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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

ASSURANCE WIRELESS USA, L.P., et al.,

Plaintiffs,

v.

ALICE B. REYNOLDS, et al.,

Defendants.

Case No. 3:23-cv-00483

**BRIEF OF *AMICI CURIAE*
MULTICULTURAL MEDIA,
TELECOM AND INTERNET
COUNCIL, ALLVANZA, AND
CALIFORNIA HAWAII STATE
CONFERENCE OF THE
NATIONAL ASSOCIATION FOR
THE ADVANCEMENT OF
COLORED PEOPLE IN SUPPORT
OF PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION**

Before the Honorable Laurel Beeler
Complaint Filed: February 1, 2023

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In the instant proceeding, MMTC believes that the California Public Utilities Commission’s (“CPUC” or “Commission”) decision is bad policy and violates well-established law. Decision Updating the Mechanism for Surcharges to Support Public Purpose Programs, *Order Instituting Rulemaking to Update Surcharge Mechanisms to Ensure Equity & Transparency of Fees, Taxes & Surcharges Assessed on Customers of Telecommc ’ns Servs. in Cal.*, D. 22-10-021, 2022 WL 16782574 (Cal. P.U.C. Oct. 20, 2022) (the “Decision”).

Also signing onto this brief is Allvanza, a non-partisan, forward-thinking, policy and action nonprofit organization that advocates for the success of Latinxs, and other underserved communities, in our innovation- and technology-based society. It advocates for regulatory

1 policies that promote equitable deployment of broadband to all communities, rural and urban
2 alike, and works to make sure its constituent communities are part of the conversation at key
3 policy discussions, industry gatherings, events, and conferences.

4 Additionally, the California Hawaii State Conference of the National Association for the
5 Advancement of Colored People joins as *amicus*. Founded in 1909 with the mission of
6 promoting social justice, the National Association for the Advancement of Colored People (the
7 “NAACP”) is the country’s oldest and largest civil rights organization. The California Hawaii
8 State Conference of the NAACP is the NAACP’s affiliate covering the State of California. The
9 NAACP has over two million supporters and members, including thousands of members in
10 California. For more than a century, the NAACP has used collective action and the legal process
11 to champion equality and justice.

12 The outcome of this case will have important civil rights implications for NAACP
13 members and for the NAACP’s institutional interest in redressing injustice and inequality.
14 People of color are more likely to be disproportionately burdened by regressive taxes and
15 regulatory fees, and ensuing that the CPUC’s surcharges do not unfairly burden their ability to
16 access to the internet (including wireless internet services) is a critical goal of the NAACP’s in
17 promoting and enhancing people of color’s full participation in the modern economy.

18 Each of the *amici* believe that if the Decision is not enjoined, the CPUC’s new per
19 access-line methodology for assessing surcharges will increase the cost of essential wireless
20 services, a cost that will be borne disproportionately by lower-income, minority communities,
21 harming the many Americans who remain on the wrong side of the digital divide.¹

22 **II. SUMMARY OF ARGUMENT**

23 Pursuant to the Decision, the CPUC seeks to change how it calculates its surcharge from
24 a revenue-based approach to a flat-fee per access-line approach. The effect of this change will be
25 to increase the cost of wireless service. Worse yet, flat-fee surcharges, like the CPUC’s proposed
26 surcharge are regressive, and disproportionately burden low-income consumers. With a flat-fee
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28 ¹ No party or party’s counsel authored this amicus brief in whole or in part, and no party or party’s counsel contributed money to fund preparing or submitting the brief.

1 per access-line approach, the CPUC places the same burden on a low-income individual who
2 buys the minimal option for connectivity as a business or a millionaire who purchases every
3 possible service for connectivity. Ultimately, this disproportionate and unfair price change will
4 force low-income individuals that rely mobile wireless services to access broadband to lose that
5 access.

6 Over the past several years, affordable and varying wireless options have helped bridge
7 the digital divide that prevents low-income and communities of color from accessing broadband
8 services in the same proportion as people in more affluent communities. The CPUC's shift to
9 flat-fee access-line surcharges threatens that progress by increasing the price of wireless services
10 and decreasing carriers' ability to offer options accessible to a variety of consumers. The flat-fee
11 access-line approach has the effect of unlawfully discriminating against wireless services as
12 compared to other services. This discrimination stifles competition, which will prevent carriers
13 from offering new, flexible, and cost-effective wireless options necessary to further bridge the
14 digital divide.

