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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Utah Administrative Code R746-8) Docket No. 17-R008-01
)
) COMMENTS OF UTAH RURAL
) TELECOM ASSOCIATION IN
) RESPONSE TO PROPOSED REVISED
) RULE R746-8-301 AND R746-8-403
)

Utah Rural Telecom Association (“URTA”) on behalf of its members All West Communications, Inc., Bear Lake Communications, Inc., Beehive Telephone Company, Carbon/Emery Telcom, Inc., Central Utah Telephone, Inc., Direct Communications Cedar Valley, LLC, Emery Telephone, Gunnison Telephone Company, Hanksville Telcom, Inc., Manti Telephone Company, Skyline Telecom, South Central Utah Telephone Association, Inc., UBTA-UBET Communications Inc. (dba Strata Networks), and Union Telephone Company, hereby files these Comments in response to Utah Public Service Commission’s (“Commission” or “PSC”) Proposed Rule R746-8-301 and R746-8-403 as set forth in the Notice of Proposed Rule Amendment that was issued by the Commission on April 24, 2018.

I. PROCEDURAL HISTORY

On April 24, 2018, the Commission issued a proposed rule amendment to R746-8 which included particular changes to R746-8-301 and R746-8-403 as follows (“Proposed Amendments”):

R746-8-301:

(1) (a) Unless Subsection R747-8-303(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.

...

(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) that generates revenue that it 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.

(iii) subject to R746-8-403(5), receives subsidization through a federal Lifeline program approved by the FCC.

R746-8-403:

(5) For an access line for which the UUSF surcharge is omitted pursuant to R746-8-301(3)(a)(iii), the UUSF surcharge amount that otherwise would have been remitted pursuant to R746-8-301 shall be deducted from the state Lifeline support paid to the provider.

The Proposed Amendments were published in the Utah State Bulletin on May 15, 2018. The Commission summarized the rule change as follows:

This amendment streamlines the compliance process for some telecommunications providers by enacting provisions that exempt a provider who provides an access line that receives federal Lifeline subsidy from collecting and remitting a state UUSF surcharge for that line, and allowing that if the access line also receives a state Lifeline subsidy, the surcharge will be deducted from the state Lifeline subsidy.¹

Comments on the published rule are due June 14, 2018. URTA submits these Comments to address the Proposed Amendments as published in the Utah Bulletin.

II. URTA COMMENTS ON PROPOSED RULE

A. The Proposed Rule Amendments Are Not Required by the Governing Statute.

URTA and its members have reviewed the Proposed Amendments and believe that permitting providers who provide access lines/connections that receive subsidization from the federal Lifeline program to omit contribution to the Utah Universal Public Telecommunications Service Support Fund (“UUSF”) is not required by the provisions of Utah Code 54-8b-15 (the “Governing Statute”). Specifically, Utah Code 54-8b-15(8) provides:

(8) Each access line provider and each connection provider shall contribute to the Universal Public Telecommunications Service Support Fund through an explicit charge assessed by the commission on the access line provider or connection provider.

Utah Code 54-8b-15(9) provides:

The commission shall calculate the amount of each explicit charge described in Subsection (8) using a method developed by the commission by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, that:

- (a) does not discriminate against:
 - (i) any access line or connection provider; or
 - (ii) the technology used by any access line or connection provider;
- (b) is competitively neutral; and

¹ Commission’s Notice of Proposed Rule Amendment, dated April 24, 2018, Docket 17-R008-01, ¶6.

- (c) if a function of an access line or connection provider's:
 - (i) annual intrastate revenue;
 - (ii) number of access lines or connections in the state; or
 - (iii) a combination of access line or connection provider's intrastate revenue and number of access lines or connections in the state.

These statutory provisions contained in the Governing Statute leave no doubt with respect to the Commission's jurisdiction and authority to implement a rule that requires all providers of access lines or connections to contribute an explicit charge to the UUSF and to develop a method for calculating the amount of the UUSF contribution. The Commission is precluded from enacting a rule that supersedes the authorizing statute. The Utah Supreme Court has stated that "it is a longstanding principle of administrative law that an agency's rules must be consistent with its governing statutes." *Sanders Brine Shrimp v. Audit Div.*, 846 P.2d 1304, 1306 (Utah 1993). Further, the Supreme Court of Utah has stated that "an administrative rule out of harmony or in conflict with the express provisions of a statute would in effect amend that statute." *Crossroads Plaza Ass'n v. Pratt*, 912 P.2d 961, 965 (Utah 1996). The question is whether the Proposed Amendment are consistent with the Governing Statute.

