STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **TIME WARNER CABLE INFORMATION SERVICES (NY), LLC** for Revision of a Determination or for Refund of Sales and Use Tax under Articles 28 and 29 of the Tax Law for the Period March 1, 2014 through February 28, 2017.	:	DECISION DTA NO. 830442

Petitioner, Time Warner Cable Information Services (NY), LLC, filed an exception to the determination of the Administrative Law Judge issued on January 4, 2024. Petitioner appeared by Eversheds Sutherland, LLP (Eric S. Tresh, Esq., Maria Todorova, Esq., and Chelsea E. Marmor, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Lori Antolick, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard on November 21, 2024, in New York, New York, which date began the six-month period for issuance of this decision.

After reviewing the entire record in the matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the fees petitioner recovered from its customers for its contributions to the Federal Universal Service Fund are subject to sales tax pursuant to Tax Law § 1105 (b).

FINDINGS OF FACT

Petitioner raised several challenges to the factual determinations below. We find the facts as determined by the Administrative Law Judge except that we have not restated the Administrative Law Judge's finding of fact 14 as it merely restates the Administrative Law Judge's treatment of parties' stipulation of facts. These facts are set forth below.

1. Petitioner, Time Warner Cable Information Services (NY), LLC, is a limited liability company with operations in New York. Since May 2016, Charter Communications, Inc. has been the parent company of petitioner. Petitioner provides intrastate, interstate, and international voice over internet protocol (VoIP) telecommunication services to its customers in New York. Petitioner sold some of these services on an unlimited basis to its customers, whereby a customer paid a flat monthly fee for combined intrastate and interstate telephone service as part of a bundled plan.

2. As a telecommunications provider, petitioner is required to contribute to the Federal Universal Service Fund (FUSF). The amount that telecommunication service providers are required to contribute is determined by their revenues from interstate services, although service providers can choose to recover their FUSF contributions from their customers. As part of its interstate services reporting, petitioner is required to file Federal Communications Commission (FCC) Forms 499-A and 499-Q with the Universal Services Administrative Company (USAC), which petitioner did as part of a consolidated group of related entities during the audit period.

3. By correspondence dated April 3, 2017, the Division of Taxation (Division) informed petitioner that it had selected petitioner's sales and use tax returns for audit for the period beginning March 1, 2014 and ending February 28, 2017 (the audit period). Attached to the audit appointment letter was an information document request, which listed the documents the

Division requested of petitioner to submit for review in the course of its audit, and naming Patrick Moylan as the auditor.

4. On February 19, 2020, the Division issued a notice of determination, bearing assessment number L-051273649 (notice), asserting additional sales and use tax of $7,298,079.94, plus interest. Therein, the Division asserted that petitioner owes additional sales tax on the charges petitioner billed its customers to recover its contributions to the FUSF.

5. On May 7, 2020, petitioner filed a timely request for a conciliation conference with the Bureau of Mediation and Conciliation Services (BCMS). On December 4, 2020, the conciliation conference was held and, pursuant thereto, the Division revised its determination of the amount of additional sales tax due to $6,667,845.05, plus interest, to account for sales tax petitioner demonstrated that it had charged on New York State Universal Service Fund fees it collected from its customers. On February 12, 2021, BCMS issued a conciliation order (CMS No. 000320215) sustaining the Division's revised amount of sales tax due from petitioner. On May 7, 2021, petitioner filed a timely petition with the Division of Tax Appeals.

6. At the hearing, the Division presented the testimony of Patrick Moylan. Mr. Moylan has been a tax auditor with the Division since 2009. He holds a bachelor's degree in accounting from Syracuse University and had 14 years of accounting experience before joining the Division. Since being employed by the Division, he has performed at least 200 audits.

7. Mr. Moylan testified that he was assigned to audit petitioner as a follow up to a previous audit. During the early phase of the audit, Mr. Moylan made several requests for documents to conduct the audit. By a written agreement dated July 24, 2017, the parties agreed to elect August 2016 as a test period for the audit. The parties entered into successive

agreements to extend the time for completion of the audit, culminating in a final consent extending that period to March 20, 2020.