15 While the current revenue-based surcharge imposes fees on only intrastate voice services
16 proportionate to their use, the flat-fee access-line surcharge would be the same regardless of use.
17 Without proportionality of use, multi-line wireless customers who rely on their smart phones as
18 their families' only means of broadband access will bear the bulk of the burden of funding the
19 public purpose programs. Thus, the low-income individuals who are the intended beneficiaries of
20 the surcharge-funded program will be hardest hit.

21 Under the CPUC's new per-line approach, the average monthly surcharge a California
22 wireless subscriber pays would jump from \$0.27 to \$1.11. *Comments of the Utility Reform*
23 *Network on the Proposed Decision Updating the Mechanism for Surcharges to Support Public*
24 *Purpose Programs* at 6 (Sept. 22, 2022) [hereinafter "TURN Sept. 22, 2022 Comments"].² That
25 would mean a typical family of four would bear an additional, new and unexpected, expense of
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² <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M497/K247/497247121.pdf>.

1 \$3.36 per month or \$40.32 per year. The shock of such a new expense would hit communities of
2 color and other marginalized groups the hardest and endanger their ability to access wireless and
3 broadband service.

4 5 **III. ARGUMENT**

6 **A. Accessible and Affordable Wireless Services Are Essential to Bridging the Digital Divide**

7 The CPUC's new per access line surcharge will make wireless service more expensive
8 and therefore, less affordable and accessible to those who need it most. Since the 1990s, a gap in
9 ownership and adoption of digital technology between the "haves" and "have nots" has been
10 coined the "digital divide." Due to a mix of factors, communities of color have historically and
11 disproportionally fallen on the wrong side of this divide. In 2020, the Federal Communications
12 Commission ("FCC") reported that over 18 million Americans still lack fixed high-speed
13 terrestrial broadband. *In re Inquiry Concerning Deployment of ATC to All Americans*, 35 FCC
14 Rcd. 8986, 9034 (2020). However, as wireless broadband has become more affordable and
15 accessible, it has served as a major factor in bridging the digital divide.
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18 According to the National Center for Health Statistics, low-income consumers are
19 significantly more likely to rely on mobile wireless as their sole connection to broadband and
20 other communications services. Stephen J. Blumberg, Ph.D. & Julian V. Luke, Nat'l Center for
21 Health Statistics, *Wireless Substitution: Early Release of Estimates from the National Health*
22 *Interview Survey, January-June 2022* (Dec. 2022).³ About 74% of all low-income adults lived in
23 wireless-only households, compared to 69% of all adults. *Id.* While only 15% of adults solely use
24 their smartphones for broadband internet access, this number increases to 25% for Latinx adults
25 and 17% for African American adults. Andrew Perrin, Pew Research Center, *Mobile Technology*
26 *and Home Broadband 2021* (June 3, 2021).⁴ Today, wireless internet connects more previously
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28 ³ <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless202212.pdf>.

⁴ <https://www.pewresearch.org/internet/2021/06/03/mobile-technology-and-home-broadband-2021/>.

1 unserved and underserved groups than ever before—91% of adults in the U.S. are now connected
2 to wired or wireless broadband, and 85% own a smartphone. *Id.*

3 This increase in connectivity has largely been driven by affordable mobile broadband
4 offerings. Wireless addresses some of the greatest barriers to broadband adoption: providing both
5 widespread access and affordable pricing structures that attract people of color, low-income
6 households, rural populations, and other unserved and underserved groups. Over time, the price
7 of wireless has decreased as compared with inflation. As wireless technology has continued to
8 evolve, it has both increased access to these connections and enhanced the ways lives can be
9 transformed. Major wireless companies, including Plaintiffs, offer low-cost and flexible
10 offerings that are highly attractive to communities of color and low-income households.

11 For communities of color in particular, which have historically faced inequities in access
12 to resources for advancement, a connection to the internet means a connection to opportunity.
13 Connecting families to high-speed internet connects them to a vastly improved quality of life,
14 including economic empowerment, improved healthcare outcomes for chronic illnesses, broader
15 opportunities for advanced education, safer workplaces, and much more.

