

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Joint Application of Comcast Phone of Utah, LLC d/b/a CIMCO, a Division of Comcast Business Services, and First Communications, LLC for Waiver of Utah Code Ann. § 54-8b-18 and Commission Rule R746-349-5

DOCKET NO. 15-2383-01

ORDER

ISSUED: January 8, 2016

I. Background.

On December 7, 2015, Comcast Phone of Utah, LLC d/b/a CIMCO (CIMCO) and First Communications, LLC jointly applied to the Commission for leave to transfer the telecommunications service of certain customers from CIMCO to First Communications without obtaining authorization and verification from the resold interexchange business customers who will be affected. In order to adjudicate the application, the Commission must address the applicability of the following regulations:

- Utah Code § 54-8b-18(2)(c):

No telecommunications corporation or its agents shall make any change or authorize a different telecommunications corporation to make any change in the provider of any public telecommunications service to a subscriber unless ... the telecommunications corporation or its agents ... confirm ... that the subscriber authorizes the change of provider [by] ...

- (i) obtaining the subscriber's written authorization;
- (ii) having the subscriber's oral authorization verified by an independent third party; or
- (iii) any means provided by rule of the Federal Communications Commission or the commission.

- Utah Administrative Code R746-349-5:

... Telecommunications providers are responsible for unauthorized service terminations and transfers resulting from the actions of

their agents. A carrier that engages in the unauthorized activity shall restore the customer's service to the original carrier without charge to the customer[.]

On December 22, 2015, the Utah Division of Public Utilities (Division) filed a memorandum recommending that the Commission waive the administrative rule. The Division also suggested that the statute is preempted by federal regulation, specifically 47 CFR 64.1120(e)(3),¹ which allows customers to be transferred upon compliance with the following streamlined requirements:

(3) Not later than 30 days before the transfer of the affected subscribers from the selling or transferring carrier to the acquiring carrier, the acquiring carrier shall provide written notice to each affected subscriber of the information specified. The acquiring carrier is required to fulfill the obligations set forth in the advance subscriber notice. The advance subscriber notice shall be provided in a manner consistent with 47 U.S.C. 255 and the Commission's rules regarding accessibility to blind and visually-impaired consumers, 47 CFR 6.3, 6.5 of this chapter. The following information must be included in the advance subscriber notice:

- (i) The date on which the acquiring carrier will become the subscriber's new provider of telecommunications service,
- (ii) The rates, terms, and conditions of the service(s) to be provided by the acquiring carrier upon the subscriber's transfer to the acquiring carrier, and the means by which the acquiring carrier will notify the subscriber of any change(s) to these rates, terms, and conditions.
- (iii) The acquiring carrier will be responsible for any carrier change charges associated with the transfer, except where the carrier is acquiring customers by default, other than through bankruptcy, and state law requires the exiting carrier to pay these costs;

¹ The Division's memorandum cites to 47 CFR 64.1102(e), which appears to be a typographical error.

(iv) The subscriber's right to select a different preferred carrier for the telecommunications service(s) at issue, if an alternative carrier is available,

(v) All subscribers receiving the notice, even those who have arranged preferred carrier freezes through their local service providers on the service(s) involved in the transfer, will be transferred to the acquiring carrier, unless they have selected a different carrier before the transfer date; existing preferred carrier freezes on the service(s) involved in the transfer will be lifted; and the subscribers must contact their local service providers to arrange a new freeze.

(vi) Whether the acquiring carrier will be responsible for handling any complaints filed, or otherwise raised, prior to or during the transfer against the selling or transferring carrier, and

(vii) The toll-free customer service telephone number of the acquiring carrier.

No other person has filed comments in this docket.²

II. Analysis.

Utah Administrative Code R746-100-15 states: "The Commission may order deviation from a specified rule upon notice, opportunity to be heard and a showing that the rule imposes an undue hardship which outweighs the benefits of the rule." The Commission considers that, by complying with 47 CFR 64.1120(e)(3), CIMCO and First Communications will provide affected customers with adequate notice of the service transfer. It would impose an undue hardship if, thereafter, First Communications were required to restore a customer's service to CIMCO. Therefore, the Commission considers it appropriate to deviate from R746-349-5.

² Pursuant to the Notice of Filing and Comment Period issued December 8, 2015, the comment deadline was January 7, 2016.

Utah Code § 54-8b-18(2)(c) may not be waived.³ However, the statutory language establishes that, where service providers comply with rules promulgated by the Federal Communications Commission, they may be deemed to have complied with Utah's requirement to obtain customers' written or verbal authorization prior to completing a service transfer. Therefore, if CIMCO and First Communications comply with 47 CFR 64.1120(e)(3), the Commission may consider Section 54-8b-18(2)(c) to be satisfied.

Having reviewed the notice that CIMCO and First Communications provided to the affected customers, the Commission notes the following:

1. The notice is dated November 23, 2015, and states that the transfer is scheduled to occur no sooner than January 1, 2016. The intervening period is more than 30 days. In addition, the notice states the names of both CIMCO and First Communications, and it establishes that customers' service features, rates, terms, and conditions will not change. Therefore, 47 CFR 64.1120(e)(3)(i) and (ii) are satisfied.
2. The notice states that First Communications will pay any carrier change charges that might be incurred, although none are anticipated. Therefore, 47 CFR 64.1120(e)(3)(iii) is satisfied.

³ Agencies may not declare a statute preempted without a court order. *See Clayton v. Bennett*, 298 P.2d 531, 533 (Utah, 1956): "[A]n administrative agency does not determine the constitutionality of statutes." *See also Lyon v. Burton*, 5 P.3d 616, 620 (Utah, 2000), in which the Utah Supreme Court states that it will not address constitutional issues unless required to do so. Under this case law, the Commission does not consider or rule on the parties' suggestion that 47 CFR 64.1120(e)(3) preempts Utah Code § 54-8b-18(2)(c). Rather, the Commission addresses the question of whether the Utah statute is satisfied through compliance with the federal regulation. If the statute is satisfied, the question of preemption is immaterial.

3. The notice instructs customers that, if they prefer to choose another provider, they must contact that provider before January 1, 2016, in order to avoid the transfer to First Communications. Therefore, 47 CFR 64.1120(e)(3)(iv) is satisfied.
4. The notice advises affected customers that any preferred carrier freeze will be lifted and that, following the transfer, the customer must contact the local service provider to arrange a new freeze. Therefore 47 CFR 64.1120(e)(3)(v) is satisfied.
5. The notice explains that CIMCO and First Communications will both be available during the transfer process to address complaints and to respond to service requests. A toll-free number for First Communications is also provided. Therefore, 47 CFR 64.1120(e)(3)(vi) and (vii) are satisfied.

ORDER

Based on the foregoing, the Commission approves the proposed asset transfer between CIMCO and First Communications as complying with Utah Code § 54-8b-18(2)(c)(iii) and precludes affected customers from requesting, pursuant to Utah Administrative Code R746-349-5, that service be restored to the original carrier.

This order shall be effective on the signature date below.

DATED at Salt Lake City, Utah, January 8, 2016.

/s/ Jennie T. Jonsson
Administrative Law Judge

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Approved and confirmed January 8, 2016 as the Order of the Public Service Commission
of Utah.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
DW#271279

Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this order by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I CERTIFY that on January 8, 2016, a true and correct copy of the foregoing was served upon the following as indicated below:

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