

STEVEN W. SNARR (3022)
Special Assistant Attorney General
ROBERT J. MOORE (5764)
Assistant Attorney General
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone: (801) 366-0158
stevensnarr@agutah.gov
rmoore@agutah.gov
Attorneys for Utah Office of Consumer Services

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

_____)	
Investigation into Management of the Utah)	Docket No. 18-999-15
Universal Service Fund Contribution Method)	
)	Comments of the Office of
)	Consumers Services
_____)	

Pursuant to Utah Code § 54-10a-301 and Utah Admin. Code r. 746-1, the Office of Consumer Services (“Office”) submits these Comments in response to the Utah Public Service Commission’s (“Commission”) October 9, 2018 Notice of Investigation and Comment Period.

BACKGROUND

On October 9, 2018, the Commission issued a Notice of Investigation and Comment Period identifying a potential conflict between Senate Bill 4, Business, Economic Development, and Labor Base Budget, 2018 General Session (“S.B. 4”) setting a target for the Commission to refrain from modifying the UUSF surcharge more than once every three fiscal years and several recent dockets that might increase UUSF distributions to an extent that require a modification of the surcharge prior to three years from the last modification. The Commission focused on two types of dockets that pose a threat of requiring change in the surcharge: (1) dockets concerning the recalculations of telecom’s distribution from the UUSF, pursuant to Utah Admin. Code r.

746-8-401(4)(a)-(b);¹ (2) dockets concerning wireless providers seeking access to the UUSF.²

Both these types of dockets stem from recent amendments to Utah Code § 54-8b-15. 2017 Utah Laws 2403-2405. (“2017 UUSF Revisions”).

First, the 2017 UUSF Revisions provide: “A rate-of-return regulated carrier of last resort that qualifies for funds under this section: (a) is entitled to a rate of return equal to the weighted average cost of capital rate of return prescribed by the Federal Communication Commission for rate-of-return regulated carriers.” Section 54-8b-15(5)(a). Rule 746-8-401(4)(a)-(b), promulgated in response to the 2017 UUSF Revisions, requires the Division of Public Utilities (“Division”) to yearly “make a recommendation of whether each provider’s monthly distribution should be adjusted accordingly to: (a) the current FCC rate-of-return . . . (b) the provider’s financial information from its last Annual Report” The Division’s recommendations under this rule form the genesis for the dockets concerning the recalculation of the distribution from the fund. The 2017 UUSF Revisions introduce a new way of calculating the rate of return and it is nearly certain that this new calculation will increase distributions from the UUSF.³

Second, the 2017 UUSF Revisions also provide: “A . . . wireless telecommunication provider is eligible for distributions from the Universal Telecommunications Service Support Fund under the lifeline program” Section 54-8b-15(15)(a). Because wireless providers were not eligible for support under the UUSF prior to the 2017 UUSF Revisions, the inclusion of wireless providers in the UUSF will increase distributions from the fund.

¹ Docket Nos. 18-040-01, 18-41-02, 18-42-01, 18-043-01, 18-046-01, 18-050-02, 18-051-01, 18-052-01, 18-053-02, 18-054-01, 18-576-01, 18-2180-01, 18-2201-01, 18-2302-02, 18-2303-01, 18-2419-01.

² Docket Nos. 17-2511-01, 18-2521-02, 18-2526-01, 18-2549-02, 18-2597-01.

³ See Docket Nos. 18-051-01, 18-052-01, 18-053-02, 18-2302-02 (recommending increase in UUSF distribution).

In contrast, the applicable portions of S.B. 4 provides: “Number of times a change to the fund surcharge occurring more than once every three fiscal years (Target = 0).” S.B. 4 at ln. 1214-12-16. In addition, S.B. 4 also provides: “Number of months within a fiscal year during which the Fund did not maintain a balance equal to at least three months of fund payments (Target = 0).” S.B. 4 at ln. 1212-1214. Accordingly, the potential conflict between the dockets identified by the Commission and S.B. 4 is actually a conflict between the requirements of the 2017 UUSF Revisions and the targets of S.B. 4.

RECOMMENDATION

The Office recommends that if disbursements from the Fund stemming from the 2017 UUSF Revisions require a change in the surcharge amount sooner than three fiscal years since the last modification, the Commission should modify the surcharge even though this will lead to a failure to meet the target set out in S.B. 4.

When interpreting statutes, the Commission must “read the plain language of a statute as a whole and interpret its provisions in harmony with other statutes in the same chapter and related chapters.” *State v. Harker*, 2010 UT 56, ¶ 12, 240 P.3d 780 (internal quotations marks, brackets, and citation omitted). Applying this principle to the 2017 UUSF Revisions and S.B. 4, results in the conclusion that the 2017 UUSF Revisions are mandatory requiring the Commission to comply with their provisions. Conversely, the targets set out in S.B. 4 are only goals which the legislature prefers the Commission to achieve but does not require the Commission to meet. Accordingly, the mandatory requirements of the 2017 UUSF Revisions supersede the preferences set out in S.B. 4.

The plain meaning of the terms in the 2017 UUSF Revisions established that provisions of the amendments are mandatory. Section 54-8b-15(5)(a) provides that a telecom that qualifies

to participate in the UUSF “is entitled to” the same rate-of-return as provided for by the FCC. Similarly, a wireless provider “is eligible” to participate in the UUSF. Section 54-8b-15(15)(a). This language leaves no room for Commission discretion to use a rate-of-return other than the FCC method or prevent a qualified wireless provider from participating in the UUSF. On the other hand, the plain meaning of the term “target” in S.B. 4 connotes a result that is aspired to but not a result that is required.

Moreover, the 2017 UUSF Revisions and S.B. 4 must be read in harmony with one another, which can’t be accomplished if both statutes are read as mandatory so that if the disbursements required by the 2017 UUSF Revisions are in unreconcilable conflict with the requirements of S.B. 4 limiting changes in the surcharge to once every three years. In fact, if the targets in S.B. 4 are interpreted as mandatory, S.B. 4 would conflict with itself. If the disbursement required by the 2017 UUSF Revisions exhaust the fund it would not be possible to meet the S.B. 4’s twin goals of not changing the fund surcharge for three years and maintaining the balance of equal to at least three months of fund payments. S.B. 4 at ln. 1212-1216.

Accordingly, if the requirements of the 2017 UUSF Revisions threaten to exhaust the fund, the targets of S.B. 4 must yield to the requirements of the 2017 UUSF Revisions and the surcharge amount must be modified despite S.B. 4’s target regarding the length of time between changes in the surcharge.

CONCLUSION

The Office recommends that if the disbursement requirements of the 2017 UUSF Revisions threaten to exhaust the fund, the surcharge amount should be modified despite the language in S.B. 4 setting a target of limiting changes to the surcharge to once every three years.

Respectfully submitted November 15, 2018.

Robert J. Moore
Robert J. Moore
Attorney for the Office of Consumer Services