B. A Change in Contribution Method Does Not Require an Exemption for Access Lines that Receive Federal Lifeline Support.

The Proposed Amendments purport to permit providers of access lines/connections in Utah to omit the surcharge for access lines that receive subsidization through the federal Lifeline program so long as the provider of access lines/connection is not also receiving subsidization through the State Lifeline program. URTA and its members do not believe that the access line/connection providers who receive federal Lifeline support are required by the Governing Statute to be exempted from UUSF contribution. In fact, historically, wireless

providers who sought eligible telecommunications carrier (“ETC”) status in Utah for purposes of providing Lifeline service, have been required, as a condition of receiving ETC status, to pay UUSF fees (among other fees).² URTA and its members do not believe that the mere fact that the contribution method has changed from a revenues based contribution to a per access line based contribution now requires an exemption from contribution for access lines/connections that receive federal Lifeline subsidization.

C. **Offsetting UUSF Contributions Against State Lifeline Support Does Not Require an Exemption for Access Lines that Receive Federal Lifeline Support.**

Although URTA, in its previous comments, suggested that the Commission should establish, by rule, the option to offset the UUSF per access line contribution against the State Lifeline support payments, URTA has never suggested that any provider be exempt from paying UUSF contributions. In fact, the “offset” mechanism could easily be employed without offering any exemption for access lines that receive the federal Lifeline support. The Commission’s stated reason for the Proposed Amendments is to streamline “the compliance process for some telecommunications providers by enacting provisions that exempt a provider who provides an access line that receives federal Lifeline subsidy from collecting and remitting a state UUSF surcharge for that line, and allowing that if the access line also receives a state Lifeline subsidy, the surcharge will be deducted from the state Lifeline

² This very issue was the subject of considerable regulatory review in the TracFone Wireless, Inc. Petition for Designation of ETC Status, Docket No. 09-2511-01 (“TracFone Docket”). Ultimately, the Commission concluded that Utah Code 54-8b-15(10) did not limit the obligation to pay into the UUSF solely to those telecommunications corporations issuing traditional bills to customers. Rather, it required UUSF contribution applied to intrastate retail rates from telecommunications corporations that provide telecommunications service in Utah.

subsidy.”³

URTA is also aware that CTIA filed a federal lawsuit against the Commission seeking to enjoin the Commission from enforcing certain of its rules. As the Commission is aware, CTIA has alleged, among other things, that requiring a prepaid wireless provider to pay a UUSF contribution on access lines that receive a federal Lifeline subsidy: (1) discriminatorily burdens the prepaid wireless provider, and (2) illegally burdens the federal universal service mechanism. However, neither of these arguments are well founded.

1. A Per Access Line Contribution Method is Not a Discriminatory Burden on Pre-Paid Wireless Providers.

First, a rule that requires a pre-paid wireless provider of access lines to pay the same UUSF contribution per access line as the wireline provider is not a discriminatory burden merely because the wireless provider does not send a monthly bill to its end-user or does not collect any revenue directly from the end-user (in the case of “no additional charge” Lifeline plans). The business model selected by a company should not determine whether UUSF contributions should be made by said company. As the Washington Supreme Court found in *TracFone Wireless, Inc. v. Washington Department of Revenue*, 242 P.2d 810 (Washington 2010), the wireless provider was, in effect, “seeking a decision that whether the tax is owed depends upon how a company decides to market and charge for its service or, to put it another way, whether a tax must be paid depends entirely upon the individual company’s business model.” In the TracFone case, the Washington Supreme Court declined to exempt TracFone from E911 excise tax merely because it chose to offer its service in a prepaid manner.

³ Commission’s Notice of Proposed Rule Amendment, dated April 24, 2018, Docket 17-R008-01, ¶6.

Similarly, in this case, the argument has been made that because “no additional charge” Lifeline customers do not have a billing relationship with the wireless ETC, the wireless ETC would be forced to change its billing method or risk not being able to collect the UUSF contribution from its end user customer. First, whether prepaid or subsidized by the federal Lifeline program, it is telephone service that allows an end user to access the public switched network that is involved in this docket and subject to UUSF contribution. The business model of the particular provider is not controlling. Rather, the Governing Statute is controlling. In this case, the plain language of the Governing Statute does not require an exemption for federally subsidized Lifeline access lines/connections. Therefore, URITA and its members do not believe the proposed amendment to R746-8-301(3)(a)(iii) is required. Moreover, the “business model” argument fails to take into consideration that the very same wireless ETC who does not have a billing arrangement with its customer could petition to receive State Lifeline, which would more than offset the UUSF contribution and would resolve the “collection” issue. The wireless ETC could also collect such payment from its customer via a contractual provision. As a result, the “business model” argument does not support exempting access lines that receive federal Lifeline support from contributing to the UUSF.

