

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Utah

CTIA -- THE WIRELESS ASSOCIATION

Plaintiff(s)

v.

THAD LEVAR, DAVID R. CLARK and JORDAN A. WHITE, in their official capacities as Commissioners of the Utah Public Service Commission

Defendant(s)

TIME 1535 DATE 4-11-18
SERVED Thad Levar
RELATIONSHIP Self
ADDRESS 160 E 300 S # 100
SERVER
ID'S LEGAL PROCESS LLC 964-9393

Civil Action No. 2:18-cv-00302-EJF

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Thad Levar
Utah Public Service Commission
160 East 300 South
Salt Lake City, UT 84111

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: William J. Evans, Adam E. Weinacker, Parsons Behle & Latimer, 201 S. Main Street, Suite 1800, Salt Lake City, UT 84111

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date: 04/11/2018



D. Mark Jones
CLERK OF COURT

Tracy J. Hopkins
Signature of Clerk or Deputy Clerk

Civil Action No. 2:18-cv-00302-EJF

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____

I personally served the summons on the individual at *(place)* _____
on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify):* _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CTIA–THE WIRELESS
ASSOCIATION®

Plaintiff,

vs.

THAD LEVAR, in his official capacity as
a Chair and Commissioner of the Utah
Public Service Commission; DAVID R.
CLARK, in his official capacity as a
Commissioner of the Utah Public Service
Commission; and JORDAN A. WHITE,
in his official capacity as a Commissioner
of the Utah Public Service Commission,

Defendants.

**VERIFIED COMPLAINT FOR
DECLARATORY RELIEF AND
INJUNCTIVE RELIEF**

Case No. 2:18-cv-00302-EJF

Magistrate Judge Evelyn J. Furse

JURY DEMANDED

Plaintiff CTIA–The Wireless Association® (“CTIA”) brings this Complaint for declaratory relief and injunctive relief to prevent Defendants Thad LeVar, David R. Clark, and Jordan A. White, each in his official capacity as a Commissioner of the Utah Public Service Commission (the “Commission” and Defendants LeVar, Clark, and White, collectively, “Commissioners”), from continuing, in contravention of federal law, to give effect to or enforce the rule that the Commission made effective in its October 11, 2017 Notice That Proposed Rules Have Been Made Effective, issued in Docket No. 17-R360-01, *In the Matter of the Utah Administrative Code R746-360 Universal Public Telecommunications Service Support Fund*, as such rule was amended by certain revisions made effective in the Commission’s Notice That Proposed Rules Have Been Made Effective and Order of Clarification, issued in the same docket on December 22, 2017 (collectively, “PSC Rule”).¹ The PSC Rule is inconsistent with the Communications Act of 1934, as amended, 47 U.S.C. § 151, *et. seq.* (the “Communications Act”); in particular, 47 U.S.C. §§ 254 and 332.

¹ The challenged PSC Rule was made effective October 11, 2017, and a subsequent amendment was made effective December 22, 2017. The entirety of R746-360 was later repealed and re-codified under R746-8 of the Utah Administrative Code. *See In re Utah Administrative Code R746-8, Proposing Repeal R746-360, R746-341, and R746-343*, Docket No. 17-R008-01. The current version of the PSC Rule, codified under R746-8, is attached as **Exhibit A**. CTIA also attaches the Commission’s Notice Application for Rehearing Will Be Denied by Operation of Statute and Order Denying Request for Stay (“Notice of Denial”) (**Exhibit B**); CTIA’s Application for Rehearing and Request for Stay (“Rehearing Application”) (**Exhibit C**); and the Commission’s Notice That Proposed Rules Have Been Made Effective and Order of Clarification (“Clarification”) (**Exhibit D**).

PARTIES

1. Plaintiff CTIA is a non-profit corporation founded in 1984 with its principal place of business in Washington, D.C. CTIA, as a trade association, represents the U.S. wireless communications industry and companies throughout the mobile ecosystem. CTIA's members include wireless carriers, device manufacturers, and suppliers, as well as app and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment.

2. Several of CTIA's members deliver telecommunications services to Utah customers and therefore are subject to the requirements of the PSC Rule. In addition, the interests that CTIA seeks to protect in this lawsuit are germane to its members and to CTIA's purpose as a trade association for members of the wireless communications industry. Neither the claims that CTIA asserts nor the relief that CTIA requests requires the participation of individual members in this lawsuit.

3. Defendant Thad LeVar is a Commissioner and the Chair of the Utah Public Service Commission. Defendants David R. Clark and Jordan A. White are Commissioners of the Utah Public Service Commission. These Defendants are residents of Utah and are here named solely in their official capacities.

JURISDICTION AND VENUE

4. This Court has jurisdiction over CTIA's claims under 28 U.S.C. §§ 1331 and 1343(a), as CTIA's claims arise under the Constitution and the laws of the United

States, including the Communications Act of 1934 (“the federal Communications Act”), as amended, 47 U.S.C. § 151, *et seq.*, and specifically 47 U.S.C. §§ 254 and 332.

5. This Court has authority to issue declaratory judgments and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and the All Writs Act, 28 U.S.C. § 1651.

6. Venue is proper in this Court under 28 U.S.C. § 1391(a) as Defendants are all residents of this judicial district. Venue also is proper in this Court under 28 U.S.C. § 1391(b) because Defendants are government officials who perform official duties in this judicial district and because substantial parts of the events giving rise to CTIA’s claims occurred in this judicial district.

PROCEDURAL BACKGROUND

7. The Commission issued a request for comments on March 27, 2017 regarding the implementation of Utah S.B. 130, a general session bill signed into law on March 25, 2017, which revises provisions related to the Utah Universal Public Telecommunications Service Support Fund (“UUSF”). After receiving comments, the Commission issued a Notice of Proposed Rule Amendment, along with the text of a proposed rule, R746-360-4. *In the Matter of the Utah Administrative Code R746-360 Universal Public Telecommunications Service Support Fund*, Docket No. 17-R360-01, Notice of Proposed Rule Amendment (rel. May 15, 2017) (“Proposed Rule”).

8. CTIA filed multiple comments in the proceeding advising the Commission that the Proposed Rule, which would adopt a universal service contribution mechanism

based on a flat amount per connection, departing from a contribution mechanism based on a percentage of revenues, was inconsistent with various provisions of federal law.

9. CTIA advised the Commission, among other things, that the Proposed Rule would be inconsistent with the requirements related to the federal universal service Lifeline program. CTIA also advised the Commission that the Proposed Rule would illegally assess prepaid wireless services in a manner that was discriminatory and not competitively neutral, because the Proposed Rule would allow third-party retailers of prepaid wireless telecommunications services to avoid the UUSF surcharge, as the Commission lacked statutory authority to impose the surcharge on these providers. Nonetheless, in the course of these multiple rounds of comments, the Commission made only minor modifications to the Proposed Rule.

10. On September 5, 2017, the Commission, acknowledging that it did not have the statutory authority to assess surcharges on prepaid services purchased from non-carrier, third-party retailers, solicited further comment on its modified Proposed Rule language on this particular issue, requesting such comment by October 17, 2017. *In the Matter of the Utah Administrative Code R746-360 Universal Public Telecommunications Service Support Fund*, Request for Comments and Draft Language: UUSF Assessment of Prepaid Wireless; Notice of Proposed Rulemaking, Docket No. 17-R360-01 (rel. Sept. 5, 2017).

11. Then, less than one week before the October 17, 2017 date it had established to receive stakeholder comments and input on the issue concerning surcharges on prepaid services from non-carrier retailers, the Commission released a Notice stating that the modified Proposed Rule still under debate had already been made effective. *In the Matter of the Utah Administrative Code R746-360 Universal Public Telecommunications Service Support Fund*, Notice that Proposed Rules Have Been Made Effective, Docket No. 17-R360-01 (rel. Oct. 11, 2017).

12. Just thirteen days later, the Commission released another Notice with further amendments to the Proposed Rule. *In the Matter of the Utah Administrative Code R746-360 Universal Public Telecommunications Service Support Fund*, Notice of Rule Filing, Docket No. 17-R360-01 (rel. Oct. 24, 2017) (“Notice of PSC Rule”). This final version of the PSC Rule was published in the November 15, 2017 Utah State Bulletin and went into effect on December 22, 2017. (*See Clarification, Exhibit D.*)

13. The PSC Rule provides that, effective January 1, 2018, “providers shall remit to the Commission \$0.36 per month per access line that, as of the last calendar day of each month, has a place of primary use in Utah in accordance with the Mobile Telecommunications Sourcing Act, 4 U.S.C. Sec. 116 et seq.” R746-8-301(1)(a) (formerly R746-360-4(3)(a)). It also provides that “a provider of mobile telecommunications service shall consider the customer’s place of primary use to be the

customer's residential street address or primary business street address." R746-8-301(1)(b)(ii) (formerly R746-360-4(3)(b)(ii)).

14. An "access line" is defined, per Utah Code, and as referenced by the PSC Rule, as "a circuit-switched connection, or the functional equivalent of a circuit-switched connection, from an end-user to the public switched network." Utah Code § 54-8b-2(1); R746-8-200(1)(a) (formerly R746-360-4(1)(a)). The PSC Rule further provides that the term "access line" is used in the rule "to the extent consistent with federal law." R746-8-200(1)(a) (formerly R746-360-4(1)(a)).

15. The only exceptions to the required \$0.36 monthly assessment on all access lines are for access lines that generate revenue that is subject to a universal service fund surcharge in a state other than Utah, and for access lines not used to access Utah intrastate telecommunications services. R746-8-301(3)(a)(i)-(ii) (formerly R746-360-4(5)(a)(i)-(ii)).

16. In addition, specific to prepaid wireless service, the PSC Rule provides that "[a] provider that offers prepaid access lines or connections that permit access to the public telephone network shall remit to the Commission \$0.36 per month per access line for such service (new access lines or connections, or recharges for existing lines or connections) purchased on or after January 1, 2018." R746-8-301(1)(e) (formerly R746-360-4(3)(e)).

17. The required \$0.36 per month per access line UUSF assessment therefore applies to all Utah access lines, except as noted in R746-8-301(3)(a) (formerly R746-360-4(5)), as described, *supra*.

18. The required \$0.36 per month per access line UUSF assessment therefore applies to federal Lifeline connections. The federal Lifeline program is discussed in more detail herein.

19. The required \$0.36 per month per access line UUSF assessment therefore also applies to access lines that generate less than \$0.36 per month of revenue attributable to intrastate telecommunications services.

20. Although providers are allowed to omit the UUSF surcharge for access lines that do not access Utah intrastate telecommunications services during a given month, per R746-8-301(3)(a) (formerly R746-340-4(5)(a)), the PSC Rule includes no mechanism for a provider to assert that its revenue attributable to Utah intrastate telecommunications services for a given access line exists, but is less than the required \$0.36 per month per access line assessment.

21. The required \$0.36 per month per access line UUSF assessment also applies to prepaid wireless access lines, per R746-8-301(1)(e) (formerly R746-360-4(3)(e)), and therefore would apply to access lines offered by prepaid wireless sales through retail sellers who are not themselves prepaid wireless providers.

22. The Commission has since conceded in a subsequent Order of Clarification that the PSC Rule needs further refinement, and that the Commission intends to improve the PSC Rule in its ongoing rulemaking proceedings. (*See* Clarification, **Exhibit D**.) However, the Commission did not stay the PSC Rule in the interim, and the current rule has been in effect, and has remained in effect, since December 22, 2017. Per the PSC Rule, the connections-based UUSF surcharge assessment of \$0.36 per month per access line has been in place since January 1, 2018.

23. CTIA timely sought reconsideration, rehearing, and stay of the PSC Rule on November 13, 2017. (Rehearing Application, **Exhibit C**.) The Commission denied CTIA's Rehearing Application on November 30, 2017. (Notice of Denial, **Exhibit B**.)

FACTUAL AND FEDERAL REGULATORY BACKGROUND

A. THE FEDERAL UNIVERSAL SERVICE MODEL

24. In the Telecommunications Act of 1996, Congress codified the Federal Communications Commission's ("FCC's") commitment to advancing the availability of telecommunications services to all Americans by establishing principles upon which "the [FCC] shall base policies for the preservation and advancement of universal service." 47 U.S.C. § 254(b).

25. Among other things, Congress articulated in the Telecommunications Act national goals that services should be available at "affordable" rates and that "consumers

in all regions of the nation, including low-income consumers, should have access to telecommunications and information services.” *Id.* § 254(b)(1) & (3).

26. To advance these goals, the FCC has established a number of programs, including the Connect America Fund, Lifeline, the Schools and Libraries (or “E-rate”) and Rural Health Care programs. These federal universal service fund (“USF”) programs are funded by a federal USF surcharge levied on providers of telecommunications services based on their interstate and international end-user revenues.

B. THE FEDERAL LIFELINE PROGRAM

27. The FCC first implemented the Lifeline program in 1985 as part of its longstanding mission to promote “universal service” by ensuring that low-income Americans who meet established eligibility criteria have affordable access to telephone services.

28. The federal Lifeline program provides a monthly subsidy of \$9.25 per customer that is applied to reduce the service rate that Eligible Telecommunications Carriers (“ETCs”) would otherwise charge Lifeline enrollees for telecommunications service. The subsidy is funded by the federal USF surcharge on interstate telecommunications revenues.

29. Enrollment in the Lifeline program is available only to low-income households that meet federal or state eligibility criteria. Prospective enrollees must apply for admission to the Lifeline program, a process that includes completing a detailed Lifeline eligibility certification form and submitting documentation demonstrating

eligibility to enroll in the Lifeline program. Enrollees must also annually verify their continued eligibility for participation in the Lifeline program.

