “presubscribed line chg”) of \$19.75 and total long  
16 distance call charges of \$96.91 (comprised of \$9.32 “In-State” and the remaining “State-to-  
17 State” and “International”). For that bill the charges for intrastate long distance calls were  
18 9.617% of the total long distance call charges ( $\$9.32/\$96.91$ ). 9.617% of \$19.75 results in a 911  
19 tax for monthly recurring charges of \$1.899 for this bill.

20 The allocation discussed in the previous paragraph requires that there be at least one long  
21 distance call made in a billing period. Since there is at least one Sprint bill in evidence where no  
22 long distance call was made during the billing period, some “default” allocation needs to be  
23 established when a bill shows no long distance calls. Since the parties have not addressed this  
24 issue, it is best to remand the issue for SBE’s determination in the first instance. While I am not  
25 deciding what the default amount should be, or how it should be calculated, it is clear to me that  
the determination of such an amount is not administratively difficult or unworkable. Two of

1 presumably several possible ways to calculate the amount illustrate this point. The default  
2 amount could be based on the percentage of the charges for all intrastate long distance calls of  
3 the charges for all long distance calls made by all customers during a particular time period such  
4 as the previous full year or it could be based on the percentage of the charges for all intrastate  
5 long distance calls for that particular customer during a particular time period such as the  
6 immediate prior bill. In either event, modern calculating technology makes the task of  
7 determining the default amount a fairly simple one.

8 Sprint's contention that allocation can not apply because there is no regulation or SBE  
9 annotation authorizing allocation is unsupported by any case law and is implicitly rejected by  
10 *Dell*, where the court decided adversely to the SBE's position that an allocation could not be  
11 made in that case because SBE's annotations required a "separate statement" of the different  
12 charges on an invoice and there was none in that case. As previously noted, here, in contrast to  
13 the invoices at issue in *Dell*, Sprint's bills do contain a separate statement of charges for  
14 intrastate long distance calls from charges for interstate calls, thereby making this case an even  
stronger one for allocation than *Dell*.

15 **III. Sprint's Administrative Claim Sufficiently Raised the Issue that the 911 Tax does not**  
16 **Apply to Intrastate Long Distance Toll Charges whose Only Distance Variation is whether**  
17 **they are IntraLata or InterLata for this Court to Address that Issue.**

18 At our two hearings I adopted Sprint's shorthand term of "time-only" charges to refer to  
19 charges for intrastate long distance telephone calls whose only distance variation was whether  
20 the calls were intraLata or interLata. At the time I recognized that such shorthand was not  
21 entirely accurate and, in this decision, I have chosen to abandon it, and instead use the more  
22 unwieldy but more precise phrase of "intrastate long distance telephone charges whose only  
23 distance variation is whether they are intraLata or interLata." Relying exclusively on §41016(a),  
24 Sprint contends that such charges are not subject to the 911 tax. SBE disagrees. SBE's first  
25

1 argument is that Sprint failed to raise this issue in its claim for a refund before the SBE and thus  
2 is now barred from making such a claim in this Court.

3 The leading case on this issue is *Preston v. State Board of Equalization* (2001) 25 Cal. 4<sup>th</sup>  
4 197, 205-208, which sets a low hurdle for how an issue needs to be addressed in a administrative  
5 claim for refund to allow the taxpayer to assert that issue in a tax refund lawsuit. *Preston*, 14 Cal.  
6 4<sup>th</sup> at 206 states “a taxpayer need not expressly raise a contention in order to meet the statutory  
7 exhaustion requirements. Where the contention is intertwined with contentions expressly raised  
8 in the refund claim, courts may consider that contention even though the claim did not expressly  
9 raise it. In other words, unstated contentions clearly implied from contentions expressly raised in  
10 a claim for refund are sufficiently stated for purposes of exhaustion.”

11 Application of the *Preston* principles is very fact-dependent and, in some cases (this  
12 being one) not readily apparent. On the one hand, nowhere in its claim for refund before the SBE  
13 did Sprint explicitly contend that charges for intrastate long distance telephone calls whose only  
14 distance variation is that they are intraLata or interLata are not subject to the 911 tax. Indeed,  
15 there is no reference in that claim to any LATAs, much less calls within or between them. On the  
16 other hand, the claim, citing §41016, explicitly contends that toll charges for long distance calls  
17 that are “not for WATS services and do not vary with the distance or duration of individual  
18 calls” are not subject to the 911 tax. (Claim, p. 4.)

