

PAUL H. PROCTOR (#2657)
Assistant Attorney General
Utah Office of Consumer Services
MARK L. SHURTLEFF (#4666)
Attorney General
160 East 300 South
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone (801) 366-0552
pproctor@utah.gov

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of a Request for Agency
Action for Creation of a Telecom
Working Group to Address Possible
Streamlined Procedures for Approving
Changes Mandated by the FCC.

Docket No. 12-999-05

**UTAH OFFICE OF CONSUMER
SERVICES' RESPONSE TO DIVISION
OF PUBLIC UTILITIES REQUEST
FOR AGENCY ACTION**

As authorized by Utah Code Ann. § 54-10a-4 (Supp. 2011), the Utah Office of Consumer Services enters its appearance in this docket, and under Utah Code Ann. 63G-4-201 (Supp. 2011) and Utah Admin. R. 746-100-4 (D) (2012) responds to the Utah Division of Public Utilities' Request for Agency Action filed May 18, 2012.¹

¹ This Response is filed pursuant to the requirements the Utah Administrative Procedures Act and Utah Public Service Commission administrative rules. The Office intends to also file "comments" as provided by the Commission's Notice of Technical Conference issued May 24, 2012. By filing comments, the Office does not waive any response or objection to the Request for Agency Action or the Technical Conference identified in this response.

I. The Division's Request for Agency Action does not comply with Utah Code Ann. § 63G-4-201 (Supp. 2011), procedurally or substantively.

The Division describes the Request as one to create a telecom working group related to the FCC Report and Order commonly referred to as the Transformation Order.² The policy and procedure changes implemented by the Transformation Order are complex and appropriate matters for Commission consideration. Some of the specific issues concerning new filing and other requirements imposed by the specific parts of the Transformation Order are cited in the Request. See, "Background", Request for Agency Action, Part II.

However, the Request is attempting to initiate an open-ended, formal adjudicative proceeding without explaining the purpose of the adjudication, stating the facts and reasons forming the basis of the relief or action sought from the Commission.³ With its May 24, 2012 Notice of Technical Conference, the Commission has authorized further proceedings for which there is insufficient legal authority and jurisdiction, a vague and/or deficient purpose, an inadequate statement of the action or relief that is sought, and an inadequate statement of facts

² On November 18, 2011, the FCC released the *USF/ICC Transformation Order* in which the Commission adopted comprehensive reforms to modernize the universal service and intercarrier compensation systems to ensure that robust, affordable voice and broadband service, both fixed and mobile, are available to Americans throughout the nation. The *USF/ICC Transformation Order* was published in the Federal Register on November 29, 2011, 76 Fed. Reg. 73830, 73870 (Nov. 29, 2011).

³ The only relief properly pled in the Request is for the Commission to issue an order for a technical conference, which has been granted. See, "Action Requested", Request for Agency Action, Part III. However, as a whole the Request is seeking undefined and broad relief upon issues yet to be determined, and by commencing the adjudication with its order for a technical conference, the Commission has effectively granted that relief.

and reasons upon which the action or relief is based. Utah Code Ann. §§ 63G-4-201 (2) and (3) (Supp. 2011).⁴

The Division requests and the Commission has created a “venue” to address possible consequences to statutory proceedings, “as well as other items” parties may raise in comments.⁵ Such an unfocused request improperly and unmanageably expands a formal adjudicative proceeding by beginning with a “comment period” for submitting “agenda items” and permitting “general discussions and analyses.” Neither the Request nor the technical conference order notify parties known to have a direct interest in the requested agency action, nor is there notice of interested parties’ rights to file answers, protests or other traditional pleadings responding to a request for agency action. See Utah Admin. Code R. 746-100-3 A. Furthermore, the Division’s Request and the Commission technical conference order limits the comment period to between the date of the Commission’s technical conference notice, May 24, 2012, and June 22, 2012.⁶

The Commission described the Request for Agency Action as follows:

On May 18, 2012, the Division of Public Utilities (“Division”) filed a request for agency action seeking a technical conference to address the new requirements imposed by the Federal

⁴ The Notice of Technical Conference includes the curious provision placing the Division as the lead for this phase of the adjudicative proceeding and permits the Division to limit participation to only parties filing comments. Such restrictions are not consistent with the common practices in even a working group under the Division’s general investigation or study authority.

⁵ The Office finds no record from the Division or on the Commission’s website identifying to whom the Request was sent, as required by Section 63G-4-201 (3). Also, the Division’s pleading does not conform to the Commission’s rules on pleading forms. Utah Admin. Code R. 746-100-3 (B) (2).

⁶ The comment period has been extended to July 11, 2012, but the time for filing responsive pleadings has not been extended.

Communications Commission (“FCC”) Report and Order (the “Transformation Order”) reforming the Universal Service Fund and Intercarrier Compensation regulatory schemes. The proposed docket would also provide a venue for interested parties to make recommendations regarding possible streamlined procedures for implementing FCC mandated changes, requests for increased disbursements from the state Universal Public Telecommunications Service Support Fund, as well as other items submitted in comments from interested parties. Notice of Technical Conference, May 24, 2012.

By so framing this adjudicative proceeding, and then effectively granting the Request, the Commission sets the stage for an uncertain process by which to resolve issues yet to be defined.