30. CTIA members currently offer wireless telephone service plans that rely on the federal Lifeline subsidy to provide eligible low-income Utahans Lifeline enrollees with wireless telephone service, often at no charge to the customer. They are able to offer no-charge, and other low-charge, Lifeline service because the \$9.25 subsidy provides carriers the funding they require in order to provide such Lifeline plans to eligible consumers.

31. Carriers providing such no-charge Lifeline-supported wireless plans often do not even have a billing relationship with the customer, as the carrier does not render a bill to the customer.

32. These no-charge wireless service plans further the aims of the Lifeline program and the FCC's universal service mandate because they help ensure that the thousands of low-income Utah households have access to the public telecommunications network in order to pursue employment, remain in contact with family, and access critical medical, social, and emergency services without economically burdening such vulnerable consumers.

33. Many Utahans who receive Lifeline-subsidized wireless telephone services provided by CTIA members are likely to have no other phone service. Many low-income

consumers have stated before the FCC that without a Lifeline subsidy, they would be unable to afford service.

C. UNIVERSAL SERVICE JURISDICTIONAL SEPARATIONS

34. As previously stated, federal USF programs are funded by a federal USF surcharge levied on providers of telecommunications services based on their interstate and international end-user revenues. The federal USF surcharge does not apply to intrastate telecommunications service revenues.

35. Because the federal USF surcharge does not apply to intrastate revenues, and because most wireless service plans at present contain a mix of revenues generated from intrastate and interstate services, carriers must determine a method to separate their intrastate and interstate revenues. The following process for jurisdictional separation of revenues is illustrative of the process wireless carriers may use and it arises from the FCC's universal service program:

a. Carriers first identify the various services offered under a service plan. Examples may include: data, text, voice, voicemail, call forwarding, call waiting, etc.

b. Carriers then determine the value of each of the various services, with the total of the assigned values equaling the total of the overall service plan. This process is conducted by carriers' business experts and is highly proprietary.

c. Carriers next categorize the various services within a plan as assessable services (generally, telecommunications services), non-assessable services (such as broadband Internet access service) and other non-assessable revenue items (equipment sales or leasing, equipment insurance, etc.).

d. After these steps are conducted, carriers calculate the interstate and intrastate portion of each assessable service. To calculate the jurisdictional amounts, the FCC permits use of one of three methods:

i. Carriers may use the FCC's defined safe harbor (37.1% of revenues are deemed interstate), or

ii. Carriers may study their own traffic (and such studies are highly confidential) to determine the jurisdictional split between interstate and intrastate revenues, or

iii. Carriers may use any other reasonable method to determine the jurisdictional split between interstate and intrastate traffic.

36. Once the amount of interstate and intrastate revenue subject to surcharge is determined, carriers then apply the federal surcharge – a percentage of revenue – to their interstate revenues. In almost every state with a state universal service fund other than Utah, carriers also apply a state surcharge – a percentage of revenue – to their intrastate revenues. When state and federal universal service programs are consistent and collect

universal service funds based on jurisdictional revenues, there is no risk of state surcharges applying to interstate revenues.

D. THE UUSF ASSESSMENT PRESENTS A HOBSON'S CHOICE BETWEEN LEGALLY INFIRM ALTERNATIVES

37. As CTIA states in its claims for relief, the Commission's UUSF surcharge requires wireless carriers who provide Lifeline services at no-charge to eligible consumers, or at a rate that does not generate \$0.36 of intrastate revenue, with a multi-faceted Hobson's choice of alternatives for funding the required UUSF \$0.36 surcharge that are all legally infirm:

a. If the Commission requires wireless providers to increase rates for Lifeline services to at least a level generating \$0.36 of intrastate revenue subject to surcharge in order to cover the monthly UUSF assessment, that would violate 47 U.S.C. § 332(c)(3)(A), as stated in Count I below.

b. If the Commission requires such wireless providers to impose the \$0.36 monthly UUSF surcharge on Lifeline customers as a direct surcharge (leaving aside that carriers often have no billing relationship with these customers), that would violate 47 U.S.C. § 254(f) and 47 C.F.R. § 54.403, as inconsistent with, relying on, and burdening the federal universal mechanism, as stated in Counts II and III below.

c. If the Commission requires wireless providers receiving Lifeline support to pay the \$0.36 monthly UUSF assessment for access lines out of the \$9.25 monthly federal Lifeline support, that would equally violate 47 U.S.C. § 254(f) and 47

C.F.R. § 54.403, as inconsistent with, relying on, and burdening the federal universal mechanism, as stated in Counts II and III below.

d. If the Commission requires such wireless providers simply to fund the \$0.36 monthly UUSF assessment out of their own pockets, or indirectly through charges on other customers, that would be discriminatory, and violate 47 U.S.C. § 254(f) as stated in Count IV below, because providers of other services who can pass through the UUSF surcharge to customers will not be similarly required to absorb the monthly UUSF surcharge.

38. The Commission asserts that the rule does no more than “require wireless providers receiving Lifeline support, including those currently offering Lifeline service at no cost to the customer, to make a business decision about how to price its plans.” (*See* Clarification, **Exhibit D**, at 4.) Each of the alternatives discussed above to fund the \$0.36 monthly UUSF assessment for wireless Lifeline access lines, however, would violate federal law as set forth in CTIA’s Claims for Relief. The Commission has identified no other way by which wireless Lifeline service providers could pay the \$0.36 monthly UUSF assessment, and in fact, there is none.

CLAIMS FOR RELIEF

COUNT I (Violation of 47 U.S.C. § 332(c)(3)(A) Prohibition Against State Regulation of Wireless Rates)

39. CTIA incorporates the preceding paragraphs by reference as though set forth fully herein.

40. 47 U.S.C. § 332(c)(3)(A), entitled “State Preemption,” provides in pertinent part that “no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service. . . .”

41. The PSC Rule requires payment of the UUSF surcharge on no-charge Lifeline plans that are supported only by the federal Lifeline subsidy. The Commission rule thereby impermissibly interferes with or prevents such no-charge Lifeline offers.

42. Similarly, by requiring payment of the UUSF surcharge on Lifeline connections, the PSC Rule impermissibly interferes with or prevents any low-rate Lifeline account for which there is less than at least \$0.36 of intrastate revenue from which to collect the surcharge. And while a surcharge that collects all or nearly all of a carriers’ jurisdictional revenue may also be unlawful, that particular issue is not pled herein.

43. Ironically, for the sake of collecting surcharges that are intended to keep rates affordable, the Commission has effectively increased the minimum rate for those most in need of affordable rates — low-income households enrolled in the Lifeline program — by effectively increasing the minimum Lifeline service rate in Utah to \$0.36. This effective floor on Lifeline rates prevents the offering of no-charge, or very low charge, Lifeline wireless service and serves to regulate the rates charged by wireless providers, in contravention of 47 U.S.C. § 332(c)(3)(A).

44. The PSC Rule's \$0.36 monthly UUSF surcharge on Lifeline wireless access lines cannot be saved by the Commission's suggestion that a provider should determine how to pay the surcharge by simply "mak[ing] a business decision about how to price its plans," essentially suggesting carriers can just raise their rates to cope with the impact of the surcharge. (*See* Clarification, **Exhibit D**, at 4.)

45. The legally infirm options to collect UUSF subsidies from wireless Lifeline customers, and no-charge Lifeline customers in particular, as described *supra*, would all lead to absurd real world results. Participants in these programs are frequently members of "unbanked" communities, and even a monthly rate of \$0.36 may prove an insurmountable obstacle to participation in the Lifeline program. Those without bank accounts or a credit card have no effective means to remit a surcharge of \$0.36. If they choose to mail cash, they would have to spend more on postage than on the surcharge itself. Or they may need to purchase a money order, if such are available in increments of \$0.36, and pay both the charges applicable to obtaining a money order and the cost of postage – all well in excess of the \$0.36 due under the PSC Rule.

46. Additionally, by forcing carriers to choose among only surcharge collection methods that cannot be imposed without violating federal law, the PSC Rule has a chilling effect on the introduction of service offers in the market today. Carriers that have an interest in introducing innovative service plans that have or are likely to have intrastate revenues near, at, or below \$0.36 will have to determine whether to select a collection

method illegally imposed on them under the PSC Rule or to not offer such service plans at all. These consequences violate the spirit, if not the letter, of the prohibition under 47 U.S.C. § 332(c)(3)(A) against states regulating wireless carriers' rates.

47. Because the PSC Rule therefore operates to prevent wireless carriers from charging a particular rate (zero), and would require wireless providers offering Lifeline service to charge at least a particular rate (\$0.36), it violates, and is preempted by, federal law prohibiting state regulation of wireless rates, 47 U.S.C. § 332(c)(3)(A).

COUNT II

(Violation of 47 U.S.C. § 254(f) Requirement That State USF Mechanisms Must Be Consistent with the Federal USF Mechanism)

48. CTIA incorporates the preceding paragraphs by reference as though set forth fully herein.

49. The federal Communications Act authorizes states, like Utah, to create their own supplemental support mechanisms to further the same goal of universal service embodied by 47 U.S.C. § 254, *provided* that those mechanisms are “not inconsistent” with federal mechanisms, require carriers to contribute to such state support mechanisms on “an equitable and nondiscriminatory basis,” and do not “rely on or burden Federal universal service support mechanisms.” 47 U.S.C. § 254(f).

50. Specifically, 47 U.S.C. § 254(f) provides that: “A State may adopt regulations not inconsistent with the [FCC’s] rules to preserve and advance universal service.”

51. The PSC Rule is inconsistent with the FCC's rules to preserve and advance universal service in at least four ways:

a. *First*, the FCC funds the federal universal service mechanism through assessments based on a percentage of carriers' revenues. 47 C.F.R. § 54.709. By contrast, the PSC Rule imposes a connections-based UUSF surcharge assessment. The PSC Rule is therefore fundamentally inconsistent with the revenue-based assessment approach specified by the federal universal service mechanism.

b. *Second*, the PSC Rule fails to ensure that it does not impermissibly apply UUSF surcharges to interstate traffic. As explained *supra*, carriers determine their jurisdictional split of assessable interstate and intrastate revenue for USF purposes based on one of the separations methods permitted to be used under the federal universal service program. However, a carrier generating less than \$0.36 of intrastate revenue on an access line in Utah would still be subject to the PSC Rule's \$0.36 per month per access line UUSF surcharge. The difference between the carrier's intrastate revenue on an access line and the UUSF surcharge would then necessarily have to be assessed on interstate revenues, burdening the federal universal service mechanism, which is already assessing those revenues. The Commission has neither determined whether such situations would exist with any rate plans currently in the Utah market nor established a mechanism where carriers in such situations can request relief from such illegal collection of the UUSF surcharge.

c. *Third*, the PSC Rule is inconsistent with the federal Lifeline program administered as part of the federal universal service mechanism. FCC regulations require that ETCs offering Lifeline service must pass through the full amount of support from the federal universal program to the qualifying low-income consumer, in the form of qualifying Lifeline services. 47 C.F.R. § 54.403. The PSC Rule, however, obligates carriers to remit UUSF surcharges on Lifeline access lines provided at no cost to customers, or at a rate that generates less intrastate revenue than the \$0.36 due for the UUSF surcharge. In each instance, the only revenue available for an ETC to pay the UUSF surcharge is the federal subsidy payment. Any state USF assessment on the federal Lifeline subsidy is therefore starkly inconsistent with the federal universal service mechanism.

d. *Fourth*, the PSC Rule is inconsistent with the purposes and objectives of the Communications Act and the FCC, among which are to: ensure that telecommunications services are universally available to consumers, including low-income consumers; develop a uniform national regulatory policy for the telecommunications industry; and prevent burdensome and unnecessary state regulations. In particular, by preventing CTIA members from continuing to offer no-charge or low-charge wireless services to Utah Lifeline enrollees, the PSC Rule will frustrate each of these federal purposes and objectives.

52. Because the PSC Rule is inconsistent with the federal universal service mechanism and the FCC's rules regarding the federal universal service mechanism in each of these ways, it violates, and is preempted by, 47 U.S.C. § 254(f).

COUNT III
(Violation of 47 U.S.C. § 254(f) Prohibition Against State USF Mechanisms Relying on or Burdening the Federal USF Mechanism)

53. CTIA incorporates the preceding paragraphs by reference as though set forth fully herein.

54. State universal service mechanisms are permissible, provided they “do not rely on or burden Federal universal service support mechanisms.” 47 U.S.C. § 254(f).

55. Unlike the federal USF, the PSC Rule authorizes a per-connection assessment and does not explicitly exempt Lifeline access lines funded entirely or in part with federal universal service support from the surcharge, thereby impermissibly both relying on and burdening the federal USF.

56. Additionally, as noted in Count II, FCC regulations require that carriers offering Lifeline service must pass through the full amount of the monthly \$9.25 in support from the federal universal service program to the qualifying low-income consumer, in the form of qualifying Lifeline services. 47 C.F.R. § 54.403.

57. The PSC Rule, however, now obligates carriers to remit UUSF surcharges for Lifeline access lines, including for no-charge Lifeline services.

58. The UUSF surcharge on Lifeline access lines under the PSC Rule thereby both relies on and burdens the federal universal service mechanism by requiring each

month, for every Lifeline access line in Utah, that \$0.36 of the \$9.25 federal Lifeline subsidy be paid over to the UUSF in violation of 47 C.F.R. § 54.403. This violation of FCC regulations, in turn, demonstrates that the PSC Rule therefore violates, and is preempted by, 47 U.S.C. § 254(f).