19 Per *Preston*, the resolution of this issue depends on whether the specific issue regarding  
20 distance variation of intrastate long distance calls was “clearly implied” from the previously-  
21 quoted contention that Sprint explicitly made in its claim. While a close call, I think the answer  
22 is yes for the reason that, fairly read, Sprint’s claim put SBE on notice of Sprint’s position that  
23 only charges for services expressly covered by §§ 41015 and 41016 are subject to the 911 tax  
24 and thus SBE knew or should have known that Sprint believed that charges for intrastate long  
25 distance telephone calls whose only distance variation is that they are intraLata or interLata are  
not subject to the 911 tax. (*Preston*, 25 Cal. 4<sup>th</sup> at 206 (“The purpose of these statutory

1 requirements is to ensure that the Board [SBE] receives sufficient notice of the claim and its  
2 basis.”))

3 **IV. Charges for Intrastate Long Distance Telephone Calls whose only Distance Variation is**  
4 **that they are IntraLata or InterLata are not Subject to the 911 Tax.**

5 SBE makes two arguments why charges for intrastate long distance telephone calls whose  
6 only distance variation is that they are intraLata or interLata are subject to the 911 tax. The first  
7 argument is that the first “and” in the version of §41016(a) that applied during the relevant time  
8 period should be construed to mean “and/or.” SBE does not contend, nor could it consistent with  
9 well-established due process rules, that the current version of §41016(a) adopted in 2008 which  
10 has disjunctive language, is applicable to this case. SBE’s second argument is that, even if “and”  
11 is construed to mean “and,” toll charges which vary depending on whether they are for intraLata  
12 or interLata calls do vary by distance and thus are calls that vary by both “distance and elapsed  
transmission time” as that phrase is used in §41016(a).

13 Both of SBE’s arguments are rejected by five federal appellate court decisions construing  
14 identical language in the federal telephone excise tax statute. Because I do not perceive any  
15 reason not to do so, I will adhere to the well-established rule of statutory construction of  
16 interpreting language taken from another statute in the same way as the language in the other  
17 statute has been interpreted absent some indication that the two statutes should be construed  
18 differently. (*See Jones v. Kmart Corp.* (1998) 17 Cal. 4<sup>th</sup> 329, 335-338) (refusing to apply this  
19 rule where a decision construing the other statute was poorly reasoned and not faithful to the  
20 statutory language and its purpose.)

21 The federal decisions construing “and” to mean “and” are well-reasoned and faithful to  
22 the statutory language. Indeed, as those decisions emphasize, a construction like the one  
23 advocated by the SBE, has significant logical flaws because of the implausibility of charges for  
24 telephone calls that vary by distance but not elapsed time. The indisputable fact that the 911  
25 statute, unlike the federal statute, was enacted for the purpose of funding a specific program does

1 not require or even support a departure from the impressive unanimity of the federal appellate  
2 judiciary on the interpretation question presented here. This is because whether “and” means  
3 “and” or it means something else is determinable from the language, structure and context of the  
4 statute and the circumstances of its enactment. Further, as shown by the 2008 amendment, the  
5 Legislature surely knows how to use language expressing that variation by either distance or time  
6 suffices for a call to be subject to the 911 tax, but did not employ such language until 2008.  
7 Significantly, there is no indication that the 2008 amendment was intended to be merely  
8 declaratory of existing law, as was held to be the case with another judicially construed provision  
9 of the Act in *GTE Sprint Communications Corp. v. State Board of Equalization* (1991) 1 Cal.  
10 App. 4<sup>th</sup> 827.