8. During the course of the audit, with the help of the Division's Technical Audit Assist (TAA) unit, Mr. Moylan prepared reports of data submitted by petitioner regarding transactions on which Universal Service Fund fees were collected. Using the findings of the audit of the test period, Mr. Moylan calculated the error rates for each of the different areas under audit, including the amount of sales tax due on the FUSF collected from petitioner's customers. Mr. Moylan determined that the error rate for the FUSF fee during the test period was 6.5344 percent of the sales tax collected from petitioner's customers. Mr. Moylan then applied this error rate to petitioner's sales tax returns and determined that $7,298,079.94 in additional sales tax was due on the Universal Service Fund fees collected from petitioner's customers during the audit period.

9. Pursuant to the audit, petitioner submitted sample invoices representing charges to its customers for its telecommunication services provided during the audit period. The charges detailed therein were for phone service bundles that included interstate and intrastate phone service. The invoices stated that for purposes of calculating sales tax, set percentages ranging between 25.97 and 26.3 of the charges for phone services were for interstate or international activity. As explained in a sample invoice, the purpose of the FUSF charge to petitioner's customers is to "recover the amount that telephone service providers must contribute to the Federal Universal Service Fund, which helps keep local phone rates affordable for all Americans."

10. At the hearing, petitioner offered the testimony of Jennifer Tatel, a former general counsel with the FCC. Ms. Tatel earned a bachelor's degree from the University of Illinois, a master's degree from Columbia University, and her juris doctor from George Washington

University. Before joining the law firm of Wilkinson Barker & Knauer in 2017, Ms. Tatel served in several roles at the FCC, including chief of industry analysis in the FCC's media bureau, as a legal advisor, and in the office of general counsel, where she spent most of her time at the FCC. While in the office of general counsel, Ms. Tatel served as assistant general counsel, chief of staff, deputy general counsel, and acting general counsel. Ms. Tatel is currently a member of the Federal Communications Bar Association. While serving in her roles at the FCC, Ms. Tatel's responsibilities included dealing with issues related to the FCC's adoption of the regulations concerning the FUSF and implementing its requirements.

11. Ms. Tatel explained the history of the FUSF and Congress' goal of making basic telephone service universally available. Toward that end, providers of interstate and international telephone services are required to contribute to the FUSF based on their revenues from such services. In determining that amount, service providers may elect a safe harbor percentage under FCC regulations for interstate and international services or they may conduct a traffic study to determine the relative intrastate versus interstate and international traffic in calculating their revenues from those services. Service providers then file quarterly estimates of their interstate and international service revenues with the FCC on form 499-Q for the upcoming quarter. The FCC sets a contribution factor based on all service providers' quarterly revenue estimates and the amount it expects is needed to operate the FUSF. The USAC then bills service providers based on the contribution factor and the estimated revenues reported to the FCC. In April of the following year, service providers are required to file form 499-A with the FCC, which represents their actual revenues for the year prior, and reconciles their contributions with the actual costs of operating the FUSF. According to Ms. Tatel, for purposes of a required contribution to the FUSF from a service provider, it does not matter whether any interstate or

international calls were made during the quarter, but rather only if revenues from interstate and international services were received. While service providers are not required to pass the FUSF fee along to their customers, in practice most do, including petitioner.

12. Petitioner also presented the testimony of its employee, Brandi Drake. Ms. Drake most recently has served as petitioner's senior director of transaction tax and has been employed by petitioner for about 15 years. She earned a bachelor's degree in business administration and a master of accountancy degree from the University of Georgia. She is a certified public accountant and is licensed in Georgia. She currently oversees audits for petitioner and in the past she also oversaw compliance with state and federal Universal Service Fund requirements. During the audit period, Ms. Drake also oversaw the filing of petitioner's sales tax returns and filings related to regulatory fees including the FUSF.