COUNT IV
(Violation of 47 U.S.C. § 254(f) Requirement That State USF Mechanisms Must Be Non-Discriminatory)

59. CTIA incorporates the preceding paragraphs by reference as though set forth fully herein.

60. Under federal law, state universal service mechanisms are permissible provided that all providers of intrastate telecommunication services contribute “on an equal and nondiscriminatory basis.” 47 U.S.C. § 254(f).

61. The PSC Rule violates 47 U.S.C. § 254(f) to the extent that it requires prepaid Lifeline service providers to pay the required \$0.36 per month UUSF surcharge directly, whereas other providers are able to pass the surcharge through to their end-user customer.

62. In addition, the PSC Rule violates 47 U.S.C. § 254(f) because it discriminates with regard to prepaid wireless services.

63. Prepaid wireless service plans, where customers pay up front for service as opposed to being billed after the fact, are a significant and growing segment of the wireless marketplace.

64. Prepaid service plans are sold directly to consumers, either by carriers, or by third-party retailers on behalf of carriers, and after their initial purchase customers can purchase additional credits as needed. In the case of third-party retail sales, the retailer collects the customer's payment at the point of sale.

65. Third-party retailers, however, are not subject to the Commission's jurisdiction, a fact that the Commission has acknowledged.

66. There is therefore no mechanism for the Commission to require and ensure that third-party retailers selling prepaid wireless plans remit the required \$0.36 per month UUSF surcharge, and so third-party retailers of prepaid telecommunications services can escape the UUSF assessment that service providers must remit for such services.

67. Further, requiring the underlying wireless carrier to pay the required \$0.36 per month UUSF surcharge in such third-party retail prepaid situations would not cure this discrimination, as the wireless carrier generally has no billing relationship with the end-user customer, and therefore no ability to pass the charge through to the end-user customer. Requiring wireless carriers to remit the UUSF surcharge in those situations, notwithstanding their inability to pass the surcharge through to the end-user customer, is equally discriminatory vis-à-vis service providers who can pass through the UUSF surcharge to customers.

68. In addition, because prepaid customers may purchase prepaid wireless plans or recharge credits on such plans at irregular intervals, the monthly \$0.36 UUSF

assessment is further discriminatory. Although the PSC Rule exempts providers from contributing multiple times in the same month if customers purchase additional minutes, wireless providers are required to remit the monthly \$0.36 surcharge even in months during which they have obtained no revenues; whereas other providers have a monthly billing relationship with their customers that enable them to collect the UUSF surcharge from those customers monthly.

69. These and other similar instances of discrimination relating to prepaid wireless services cannot be avoided until and unless the Utah Legislature authorizes collection of UUSF surcharges at the third-party retailer point of sale.

70. For all these reasons, the PSC Rule is discriminatory and violates, and is preempted by, 47 U.S.C. § 254(f).

PRAYER FOR RELIEF

WHEREFORE, CTIA respectfully requests that this Court:

- A. enter judgment in CTIA's favor on all claims asserted herein;
- B. declare that the PSC Rule violates and is preempted by federal law as pleaded herein;
- C. permanently enjoin each and all of the Commissioners, their officers, agents, subordinates, employees, and all acting in concert with any of the foregoing from enforcing, or proposing to enforce, the PSC Rule (**Exhibit A**);

D. award CTIA its costs and reasonable attorneys' fees, to the extent allowed by law; and

E. grant such additional relief as this Court may deem just and appropriate.

JURY DEMAND

Pursuant to Fed. R. Civ. P. 38(b), Plaintiff hereby demands a trial by jury on any issue triable of right by jury.

DATED: April 10, 2018

PARSONS BEHLE & LATIMER

/s/ Adam E. Weinacker

William J. Evans

Adam E. Weinacker

Philip J. Roselli (*pro hac vice* pending)

WILKINSON BARKER KNAUER, LLP

Benjamin J. Aron (*pro hac vice* pending)

CTIA–The Wireless Association®

Attorneys for Plaintiff CTIA–The Wireless Association®

VERIFICATION

I, Benjamin J. Aron, hereby verify under penalty of perjury that I have read the foregoing Verified Complaint and that its factual allegations are true and correct to the best of my knowledge and belief.

Executed this 10th day of April, 2018.

By: 
Benjamin J. Aron
Director, State Regulatory and External Affairs
CTIA – The Wireless Association®

JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

CTIA – The Wireless Association,

(b) County of Residence of First Listed Plaintiff Washington, DC
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
William J. Evans and Adam E. Weinacker, PARSONS BEHLE & LATIMER, 201 S. Main St., Salt Lake City, UT 84111

DEFENDANTS

THAD LEVAR, DAVID R. CLARK, and JORDAN A. WHITE, in their official capacities as Commissioners of the Utah Public Service Commission

County of Residence of First Listed Defendant SALT LAKE COUNTY
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- 1 U.S. Government Plaintiff
- 3 Federal Question *(U.S. Government Not a Party)*
- 2 U.S. Government Defendant
- 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business in This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans <i>(Excludes Veterans)</i> <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/ Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DJWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 450 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN *(Place an "X" in One Box Only)*

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District *(Specify)*
- 6 Multidistrict Litigation - Transfer
- 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity):*

47 U.S.C. 254(f), 332(c)(3)(A)

Brief description of cause:

Rule enacted by Defendants violates 47 U.S.C. 254(f) and 332(c)(3)(A) in several ways

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMANDS
0.00

CHECK YES only if demanded in complaint
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions.)

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

04/10/2018

/s/ Adam E. Weinacker

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING FFP

Case: 2:18-cv-00302

Assigned To : Furse, Evelyn J.

Assign. Date : 4/10/2018

Description: CTIA The Wireless

Association v. Levar, et al

EXHIBIT A

R746. Public Service Commission, Administration.

R746-8. Utah Universal Public Telecommunications Service Support Fund (UUSF).

R746-8-100. Authority, Purpose, and Organization.

- (1) This rule is adopted under:
 - (a) Utah Code Section 54-8b-10; and
 - (b) Utah Code Section 54-8b-15.
- (2) This rule:
 - (a) governs the methods, practices, and procedures by which:
 - (b) the UUSF is created, maintained, and funded; and
 - (c) funds are disbursed from the UUSF to qualifying access line providers.
- (3) This rule is organized into the following Parts:
 - (a) Part 100: Authority, Purpose and Organization;
 - (b) Part 200: Definitions;
 - (c) Part 300: UUSF Funding; and
 - (d) Part 400: UUSF Distributions.

R746-8-200. Definitions.

(1)(a) "Access line" is defined at Utah Code Subsection 54-8b-2(1), and is used in this rule, R746-8, to the extent consistent with federal law.

(b) For purposes of applying the statutory definition of "access line," the term "connection" is defined at Utah Code Subsection 54-8b-15(1) and is used in this rule, R746-8, to the extent consistent with federal law.

(c)(i) Providers of access lines and functionally equivalent connections are hereafter referred to jointly as "providers."

(ii) Access lines and connections are hereafter referred to jointly as "access line" or "access lines."

(2)(a) "Affordable base rate" or "ABR" means the monthly retail rate that a rate-of-return regulated provider is required to charge on a per-access line basis in order to receive ongoing disbursements from the UUSF.

(b) "Affordable base rate" may include, if itemized in the provider's Commission-approved tariff:

- (i) the applicable UUSF surcharge;
- (ii) mandatory extended area service fees; or
- (iii) state subscriber line fees.

(c) "Affordable base rate" does not include:

- (i) municipal franchise fee(s);
- (ii) tax(es); or
- (iii) any incidental surcharge(s) other than those identified in R746-8-200(2)(b):

(A) included in a Commission-approved tariff; or

(B) authorized under these rules.

(3) "Broadband internet access service" is defined at Utah Code Subsection 54-8b-15(1).

(4) "Carrier of last resort" is defined at Utah Code Subsection 54-8b-15(1).

(5) "Eligible telecommunications carrier" or "ETC" means a provider that, if seeking to participate in the state Lifeline program:

(a) is designated as an eligible telecommunications carrier by the commission in accordance with 47 U.S.C. Section 214(e); or

(b) is designated by the FCC as a Lifeline Broadband Provider (LBP).

(6) "Designated support area" means the geographic area used to determine a provider's UUSF support distribution, including, at a minimum, the provider's entire certificated service territory located in the State of Utah.

(7) The acronym "FCC" means the Federal Communications Commission.

(8) "Facilities-based provider" means a provider that uses:

(a) its own facilities;

(b) essential facilities or unbundled network elements obtained from another provider; or

(c) a combination of its own facilities and essential facilities or unbundled network elements obtained from another provider.

(9) (a) "Household" means any individual or group of individuals living together at the same address as one economic unit.

(b) "Economic unit" means all adult individuals contributing to and sharing in the income and expenses of a household.

(10) "Lifeline subscriber" means an individual who qualifies for state subsidization of an access line through participation in a program for low-income individuals that is recognized by the FCC.

(11) "Non-rate-of-return regulated" is defined at Utah Code Subsection 54-8b-15(1).

(12) "Rate-of-return regulated" is defined at Utah Code Subsection 54-8b-15(1).

(13) "Wholesale broadband internet access service" is defined at Utah Code Subsection 54-8b-15(1).

R746-8-300. UUSF Funding.

The following sections in the 300 series address UUSF Funding.

R746-8-301. Calculation and Application of UUSF Surcharge.

(1) The Utah Universal Public Telecommunications Service Support Fund (UUSF) shall be funded as follows:

(a) Unless Subsection R746-8-301(3) applies, providers shall remit to the Commission \$0.36 per month per access line that, as of the last calendar day of each month, has a place of primary use in Utah in accordance with the Mobile Telecommunications Sourcing Act, 4 U.S.C. Sec. 116 et seq.

(b)(i) "Place of primary use" means the street address representative of where the customer's use of the telecommunications service primarily occurs.

(ii) A provider of mobile telecommunications service shall consider the customer's place of primary use to be the customer's residential street address or primary business street address.

(iii) A provider of non-mobile telecommunications service shall consider the customer's place of primary use to be:

(A) the customer's residential street address or primary business street address; or

(B) the customer's registered location for 911 purposes.

(c) A provider may collect the surcharge:

(i) as an explicit charge to each end-user; or

(ii) through inclusion of the surcharge within the end-user's rate plan.

(d) A provider that offers a multi-line service shall apply the surcharge to each concurrent real-time voice communication call session that an end-user can place to or receive from the public switched telephone network.

(e)(i) A provider that offers prepaid access lines or connections that permit access to the public telephone network shall remit to the Commission \$0.36 per month per access line for such service (new access lines or connections, or recharges for existing lines or connections) purchased on or after January 1, 2018.

(ii) Subsection R746-8-301(1)(e)(i) operates in lieu of Subsection R746-8-301(1)(a) in that a provider who is required to make a remittance for an access line under Subsection R746-8-301(1)(e)(i) is not required to make an additional remittance for the same access line under Subsection R746-8-301(1)(a).

(iii)(A) Multiple recharges of a single prepaid access line during a single month do not trigger multiple remittance requirements.

(B) \$0.36 per month is both the maximum and minimum amount of remittance necessary for any single access line.

(2)(a) A provider shall remit to the Commission no less than 98.69 percent of its total monthly surcharge collections.

(b) A provider may retain a maximum of 1.31 percent of its total monthly surcharge collections to offset the costs of administering this rule.

(3)(a) Subject to Subsection R746-8-301(3)(b), a provider may omit the UUSF surcharge with respect to an access line that is described in Subsection R746-8-301(1), and:

(i) generates revenue that is subject to a universal service fund surcharge in a state other than Utah for the relevant month for which the provider omits the UUSF surcharge; or

(ii) for the relevant month for which the provider omits the UUSF surcharge, was not used to access Utah intrastate telecommunications services.

(b) A provider that omits any UUSF surcharge pursuant to Subsection R746-8-301(3)(a) shall:

(i) maintain documentation for at least 36 months that the omission complied with Subsection R746-8-301(3)(a); and

(ii) consent to any audit of the documentation requested by the:

(A) Commission; or

(B) Division of Public Utilities.

(c) A provider who omits any UUSF surcharge pursuant to Subsection R746-8-301(3)(a) shall report monthly to the Division of Public Utilities, using a method approved by the Division, the number of omissions claimed pursuant to each Subsection R746-8-301(3)(a)(i) and R746-8-301(3)(a)(ii).

R746-8-302. UUSF Surcharge Remittances.

Providers shall remit surcharge assessments to the Commission as follows:

(1) If, over a period of six months, the average monthly UUSF surcharge assessments total \$1,000 or more, the provider shall remit the funds:

(a) on a monthly basis; and

(b) within 45 days of the last calendar day of each month.

(2) If, over a period of six months, the average UUSF surcharge assessments are less than \$1,000 per month, the provider shall accrue the UUSF surcharge assessments and submit the accrued assessments every six months.

R746-8-400. UUSF Distributions.

The following sections in the 400 series address UUSF Distributions.

R746-8-401. Rate-of-Return Regulated Providers.

(1) A rate-of-return regulated provider is eligible for ongoing UUSF support pursuant to Utah Code Section 54-8b-15 if the provider:

- (a) is a carrier of last resort;
- (b) is in compliance with Commission orders and rules;
- (c) unless a petition brought pursuant to Subsection R746-8-401(2) is granted after adjudication, charges, at a minimum, \$18 per access line;
- (d) offers Lifeline service on terms and conditions prescribed by the Commission;
- (e) operates as a facilities-based provider, not a reseller; and
- (f) in compliance with R746-8-401(3), demonstrates through an adjudicative proceeding that its costs as established in Utah Code Section 54-8b-15 exceed its revenues as established in Utah Code Section 54-8b-15.