11 The thoughtful and persuasive discussion in *OfficeMax, Inc. v. United States* (6<sup>th</sup> Cir.  
12 2005) 428 F.3d 583, 596-97 rejecting the argument that variation in charges between intrastate  
13 and interstate calls are charges that vary by “distance” for purposes of the toll charges  
14 definitional section in the federal statute applies fully to and requires rejection of SBE’s  
15 argument that variation in charges between intraLata and interLata calls are charges that vary by  
16 “distance” in the identically-worded §41016(a). As Sprint points out, just as an intrastate call  
17 (e.g. from Sacramento to San Diego) is often between two points farther in distance than an  
18 interstate call (e.g. from Sacramento to Reno), an intraLata call (e.g. from Crescent City to San  
19 Jose) is often between two points farther in distance than an interLata call (e.g. from Crescent  
20 City to Yreka).

21 **V. The 911 Tax Does Not Apply to the CPUC-Mandated Charges.**

22 Citing the identical language in §41011 that “charges billed by a service supplier to a  
23 service user for intrastate telephone communications services” are subject to the 911 tax, the  
24 parties disagree whether certain charges mandated by the CPUC pursuant to various California  
25 statutes are taxable under the Act. Sprint contends that the charges are not made for services and  
thus fall outside the scope of the Act. The SBE’s position to the contrary is based on the

1 language of the underlying statutes which it contends imposes the charges on Sprint and thus the  
2 charges are for services taxed by the Act. The parties agree that resolution of this issue depends  
3 on whether these charges are imposed on Sprint or its customers. If the former, the parties agree  
4 that the charges are subject to the 911 tax. If the latter, the parties agree that the charges are not  
5 subject to the 911 tax.

6 After Sprint withdrew its arguments as to several of the CPUC-mandated charges, the  
7 only such charges that remain in dispute are the universal lifeline telephone service surcharge  
8 (ULTS), the California high-cost fund-A and fund-B surcharges, and the California teleconnect  
9 fund surcharge (CTF). The parties disagree about where I should look to determine whether  
10 these charges are subject to the 911 tax. The SBE says that the answer is found in the underlying  
11 statutes authorizing these charges, while Sprint says the answer is found in the CPUC orders  
12 directing the collection of these charges.

13 The ULTS is authorized by Pub. Util. Code §879(c). That subdivision provides for  
14 funding of lifeline telephone services “in the form of a surcharge to service rates.” While not  
15 entirely clear, this language suggests that the ULTS is imposed on Sprint’s customers who are  
16 the rate payers, not Sprint, who is the collector of the surcharge. CPUC orders – in particular,  
17 Resolution T-15984 (exhibit 25) and paragraph 7d of Interim Order 95-01-021 found on page  
18 199 of the Westlaw printout of that order (1996 WL 651546) which is included in exhibit 26 –  
19 provide further corroboration that the ULTS is imposed on Sprint’s customers, not Sprint.

20 The fund-A and fund-B surcharges are authorized by Pub. Util. Code §§ 275(b) and  
21 276(b) respectively. These statutes provide for “revenues collected by telephone corporations in  
22 rates authorized” by the CPUC to fund these two programs. While this statutory language is also  
23 unclear, it too suggests that the fund-A and fund-B surcharges are imposed on Sprint’s customers  
24 and “collected by” Sprint. Once again, CPUC orders – in particular, paragraph 72 of the order  
25 found on page 238 of the Westlaw printout of that order included in exhibit 24 and paragraph 8g

1 of Interim Order 95-01-021 found on page 200 of the Westlaw printout of that order (1996 WL  
2 651546) which is included in exhibit 26 – seems to corroborate this view.

3 The CTF surcharge is authorized by Pub. Util. Code §280(c), which provides for  
4 “revenues collected by telephone corporations in rates” to fund the CTF program. While this  
5 language also leaves some room for dispute on the issue of who the surcharge is imposed on, it  
6 suggests that the surcharge is imposed on Sprint’s customers in the form of rates and collected by  
7 Sprint from those customers. The parties have not called my attention to any PUC orders  
8 regarding the CTF surcharge and my own review has not located any.

9 To summarize, based on the language of the authorizing statutes and the cited PUC  
10 orders, and further confirmed by the rule that ambiguity in tax legislation favors the taxpayer, I  
11 have determined that the four CPUC-mandated charges in dispute are not subject to the 911 tax.