16 **B. The CPUC’s Access Line Surcharge Will Undermine the Progress from Affordable**
17 **Wireless Service**

18 The CPUC’s per access-line surcharge would undermine the progress in bridging the
19 digital divide, by imposing a significantly higher and disproportionate fee on those least able to
20 afford it. Increasing the cost of wireless service through the surcharge could prevent people on
21 the wrong side of the digital divide from initiating or continuing to access wireless services. For
22 example, in 2015, the high cost of home internet was the primary reason households did not
23 subscribe to home internet. In California, communities of color were more likely to not be
24 connected to the internet or were connected only via a smartphone. Mark DiCamillo, Institute of
25 Governmental Studies, University of California, Berkeley, *Internet Connectivity and the “Digital*
26 *Divide” in California – 2019*, Table 4a, <https://escholarship.org/uc/item/7rj7p5vw>. Nearly 50%
27 of the most vulnerable smartphone-dependent populations have had to allow their phones to
28 lapse based on financial hardship. *Id.* Since the flat access-line surcharge, which will

1 disproportionately be collected from wireless customers, it will disproportionately impact
2 communities of color.

3 The CPUC's access-line surcharge also operates as a tax on broadband access for
4 disproportionately low-income and minority individuals, who rely on wireless services as their
5 sole means of broadband access. This new tax burden is not only illegal, but would prevent more
6 and continued access to wireless broadband by people on the wrong side of the digital divide.
7 The FCC preempts states from subjecting broadband to charges such as the CPUC surcharge. *In*
8 *re FCC Releases Open Internet R&O, Declaratory Ruling, & Order*, 30 FCC Rcd. 5601, 5803,
9 5837 [¶¶ 431-32, 490 & n.1477] (2015); *In re Restoring Internet Freedom*, 33 FCC Rcd. 311,
10 429 [¶ 196 & n.736, ¶¶ 199-200] (2018). While the CPUC purports to avoid directly imposing a
11 tax on broadband, the practical effect of the increased surcharge would be to impose an
12 additional tax on individuals who rely on their wireless phone primarily, if not exclusively, for
13 non-taxable broadband access. Meanwhile, higher-income individuals that can afford to purchase
14 a home broadband subscription do not pay the surcharge on that service. The result is not a fee
15 proportionate with use, but instead an effective higher tax rate on individuals least able to afford
16 it. The access-line surcharge results in an end run around the preemption on taxing broadband
17 services, but only for those often lower-income and people in communities of color, that do not
18 have stand-alone broadband.

19 **C. The Access Line Surcharge Would Disproportionately Hurt Low-Income Individual**
20 **and Communities of Color**

21 The change in surcharge calculation would exacerbate the digital divide problem by
22 disproportionately shifting the burden of the CPUC surcharges to residential consumers,
23 particularly those who rely on wireless services as their sole means of broadband access. With
24 the flat access-line surcharge method, wireless customers will pay a surcharge disproportionate
25 to their use of taxable telecommunications service. By eliminating the proportionality of the fees
26 to the services, the bulk of the burden of funding the public purpose programs will be borne by
27 the multi-line wireless customers who rely on their smart phones as their only means of
28 broadband access.

1 The CPUC staff's report shows that if the new approach goes into effect, it "will
2 dramatically increase the recovery of surcharge revenues from non-business customers." TURN
3 Sept. 22 Comments at 6. Business customers, unlike low-income wireless customers, rely on
4 broadband access from their business accounts. As The Utility Reform Network ("TURN")
5 noted, wireless mobility customers' contribution will increase by nearly \$455 million, an
6 especially large increase compared to traditional telecommunications service: VoIP customers
7 will experience a surcharge assessment increase of \$21 million, and Plain Old Telephone Service
8 ("POTS") customers will experience a decrease of \$77 million. *Id.* Thus, the CPUC's new
9 methodology for assessing the surcharge shifts the burden to wireless customers without regard
10 to the services they are using.

11 Imposing the bulk of the burden on wireless customers operates as a regressive tax. All
12 customers would pay the same fee per-line regardless of income, so the per-line impact on lower
13 income earners would be proportionally higher than for higher-income earners. Rather than
14 seeking to transfer wealth from better-off, higher-income service plans, the regressive surcharge
15 would transfer the burden for the public benefit programs to the economically disadvantaged
16 individuals those programs seek to support.