Only an adjudicative proceeding that is commenced, filed and served according to Utah Code Ann. Section 63G-4-201 (Supp. 2011), can command an appearance or a knowing waiver of the right to appear, and result in a binding final order. Utah Code Ann. §63G-4-102 (1) (Supp. 2011). Neither the Request nor the May 24, 2012 Notice of Technical Conference provide adequate notice of the questions to be decided, the legal authority and jurisdiction under which the proceeding will be maintained, nor does it provide adequate notice to parties whose rights, duties, privileges, immunities or legal interests will be determined or notice of the requirement that an interested party who does not appear will be bound by the final agency action. Utah Code Ann. § 63G-4-201 (3) (Supp. 2011).

II. The Division authority to initiate an investigation or study of matters within the Commission’s jurisdiction for the purpose of making recommendations upon the same will provide a more efficient and effective consideration of the requirements imposed by the Transformation Order.

Utah Code Ann. §§ 54-4a-1 (1) (c) and (h) (2004) authorizes the Division to initiate an investigation or study of matters such as the Transformation Order, and to make

recommendations regarding public utility regulatory policy.⁷ Exercising this authority seems particularly well suited to the broad policy and the full procedural and substantive implications of the Transformation Order. At present, the policy and implications are uncertain or unknown, and there are expected to be multiple interested parties with different viewpoints for what the issues are, as well as what the solutions may be.

A recent case demonstrates the prudence of requiring the Division to revise its filing to request the Commission open a docket to accommodate such an investigation. In its February 23, 2012 Report and Order in Docket 11-035-T14, the Commission approved a settlement that included an agreement to discuss process improvements for an advisory group. Interested parties were notified of and participated in the discussions, the outcome of which was a joint request for agency action, Docket No. 12-035-69. The request was for specific relief grounded upon specific facts and circumstances and provided parties with a notice and opportunity to respond.

Similarly, in Docket No. 10-2528-01, the Commission issued a Notice of Scheduling Conference as the initiating pleading for a generic proceeding pertaining to eligible telecommunications company designations. Parties in that docket expressed concerns similar to those in this docket, because as in this docket, the scheduling conference notice overlooked the Utah Administrative Procedures Act, requiring the following: “At the scheduling conference, parties should be prepared to define the issues that need to be addressed in this docket, and to establish an expeditious schedule for discovery, the distribution of pre-filed testimony, and

⁷ The Commission may, and regularly does, order the Division to investigate or study such matters.

hearings.” Because of those concerns, the Commission first provided interested parties with notice of the proceeding and an opportunity to participate. The Commission provided for a series of comments from which it could issue and serve a Notice of Agency Action for formal adjudication, providing for formal responses, discovery, and hearings as required by statute.⁸

III. Conclusion and relief requested.

In its September 23, 2008 Order on Motions in Docket No. 08-035-38, the Commission outlined the importance of preserving fairness and parties’ due process rights by complying with the law governing administrative adjudications.

Utah’s statutory provisions regarding administrative adjudications are found in UAPA and provide relatively general guidance. *E.g.*, provision for how adjudicative proceedings are started, *id.*, §63G-4-201; provision for possible responsive pleadings, *id.*, §63G-4-204; provision for discovery and subpoenas, *id.*, §63G-4-205; and the conduct of hearings, *id.*, §63G-4-206. Although general in its tenor, UAPA incorporates concepts of fairness or procedural due process. *E.g.*, hearings are to provide opportunity for “full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions,” *id.*, §63G-4-206(1)(a), and judicial relief is available if the agency’s adjudicatory proceedings have violated procedural requirements, *id.*, §63G-4-403(4)(e), or trespassed indicia associated with due process, *id.*, §63G-4-403(4)(h).⁹

The Division’s Request for Agency Action falls far short of these general guidelines and therefore should be denied, but with direction. The Office requests the Commission direct the Division to revise and re-file the Request under sections 54-4a-1 (1) (c) and (h), to initiate an

⁸ This Notice of Agency Action, Docket No. 10-2528-01, is pending but dormant; the last action in the docket was on June 29, 2011. Issues in that docket may overlap those presented by the Transformation Order.

⁹ References are to *Utah Department of Business Regulation v. Utah Public Service Commission*, 614 P.2d 1242, 1245-1246 (Utah 1980).

investigation or study of the issues posed by the Transformation Order, and that the Division should serve notice of the investigation upon all parties known to have an interest in these issues. The Office requests that the Commission take no further action on the Division's Request, except for the receipt of comments which parties may but need not file and would in any event be considered preliminary. Finally, the Office requests that the Commission substitute for the technical conference now scheduled for July 19, 2012, a scheduling conference that the Commission will conduct.

DATED this 21st day of June 2012.

/s/Paul H. Proctor
Paul H. Proctor
Assistant Attorney General
Utah Office of Consumer Services

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response was provided by electronic mail on June 21, 2012 to the following parties believed to have an interest in the proceeding.

Utah Division of Public Utilities

wduncan@utah.gov

chrisparker@utah.gov

wfelix@utah.gov

jjetter@utah.gov

pschmid@utah.gov

Utah Rule Telecom Assn.

KiraM@blackburn-stoll.com

CenturyLink

James.Farr@CenturyLink.com

Torry.R.Somers@CenturyLink.com

/s/ Paul H. Proctor

Paul H. Proctor

Assistant Attorney General