2. A Per Access Line Contribution Method Does Not Burden or Rely Upon the Federal Universal Service Mechanism.

The second argument raised in the CTIA litigation is that requiring a prepaid wireless provider to pay a UUSF contribution on access lines that receive a federal Lifeline subsidy illegally burdens the federal USF mechanism in violation of 47 USC Section 254(f) and 47

CFR Section 54.403. 47 USC Section 254 (f) provides:

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

47 USC 254(f) requires every telecommunications carrier that provides intrastate telecommunications services to contribute to the USF on an equitable and nondiscriminatory basis; 47 USC 254(f) permits states to adopt additional regulation to preserve and advance universal service within the State, so long as such regulations do not rely on or burden the Federal universal service support mechanism. Clearly, a state mechanism that requires all providers of access lines to pay the same rate on a per access line basis is not a burden to the federal USF mechanism even if a wireless provider's business model is designed so that the only revenue the wireless provider receives is the \$9.25 monthly federal Lifeline support. In that case, the federal Lifeline program is paying the wireless provider \$9.25 for that access line each month. If the State of Utah requires that same wireless provider to now pay \$.36 to the State of Utah for access to the public switched network, the amount paid by the federal Lifeline program remains \$9.25. There is no additional burden to the federal universal support mechanism.

Additionally, the Utah per access line contribution method does not rely on the federal USF mechanism. Rather, all providers, regardless of their business model, are currently required to pay the \$.36 per access line per month UUSF charge. If providers choose to price

their plans so that the only revenue they receive is the \$9.25 federal Lifeline support, with no additional revenue paid by the customer, they may do so, but this does not mean that the UUSF is “relying” on the federal USF mechanism. On the contrary, once the provider receives the \$9.25 from the federal Lifeline program, that \$9.25 belongs to the provider and is either used to cover costs or is profit to the provider. To use any portion of the \$9.25 to pay UUSF (or employee wages, insurance, or transport costs) certainly does not mean the UUSF (or employee wages, insurance, or transport costs) illegally relies on the federal support mechanism. Rather, such costs are costs of doing business borne by the provider and are not prohibited by 47 USC 254(f).

Finally, while the requirement on the provider to pay the \$.36 UUSF contribution per access line to the State Commission, may be considered a burden, it is not discriminatory because the same burden is placed on each provider of access lines in Utah. Again, the business model selected by the provider does not determine whether such provider is required to pay for access to the public switched network.

D. **URTA Will Not Oppose the Proposed Amendments Because as Wireless ETC’s Apply for State Lifeline, They Will Contribute to the UUSF.**

Based on the foregoing arguments, URTA and its members do not believe the Proposed Amendments that exempt access lines that receive federal Lifeline support from contributing to the UUSF, are required by the Governing Statute. However, because the Proposed Amendments include a mechanism for ensuring that all providers who receive federal and State Lifeline support will contribute to the UUSF, URTA and its members will not oppose the Proposed Amendments, notwithstanding the legal issues raised herein. Currently there are three applications pending at the Commission for wireless ETC’s seeking

to receive State Lifeline support. If such applications are granted, pursuant to the Proposed Amendment to R746-8-403(5), the State Lifeline support paid to the provider will be offset by the UUSF contribution for such access line/connection. It is anticipated that most, if not all, wireless ETC's will eventually seek the State Lifeline support, and will, thus, be making the appropriate contribution to the UUSF for such access lines. Therefore, many of the issues raised in these comments will be mooted as more and more wireless ETCs seek and receive state Lifeline support.

III. CONCLUSION

As a result, although URTA and its members question the necessity and appropriateness of the Proposed Amendments, URTA does not oppose the Proposed Amendments.

Dated this 14th day of June, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of June, 2018, I served a true and correct copy of Utah Rural Telecom Association's Comments on Proposed Rule Amendments to R746-8-301 and R746-8-403 in the Matter of the Utah Administrative Code R746-8, Docket No. 17-R008-01 via e-mail transmission to following persons at the e-mail addresses listed below:

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