(2)(a) A rate-of-return regulated provider may petition the Commission to deviate from the affordable base rate set forth in Subsection R746-8-401(1)(c).

(b) A rate-of-return regulated provider that files a petition to deviate from the affordable base rate shall:

- (i) demonstrate that the affordable base rate is not reasonable in the provider's designated support area; or
- (ii) impute income up to the affordable base rate in calculating the provider's UUSF disbursement.

(3) The calculation of a rate-of-return regulated provider's ongoing UUSF distribution shall conform to the following standards:

(a) The provider's state rate-of-return shall be equal to the weighted average cost of capital rate-of-return prescribed by the FCC for rate-of-return regulated carriers, as of the date of the provider's application for support, and as follows:

- (A) beginning July 1, 2016: 11.0%
- (B) beginning July 1, 2017: 10.75%;
- (C) beginning July 1, 2018: 10.5%;
- (D) beginning July 1, 2019, 10.25%;
- (E) beginning July 1, 2020, 10.0%; and
- (F) beginning July 1, 2021, 9.75%.

(b) The provider's depreciation costs shall be calculated as established in Utah Code Section 54-8b-15.

(4) Yearly following a change in the FCC rate-of-return, unless the provider files with the Commission a petition for review of its UUSF disbursement, the Division shall make a recommendation of whether each provider's monthly distribution should be adjusted according to:

- (a) the current FCC rate-of-return as set forth in

R746-8-401(3)(a); and

(b) the provider's financial information from its last Annual Report filed with the Commission.

R746-8-402. Non-rate-of-return Regulated Providers.

(1) A non-rate-of-return regulated provider may be eligible for ongoing UUSF support for the deployment and management of networks capable of providing access lines, connections, or broadband internet access, upon application to the Commission, if the provider:

(a) is a carrier of last resort; and

(b) is in compliance with Commission orders and rules.

(2) Upon receipt of an application brought under R746-8-402, the Commission shall establish the appropriate criteria for the entitlement to, and the disbursement of, UUSF funds to non-rate-of-return regulated providers.

R746-8-403. Lifeline Support.

(1) In addition to any disbursement calculated under R746-8-401 or R746-8-402, an ETC may receive an ongoing distribution through ongoing participation in a Commission-approved Lifeline program upon a specific finding of public interest by the Commission.

(2)(a) The support claimed under this Subsection R746-8-403 may not exceed \$3.50 per Lifeline subscriber per month of subscription to a service that:

(i)(A) meets FCC broadband Lifeline requirements as set forth in 47 C.F.R. 54.408; and

(B) for wireless Lifeline, allows, at no charge beyond the basic monthly fee, unlimited texting and at least 750 voice minutes per month; or

(ii)(A) meets FCC broadband Lifeline requirements as set forth in 47 C.F.R. 54.408; and

(B) does not include a voice component.

(b) Lifeline distributions will be based on eligible Lifeline subscribers as of the first day of each month, with no prorated discounts.

(3) An ETC that is approved to participate in the Commission Lifeline program shall:

(a) provide potential Lifeline subscribers with application materials and information;

(b) provide service to any customer who is verified as eligible for participation through:

(i) the FCC's national verifier system; or

(ii) if the FCC's national verifier system is not yet operational, the program administrator with which the Commission contracts to administer the initial and continued eligibility verification of state Lifeline participants;

(c) waive, for Lifeline subscribers, the following charges:

(i) customer security deposits, if the customer voluntarily elects to receive toll blocking; and

(ii) within any 12-month period, the first nonrecurring service charge for:

(A) changing local exchange usage service to Lifeline service; and

(B) changing from flat rate service to message rate service;

and

(d) (i) add the Lifeline discount to a customer's account within five (5) business days of notification of the customer's eligibility under FCC Lifeline requirements; and;

(ii) remove the Lifeline discount from a Lifeline subscriber's account within five (5) business days of notification of the Lifeline subscriber's ineligibility under FCC Lifeline requirements; and

(e) submit to the Division by May 1 of each year, a complete Lifeline subscriber list, as defined by the FCC.

(4) An ETC participating in the Commission Lifeline program may not:

(a) disconnect Lifeline telephone service for nonpayment of toll service;

(b) require a Lifeline subscriber to purchase additional services from the ETC; or

(c) prohibit a Lifeline subscriber from purchasing additional services from the ETC, unless the participant fails to comply with the ETC's terms and conditions for those additional services.

R746-8-404. One-time UUSF Distribution.

A non-rate-of-return regulated carrier of last resort may apply for a one-time UUSF distribution pursuant to Utah Code Subsection 54-8b-15(3) (d).

R746-8-405. UUSF Support for Deaf, Hard of Hearing, or Severely Speech Impaired Person.

(1) This rule governs a program to provide telecommunication devices and services to qualifying deaf, hard of hearing, or severely speech impaired persons

(2) Definitions.

(a) "Applicant" means a person applying for:

(i) a telecommunication device for the deaf, hard of hearing, or severely speech impaired;

(ii) a signal device; or

(iii) another assistive communication device.

(b) "Audiologist" means a person who:

(i) (A) has a master's or doctoral degree in audiology; or

(B) is licensed in audiology in Utah; and

(ii) holds a Certificate of Clinic Competence in Audiology from the American Speech/Language/Hearing Association or its equivalent.

(c) "Deaf" means hearing loss that requires the use of a TDD to communicate effectively on the telephone.

(d). "Hard of hearing" means hearing loss that requires use of a TDD to communicate effectively on the telephone.

(e) "Otolaryngologist" means a licensed physician specializing in ear, nose, and throat medicine.

(f) "Recipient" means a person who is approved to receive a TDD, signal device, personal communicator, or other assistive communication device.

(g) "Speech language pathologist" means a person who:

(i) has a master's or doctoral degree in Speech Language Pathology; and

(ii) holds a Certificate of Clinical Competence in Speech/Language Pathology from the American Speech Language Hearing

Association or its equivalent.

(h) "Severely Speech Impaired" means a speech handicap or disorder that renders speech on an ordinary telephone unintelligible.

(i) "Signal device" means a mechanical device that alerts a deaf, deaf-blind, or hard of hearing person of an incoming telephone call.

(j) "Telecommunications Device for the Deaf" or "TDD" means an electrical device for use with a telephone that utilizes:

(i) a key board;

(ii) an acoustic coupler;

(iii) a display screen;

(iv) a braille display; or

(v) a tablet device or unlocked cellular telephone that is equipped with applications that allow a user to transmit and receive messages.

(3) Eligibility.

(a) At a minimum, applicants shall demonstrate that they:

(i) live within the State of Utah;

(ii) are

(A) deaf;

(B) hard of hearing; or

(C) severely speech impaired;

(iii) are eligible for assistance under a low-income public assistance program; and

(iv) are able to send and receive messages with a TDD or other appropriate assistive device.

(b) Qualification under Subsection R746-8-405(3)(a)(ii) shall be established by the certification of:

(i) a person who is licensed to practice medicine;

(ii) an audiologist;

(iii) an otolaryngologist;

(iv) a speech/language pathologist; or

(v) qualified personnel within a state agency.

(4) Distribution process.

(a) If approved by the Commission to receive an assistive device, the applicant shall:

(i) unless Subsection R746-8-405(4)(b) applies, sign an agreement and conditions of acceptance form supplied by the Commission; and

(ii) report, as instructed by the Commission, for training and receipt of the approved device.

(b) If the recipient is a minor or is unable to sign the agreement and conditions of acceptance form, the recipient's legal guardian may sign.

(5) Ownership and Liability.

(a)(i) An assistive device provided under this rule remains the property of the State of Utah.

(ii) A recipient shall not remove an assistive device from the state of Utah for a period of time longer than 90 days unless the recipient obtains the written consent of the Commission.

(b) A recipient shall be solely responsible for the costs of:

(i) repair of an assistive device, other than for normal wear and tear;

(ii) replacement of an assistive device;

- (iii) paper required by an assistive device;
 - (iv) telephone and internet service; and
 - (v) light bulbs required by an assistive device.
- (c) If an assistive device requires repair, the recipient shall return it to the Commission and may not make private arrangements for repair.
- (6) Termination of Use. A recipient, or if applicable, the recipient's guardian, shall return an assistive device to the Commission if the recipient:
- (a) no longer intends to reside in Utah;
 - (b) becomes ineligible pursuant to R746-8-405(3); or
 - (c) is notified by the Commission to return the device.

R746-8-405a. New Technology Equipment Distribution Program (NTEDP).

- (1) Authority and Purpose.
- (a) This rule section is promulgated pursuant to Utah Code Subsection 54-8b-10(3)(b).
- (b) The purposes of the NTEDP are:
- (i) to explore the feasibility of using tablet devices and/or unlocked cellular telephones to address the telecommunication needs of the deaf, hard of hearing, and severely speech-impaired communities;
 - (ii) to determine how best to manage a program in which tablet devices and/or unlocked cellular telephones are provided; and
 - (iii) to determine the level of support services that would be required if tablet devices and/or unlocked cellular telephone devices are provided.
- (2) Duration. The NTEDP shall terminate no later than December 31, 2018.
- (3) Participation.
- (a) An individual who wishes to participate in the NTEDP shall:
- (i) submit a completed application form to the Relay Utah office;
 - (ii) provide medical documentation of:
 - (A) deafness;
 - (B) hardness of hearing; or
 - (C) severe speech impairment;
 - (iii) demonstrate that the individual is receiving assistance from a low-income public assistance program administered by a state agency;
 - (iv) (A) if applying for a tablet, certify that the individual has consistent access to a WiFi network; or
 - (B) if applying for an unlocked cellular telephone, certify that the individual has a service plan in place with a wireless telecommunications provider; and
 - (v) certify that the individual is able and willing to comply with Subsection (4).
- (b) Priority may be given to applicants who have previously participated in the Commission's Relay Utah program.
- (c) An applicant who is not selected to participate may request to be placed on a waiting list.
- (d) Participation shall be limited as follows:
- (i) From the inception of the program through June 30, 2017, no more than 25 participants, as follows:

(A) no more than 8 deaf individuals who are at least 13 years old;

(B) no more than 8 hard of hearing individuals who are at least 13 years old;

(C) no more than 8 severely speech impaired individuals who are at least 13 years old; and

(D) at least one deaf, hard of hearing, or severely speech impaired individual who is under 13 years of age.

(ii) From July 1, 2017 through the conclusion of the program, up to 10 additional participants in each six-month period.

(4) Participant obligations.

(a) An individual who is chosen to participate in the NTEDP shall:

(i) participate in an entrance interview with the Relay Utah office;

(ii) complete online surveys as instructed by the Relay Utah office;

(iii) promptly comply with all instructions from the Relay Utah office to download apps;

(iv) promptly respond to requests from the Relay Utah office for information and feedback;

(v) maintain the device in the storage case provided;

(vi) retain all original device packaging, instructions, and information;

(vii) contact the manufacturer's customer service department for assistance with technical support;

(viii) promptly report to the Relay Utah office:

(A) software and hardware failures; and

(B) damage to the device;

(ix) take financial responsibility for loss of, or damage to, the device if caused by the individual's misuse or negligence; and

(x) immediately return the device to the Relay Utah office if the individual:

(A) moves from the State of Utah;

(B) is disqualified by the Relay Utah office from further participation in the NTEDP; or

(C) chooses to terminate the individual's participation in the NTEDP.

(b) An individual who is chosen to participate in the NTEDP may not:

(i) reformat or attempt to reformat the device;

(ii) allow any other person to use the device, except as necessary to assist the participant with telecommunications; or

(iii) install software, apps, or other programs not authorized by the Relay Utah office.

(c) A participant who fails to comply with this Subsection (4) may be disqualified from further participation in the NTEDP.

(5) All devices distributed as part of the NTEDP shall remain the property of the State of Utah Public Service Commission.

**KEY: Utah universal service fund, surcharges and disbursements, speech/hearing challenges, assistive devices and technology
Date of Enactment or Last Substantive Amendment: February 21, 2018
Authorizing, and Implemented or Interpreted Law: 54-3-1; 54-4-1;**

54-8b-15; 54-8b-10

EXHIBIT B

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

Utah Administrative Code R746-360 Universal
Public Telecommunications Service Support
Fund

DOCKET NO. 17-R360-01
NOTICE APPLICATION FOR REHEARING
WILL BE DENIED BY OPERATION OF
STATUTE AND ORDER DENYING
REQUEST FOR STAY

ISSUED: November 30, 2017

On November 13, 2017, CTIA filed a consolidated Application for Rehearing (“Application”) pursuant to Utah Code § 54-7-15 and Request for Stay (“Motion to Stay”). Having reviewed the Application, the Public Service Commission (“PSC”) gives notice it does not intend to grant the Application, which will, therefore, be denied by operation of statute 20 days after its filing. Utah Code Ann. § 54-7-15(2)(c). As the Application will be denied and given the Legislature’s requirement the PSC adopt a method, by rule, to comply with the pertinent provisions of Senate Bill 130 before January 1, 2018, the PSC finds no cause exists to stay implementation of its rule. *See* Utah Code Ann. § 54-8b-15(9), (10). The Motion to Stay is denied.

DATED at Salt Lake City, Utah, November 30, 2017.