17 The CPUC's flat-fee per-line surcharge of \$1.11 per-line will adversely impact low-
18 income consumers, especially communities of color, who are still financially struggling after the
19 Covid-19 pandemic and record-high levels of inflation. The average monthly surcharge a
20 California wireless subscriber pays would jump from \$0.27 to \$1.11. TURN Sept. 22, 2022
21 Comments at 6. With the new flat-rate surcharge, that would mean a typical family of four would
22 bear an additional, new and unexpected, expense of \$3.36 per month or \$40.32 per year.⁵ This is
23 a dramatic increase. Although \$40.32 may not seem like much to some, the reality is that low-
24 income consumers "frequently have to choose between broadband service and basic necessities
25 such as food." FCC, *Report on the State of the Lifeline Marketplace* at 30 (June 2021) (citing the
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28 ⁵ As TURN explained, the surcharge burden would jump to \$1.11 per month (or \$4.44 for a family of four). TURN
Sept. 22 Comments at 6, 8.

1 Benton Institute’s comments).⁶ For struggling families, this price charge will be acutely felt: the
2 decision between a week of groceries and a year of broadband is an easy one. The shock of this
3 new expense will cause struggling families to cut back on multiple lines for families if not all
4 their lines. Not only will the additional \$40.32 expense deter low-income individuals from
5 obtaining broadband, but the CPUC reserves the right to increase the surcharge amount from
6 \$1.11, making it difficult for consumers to budget how much a new connection will cost them
7 annually. Decision at 62, 76.

8 Undoubtedly, this unpredictable price increase will hit communities of color and other
9 marginalized groups the hardest. In comments from the public to the CPUC prior to its decision,
10 members of the public noted their opposition to the negative impact that the CPUC’s change will
11 have on them. Specifically, commenters stated that cell phone owners with fixed incomes will be
12 directly and severely impacted by this substantial increase and will make wireless unaffordable
13 and they depend on wireless communications for essential services such as communicating with
14 doctors or international family. Public Comments on the Proposed Decision Updating the
15 Mechanism for Surcharges to Support Public Purpose Programs, R.21-03-22 (Cal. P.U.C.).

16 Under the status quo, the CPUC’s revenue-based surcharge was calculated based on
17 revenues from intrastate voice service or information services. Under this revenue-based
18 methodology, wireless customers pay a surcharge on the portion of their service from intrastate
19 voice services, but not the interstate and broadband services, which are prohibited from being
20 taxed. With the revenue approach, all types of customers—wireless and wireline are paying the
21 same percentage fees on their intrastate telecommunications usage. *See Cal. Public Utilities*
22 *Comm’n Staff Report – Part 1*, R.21-03-002 at 9 (June 2021).⁷ The progressive revenue-based
23 surcharge allows a consumer that needs to reduce expenses to make spending changes to
24 decrease the surcharge. In contrast, a flat-fee per access-line surcharge will stay the same such
25 that the low-income consumer’s only option to avoid the newly quadrupled surcharge would be
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28 ⁶ <https://www.fcc.gov/document/bureau-releases-report-state-lifeline-marketplace>.

⁷ <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M389/K957/389957174.pdf>.

1 to cancel a phone line. That effect will be multiplied when a family has multiple lines for
2 multiple users, some of whom may not use the line for anything other than broadband.

3 **D. Unfairly Burdening Wireless Services Harms Consumers**

4 California's Universal Service programs may not be "inconsistent with" the FCC's
5 Universal Service rules and the rules require that contributions be made on an "equitable and
6 nondiscriminatory basis." 47 U.S.C. § 254(f). Federal law therefore recognizes that the CPUC
7 may not implement rules which unfairly favor or disfavor one type of technology in unfair ways.
8 (*See* Pl.'s Mot. for Preliminary Injunction at 6, ECF No. 4.) The FCC explained that this
9 technological neutrality principle is consistent with the congressional intent to promote a pro-
10 competitive framework and "will allow the marketplace to direct the advancement of technology
11 and all citizens to benefit from such development." *In re Federal-State Joint Board on Universal*
12 *Service*, 12 FCC Rcd. 8776, 8801-02 [¶¶ 48–49] (1997) ("1997 FCC Order"). Moreover the FCC
13 wanted to avoid limiting providers' service offering, when more cost-effective and relevant
14 services were available. *Id.* Thus, the technological neutrality principle benefits consumers by
15 fostering a marketplace where consumers can choose affordable communications options that are
16 best for them, without being penalized by state policies for that choice.