13. Ms. Drake testified that petitioner offers bundled plans for its telecommunications services. She explained that a bundled plan encompasses more than one service for a single charge, such as a bundle that includes interstate and intrastate phone service. Ms. Drake testified that during the audit period, petitioner utilized a traffic study that analyzed the calls its customers made to determine the portion of calls that were interstate as opposed to intrastate in nature. Petitioner used that information to set the price for its telecommunication bundles. Using its accounting software, petitioner records revenue from its sales of intrastate and interstate sales separately in its general ledger. Although the revenue streams from each service are separately recorded in the general ledger, the customer is charged a single price for the bundled services. Along with the revenues from sales of the services provided, in the general ledger petitioner recorded as revenue the amounts collected from its customers for petitioner's required FUSF contributions. Ms. Drake reiterated that the price of bundled plans remained

static notwithstanding whether customers made purely intrastate or interstate calls. According to Ms. Drake, petitioner charged sales tax on the New York State Universal Service Fund fee passed along to its customers, but not on the FUSF because the FUSF is only associated with interstate and international phone service. Ms. Drake confirmed that the amounts that petitioner charged its customers for the FUSF fees makes up part of the price it charged its customers for interstate telecommunications services.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that under the Tax Law, a receipt includes the sales price for a taxable service without deduction for expenses (***see*** Tax Law § 1101 [b] [3]). Focusing on caselaw which indicates a service should be reviewed as a whole, the Administrative Law Judge found that petitioner is selling a bundled service comprised of both taxable and nontaxable services and the FUSF fees here at issue are an integral component of the bundled overall services it sells. The Administrative Law Judge held that the recovered FUSF fees passed on via charge to customers constitute an expense of the overall bundled service and, thus, were a component of the taxable receipts from the sales of telephony and telephone service in New York State. Accordingly, the Administrative Law Judge denied the petition of Time Warner Cable Information Services (NY) LLC and sustained the notice of determination.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the FUSF fee was calculated based only on its interstate telecommunications service receipts and FUSF fee is a receipt of the provision of a nontaxable interstate and international service, and not an expense of a taxable service. Additionally, petitioner also argues that if, in fact, the FUSF fees were taxable pursuant to the Division's contention that they are an expense of the whole service, then logic dictates that only

73.7% of the FUSF fees should be subject to sales tax as only that portion of the total receipts is taxable.

The Division argues that the FUSF fees are not receipts from the sale of interstate telephone services, but are petitioner's expenses, without differentiation between intrastate and interstate service, that are not deductible from its taxable receipts. The Division notes that the services were sold as a bundle and therefore, all customers paid the recouped FUSF fee even if they made only intrastate calls.

OPINION

The Federal Communications Act requires every telecommunications carrier that provides interstate telecommunications services to contribute to the FUSF (***see*** 47 USC § 254 [f]). The FUSF "subsidizes the cost of telecommunication services for schools, libraries, health care providers and low income consumers" (***Panatronic USA v AT&T Corp.***, 287 F3d 840, 843 [9th Cir 2002] citing 47 USC § 254 [d], [h]).

The FUSF is a federally imposed mandatory regulatory surcharge that petitioner must pay on revenue related to its interstate and international service. The FCC offers the option of a traffic study or safe harbor as a means of calculating a provider's FUSF contribution and requires quarterly and yearly reporting (***see*** Communications Act of 1934; 47 USC § 254 [d], [h]), as amended, 47 USC § 254 [d], [h]). Ultimately, the FCC uses this information to calculate a contribution fee based on the revenue of all the providers. The FUSF is collected from providers of telecommunications services, not end users, although providers may seek to recoup those costs from their customers (***see id.***). Petitioner sought such recoupment.