12 **VI. §41025 Requires that the 911 Tax Be Based on the Sum of All Charges Subject to the**  
13 **911 Tax, Not on a Charge-By-Charge Basis.**

14 The final issue in dispute requires construction of §41025. As applicable to the relevant  
15 time period, that section provides: “If a bill is rendered to persons using intrastate telephone  
16 services, the amount on which the surcharge with respect to such services shall be based shall be  
17 the sum of all charges for such services included in the bill; except that if the person who renders  
18 the bill groups individual items for purposes of rendering the bill and computing the surcharge,  
19 then the amount on which the surcharge with respect to each such group shall be based shall be  
20 the sum of all items within that group, and the surcharge on the remaining items not included in  
21 any such group shall be based on the charge for each item separately.”

22 Sprint contends that this section permits it to calculate the amount of 911 tax on charges  
23 subject to the tax based on a charge-by-charge basis rather than on the sum of all charges subject  
24 to the 911 tax because that is the way it bills its customers and the section was intended to permit  
25 a telephone company to collect the 911 tax in conformity with the way it bills its customers.

Sprint supports its position by reference to some of the legislative history of the federal excise

1 tax statute which contains a substantially similar provision in 26 USC 4254(a). Alternatively  
2 Sprint contends that, if §41025 is not interpreted to allow for the method of computation it urges,  
3 that section results in Sprint being denied equal protection under the Fourteenth Amendment to  
4 the United States Constitution. The SBE argues that because Sprint does not “group” individual  
5 charges on its bills, Sprint must calculate the amount of the 911 tax based on the sum of all of the  
6 charges subject to the tax.

7 This issue is relevant only because Sprint employs a “*de minimis*” rule in its bills to its  
8 customers so that certain charges subject to the 911 tax are not charged any 911 tax at all.  
9 Although I was not cited to any evidence on this point, I have assumed that Sprint employs this  
10 rule for reasons wholly independent of 911 tax computation.

11 Resolution of this issue turns on whether §41025 provides for two or three different  
12 computation methods. I agree with the SBE that the section only provides for two methods: the  
13 first one providing for computation based on “the sum of all charges” and a second one, as an  
14 exception to the first, which applies when a telephone company “groups individual items for  
15 purposes of rendering” its bills. I disagree with Sprint’s interpretation that the section provides  
16 for a third method allowing for computation on a charge-by-charge basis on items not included  
17 in groups when the telephone company does not group individual charges. Because Sprint does  
18 not group individual charges on its bills, it must use the first computation method in §41025  
19 requiring that the 911 tax be based on the sum of all charges subject to the 911 tax.

20 Sprint’s equal protection argument is unsupported by any facts or law. Even assuming  
21 that Sprint is somehow adversely treated compared to another taxpayer of the 911 tax, which  
22 Sprint has not shown, there is a rational basis – the test governing equal protection challenges to  
23 statutes of general application not involving either fundamental rights or immutable individual  
24 characteristics – for §41025. It is neither irrational nor unreasonable for a tax to be calculated  
25 based on the sum of all charges subject to the tax, as opposed to the calculation made on each  
charge on a charge-by-charge basis. At a minimum, uniformity of computation and

1 administrative ease provide sufficient rational bases for §41025 to withstand an equal protection  
2 challenge.

3 **VII. Further Proceedings in this Case.**

4 In the event that one or both parties believe there is any need for further oral or written  
5 argument, there is some lack of clarity to this decision, and/or the decision has not fully resolved  
6 all issues requiring resolution, the parties should meet and confer and, if they can agree, submit a  
7 joint statement no later than March 13, 2009 setting forth their views on these matters including  
8 a proposed schedule. If the parties cannot agree on a joint statement, then they may submit their  
9 views on the foregoing issues in separate statements no later than March 13, 2009. Based on the  
10 joint statement or separate statements, I will then advise the parties of further proceedings in the  
11 case. In the event that either party desires a further hearing or, after my review of a joint  
12 statement, I believe such a hearing is warranted, I will schedule such a hearing. If I do not  
13 receive a joint statement or separate statements by March 13, 2009, I will enter judgment in  
14 accordance with this decision.

14 IT IS SO ORDERED.

15 Dated: FEBRUARY 13, 2009



Harold E. Kahn  
Judge of the Superior Court