/s/ Michael J. Hammer
Presiding Officer

Attest:

/s/ Gary L. Widerburg
PSC Secretary
DW#298178

DOCKET NO. 17-R360-01

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CERTIFICATE OF SERVICE

I CERTIFY that on November 30, 2017, a true and correct copy of the foregoing was served upon the following as indicated below:

By Electronic-Mail:

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EXHIBIT C

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Utah Administrative
Code R746-360 Universal Public
Telecommunications Service Support Fund

Docket No. 17-R360-01

**CTIA’S APPLICATION FOR
REHEARING AND REQUEST FOR STAY**

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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Utah Administrative
Code R746-360 Universal Public
Telecommunications Service Support Fund

Docket No. 17-R360-01

**CTIA'S APPLICATION FOR
REHEARING AND REQUEST FOR STAY**

APPLICATION FOR REHEARING AND REQUEST FOR STAY

Pursuant to Utah Code § 54-7-15, CTIA submits this Application for Rehearing and Request for Stay (“Application for Rehearing”) of the proposed rules that the Public Service Commission of Utah (“Commission”) made effective in its October 11, 2017 Notice in this docket.¹ The Notice indicates that the Proposed Rule published June 1, 2017 and the Change in Proposed Rule published September 1, 2017 (collectively, “Effective Rule”) have been made effective. For the reasons discussed herein, the Commission should grant rehearing of the Effective Rule, reject the Effective Rule in favor of a revenue-based mechanism, and stay the Effective Rule pending such action.

I. INTRODUCTION AND SUMMARY

The Commission’s decision to announce the effectiveness of the Effective Rules places CTIA and other stakeholders in this proceeding in an odd position because the Commission’s work in this proceeding is ongoing. Indeed, subsequent to the October Notice announcing the Effective Rules on October 11, 2017, the Commission released additional proposed changes to

¹ *In the Matter of the Utah Administrative Code R746-360 Universal Public Telecommunications Service Support Fund*, Docket No. 17-R360-01, Notice that Proposed Rules Have Been Made Effective (Oct. 11, 2017) (“October Notice”).

the *same regulations* on October 25, 2017.² Given the deadlines for rehearing and judicial appeal,³ however, CTIA is obligated at this time to file this Application for Rehearing challenging the Effective Rule in order to preserve its rights.

The Effective Rule is not competitively neutral and non-discriminatory as between prepaid and postpaid providers;⁴ does not comply with Senate Bill 130 (“S.B. 130”)⁵ and its requirement of compliance with the Mobile Telecommunications Sourcing Act (“MTSA”);⁶ and would impermissibly burden the federal Universal Service Fund (“USF”). Because these issues, raised throughout the proceeding, continue to exist in the Effective Rule, CTIA urges the Commission to stay the Effective Rule and retain its current revenue-based approach that is expressly permitted under Utah Code § 54-8b-2(9)(c)(i).⁷

II. THE EFFECTIVE RULE IS NOT EQUITABLE, NON-DISCRIMINATORY, OR COMPETITIVELY NEUTRAL AS REQUIRED BY LAW

A. The Effective Rule Discriminates Between Prepaid and Postpaid Providers

As discussed in more detail below, many sales of prepaid wireless products involve retailers rather than carriers, and the Commission concedes that it does not have jurisdiction to assess Utah Universal Public Telecommunications Service Support Fund (“UUSF”) surcharges

² Notice of Proposed Rule Amendment, DAR 42265 (rel. Oct. 25, 2017).

³ See Utah Code § 54-7-15.

⁴ See Utah Code § 54-8b-15(9)(a)-(b).

⁵ S.B. 130, Utah Reg. Session 2017 (Utah 2017) (“S.B. 130”), new § 54-8b-10(11) (effective July 1, 2017) requires the Commission to assess universal service “only to the extent permitted by the MTSA.”

⁶ See 4 U.S.C. §§ 106-252 (2017).

⁷ Utah Code § 54-8b-2(9)(c)(i)-(iii). Specifically, Utah law provides that the Commission may fund the UUSF through a surcharge that is based upon (i) a provider’s intrastate revenue, (ii) the number of access lines or connections maintained by a provider in the state, or (iii) a combination of the two methodologies.

on these third parties.⁸ Until the Commission is given the authority to require collection of UUSF surcharges at the point-of-sale by third-party retailers, millions of dollars in revenues from prepaid services will be omitted from assessments, imperiling UUSF funding and creating discrimination and inequity among providers in violation of Utah Code § 54-8b-15.⁹ Thus, CTIA has previously urged the Commission, prior to its promulgation of the Effective Rule, to “maintain its current revenue-based approach ... at least until such time as the Commission has the authority to assess *all* providers of intrastate telecommunications services on a per-line basis.”¹⁰

Prepaid mobile services are a significant and growing segment of the wireless marketplace, comprising approximately one-third of all mobile consumers as of 2013.¹¹ Prepaid mobile services are sold directly to consumers by either carriers or third-party retailers. Under a prepaid wireless service plan, providers charge consumers up front for a certain amount of voice, text, and data services, with any additional usage credits purchased separately. These prepaid credits are sold by carriers, but a significant portion of credit sales come from third-party retailers, often in the form of “top-up cards.” In these cases, the retailer will typically collect the customer’s payment in the first instance and share some portion of that payment with the carrier.

⁸ *Utah Administrative Code R746-360 Universal Public Telecommunications Service Support Fund*, Notice of Change to Proposed Rule and Response to Reply Comments, Docket No. 17-R360-01 at 3 (issued Aug. 14, 2017) (“Notice”), <https://pscdocs.utah.gov/Rules/17R36001/29595217R36001noctprartc8-14-2017.pdf>.

⁹ See Utah Code § 54-8b-15(9)(a)-(b); see, e.g., *Rural Cellular Association v. FCC*, 588 F.3d 1095, 1104 (D.C. Cir. 2009) (Competitive neutrality requires that “universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another”).

¹⁰ CTIA Reply Comments (Oct. 14, 2017) at 1 (emphasis added).

¹¹ Marc Lifsher, “More cellphone users switch to prepaid plans,” *LA Times* (Feb. 19, 2013), <http://articles.latimes.com/2013/feb/19/business/la-fi-0220-prepaid-cellphone-boom-20130220>; see “Competition Intensifies in the U.S. Wireless Prepaid Market,” *Zacks* (Apr. 12, 2017), <https://www.zacks.com/stock/news/256231/competition-intensifies-in-the-us-wireless-prepaid-market>.

Prepaid plans have a number of benefits that make them an increasingly favorable option for consumers; they allow consumers to limit their spending, control usage, and avoid the burdens and financial costs of long-term contracts. Accordingly, low and fixed-income consumers, students, service members, and travelers have traditionally favored prepaid plans in lieu of post-paid plans that often price-in hefty handset costs or require a permanent address, minimum credit score, or a credit card.¹² However, changes in handset marketing and advancements in mobile payment and cellular technologies have made prepaid plans an increasingly popular and consumer-friendly option for higher income consumers as well.¹³ As a result, prepaid consumers have grown into a highly desirable consumer base with average revenue per user comparable to that of postpaid consumers,¹⁴ and the five largest prepaid wireless carriers now have a combined 75.61 million subscribers in the United States.¹⁵

The Commission concedes that it currently lacks the authority to require collection of surcharges from non-carrier retailers, such as at the point of sale.¹⁶ Despite that acknowledgement in this proceeding, however, and the unique ability of the Legislature to remedy it, the Commission neglected to raise this important issue in its recent Report to the

¹² See Lifsher, *supra* note 10; Susan Johnston Taylor, "The Rise of No-Contract Cellphones," US News (Sept. 16, 2013), <https://money.usnews.com/money/personal-finance/articles/2013/09/16/the-rise-of-no-contract-cellphones>.

¹³ Colin Gibbs, "T-Mobile and AT&T are killing the gap between prepaid and postpaid," Fierce Wireless (May 4, 2017), <http://www.fiercewireless.com/wireless/t-mobile-and-at-t-are-killing-gap-between-prepaid-and-postpaid/>.

¹⁴ *Id.* at 1; "Wireless Industry Continues to Evolve: Prepaid/No Contract a Favorite Consumer Choice," Prepaid Wireless, <http://www.prepaidpress.com/features/wireless-industry-continues-to-evolve.html>.

¹⁵ Dennis Bournique, "First Quarter 2016 Prepaid Mobile Subscriber Numbers By Operator," Prepaid Phone News (May 3, 2016), <http://www.prepaidphonenews.com/2016/05/first-quarter-2016-prepaid-mobile.html>.

¹⁶ Notice at 3.

Legislature on the UUSF.¹⁷ Without legislative changes to address this issue, the sizeable revenue from prepaid wireless sales by third party retailers will be excluded from the obligation to contribute to the UUSF,¹⁸ while revenue from prepaid wireless service sold directly by carriers would remain subject to surcharge, though the products and services sold are the same. This asymmetrical regulation would discriminate against connections purchased from carriers directly, as compared to those purchased through third party retailers, running afoul of the requirement for competitive neutrality found in Utah Code § 54-8b-15.¹⁹

Even if there were a way to assess all prepaid wireless sales, a per-connection approach still would lead to inequitable and discriminatory results.²⁰ For example, as CTIA noted in its July 3, 2017 comments, many prepaid customers purchase top-up cards at irregular intervals—on biweekly paydays or as needed—not necessarily on a monthly basis.²¹ Thus, even if point-of-sale collection were permitted, implementation of the Effective Rule would result in customers that purchase top-up cards more than once a month being assessed multiple surcharges per month. Conversely, customers that purchase top-up cards less than monthly would be assessed fewer surcharges, effectively creating a partial exemption from the surcharge for such customers. In either case, the outcome would violate the statutory requirements for a non-discriminatory and competitively neutral surcharge.

¹⁷ Public Service Commission, Report from Public Service Commission Under Utah Code Ann. § 54-8b-15(16) (Oct. 30, 2017).

¹⁸ The Legislature has provided such an approach for 911 fees. See Utah Code § 69-2-5.7.

¹⁹ See Utah Code § 54-8b-15(9)(a)-(b); see, e.g., *Rural Cellular Association v. FCC*, 588 F.3d 1095, 1104 (D.C. Cir. 2009).

²⁰ Collecting surcharges from retail sales of top-up cards also could lead to significant practical problems, such as the elimination of national pricing for Utah consumers.

²¹ CTIA Comments (July 3, 2017) at 1.

The Commission's statement that it will "engage in one more stage of rulemaking" to address prepaid-related concerns²² does not allow it to adopt a rule that, on its face, violates the requirement for competitive neutrality found in Utah Code § 54-8b-15,²³ and it is unclear whether further proceedings will resolve the problem. The Commission should grant this Application for Rehearing, reconsider the rule, and stay the rule pending these proceedings.

B. The Effective Rule Is Not Competitively Neutral Because It Omits Contributions From Other Providers

In addition to the problems it creates with respect to prepaid wireless services, the Effective Rule also would be illegal because it would fail to assess providers of intrastate Utah telecommunications that do not also offer connections. For instance, interexchange carriers offer intrastate telecommunications services, but not connections. Under a per-connection assessment, they would be excluded from any contribution obligation. A similar result would obtain as to over-the-top interconnected voice over Internet protocol ("VoIP") providers such as Vonage.²⁴

Exclusion of a group of telecommunications providers from the obligation to contribute to the UUSF would violate the requirement that the calculation of UUSF charges must be "competitively neutral"²⁵ because both interexchange carriers and over-the-top VoIP providers provide services that compete with services offered by telecommunications carriers in Utah, including CTIA's member companies. Because the Effective Rule would fail to assess telecommunications carriers that provide intrastate telecommunications services in Utah but do

²² October Notice at 1.

²³ See Utah Code § 54-8b-15(9)(a)-(b).

²⁴ CTIA notes that while VoIP has not been classified as either a telecommunications or an information service, the FCC has determined that revenues from interconnected VoIP are subject to state USF contribution obligations. To the extent interconnected VoIP providers' contribution obligations mirror those of telecommunications providers, the statutory non-discrimination requirement must reasonably be interpreted as applying to interconnected VoIP providers.

²⁵ Utah Code § 54-8b-15(9)(b).

not provide connections, it would violate state statute and therefore must be reconsidered by the Commission.

C. The Effective Rule Does Not Make the UUSF More Competitively Neutral Than the Current System, But in Any Event, That Is Not the Statutory Standard

In the October Notice, the Commission incorrectly asserts that the Effective Rule changes “have made the UUSF surcharge more competitively neutral than it has been in the past.”²⁶ The Commission does not explain why it believes this to be true, but it is incorrect in any event. To the extent that the Commission is lending credence to the ILECs’ suggestion that the revenue-based system is somehow inequitable because wireless carriers’ revenues have shifted towards data services in response to consumer demand,²⁷ CTIA wishes to reiterate that this theory is inaccurate.²⁸ The ILECs’ revenues have dropped even more than wireless carriers’,²⁹ and it is also equitable that wireless carriers’ contribution obligations to the UUSF should fall as they collect less revenue for services that are subject to this Commission’s jurisdiction. Indeed, a system that singles wireless carriers out to pay a disproportionately larger share towards UUSF would clearly be *inequitable*, in addition to being unlawfully discriminatory.

Regardless, even if it were true that the Effective Rule would lead to a “*more* competitively neutral” assessment than under the current system, this would not be sufficient to save the flawed Effective Rule. S.B. 130 requires that the Commission’s rule be “competitively neutral”—there is no qualification on this requirement. Statutory fidelity is not a game of horseshoes; the Commission must meet the statutory standard, or the action is invalid. As

²⁶ October Notice at 14.

²⁷ See, e.g., URTA Comments (April 26, 2017) at 6-8; CenturyLink Comments (June 30, 2017) at 2-3.

²⁸ See CTIA Reply Comments (May 11, 2017) at 4-8.