Section 1105 (b) (1) (B) of the Tax Law imposes sales tax on "the receipts from every sale . . . of telephony and telegraphy and telephone and telegraph service of whatever nature

except interstate and international telephony and telegraphy and telephone and telegraph service." Therefore, Tax Law § 1105 (b) (1) (B) provides, consistent with federal law, that the interstate and international service at issue in this case is *excepted* from taxation. In general, "when the matter at issue is subject to the taxing statute, but the question is whether taxation is negated by a statutory exclusion . . . the presumption is in favor of the taxing power," and "the burden rests on the petitioner to establish that the item comes within the language of the exclusion" (***Matter of Wegmans Food Mkts., Inc. v Tax Appeals Trib. of the State of N.Y.***, 33 NY3d 587, 592–594 [2019] [internal quotation marks, brackets and citations omitted]; ***see also Matter of SLIC Network Solutions, Inc. v New York State Dept. of Taxation & Fin.***, 223 AD3d 1126, 1127 [3d Dept 2024]). However, here there is no dispute since the Division agrees that the interstate and international service offered by petitioner is nontaxable.

The only question is whether the mandatory FUSF fees passed on to petitioner's customers constitute a receipt of the nontaxable interstate and international service in which case they are similarly excepted from taxation or rather are an expense of the telecommunications service as a whole. Both parties agreed at oral argument that the question is not well-settled.

Section 1101 (b) (3) defines the term "receipt" as "the amount of the sale price of any property and the charge for any service taxable under this article . . . without any deduction for expenses . . .." Petitioner contends that the FUSF fees it recoups from its customers are receipts of its nontaxable interstate and international service. We agree. Since the Division cannot tax the interstate and international services, it is not permissible to tax the federal regulatory surcharge on the nontaxable service.

The Division contends that because petitioner did not recoup the FUSF fee on a call-by-call basis, it is not sufficiently tied to the interstate and international calling to constitute a

receipt. But this misses the mark. The FCC methodology for calculating the FUSF fee aims at assessing the *revenue* from the interstate and international service not merely the number of interstate and international calls (***see generally*** 47 CFR § 54.709 [a]; ***see also*** TSB-M-17[3]C, [6]S [2017][1] ["taxpayers in this industry must contribute to the federal Universal Service Fund (USF) based on a percentage of their interstate/international telecommunications revenues. Thus, these taxpayers are already required to keep records to substantiate the allocation of their revenues between intrastate and interstate/international categories for federal purposes"]). With modern telephone plans moving away from the individual call-by-call charge model and offering "all-in-one" or "unlimited calls," a provider would naturally opt for a different method of calculating how it would recoup its FUSF fee from its customers. The change in the method of calculating the recoupment does not change the nature of the fee which is based on the revenue collected by the provider for its non-taxable interstate and international telephone services.

The Division relies heavily on ***Matter of Penfold v State Tax Commn.*** (114 AD2d 696 [3d Dept 1985]) for the proposition that a service must be viewed as a whole and all expenses of a service, without regard to its taxable nature, must be included in the taxable receipt of the service (***see also*** Tax Law § 1101 [b] [3]); 20 NYCRR 526.5 [e]). Penfold involved a single and fully taxable service, the collection and disposal of trash. The vendor charged his customers the nontaxable dumping charges and argued that since he paid no tax on these fees they should not be taxed. The Court properly found that trash could not be collected without its disposal and that the dumping charges were an expense of that overall taxable trash collection service.

Here the Division contends that as in ***Matter of Penfold***, the overall telephone service offered by petitioner is one "bundled service." Petitioner disagrees stating that it sold separate

[1] The TSB-M-17(3)C, (6)S (2017) was released after the tax period at issue.

