

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



MARK L. SHURTLEFF
ATTORNEY GENERAL

JOHN SWALLOW
Chief Deputy

KIRK TORGENSEN
Chief Deputy

--= MEMORANDUM =--

TO: Public Service Commission of Utah

FROM: Justin C. Jetter Assistant Attorney General
Counsel for the Division of Public Utilities

SUBJECT: In the Matter of the Resolution of Certain Issues Related to the
Designation of a Common Carrier as an Eligible Telecommunications
Carrier

RE: Docket No. 10-2528-01

DATE: December 12, 2012

This memo is supplemental to the Division of Public Utilities (“Division”) memo filed on December 3, 2012.

After further consideration and review of the October 11, 2012 FCC Public Notice DA 12-1626 (“Public Notice”), it does not appear as though the re-certification process will be completed by the December 31 deadline.

There was some indication from the FCC in the *Lifeline and Link Up reform and Modernization et al. WC DKt. Nos. 11-42 et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (“Lifeline Order”) and related FCC Rules that the FCC was treating the re-certification process as distinct from de-enrollment. For example, paragraphs 129 – 40 of the Lifeline Order describe the various requirements for re-certification. Paragraph 141 is titled “*Procedures to be followed after annual re-certification*” (emphasis added) and goes on to describe the 47 CFR § 54.405 revisions which include procedures for de-enrollment of those subscribers who do not respond to verification requests. This indicates an intent that de-enrollment be completed after re-certification as a separate action.

In contrast the Public Notice states that the “re-certification is not considered “complete” until the ETC has de-enrolled all subscribers that failed to respond to a re-certification request...” The plain language of that sentence is clear. The following sentence in the same notice goes on to state that “state agencies must provide sufficient notice to each ETC so that the ETC can initiate all de-enrollments by December 31, 2012 and can file its annual re-certification report by January 31, 2013.” It would therefore seem only reasonable to interpret the Public Notice language as meaning that the databases must be queried and the results provided by December 31, 2012, and the 30 day de-enrollment completed by January 31, 2013 based on the 30 day de-enrollment period.

While the DPU has finished its query of the relevant databases well in advance of the December 31, 2012 deadline, it cannot meet the January 31, 2013 deadline for de-enrollment of non-responsive subscribers because Utah’s de-enrollment rules found in Rule 746-341-4 provide subscribers a combined 60 days prior to completion of the de-enrollment process. It is uncertain how Utah should proceed in light of the internal inconsistency in the Federal Rules.

47 CFR § 54.405 as amended by the Lifeline Order is internally inconsistent as it applies to Utah. § 54.405 states that “[a] carrier providing Lifeline service in a state that has dispute resolution procedures applicable to Lifeline termination, that requires, at a minimum, written notification of impending termination, must comply with the applicable state requirements.” Based on this Utah would be required to follow the current rules allowing a total of 60 days for de-enrollment. § 54.405 then goes on to require a subscriber be provided 30 days to respond. The rule then requires termination if not responded to within the 30 day period. The clause requiring Utah to comply with its state rule 40 day notice plus 20 day appeal and the clause requiring Utah to comply with the FCC’s 30 day de-enrollment requirement cannot both be fulfilled. Adding further confusion, the Lifeline Order and the October 12, 2012 Public Notice assert a requirement that de-enrollment take place “within 30 days” of the notice. While it’s likely that this was merely poorly chosen language, it’s reasonable to note that it would be impossible to both “allow 30 days” for response before de-enrolling and de-enroll “within 30 days.” The two are mutually exclusive.

In light of this, there are two options. The first would be to continue with the Utah combined 60 day de-enrollment process and report after the 40 day period, or to waive the Utah rules and de-enroll the subscribers within 30 days. It is the recommendation of the DPU that the PSC file the re-certification forms completed with the numbers based on the 40 day response along with a notification that, based on Utah administrative rules, the subscribers have another 20 days to appeal. While this is not technically a completed de-enrollment it would provide the best information to the FCC that is available by the January 31 deadline, remain in compliance with the Utah Rules, and meet part of the § 54.405 requirements. This approach also avoids potential complications that might arise from waiving a time period that a subscriber might feel reasonably entitled to.

cc: Service List