²⁹ See AT&T Comments at 6 (April 26, 2017).

explained above, because the Effective Rule is not competitively neutral, it does not meet the requirements of S.B. 130 and is therefore unlawful.

II. THE EFFECTIVE RULE IDENTIFIES UTAH ACCESS LINES FOR SURCHARGE IN A WAY THAT IS INCONSISTENT WITH THE MTSA

As CTIA has already observed, the Effective Rule does not limit the jurisdictional scope of the UUSF assessment in a manner consistent with the Mobile Telecommunications Sourcing Act (“MTSA”) as S.B. 130 requires.³⁰ The Commission, pursuant to S.B. 130, can only assess universal service obligations “to the extent permitted by MTSA.”³¹ Under the MTSA, states are only permitted to assess charges on mobile services if the “customer’s place of primary use” is in the state, and the MTSA further defines “place of primary use” to mean “the street address representative of where the customer’s use of the mobile telecommunications service primarily occurs, which must be (A) the residential street address or the primary business street address of the customer; *and* (B) within the licensed service area of the home service provider.”³²

The Effective Rule’s definition for “primary place of use” diverges from the MTSA by omitting MTSA’s requirement that the place of primary use be “within the licensed service area of the home service provider.”³³ Because the Effective Rule could lead to assessments that are not “permitted by the MTSA” (for example, where a customer’s address is outside the licensed service area of the home service provider), the Effective Rule is impermissibly inconsistent with the enabling statute. However, if the Commission were to fully adopt the MTSA’s definitions, the Commission could follow the federal design and ensure that its rules for universal service

³⁰ As CTIA has pointed out previously, the Commission’s October 25, 2017 Notice of Proposed Rule Amendment in this proceeding also does not resolve this problem.

³¹ See 4 U.S.C. §§ 106-252 (2017).

³² 4 U.S.C. § 117 (emphasis added).

³³ October Notice at 1.

were harmonized with other states, thereby preventing the UUSF from assessing overlapping contribution obligations on the same intrastate revenue with other jurisdictions following the MTSA.³⁴

III. THE EFFECTIVE RULE ILLEGALLY BURDENS THE FEDERAL UNIVERSAL SERVICE FUND

A. The Effective Rule Taxes Federal Lifeline Support

In contrast to the rules applicable to other state universal service funds, the Effective Rule does not exempt Lifeline connections from UUSF surcharges, in contravention of Section 254(f) of the federal Communications Act, as amended.³⁵ Many Lifeline providers offer services at no charge to the consumer, funded entirely by the Lifeline subsidy from the federal universal service fund. Because the customer is not charged, carriers often have no established billing relationships with such customers. Thus, if the Commission obligates carriers to remit surcharges on such lines, there will be no source other than the federal subsidy revenues, and so the Commission would be directly surcharging the federal support mechanism, illegally burdening the federal Lifeline program.³⁶ Further, such an approach would also be inconsistent with the Effective Rule itself because the carriers would be collecting surcharges from subsidy revenues—not “from their end-user customers” as the Rule itself requires. These collections

³⁴ For this reason, the FCC has recommended that states model their universal service contribution obligations on the MTSA in the context of interconnected VoIP services. *See* Declaratory Ruling, *In the Matter of Universal Service Contribution Methodology, Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, 25 FCC Red. 25651, ¶ 21 (2010) (“*KS/NE Declaratory Ruling*”) (“[A]n allocation of revenues among the states modeled on the Mobile Telecommunications Sourcing Act, but adapted to provide interconnected VoIP service providers a means of determining a customer’s primary place of use of service, could be a method of ensuring against double assessments in the context of interconnected VoIP.”).

³⁵ In addition, in its October 24, 2017 Notice of Rule Filing in this docket, the Commission affirmatively “declined to accept the suggestion to exempt access lines that receive a Lifeline subsidy from the UUSF surcharge.”

³⁶ *See* 47 U.S.C. § 254(f).

would, in turn, violate S.B. 130, as they would discriminatorily require certain carriers to remit surcharges from subsidy revenues while other carriers could collect such surcharges directly “from their end-user customers.” Conversely, if the Commission intended to level the playing field by requiring all carriers to somehow collect UUSF surcharges from Lifeline customers with whom they have no established billing relationship, this would also violate federal law. Surcharging such customers would be inconsistent with and burden the federal Lifeline program by making federally-funded Lifeline service less affordable for consumers.

For all these reasons, the Commission should grant this Application for Rehearing, reconsider the Effective Rule, and stay its effectiveness in the interim.

B. Development of The Effective Rule Included No Consideration As To Whether It Otherwise Burdens the Federal USF Program

Under Section 254(f) of the federal Communications Act, as amended, state universal service mechanisms such as the UUSF cannot be “inconsistent” with, “rely on,” or “burden” the federal mechanism for calculating USF contributions.³⁷ The FCC calculates USF contributions from interstate telecommunications revenue, and the Effective Rule’s proposed “per line” or “per connection” mechanism may inadvertently—and illegally—assess UUSF surcharges on the same base of revenue that the FCC assesses for the federal fund.³⁸ Because the federal fund is based on interstate revenue and has mechanisms (safe harbor, traffic study, etc.) for determining the jurisdictional allocation of revenue, states cannot ignore the federal mechanism and the amount of revenue allocated to the intrastate jurisdiction. For instance, if \$0.75 of revenue is allocated to

³⁷ See 47 U.S.C. § 254(f); *AT&T Corp. v. Public Utility Commission of Texas*, 373 F.3d 641 (5th Cir. 2004) (finding “assessment on both interstate and intrastate calls creates an inequitable, discriminatory, and anti-competitive regulatory scheme. ... PUC assessment of interstate and international calls is discriminatory, conflicts with § 254(f), and thus is preempted by federal law.”).

³⁸ CTIA acknowledges that S.B. 130 empowers the Commission “to adopt a surcharge mechanism based on the number of lines and connections.” *Id.*

the intrastate jurisdiction, a state may not apply a surcharge of \$1.00 because a portion of the surcharge (\$0.25) would be applied impermissibly to interstate revenue. The Commission's decision to implement a per-connections mechanism does not insulate it from ensuring that its surcharge does not burden the federal program by imposing surcharges on interstate revenue. Whether through a per-connection or revenue-based surcharge, the Commission must ensure that its surcharge – in all instances – is not in excess of revenue allocated to the intrastate jurisdiction. However, the Commission has made no effort to determine whether the per-connection charge in the Effective Rule will burden the federal universal service program by assessing UUSF fees upon the same revenue assessed by the federal government. The fact that the Effective Rule applies a per-connection assessment does not immunize the rule from violating the proscriptions of Section 254 of the federal Communications Act.

Although the \$0.36 surcharge in the Effective Rule may not attach federal revenues in all cases, there certainly may be low-revenue accounts, both wireline and wireless, where the charge does indeed impinge on the federal revenue base.³⁹ The problem is that the Commission has not done any analysis of whether the Effective Rule will or could burden the federal fund. The Commission also has not established any safeguards to prevent such from occurring.

In part, this uncertainty flows solely and directly from the Commission's decision to reject familiar and well-established revenue-based mechanisms in favor of a novel per-connection mechanism. Accordingly, the Commission should proceed cautiously, grant this Application for Rehearing, and stay the Effective Rule until it has found a lawful path forward.

³⁹ It is easier to see, however, that if the Commission imposed a UUSF surcharge of \$9.00, and a wireless service plan cost \$10, the Commission clearly would burden the federal mechanism because it would be assessing the same base of revenue as the federal program.

CERTIFICATE OF SERVICE

I certify that, on November 13, 2017, a true and correct copy of the foregoing Application for Rehearing and Request for Stay in Docket No. 17-R360-01 were delivered to the following by electronic mail:

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EXHIBIT D

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

Utah Administrative Code R746-360 Universal Public Telecommunications Service Support Fund	<u>DOCKET NO. 17-R360-01</u> <u>NOTICE THAT PROPOSED RULES HAVE BEEN MADE EFFECTIVE AND ORDER OF CLARIFICATION</u>
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ISSUED: December 22, 2017

The Public Service Commission of Utah (“PSC”) has made effective the Notice of Proposed Rule, DAR File No. 42265, that was published in the November 15, 2017 (Vol. 2017, No. 22) Utah State Bulletin (“Proposed Rule”). CTIA filed comments on December 15, 2017, generally opposing the Proposed Rule. CenturyLink and the Utah Rural Telecom Association filed joint comments (“Joint Comments”) on December 15, 2017, generally supporting the Proposed Rule. We address those comments in this notice.

CTIA expresses concerns with our process, particularly our notice on October 11, 2017 that a currently pending publication of proposed rules was being made effective, while at the same time we were still in the process of receiving comments on potential further amendments to those rules (that we have now made effective as described in this Notice). We understand that this rule process has been complicated. That process has been driven partly by the complexity of the positions of various stakeholders, and partly by the requirements of the Utah Administrative Rulemaking Act.¹

In October, having made the decision following multiple rounds of comments to implement a per line/connection contribution method for the Utah Universal Public Telecommunications Service Support Fund (“UUSF”), but recognizing that our published rule

¹ Utah Code Title 63G, Chapter 3.

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needed further refinement prior to the contribution method changing on January 1, 2018, we faced two choices. We could let the pending rule lapse without making it effective, and publish a new rule filing that could have been made effective prior to January 1, 2018. We chose a different path, to allow the existing filing to become effective, which still afforded us the opportunity to amend that rule further prior to January 1, 2018. We chose that option because it accomplished two objectives: it gave the stakeholders in the telecommunications industry as much advance notice as we were able to give that we had made a final decision to implement a per line/connection contribution method for the UUSF, and it still afforded us the opportunity for further refinements before the effective date of the contribution method change. Allowing the pending rule to lapse and re-starting the rule making process would have, in our judgment, created additional uncertainty about our intentions. We regret if that choice of process caused confusion among stakeholders.

CTIA continues to state its position that a per line/connection contribution method for the UUSF is unlawful, particularly because we do not have authority to require point-of-sale collection from third party resellers of prepaid wireless service. We agree with the Joint Comments that the rule language we have now made effective allows providers of prepaid wireless service to determine their own method of managing those contributions while clarifying their obligation to do so. We have taken no position on whether legislative changes are necessary or appropriate. We conclude that the current rule, with the amendments we have now made effective, is competitively neutral because it requires a contribution of a uniform amount for each line/connection without respect to the technology type. Exemptions are provided for a

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line/connection that pays into a different state's fund, or that does not access Utah intrastate telecommunications services.

CTIA further alleges ambiguities about the rule language requiring UUSF contributions for prepaid wireless service. We are issuing an order of clarification to address those ambiguities, and recognize that we can include that clarification in the next UUSF rule publication (primarily addressing issues other than the surcharge method) we intend to publish in January 2018. The clarification is that the \$0.36 per month per access line/connection is both the maximum and minimum amount of contribution necessary for any single access line or connection. Multiple recharges of prepaid wireless service during a single month do not trigger multiple contribution requirements. R746-360-4(3)(e) applies to providers of prepaid wireless service in lieu of Subsection (3)(a). The rule does not require double contribution from a provider of prepaid wireless service.

The Joint Comments suggest that any exemptions claimed under R746-360-4(5)(i) and (5)(ii) be reported to the Division of Public Utilities to allow monitoring of the exemptions and better focus for any needed audits. We find this suggestion to be intuitive, but conclude that the requirement would not qualify as a clarification of existing rule language. Therefore, we intend to address this suggestion in our next UUSF rule publication.

Finally, while CTIA in its December 15, 2017 comments did not address concerns about burdening the federal Lifeline program, the Joint Comments address previous concerns expressed by CTIA on that issue. We agree with the Joint Comments and conclude that the UUSF contribution method we have now implemented will not burden the federal Lifeline

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program. It will not require any modification to the amount of federal Lifeline support providers receive. At most, it may require wireless providers receiving Lifeline support, including those currently offering Lifeline service at no cost to the customer, to make a business decision about how to price its plans. But as the Joint Comments accurately note, “[t]he federal USF support will not increase to cover the UUSF charge.”²

ORDER OF CLARIFICATION

The \$0.36 per month per access line/connection is both the maximum and minimum amount of contribution necessary for any single access line or connection. Multiple recharges of prepaid wireless service during a single month do not trigger multiple contribution requirements. R746-360-4(3)(e) applies to providers of prepaid wireless service in lieu of Subsection (3)(a). The rule does not require double contribution from a provider of prepaid wireless service.

DATED at Salt Lake City, Utah, December 22, 2017.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg
PSC Secretary
DW#298694

² Joint Comments at 5.

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CERTIFICATE OF SERVICE

I CERTIFY that on December 22, 2017, a true and correct copy of the foregoing was served upon the following as indicated below:

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Attorneys for Plaintiff CTIA–The Wireless Association®

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CTIA–THE WIRELESS ASSOCIATION®,

Plaintiff,

vs.

THAD LEVAR, in his official capacity as a
Chair and Commissioner of the Utah Public
Service Commission; DAVID R. CLARK,
in his official capacity as a Commissioner
of the Utah Public Service Commission;
and JORDAN A. WHITE, in his official
capacity as a Commissioner of the Utah
Public Service Commission,

Defendants.

**CORPORATE DISCLOSURE
STATEMENT**

Case No. 2:18-cv-00302-EJF

Magistrate Judge Evelyn J. Furse

Pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, CTIA–The Wireless Association® (“CTIA”), through counsel, states as follows:

CTIA is a non-profit corporation and trade association that represents the U.S. wireless communications industry and companies throughout the mobile ecosystem. Its members include wireless carriers, device manufacturers, and suppliers, as well as app and content companies. CTIA does not have a parent company, and no publicly held company owns ten percent or more of CTIA’s stock.