17 To assess whether something is competitively neutral, the appropriate inquiry is whether
18 the fee has the "practical effect" of burdening something Congress intended to prevent. *See*
19 *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 373 (1991) (quoting *Mobil Oil Corp. v.*
20 *Comm'r of Taxes of Vt.*, 445 U.S. 425, 443 (1980)) (discussing a preemption of taxes). As
21 explained above, the CPUC's flat-fee access-line surcharge disproportionately burdens wireless
22 customers who rely on that service for broadband access. Meanwhile, individuals who can afford
23 stand-alone terrestrial internet service do not pay the fee for the same service.⁸ The CPUC's
24 access-line method of calculation puts its thumbs on the scale in favor of one identical service
25 over another, penalizing those individuals whose only affordable means of accessing the internet
26 is wireless.

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28 ⁸ The CPUC's definition of "access line" applies only to a "telephone line" and associated with a telephone number,
and therefore does not include stand-alone internet service. Decision at 40.

1 By imposing a discriminatory surcharge that is not proportionate to the services used, the
2 CPUC would also limit the competitive market's ability to offer new dynamic options to fit
3 consumers' needs. Plaintiffs note that they will have to absorb the financial impact of the new
4 surcharge for their popular and consumer-friendly tax-inclusive wireless plans. (Compl. at 3 n.4,
5 26, ECF No. 1.) Penalizing carriers making different kinds of plans available, like the tax-
6 inclusive wireless plan, is anti-competitive and bad for consumers by limiting carriers' ability to
7 innovate. If a carrier offering transparent and popular options is penalized, that will deter carriers
8 from coming up with new cost-effective options. But these flexible and cost-effective options are
9 exactly what is necessary to help bridge the digital divide.

10 **E. The CPUC Should Address Funding Issues through Less Harmful Means**

11 The CPUC surcharges are intended to help needy Californians access communications
12 services—in other words, to help bridge the digital divide. The CPUC's change in surcharge
13 calculation methods would run contrary to that very policy. The FCC has recognized the threat to
14 competitive neutrality an access-line surcharge poses, since it has considered, but never
15 authorized an access-line charge.

16 As discussed above, the change will make it less likely that new users would subscribe to
17 wireless services, more expensive for existing customers, and harder for carriers to offer flexible
18 options to customers who need wireless service. The flat-fee surcharge would cause low-income
19 wireless consumers to be a disproportionately large contributor to the fund, rather than a
20 progressive model which is based on use and cost. The CPUC's exception to the surcharge for
21 Lifeline customers does not encompass all the low-income wireless customers, or potential
22 wireless customers, who will be affected by the surcharge. In 2022, only 29% of Californians
23 eligible for Lifeline participated. Universal Service Administrative Co, *Lifeline Program Data*,
24 <https://www.usac.org/lifeline/resources/program-data/>.⁹ The CPUC's efforts to increase funding
25 for these programs should favor policies which are consistent with the mission on increasing
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28 ⁹ Similarly, the California equivalent of the federal Lifeline program estimates about 40% participation by eligible households. Legislative Analyst's Office, *A Review of LifeLine Budget Estimates and Enrollment Process* (Apr. 3, 2019), <https://lao.ca.gov/Publications/Report/3995>.

1 access to essential communications services, rather than the route the CPUC has taken here. The
2 CPUC's new surcharge methodology is antithetical to this mission by making access to wireless
3 broadband less affordable and accessible.

4 IV. CONCLUSION

5 *Amici* respectfully urge the Court to issue a preliminary injunction against enforcement of
6 the CPUC's Decision and new connections-based surcharge rule that will increase costs for low-
7 income communities of color and prevent access to broadband.

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9 Dated: February 17, 2023

EVERSHEDS SUTHERLAND (US) LLP

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12 By: _____
13 Timothy A. Gustafson
14 Attorney for *Amici Curiae*
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