services for a combined charge and not a single set of bundled service. Regardless of the terminology, the Division nonetheless concedes that as a functional matter, the component categories can and must be separated or to use the Division's language "unbundled" for taxation purposes. The concept of "unbundling" to separate taxable and nontaxable revenue streams is a familiar concept in federal telecommunication law (***see e.g.*** The Mobile Telecommunications Sourcing Act, 4 USC § 123 [b] ["If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation and if these charges are aggregated with and not separately stated from charges that are subject to taxation, then the charges for nontaxable mobile telecommunications services may be subject to taxation unless the home service provider can reasonably identify charges not subject to such tax, charge, or fee from its books and records that are kept in the regular course of business"]). In fact, the FCC has provided detailed guidance encouraging the bundling of various telecommunications services for efficiency and describing the calculation of the FUSF fee for an applicable portion of a bundled services (***see e.g., In Re Policy & Rules Concerning The Interstate, Interexchange Marketplace***, 16 FCC Rcd 7418, 7446 [2001] ["Carriers are assessed universal service contributions only on their revenues from telecommunications services. If carriers generate revenues from bundled packages of telecommunications services and CPE/enhanced services, however, the calculation of their universal service contributions becomes more complicated"]). [2]

Since there is no dispute that communication services offered here must be separated for taxation, the Division offers no precedent permitting it to tax a federal surcharge on the nontaxable set of services. The Division's reliance on ***Matter of Helio, LLC***, which considered the FUSF fee in the context of a mobile telephone service that was found entirely taxable is

[2] CPE refers to Customer Premise Equipment a tangible property such as VoIP phones, routers modems. ES refers to Enhanced Services such as managing and storing of information.

inapposite (***Matter of Helio, LLC***, Tax Appeals Tribunal, July 2, 2015) . In ***Matter of Helio***, the Tribunal affirmed without discussion, the decision of an Administrative Law Judge who held that the FUSF fee was taxable where charges for interstate and intrastate mobile voice services were subject to New York sales tax in their entirety pursuant to Tax Law § 1105 (b) (2) which imposed tax on "[t]he receipts from every sale of mobile telecommunications service" (***Matter of Helio, LLC***). There was no need to view the interstate and international services separately from the intrastate service because in the area of mobile voice communications, all such revenue is taxable by the state.

In finding that the FUSF fee is a receipt of the nontaxable service offered here by Time Warner, we note there is a potential federal preemption argument that may be raised in an appropriate forum (***see e.g. People v Sprint Nextel Corp.***, 26 NY3d 98 [2015], ***cert denied*** 578 US 1012 [2016]) The Tribunal is however, not such a forum since we are without jurisdiction to opine on constitutional doctrines arising under the Supremacy Clause of the United States Constitution (***see Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.***, 1 NY3d 85 [2003], ***cert denied***, 541 US 1009 [2004]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Time Warner Cable Information Services (NY), LLC is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Time Warner Cable Information Services (NY), LLC is granted; and

4. The notice of determination dated February 19, 2020, as modified by the Division on December 4, 2020, is reversed.

DATED: Albany, New York
May 20, 2025

/s/ Jonathan S. Kaiman
Jonathan S. Kaiman
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

COMMISSIONER CAHILL dissenting:

The determination below is straight forward, on point and should be sustained. It accurately quotes the law and fairly relies on undisputed, until now, interpretations of those sections of the law. I respectfully disagree with the majority opinion here that "[b]oth parties agreed at oral argument that the question is not well-settled." Indeed, the Division was consistent and adamant regarding the taxability of the charges here.

While the subject matter of the internet, communications services and the like are technologies that can certainly be confusing, the taxability of receipts is not at all complex. The notice issued by the Division is correct and should be sustained.

Simply put, the FUSF is an expense, a fee, and therefore, not a tax on interstate and international calls. It is a fee that carriers are required to pay to the FCC, not the Internal Revenue Service. It is a license fee imposed by a federal agency that is clearly and unequivocally an expense. As such, its inclusion on petitioner's customers' bills is irrelevant. There is no exemption or reduction from state sales tax for taxable receipts simply because a filer chooses to line out an expense, and that includes federal fee expenses.

