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Emergency Surcharge January 2010

Proration of Flat Rate Service Charges or Monthly Recurring Charges

Since flat rate service charges, also known generally as monthly recurring charges, are both intrastate and interstate in nature, they must be prorated to determine the intrastate portion of the total charge, and the Emergency Telephone Users (911) Surcharge should only be applied to the intrastate portion. Of the two types of monthly recurring charges that must be prorated to determine the amount of their intrastate component, the first is flat rate charges (variously named) that the service supplier bills, generally in connection with its various calling plans, to its customers, the service users, each billing period and that do not vary based on the number, length, or time elapsed of any toll calls made during the billing period. The second type is charges (also variously named) that are intended to reimburse the service supplier for amounts it pays to local telephone companies for access to and use of local telephone lines so that its customers can make intrastate, interstate, and international long distance phone calls. Both types of charges:

Are billed by service suppliers as part of their various billing plans and must be paid by their customers as a precondition to the customer being able to make long distance calls, whether intrastate, interstate, or international.

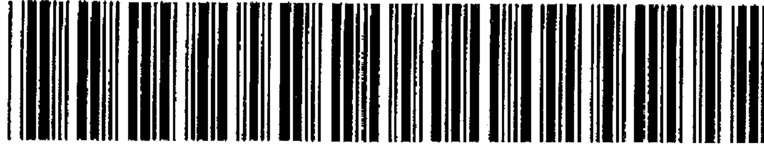
Are billed to a customer in the exact same amount each month, whether or not the customer makes any long distance calls during the billing period and whether or not all long distance calls made during the billing period are intrastate or interstate or some combination of each.

Are set forth in the service supplier's federal tariffs, filed with the Federal Communications Commission, not with the California Public Utilities Commission.

However, monthly recurring flat charges that have been historically associated with the provision of local telephone service are not subject to proration. In addition, the flat charge made by service suppliers for recoupment of their contribution to the Federal Universal Service Fund should not be prorated because it does not have an intrastate component and is not subject to the 911 Surcharge. 1/8/10.

Federal Universal Service Fund Charge

The federal government requires service suppliers to contribute to the Federal Universal Service Fund (FUSF), and service suppliers may pass on, if they choose, the cost of this contribution to their customers, which they do in the form of a line item called a variety of different names (e.g., "Federal Universal Service Fee" or "Universal Connectivity Fee"). Regardless of the name by which it is called, if the charge is for recoupment of the cost of the service supplier's contribution to the FUSF, the charge is not subject to the Emergency Telephone Users Surcharge. 1/8/10.



SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

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Case Number: CGC-06-455982
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ORDER

SPRINT COMMUNICATIONS COMPANY LP VS. STATE BOARD OF EQUALIZATION

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SPRINT COMMUNICATIONS COMPANY, L.P.,	)	Case No.: CGC-06-455982
Plaintiff,	)	**ORDER AMENDING THE FEBRUARY 18, 2009 DECISION AFTER NONJURY TRIAL**
VS.	)	
STATE BOARD OF EQUALIZATION,	)	Date: April 17, 2009
	)	Time: 9:00 A.M.
Defendant.	)	Place: Department 604
	)	Judge: Harold E. Kahn
	)	Action Filed: September 7, 2006

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

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

IV. Charges for Intrastate Long Distance Telephone Calls that do not Vary by Distance, Including Charges Whose Only Distance Variation is that they are IntraLATA or InterLATA, Are Not Subject to the 911 Tax

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

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

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

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

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

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

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

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

E. A default apportionment percentage will be calculated and applied to the Presubscribed Line Charges and monthly recurring charges on the bills at issue here, whether they include long distance call charges or not, based on the cumulative results of summing, separately, all of the intrastate and interstate call charges on those bills that include long distance call charges, and calculating the percent of intrastate call charges versus interstate call charges. Applying the intrastate percentage so calculated to the amount

of these charges would produce the intrastate portion of these charges to which the 911 tax will be applied; and conversely, the interstate portion that will be excluded from the redetermined 911 tax base.

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

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

(2) Decision Page 4:16 should read: The Federal Communications Commission…

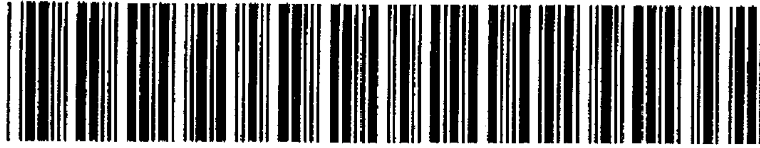
(3) Decision Page 4:19 should read: …is a regulatory agency established by the California Constitution…

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

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

Dated: 4/17/09

Harold E. Kahn
Judge of the Superior Court



SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

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Dec-14-2009 10:20 am

Case Number: CGC-06-455982
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STATEMENT OF DECISION

SPRINT COMMUNICATIONS COMPANY LP VS. STATE BOARD OF EQUALIZATION

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Prepared by the Court

SUPERIOR COURT OF CALIFORNIA

County of San Francisco

Department No. 604

SPRINT COMMUNICATIONS CO., L.P.	Case No.: CGC 06-455982
Plaintiff,	
vs.	DECISION AFTER NONJURY TRIAL
STATE BOARD OF EQUALIZATION,	
Defendant.	

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. & Tax Code § 41001 et seq. (the Act). Hereafter all code sections refer to the Revenue and Taxation Code unless otherwise indicated.
The case was assigned to me for trial. Sprint appeared by its counsel Richard Wiley. Defendant State Board of Equalization (SBE), the entity that determined that Sprint owed the 911 taxes which are the

subject of this action, appeared by its counsel Deputy Attorney General Lucy Wang and SBE tax counsel Carolee Johnstone. The parties informed me that, in their view, resolution of the issues in dispute did not depend on live testimony and thus none was provided. Instead, the parties submitted a Joint Stipulation of Facts, which served the dual purposed of setting forth certain facts and authenticating 56 exhibits. The parties stipulated that all 56 exhibits were admissible, and thus all of them were admitted in the trial. The parties also submitted supplemental joint exhibit 1, consisting of 977 pages of legislative history materials 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.

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

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

I. Factual Background and a Brief Glossary.

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

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

local lines terminating at the recipient's location. Thus, for Sprint to provide long distance services it purchased access to local lines.

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

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

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

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

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

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

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

Three key facts apply to both of these charges. The first key fact is that, when charge by Sprint, payment of the presubscribed line charges and monthly recurring charges is a precondition for the customer to make any long distance calls at all, either interstate or intrastate. The second key fact is that, when charged by Sprint, both presubscribed line charges and monthly recurring charges are charged in the exact same amount to a customer, whether or not the customer makes any long distance calls during a billing period and whether or not all long distance calls made during the billing period are intrastate or interstate or some combination of each. The third key fact is that both presubscribed line charges and monthly recurring charges are set forth in tariffs that Sprint filed with and were approved by the FCC and are not included in tariffs that Sprint filed with the CPUC. Since these three key facts apply equally to both 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 distinction between presubscribed line charges and monthly recurring charges and refer to both as "monthly recurring charges."

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

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

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

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

While it is a seductive argument, it is mistaken. As an initial matter, I have some trouble understanding why SBE conceded that monthly recurring charges are not covered by the 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 the “privilege” to communicate with all or substantially all others located within the same local calling area, a service that requires at least the potential for a customer to call all or nearly all others with telephones within a local area. (*See Comcation, Inc. v. United States* (Fed. Cl. 2007) 78 Fed. Cl. 61, 64-65 (discussing definition of “local telephone service” in 26 USC 4242(a)(1).) On the other hand, §41015(b) quite clearly expands “local telephone service” beyond §41015(a) and includes “Any facility or service provided in connection with a service described in” §41015(a). It is at least arguable that access to local telephone lines for the purpose of making long distance calls is a service that is provided “in connection with” the ability to make local telephone calls.

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

Sprint has two responses to the argument that §41011 provides that monthly recurring charges are subject to the 911 tax. First, Sprint says that §41011 is not meant to determine what services are covered by the 911 tax, but rather applies to the calculation of the 911 tax once it is determined what services are covered by the tax. Reading the Act as a whole and giving meaning to all of its language, as I am required to do, this argument does not withstand scrutiny. Each time the terms “charge for services” or “charges for services” is used in non-definitional sections of the Act, those terms are used synonymously with the charges on which the 911 tax is imposed. 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.

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

The legislative history reveals that §41011, which was written specifically for the Act, was, along with §§41010 and 41020, included in early drafts of the legislation, and only later were §§41015 and 41016,

which were taken from 26 USC 4252, added to the draft legislation. This drafting sequence shows that the Legislature wrote §41011 as a definitional section to explain what matters were covered by the 911 tax and strongly negates the inference that §§41015 and 41016 were intended to be the only sections stating what services are subject to the 911 tax. Certainly there is nothing in §§41015 and 41016 that says either or both of those sections should be construed to limit any of the language in §41011 or that the matters covered by those sections are the exclusive matters subject to the 911 tax.

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

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

While they do not concern taxation of telephone services or the distinction between interstate and intrastate, *Dell, Inc. v. Superior Court* (2008) 159 Cal. App. 4th 911 and *Overly Manufacturing Co. v. State Board of Equalization* (1961) 191 Cal. App. 2d 20 strongly suggest that allocation is appropriate here. These cases teach that where a good, service or combined good-service has a dual purpose, one of which is taxable and the other is not and neither purpose is subordinate to the other, in the absence of a statute to the contrary and where administratively feasible, the taxable purpose should be segregated from the nontaxable and the former taxed per an allocation method. This rule, as applied to monthly recurring charges, is consistent with the central distinction in the Act between taxable intrastate services and nontaxable interstate services and is far more in keeping with the apparent intent of the Act than the positions of the parties. While there is no indication in either the language or legislative

history of the Act that the Legislature considered how a "bundled" charge such as the monthly recurring charges should be treated under the Act, the all-or-nothing no-allocation approach advocated by the parties necessarily results in the taxation of non-taxable interstate services or the non-taxation of taxable intrastate services.

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

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

The allocation discussed in the previous paragraph requires that there be at least one long distance call made in a billing period. Since there is at least one Sprint bill in evidence where no long distance call was made during the billing period, some "default" allocation needs to be established when a bill shows no long distance calls. Since the parties have not addressed this issue, it is best to remand the issue for SBE's determination in the first instance. While I am not 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 presumably several possible ways to calculate the amount illustrate this point. The default amount could be based on the percentage of the charges for all

Intrastate long distance calls of the charges for all long distance calls made by all customers during a particular time period such as the previous full year or it could be based on the percentage of the charges for all intrastate long distance calls for that particular customer during a particular time period such as the immediate prior bill. In either event, modern calculating technology makes the task of determining the default amount a fairly simple one.

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

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

At our two hearings I adopted Sprint's shorthand term of "time-only" charges to refer to charges for intrastate long distance telephone calls whose only distance variation was whether the calls were intraLata or interLata. At the time I recognized that such shorthand was not entirely accurate, and, in this decision, I have chosen to abandon it, and instead use the more unwieldy but more precise phrase of "intrastate long distance telephone charges whose only distance variation is whether they are intraLata or interLata." Relying exclusively on §41016(a), Sprint contends that such charges are not subject to the 911 tax. SBE disagrees. SBE's first argument is that Sprint failed to raise this issue in its claim for a refund before the SBE and thus is now barred from making such a claim in this Court.

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

Application of the *Preston* principles is very fact-dependent and, in some cases (this being one) not readily apparent. On the one hand, nowhere in its claim for refund before the SBE did Sprint explicitly contend that charges for intrastate long distance telephone calls whose only distance variation is that

they are intraLata or interLata are not subject to the 911 tax. Indeed, there is no reference in that claim to any LATAs, much less calls within or between them. On the other hand, the claim, citing §41016, explicitly contends that toll charges for long distance calls that are "not for WATS services and do not vary with the distance or duration of individual calls" are not subject to the 911 tax. (Claim, p.4.)