DATED: April 10, 2018

PARSONS BEHLE & LATIMER

/s/ Adam E. Weinacker _____

William J. Evans
Adam E. Weinacker

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Attorneys for Plaintiff CTIA–The Wireless Association®

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CTIA–THE WIRELESS ASSOCIATION®,

Plaintiff,

vs.

THAD LEVAR, in his official capacity as a
Chair and Commissioner of the Utah Public
Service Commission; DAVID R. CLARK,
in his official capacity as a Commissioner
of the Utah Public Service Commission;
and JORDAN A. WHITE, in his official
capacity as a Commissioner of the Utah
Public Service Commission,

Defendants.

**MOTION FOR PRO HAC VICE
ADMISSION OF PHILIP J. ROSELLI
AND CONSENT OF LOCAL
COUNSEL**

Case No. 2:18-cv-00302-EJF

Magistrate Judge Evelyn J. Furse

Pursuant to D.U.Civ Rule 83-1.1(d), the undersigned moves for the admission of Philip J. Roselli as pro hac vice counsel for Plaintiff CTIA–The Wireless Association® in the above-captioned matter and consents to serve as local counsel. The application for pro hac vice admission is attached as **Exhibit A** to this motion, an Electronic Case Filing Registration Form as **Exhibit B**, and the admission fee, if required, has been paid to the court with the submission of this motion.

DATED: April 10, 2018.

PARSONS BEHLE & LATIMER

/s/ Adam E. Weinacker _____

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Adam E. Weinacker

Philip J. Roselli (*pro hac vice* pending)
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Benjamin J. Aron (*pro hac vice* pending)
CTIA–The Wireless Association®

*Attorneys for Plaintiff CTIA–The Wireless
Association®*

EXHIBIT A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

APPLICATION FOR ADMISSION PRO HAC VICE

Name of Attorney: Philip J. Roselli Telephone: 303-626-2321
Firm Name: Wilkinson Barker Knauer, LLP
Business Address: 1755 Blake Street, Suite 470
Denver, CO 80202

Current bar memberships and date of admission:

Table with 3 columns: Jurisdiction, Bar Number, Admitted on. Row 1: Colorado, 20963, Admitted on 10/1/1991.

Have you ever been the subject of disciplinary action by any bar to which you have been admitted?
[X] No Yes (provide additional information)

Prior pro hac vice admissions in the District of Utah: [X] none

Case Name:
Case Number:
Admission Date:

(Attach list of other cases separately if more space is needed.)

I certify that I am a member in good standing of all bars to which I have been admitted. I further agree to read and comply with the Utah Rules of Professional Conduct and the Utah Standards of Professionalism and Civility. This certification that the foregoing is true and correct is made under penalty of perjury.

Signature: Philip J. Roselli

Date: 04-09-2018

Non-resident United States attorneys and attorneys employed by agencies of the federal government are exempt from the pro hac vice fee. All other attorneys must pay a fee of \$250.00 concurrent with this application. This application must be filed as an attachment to a motion for admission and consent filed by local counsel. If you have not previously registered for CM/ECF in the District of Utah, please attach a completed Electronic Case Registration Form with this application to receive your login and password.

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

ELECTRONIC CASE FILING REGISTRATION FORM

Attorneys who are active or current pro hac vice members of the District of Utah's Bar may register for the District of Utah E-Filing System by (i) completing the required training and (ii) signing and returning this form to the Court. Please review carefully the registration conditions set forth below before signing.

PHILIP J ROSELLI WILKINSON BARKER KNAUER, LLP
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Mailing Address City, State, Zip
Utah State Bar # (if applicable) 303-626-2321
Telephone Number

By signing this form, I understand and consent to the following:

- Pursuant to Fed. R. Civ. P. 5(b)(2)(E), I will receive all items required to be served under Fed.R.Civ.P. 5(a) and 77 (d) and Fed. R. Crim P. 49 by either (i) notice of electronic filing, or (ii) e-mail transmission;
- Such electronic service will constitute service and notice of entry as required by those rules;
- I waive my right to service by USPS mail;
- I will abide by all Court rules, orders, and procedures governing the use of the electronic filing system;
- The combination of user ID and password issued by this Court will serve as the equivalent of my signature when I e-file documents with the Court;
- I will carefully examine all documents prior to e-filing them to either (i) redact sensitive and private information pursuant to DUCiv R , or (ii) move that the filing be sealed; and
- I will secure and protect my Court-issued password against unauthorized use or compromise.

Email Address(es):

Primary E-mail address PROSELLI@WBKLAW.COM

Up to two additional e-mail addresses 1) _____,

2) _____

To receive a login, please complete one of these four options. Please check appropriate box.

<input type="checkbox"/> I have completed the CMECF Online Computer-Based Training modules on the court website at http://www.utd.uscourts.gov/online-computer-based-training-cmecf
<input type="checkbox"/> I have completed the CMECF Training for Attorneys given by an in-house trainer in my firm.
<input checked="" type="checkbox"/> I have an ECF account in the Utah Bankruptcy Court or in another Federal District or Bankruptcy Court.
<input type="checkbox"/> I have attended CMECF Training given by the Court.

Date: 04-09-2018

Signature: *Philip J Roselli*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CTIA–THE WIRELESS ASSOCIATION®,

Plaintiff,

vs.

THAD LEVAR, in his official capacity as a
Chair and Commissioner of the Utah Public
Service Commission; DAVID R. CLARK,
in his official capacity as a Commissioner
of the Utah Public Service Commission;
and JORDAN A. WHITE, in his official
capacity as a Commissioner of the Utah
Public Service Commission,

Defendants.

**ORDER FOR PRO HAC VICE
ADMISSION OF PHILIP J. ROSELLI**

Case No. 2:18-cv-00302-EJF

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for the admission pro hac vice of Philip J. Roselli in the United States District Court, District of Utah in the subject case is GRANTED.

Dated: this _____ day of _____, 2018.

U.S. District Judge

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Adam E. Weinacker (USB #13396)
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Benjamin J. Aron (*pro hac vice* pending)
CTIA–The Wireless Association®
1400 16th Street NW, Suite 600
Washington, DC 20036
Telephone: 202.736.3683
Facsimile: 202.785.0721
BAron@ctia.org

Attorneys for Plaintiff CTIA–The Wireless Association®

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CTIA–THE WIRELESS ASSOCIATION®,

Plaintiff,

vs.

THAD LEVAR, in his official capacity as a
Chair and Commissioner of the Utah Public
Service Commission; DAVID R. CLARK,
in his official capacity as a Commissioner
of the Utah Public Service Commission;
and JORDAN A. WHITE, in his official
capacity as a Commissioner of the Utah
Public Service Commission,

Defendants.

**MOTION FOR PRO HAC VICE
ADMISSION OF BENJAMIN J. ARON
AND CONSENT OF LOCAL
COUNSEL**

Case No. 2:18-cv-00302-EJF

Magistrate Judge Evelyn J. Furse

Pursuant to D.U.Civ Rule 83-1.1(d), the undersigned moves for the admission of Benjamin J. Aron as pro hac vice counsel for Plaintiff CTIA–The Wireless Association® in the above-captioned matter and consents to serve as local counsel. The application for pro hac vice admission is attached as **Exhibit A** to this motion, an Electronic Case Filing Registration Form as **Exhibit B**, and the admission fee, if required, has been paid to the court with the submission of this motion.

DATED: April 10, 2018.

PARSONS BEHLE & LATIMER

/s/ Adam E. Weinacker

William J. Evans

Adam E. Weinacker

Philip J. Roselli (*pro hac vice* pending)

WILKINSON BARKER KNAUER, LLP

Benjamin J. Aron (*pro hac vice* pending)

CTIA–The Wireless Association®

Attorneys for Plaintiff CTIA–The Wireless Association®

EXHIBIT A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

APPLICATION FOR ADMISSION PRO HAC VICE

Name of Attorney: Benjamin J. Aron Telephone: 202-736-3683
 Firm Name: CTIA – The Wireless Association®
 Business Address: 1400 16th Street, NW
 Suite 600
 Washington, DC 20036

Current bar memberships and date of admission:

Jurisdiction	Bar Number	
Maryland	9706250015	Admitted on June 25, 1997
District of Columbia	461937	Admitted on June 30, 1999
U.S. Ct. App, D.C. Circuit	46704	Admitted on March 21, 2000
U.S. Supreme Court	238683	Admitted on June 18, 2001

Have you ever been the subject of disciplinary action by any bar to which you have been admitted?
 No Yes (provide additional information)

Prior pro hac vice admissions in the District of Utah: none

Case Name: _____
 Case Number: _____
 Admission Date: _____

(Attach list of other cases separately if more space is needed.)

I certify that I am a member in good standing of all bars to which I have been admitted. I further agree to read and comply with the Utah Rules of Professional Conduct and the Utah Standards of Professionalism and Civility. This certification that the foregoing is true and correct is made under penalty of perjury.


 Signature

Apr. 9, 2018
 Date

Non resident United States attorneys and attorneys employed by agencies of the federal government are exempt from the pro hac vice fee. All other attorneys must pay a fee of \$250.00 concurrent with this application. This application must be filed as an attachment to a motion for admission and consent filed by local counsel.

If you have not previously registered for CM/ECF in the District of Utah, please attach a completed Electronic Case Registration Form with this application to receive your login and password.

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

ELECTRONIC CASE FILING REGISTRATION FORM

Attorneys who are active or current pro hac vice members of the District of Utah's Bar may register for the District of Utah E-Filing System by (i) completing the required training and (ii) signing and returning this form to the Court. Please review carefully the registration conditions set forth below before signing.

Name - First: Benjamin J. Middle: Aron Last: _____ Firm Name: CTIA - The Wireless Association®
 Mailing Address: 1400 16th St. NW, Ste. 600 City, State, Zip: Washington DC 20036
 Telephone Number: 202-736-3683
 Utah State Bar # (if applicable): _____

By signing this form, I understand and consent to the following:

- Pursuant to Fed. R. Civ. P. 5(b)(2)(E), I will receive all items required to be served under Fed.R.Civ.P. 5(a) and 77 (d) and Fed. R. Crim P. 49 by either (i) notice of electronic filing, or (ii) e-mail transmission;
- Such electronic service will constitute service and notice of entry as required by those rules;
- I waive my right to service by USPS mail;
- I will abide by all Court rules, orders, and procedures governing the use of the electronic filing system;
- The combination of user ID and password issued by this Court will serve as the equivalent of my signature when I e-file documents with the Court;
- I will carefully examine all documents prior to e-filing them to either (i) redact sensitive and private information pursuant to DUCiv R , or (ii) move that the filing be sealed; and
- I will secure and protect my Court-issued password against unauthorized use or compromise.

Email Address(es):

Primary E-mail address baron@CTIA.Org

Up to two additional e-mail addresses 1) _____,

2) _____

To receive a login, please complete one of these four options. Please check appropriate box.

<input checked="" type="checkbox"/>	I have completed the CMECF Online Computer-Based Training modules on the court website at http://www.utd.uscourts.gov/online-computer-based-training-cmecf
<input type="checkbox"/>	I have completed the CMECF Training for Attorneys given by an in-house trainer in my firm.
<input type="checkbox"/>	I have an ECF account in the Utah Bankruptcy Court or in another Federal District or Bankruptcy Court.
<input type="checkbox"/>	I have attended CMECF Training given by the Court.

Date: Apr. 9, 2018

Signature: Benjamin J. Aron

Please complete this form, and submit it by one of the following methods:

1. Mail the form to: **United States District Court, Office of the Clerk, ATTN: CM/ECF Registration, 351 S. West Temple, Salt Lake City, Utah 84101, or**

2. Scan and email to ut_support@utd.uscourts.gov, or

3. Include this form as a pdf attachment with your Application for Pro Hac Vice.

After this Court processes this form, you will receive by email your user ID and password that will enable you to access the system. The User Guide and administrative procedures for system use may be downloaded at: <http://www.utd.uscourts.gov/cmecf-electronic-case-filing>. Please call the Clerk's Office Help Desk at (801) 524-6851 if you have questions concerning registration, training, or use of the electronic filing system.

Rev. 6/14/17

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CTIA–THE WIRELESS ASSOCIATION[®],

Plaintiff,

vs.

THAD LEVAR, in his official capacity as a
Chair and Commissioner of the Utah Public
Service Commission; DAVID R. CLARK,
in his official capacity as a Commissioner
of the Utah Public Service Commission;
and JORDAN A. WHITE, in his official
capacity as a Commissioner of the Utah
Public Service Commission,

Defendants.

**ORDER FOR PRO HAC VICE
ADMISSION OF BENJAMIN J. ARON**

Case No. 2:18-cv-00302-EJF

Magistrate Judge Evelyn J. Furse

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for the admission pro hac vice of Benjamin J. Aron in the United States District Court, District of Utah in the subject case is GRANTED.

Dated: this _____ day of _____, 2018.

U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CTIA–THE WIRELESS ASSOCIATION[®],

Plaintiff,

vs.

THAD LEVAR, in his official capacity as a
Chair and Commissioner of the Utah Public
Service Commission; DAVID R. CLARK,
in his official capacity as a Commissioner
of the Utah Public Service Commission;
and JORDAN A. WHITE, in his official
capacity as a Commissioner of the Utah
Public Service Commission,

Defendants.

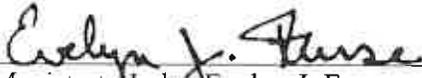
**ORDER GRANTING PRO HAC VICE
ADMISSION OF BENJAMIN J. ARON**

Case No. 2:18-cv-00302-EJF

Magistrate Judge Evelyn J. Furse

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for the admission pro hac vice of Benjamin J. Aron in the United States District Court, District of Utah in the subject case is GRANTED.