Indeed, the means by which petitioner apparently determined to account for that expense on customers' bills makes clear that petitioner is not recovering a federal tax or even the federal fee imposed on them for the services they are providing. The charge is included, at the same rate of the entire bill on all customers, even on the bills of customers who made no interstate or international calls. There is no obligation on the part of petitioner to separately state their calculation (and it is their calculation, not even that of the FCC) of the charge on any bill, just as there is no obligation that they pass the charge on to their customers. Petitioner has chosen to include an expense, and simply by stating it on the bills of their customers cannot magically

transform a taxable expense under Tax Law § 1105 (b) (1) (B), as defined in Tax Law § 1101 (b) (3) to a nontaxable component of specifically exempt charges for international and interstate telephone services.

Tax Law doesn't work this way.

The statute is clear. The regulations are clear. The judicial and learned tax authority interpretations are clear. Expenses, whether they are independently subject to sales tax, are subject to sales tax when included in a taxable receipt. To find otherwise would be making new law and that is the province of the state legislature, not the Tax Appeals Tribunal.

While the majority assiduously avoids appearing to frame their decision in terms of federal law, given that it is granting petitioner's claim that it is exempt because it is a federal charge, this can be nothing other than an interpretation of federal law. That their decision is posited as an interpretation of state law does not negate the fact that the basis of that decision is founded in constitutional prohibitions against the taxation of interstate commerce (United States Constitution [art I, § 8, cl 3]).

However, state tax statutes and regulations are clear and support the Division's taxation of the FUSF fees imposed on customers. To find otherwise requires the majority to overlook the plain language of the governing statute and our numerous precedents based on "bundling" and the concept of a "receipt." Plain language interpretations of the law must be abided (***Matter of Secureworks, Inc.***, Tax Appeals Tribunal, February 17, 202, citing ***Matter of the Walt Disney Co. and Consol. Subsidiaries***, Tax Appeals Tribunal, August 6, 2020, quoting ***Matter of DaimlerChrysler Corp. v Spitzer***, 7 NY3d 653, 660 [2006]; ***Matter of Watchtower Bible and Tract Socy. of New York, Inc.***, Tax Appeals Tribunal, July 16, 2020 ["plain language of a statute

'is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning'").

The sole issue on exception is whether the FUSF fees recovered as charges to petitioner's customers are subject to sales tax. Petitioner maintains the same arguments as below i.e., petitioner sold two separate and distinct telephone services and since the FUSF charges were collected on interstate and intrastate calls, it is exempt under Tax Law § 1105 (b) (1) (B).

Tax Law § 1105 (a) imposes a tax on the "receipts from every retail sale of tangible personal property." Tax Law § 1101 (b) (3) defines "receipt" as the amount of the sale price of any property and the charge for any service taxable under Articles 28 and 29, without any deduction for expenses. Further, 20 NYCRR 526.5 states, in part:

> "The word receipt means the amount of the sale price of any property and the charge for any service taxable under articles 28 and 29 of the Tax Law, valued in money, whether received in money or otherwise."

Tax Law § 1105 (b) (1) (B) provides (in relevant part):

> "(1) The receipts from every sale, other than sales for resale, of the following . . . (B) telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service and except any telecommunications service the receipts from the sale of which are subject to tax under paragraph two of this subdivision . . ."

Further, "[i]f non-taxable property or discrete services (other than Internet access) are bundled with taxable VoIP services and sold to the customer for a single charge, the entire charge will be subject to sales tax unless the charge for such property and/or discrete services is reasonable and separately stated on the invoice or other statement of the price provided to the customer" (***see*** Division's Office of Tax Policy Analysis, Technical Services Division, dated June 20, 2007, [NYT-G-07[2]C, Corporation Tax], [NYT-G-07[3]S, Sales Tax], citing Tax Law § 1132 [c]; 20 NYCRR 527.1]).

The regulations by which we are bound as well are consistent with the plain language of the tax law in this regard. 20 NYCRR 526.5 (e) provides, in part:

> "Expenses. All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts."