Per *Preston*, the resolution of this issue depends on whether the specific issue regarding distance variation of intrastate long distance calls was "clearly implied" from the previously-quoted contention that Sprint explicitly made in its claim. While a close call, I think the answer is yes for the reason that, fairly read, Sprint's claim put SBE on notice of Sprint's position that only charges for services expressly covered by §§41015 and 41016 are subject to the 911 tax and thus SBE knew or should have known that Sprint believed that charges for intrastate long distance telephone calls whose only distance variation is that they are intraLata or interLata are not subject to the 911 tax. (*Preston*, 25 Cal. 4th at 206 ("The purpose of these statutory requirements is to ensure that the Board [SBE] receives sufficient notice of the claim and its basis."))

IV. Charges for Intrastate Long Distance Telephone Calls whose only Distance Variation is <u>that they are IntraLata or InterLata are not Subject to the 911 Tax.</u>

SBE makes two arguments why charges for intrastate long distance telephone calls whose only distance variation is that they are intraLata or interLata are subject to the 911 tax. The first argument is that the first "and" in the version of § 41016(a) that applied during the relevant time period should be construed to mean "and/or." SBE does not contend, nor could it consistent with well-established due process rules, that the current version of §41016(a) adopted in 2008 which has disjunctive language, is applicable to this case. SBE's second argument is that, even if "and" is construed to mean "and," toll charges which vary depending on whether they are for intraLata 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).

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

The federal decisions construing "and" to mean "and" are well-reasoned and faithful to the statutory language. Indeed, as those decisions emphasize, a construction like the one advocated by the SBE, has significant logical flaws because of the implausibility of charges for telephone calls that vary by distance but not elapsed time. The indisputable fact that the 911 statue, unlike the federal statute, was enacted

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

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

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

Citing the identical language in §41011 that “charges billed by a service supplier to a service user for intrastate telephone communications services” are subject to the 911 tax, the parties disagree whether certain charges mandated by the CPUC pursuant to various California 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 language of the underlying statutes which it contends imposes the charges on Sprint and thus the charges are for services taxed by the Act. The parties agree that resolution of this issue depends on whether these charges are imposed on Sprint or its customers. If the former, the parties agree that the charges are subject to the 911 tax. If the latter, the parties agree that the charges are not subject to the 911 tax.

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

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

The fund-A and fund-B surcharges are authorized by Pub. Util. Code §§275(b) and 276(b) respectively. These statutes provide for "revenues collected by telephone corporations in rates authorized" by the CPUC to fund these two programs. While this statutory language is also unclear, it too suggests that the fund-A and fund-B surcharges are imposed on Sprint's customers and "collected by" Sprint. Once again, CPUC orders – in particular, paragraph 72 of the order found on page 238 of the Westlaw printout of that order included in exhibit 24 and paragraph 8g of Interim Order 95-01-021 found on page 200 of the Westlaw printout of that order 1996 WL 651546) which is included in exhibit 26 – seems to corroborate this view.

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

To summarize, 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.

VI. §41025 Requires that the 911 Tax Be Based on the Sum of All Charges Subject to the <u>911 Tax, Not on a Charge-By-Charge Basis.</u>

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

Sprint contends that this section permits it to calculate the amount of 911 tax on charges subject to the tax based on a charge-by-charge basis rather than on the sum of all charges subject to the 911 tax because that is the way it bills its customers and the section was intended to permit 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 tax statute which contains a substantially similar provision in 26 USC 4254(a). Alternatively, Sprint contends that, if §41025 is not interpreted to allow for the method of computation it urges, that section results in Sprint being denied equal protection under the Fourteenth Amendment to the United States Constitution. The SBE argues that because Sprint does not "group" individual charges on its bills, Sprint must calculate the amount of the 911 tax based on the sum of all of the charges subject to the tax.

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

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

Sprint's equal protection argument is unsupported by any facts or law. Even assuming that Sprint is somehow adversely treated compared to another taxpayer of the 911 tax, which Sprint has not shown, there is a rational basis – the test governing equal protection challenges to statutes of general application not involving either fundamental rights or immutable individual characteristics – for §41025. It is neither irrational nor unreasonable for a tax to be calculated 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 administrative ease provide sufficient rational basis for §41025 to withstand an equal protection challenge.

VII. Further Proceedings in this Case.

In the event that one or both parties believe there is any need for further oral or written argument,

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

IT IS SO ORDERED.

Dated: FEBRUARY 13, 2009

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Harold E. Kahn
Judge of the Superior Court