DATED this 11th day of April, 2018.


Magistrate Judge Evelyn J. Furse
U.S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CTIA–THE WIRELESS ASSOCIATION[®],

Plaintiff,

vs.

THAD LEVAR, in his official capacity as a
Chair and Commissioner of the Utah Public
Service Commission; DAVID R. CLARK,
in his official capacity as a Commissioner
of the Utah Public Service Commission;
and JORDAN A. WHITE, in his official
capacity as a Commissioner of the Utah
Public Service Commission,

Defendants.

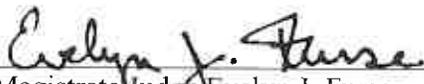
**ORDER GRANTING PRO HAC VICE
ADMISSION OF PHILIP J. ROSELLI**

Case No. 2:18-cv-00302-EJF

Magistrate Judge Evelyn J. Furse

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for the admission pro hac vice of Philip J. Roselli in the United States District Court, District of Utah in the subject case is GRANTED.

DATED this 11th day of April, 2018.


Magistrate Judge Evelyn J. Furse
U.S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION

CTIA–THE WIRELESS ASSOCIATION,

Plaintiff,

v.

THAD LEVAR, in his official capacity as a
Chair and Commissioner of the Utah
Public Service Commission, et al.,

Defendants.

ORDER TO PROPOSE SCHEDULE

Case No. 2:18-cv-00302-EJF

Magistrate Judge Evelyn J. Furse

To secure the just, speedy, and inexpensive determination of every action and proceeding and fulfill the purposes of Rules 16 and 26 of the Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED:

1. Plaintiff must propose a schedule to defendants in the form of a draft Attorney Planning Meeting Report within the earlier of fourteen (14) days after any defendant has appeared or twenty-eight (28) days after any defendant has been served with the complaint.

2. Within the earlier of twenty-eight (28) days after any defendant has appeared or within forty-two (42) days after any defendant has been served with the complaint (or such other time as the Court may order), the parties shall meet and confer and do one of the following:

- a. File a jointly signed Attorney Planning Meeting Report and also email a stipulated Proposed Scheduling Order in word processing format to ipt@utd.uscourts.gov; or
- b. If the parties cannot agree on a Proposed Scheduling Order, plaintiff must file a jointly signed Attorney Planning Meeting Report detailing the nature of the parties' disputes and must also file a stipulated Motion for Initial Scheduling Conference; or
- c. If the parties fail to agree on an Attorney Planning Meeting Report or on a stipulated Motion for Initial Scheduling Conference, plaintiff must file a Motion for Initial Scheduling Conference, which must include a statement of plaintiff's position as to the schedule. Any response to such a motion must be filed within seven (7) days.

3. In the absence of filing a stipulated Proposed Scheduling Order, the parties must be prepared to address the following questions, in addition to those raised by the Attorney Planning Meeting Report:

- a. What 2-3 core factual or legal issues are most likely to be determinative of this dispute?
- b. Who are the 1-3 most important witnesses each side needs to depose? Is there any reason these witnesses cannot be deposed promptly?
- c. What information would be most helpful in evaluating the likelihood of settlement? Is there any reason it cannot be obtained promptly?

- d. In 5 minutes or less, describe the crucial facts, primary claims, and primary defenses?
- e. Are all claims for relief necessary or are they overlapping? Can any claim for relief be eliminated to reduce discovery and expense?
- f. Are all pleaded defenses truly applicable to this case? Can any be eliminated?
- g. What could be done at the outset to narrow and target the discovery in the case?
- h. What agreements have the parties reached regarding limitations on discovery, including discovery of ESI?
- i. Is there a need to schedule follow-up status conferences?

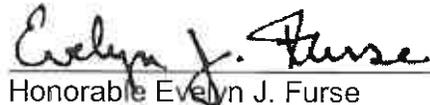
4. Each party shall make initial disclosures within forty-two (42) days after the first answer is filed. This deadline is not dependent on the filing of an Attorney Planning Meeting Report, the entry of a Scheduling Order, or the completion of an Initial Scheduling Conference.

5. The parties are urged to propose a schedule providing for:
- a. Fact discovery completion no more than six (6) months after the filing of the first answer.
 - b. Expert reports from the party with the burden of proof on that issue twenty-eight (28) days after the completion of fact discovery, and responsive reports twenty-eight (28) days thereafter.
 - c. Expert discovery completion twenty-eight (28) days after filing of an expert's report.

- d. Dispositive motion filing deadline no more than ten (10) months after the filing of the first answer.

Signed this 11th day of April, 2018.

BY THE COURT:

A handwritten signature in cursive script that reads "Evelyn J. Furse". The signature is written in black ink and is positioned above a horizontal line.

Honorable Evelyn J. Furse
United States Magistrate Judge

JURY,MLC1,OPEN_MJ,PEND_CONSENT

US District Court Electronic Case Filing System
District of Utah (Central)
CIVIL DOCKET FOR CASE #: 2:18-cv-00302-EJF

CTIA The Wireless Association v. Levar et al
Assigned to: Magistrate Judge Evelyn J. Furse
Cause: 28:2201 Declaratory Judgment

Date Filed: 04/10/2018
Jury Demand: Plaintiff
Nature of Suit: 890 Other Statutory
Actions
Jurisdiction: Federal Question

Plaintiff

CTIA The Wireless Association

represented by **Benjamin J. Aron**
CTIA THE WIRELESS
ASSOCIATION
1400 16TH ST NW STE 600
WASHINGTON, DC 20036
(202)736-3683
Email: baron@ctia.org
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Philip J. Roselli
WILKINSON BARKER KNAUER
LLP
1755 BLAKE ST STE 470
DENVER, CO 80202
(303)626-2321
Email: proselli@wbklaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

William J. Evans
PARSONS BEHLE & LATIMER
201 S MAIN ST STE 1800
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Email: ecf@parsonsbehle.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Adam E. Weinacker
PARSONS BEHLE & LATIMER
201 S MAIN ST STE 1800

PO BOX 45898
 SALT LAKE CITY, UT 84145-0898
 (801)536-6911
 Email: ecf@parsonsbehle.com
 ATTORNEY TO BE NOTICED

V.

Defendant

Thad Levar

*in his official capacity as a Chair and
 Commissioner of the Utah Public
 Service Commission*

Defendant

David R. Clark

*in his official capacity as a
 Commissioner of the Utah Public
 Service Commission*

Defendant

Jordan A. White

*in his official capacity as a
 Commissioner of the Utah Public
 Service Commission*

Date Filed	#	Docket Text
04/10/2018	<u>1</u>	Case has been indexed and assigned to Magistrate Judge Evelyn J. Furse. Plaintiff CTIA The Wireless Association is directed to E-File the <u>Complaint and cover sheet</u> (found under Complaints and Other Initiating Documents) and pay the filing fee of \$ 400.00 by the end of the business day. NOTE: The court will not have jurisdiction until the opening document is electronically filed and the filing fee paid in the CM/ECF system. Civil Summons may be issued electronically. Prepare the summons using the courts <u>PDF version</u> and email it to utdecf_clerk@utd.uscourts.gov for issuance. (nl) (Entered: 04/10/2018)
04/10/2018	<u>2</u>	COMPLAINT <i>for Declaratory Relief and Injunctive Relief</i> against David R. Clark, Thad Levar, Jordan A. White (Filing fee \$ 400, receipt number 1088-2978461) filed by CTIA The Wireless Association. (Attachments: # <u>1</u> Civil Cover Sheet Civil Cover Sheet, # <u>2</u> Exhibit A-PSC Rule, # <u>3</u> Exhibit B-Notice of Denial, # <u>4</u> Exhibit C-Rehearing Application, # <u>5</u> Exhibit D-Notice of Effective Date and Clarification) Assigned to Magistrate Judge Evelyn J. Furse (Weinacker, Adam) (Entered: 04/10/2018)
04/10/2018	<u>3</u>	CORPORATE DISCLOSURE STATEMENT under FRCP 7.1 filed by Plaintiff CTIA The Wireless Association identifying None as Corporate Parent. (Weinacker, Adam) (Entered: 04/10/2018)

04/10/2018	<u>4</u>	MOTION for Admission Pro Hac Vice of Philip J. Roselli , Registration fee \$ 250, receipt number 1088-2978546, filed by Plaintiff CTIA The Wireless Association. (Attachments: # <u>1</u> Exhibit A_Application of Pro Hac Vice Admission, # <u>2</u> Exhibit B-Electronic Case Filing Registration Form, # <u>3</u> Text of Proposed Order)(Weinacker, Adam) (Entered: 04/10/2018)
04/10/2018	<u>5</u>	MOTION for Admission Pro Hac Vice of Benjamin J. Aron , Registration fee \$ 250, receipt number 1088-2978571, filed by Plaintiff CTIA The Wireless Association. (Attachments: # <u>1</u> Exhibit A_Application of Pro Hac Vice Admission, # <u>2</u> Exhibit B-Electronic Case Filing Registration Form, # <u>3</u> Text of Proposed Order)(Weinacker, Adam) (Entered: 04/10/2018)
04/11/2018	<u>6</u>	**RESTRICTED DOCUMENT** Summons Issued Electronically as to Thad Levar. Instructions to Counsel: 1. Click on the document number. 2. If you are prompted for an ECF login, enter your 'Attorney' login to CM/ECF. 3. Print the issued summons for service. (tlh) (Entered: 04/11/2018)
04/11/2018	<u>7</u>	**RESTRICTED DOCUMENT** Summons Issued Electronically as to Jordan A. White. Instructions to Counsel: 1. Click on the document number. 2. If you are prompted for an ECF login, enter your 'Attorney' login to CM/ECF. 3. Print the issued summons for service. (tlh) (Entered: 04/11/2018)
04/11/2018	<u>8</u>	**RESTRICTED DOCUMENT** Summons Issued Electronically as to David R. Clark. Instructions to Counsel: 1. Click on the document number. 2. If you are prompted for an ECF login, enter your 'Attorney' login to CM/ECF. 3. Print the issued summons for service. (tlh) (Entered: 04/11/2018)
04/11/2018	<u>9</u>	ORDER granting <u>5</u> Motion for Admission Pro Hac Vice of Benjamin J. Aron for CTIA The Wireless Association. <i>Attorneys admitted Pro Hac Vice may download a copy of the District of Utahs local rules from the courts web site at http://www.utd.uscourts.gov</i> Signed by Magistrate Judge Evelyn J. Furse on 4/11/2018. (las) (Entered: 04/11/2018)
04/11/2018	<u>10</u>	ORDER granting <u>4</u> Motion for Admission Pro Hac Vice of Philip J. Roselli for CTIA The Wireless Association. <i>Attorneys admitted Pro Hac Vice may download a copy of the District of Utahs local rules from the courts web site at http://www.utd.uscourts.gov</i> Signed by Magistrate Judge Evelyn J. Furse on 4/11/2108. (las) (Entered: 04/11/2018)
04/11/2018	<u>11</u>	ORDER TO PROPOSE SCHEDULE - Plaintiff must propose a schedule to defendant in the form of a draft Attorney Planning Meeting Report within the earlier of fourteen(14) days after any defendant has appeared or twenty-eight (28) days after any defendant has been served with the complaint. See order for

additional instructions. Signed by Magistrate Judge Evelyn J. Furse on 4/11/2018. (las) (Entered: 04/11/2018)

PACER Service Center			
Transaction Receipt			
04/11/2018 11:46:56			
PACER Login:	lawfirm2017:2611294:0	Client Code:	99999.999
Description:	Docket Report	Search Criteria:	2:18-cv-00302-EJF
Billable Pages:	3	Cost:	0.30



201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Main 801.532.1234
Fax 801.536.6111

A Professional
Law Corporation

Adam E. Weinacker
Attorney at Law
Direct 801.536.6911
AWeinacker@parsonsbehle.com

April 11, 2018

VIA HAND DELIVERY

Thad Levar
Utah Public Service Commission
160 East 300 South
Salt Lake City, UT 84111

Re: CTIA–The Wireless Association® v. Levar et al., 2:18-cv-00302-EJF (D. Utah)

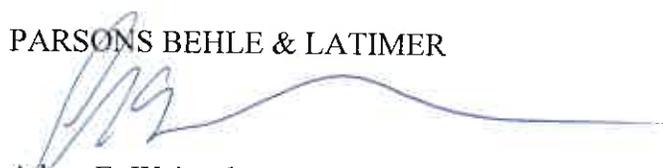
Dear Commissioner Levar,

This firm represents CTIA–The Wireless Association® in a lawsuit filed April 11, 2018, naming you as a defendant in your official capacity as a Commissioner of the Utah Public Service Commission. With this letter, you are receiving a Summons in a Civil Action issued by the Clerk of Court, as well as the Verified Complaint for Declaratory Relief and Injunctive Relief filed by CTIA.

As a courtesy, I have enclosed the following additional filings in this matter: Corporate Disclosure Statement (ECF 3); filings related to the Motion for Pro Hac Vice Admission of Philip J. Roselli and Consent of Local Counsel (ECF 4); filings related to the Motion for Pro Hac Vice Admission of Benjamin J. Aron and Consent of Local Counsel (ECF 5); the Court's orders granting the pro hac vice admission of Messrs. Roselli and Aron (ECF 9 & 10); Order to Propose Schedule (ECF 11); and a copy of the Court's docket.

Sincerely,

PARSONS BEHLE & LATIMER



Adam E. Weinacker
Attorney at Law

AEW:

Encls.