The FUSF charge is an expense that is clearly included in the receipt and, as such, is taxable.

The amount of the FUSF charge petitioner's customers is held responsible for is not determined by the actual number of interstate or international calls made or interstate or international minutes used by any individual customer in a given billing period, and it is that charge that is at issue here, not the FUSF fee paid by petitioner. Rather, the percentage of out-of-state telephony determined pursuant to petitioner's traffic study is applied to the entire cost of the bundled plan to calculate the FUSF charge the customer will pay. The customer pays the fee regardless of the customer's actual usage of interstate and international telephony, which is another reason why the FUSF charge must be deemed an expense. Even if a customer were to make no out-of-state calls for the billable period, the customer is still charged a standard percentage of the bundled plan's cost for the FUSF charge, as observed on petitioner's invoices submitted at the hearing. Petitioner's hypotheticals and the apparent adoption of that fallacy by the majority here aside, not a single invoice is in evidence, nor is it clear that such an invoice exists, whereby either only intrastate service is offered or only interstate and international service is offered.

When services of both a taxable and nontaxable nature are performed, sales tax is required to be charged on the total amount of the invoice where the charges for taxable and nontaxable services are not separately stated (***see*** McKinney's Consolidated Laws of NY, Book 59 § 1105, Notes of Decisions, Note 4 citing ***Artex Systems, Inc. v Urbach*** 252 AD2d 750 [3d

Dept 1998]). Here, the amount of the FUSF charge does not correlate to the actual amount of out-of-state (i.e. non-taxable) calls made by petitioner's customers. Rather, a calculation, estimated based upon usage by all of their customers, is applied to determine the rate the customer will pay. Every customer pays the fee regardless of their own individual actual out-of-state usage. Therefore, the portion of FUSF fee billed by petitioner qualifies as expenses under the provisions of Tax Law § 1101 (b) (3) and 20 NYCRR 526.5 (a), (e) and cannot be excluded from the total receipts subject to tax (***see id.***; ***Matter of Dynamic Tel. Answering Sys. v State Tax Commn.*** 135 AD2d 978 [3d Dept 1987], ***lv denied*** 71 NY2d 801 [1988] [Tax Commission was not bound to accept estimation of per-call value of operator service made by taxpayer, which rented telephone answering equipment and provided related operator services, and was free to consider entire basic monthly charge for rental of answering machine and 40 "free" calls to operator service taxable under sales and use tax law where taxpayer failed to itemize relative cost of equipment rental and operator service on its invoices]).

Petitioner, here, is deemed to have consumed the FUSF fee as a cost of doing business and they are characterized as items of expense included under Taxes and Surcharges on the invoice. Therefore, the FUSF fee incurred by petitioner and included in its charges to its customers is included in the definition of "receipt" provided in Tax Law § 1101(b) (3) (***see Matter of Penfold v State Tax Commn.***, 114 AD2d 696 [3d Dept 1985]; ***see also*** McKinney's Consolidated Laws of NY, Book 59 § 1105, Notes of Decisions, Note 3 ["the federal Mobile Telecommunications Sourcing Act (MTSA) does not preempt the provision of the New York Tax Law subjecting to sales tax a mobile telecommunications services provider's receipts from interstate voice services, sold along with other services for a fixed monthly charge" (***People v Sprint Nextel Corp.***, 26 NY3d 98 [2015], ***cert denied*** 578 US 1012 [2016]).

Although I agree with my colleagues that the FUSF charge is a federally imposed regulatory mandate that petitioner must pay on revenue related to its interstate and international service, relevant statutes, regulations and case law make clear that it is taxable in this circumstance. Our jurisdiction is limited to that conferred by the Legislature and may not be extended (***see Matter of Kwit***, Tax Appeals Tribunal, February 15, 2024, citing ***Matter of Hooper***, Tax Appeals Tribunal, July 1, 2010).

Accordingly, I respectfully dissent.

DATED: Albany, New York
May 20, 2025

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner