

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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

DOCKET NO. 17-R360-01  
NOTICE OF RULEMAKING AND  
RESPONSE TO COMMENTS

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ISSUED: May 16, 2017

On March 27, 2017, the Public Service Commission of Utah requested comments regarding the manner in which Utah Administrative Code R746-360-5 should be amended in order to comply with Senate Bill 130 (5<sup>th</sup> Substitute), passed during the 2017 General Legislative Session and signed by Governor Herbert on March 25, 2017. Specifically, the new law allows the UUSF to be funded as follows:

- (a) through a surcharge that is applied to a provider's annual intrastate revenue;
- (b) through a surcharge that is applied to the number of access lines or connections maintained by a provider; or
- (c) through a combination of the above two methodologies.

In addition, Senate Bill 130 applies the surcharge to all providers that facilitate telecommunications services, including through voice over Internet protocol (VoIP) technology.

The PSC has received numerous comments, as summarized below:

1. **Utah Division of Public Utilities (Division)**. The Division, which has conducted meaningful investigation,<sup>1</sup> recommends that the PSC change the UUSF funding

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<sup>1</sup> The PSC requested the Division to identify all access line providers and connection providers that are subject to the surcharge, to estimate the number of connections that are subject to the surcharge, and to recommend the amount of the surcharge if applied (a) to annual intrastate revenue; and (b) to access lines/connections. In addition, the Commission requested that the Division approximate the total funding that might be necessary to meet the statutory objectives set forth in Utah Code § 54-8b-15(3).

mechanism to a per-connection surcharge of \$0.36 per month. The Division considers that a per-connection surcharge would provide greater financial stability to the fund. Further, after estimating an increase in the number of contributors, the Division calculates that an initial surcharge of \$0.36 per month would maintain the fund at the level necessary to meet current obligations.

2. **Utah Office of Consumer Services (Office).** The Office recommends adopting a per-connection charge, but does not offer an opinion as to an amount.
3. **Utah Rural Telecom Association (URTA).** URTA recommends that the PSC use in-state telephone numbers, per the records of the North American Numbering Plan Administration (NANPA) to impose a per-connection monthly UUSF fee.
4. **AT&T.** AT&T recommends that the current revenue-based surcharge be retained for several reasons, as follows:
  - a. The FCC has been reviewing whether a reform to the USF contribution methodology is warranted. Until that issue is resolved at the federal level, any state action is premature and potentially subject to legal challenge.
  - b. The presumption that there is a need to grow the UUSF is questionable, given that Utah's rural carriers jointly receive \$36 million per year in federal support, and that Utah's state surcharge is the 16<sup>th</sup> highest in the nation.
  - c. Requiring providers to change to a per-connection assessment would impose a heavy administrative burden.
  - d. A per-connection assessment would likely impact wireless carriers more significantly than ILECs, an unfair result if ILECs are the only providers permitted to draw from the UUSF.
  - e. No change should be made until the PSC first addresses the question of whether ILECs are over-supported when federal and state support are both accounted for. Further, the PSC should limit the size of the UUSF to address specific and

identified needs, and should sunset the UUSF when those needs are met. Finally, when and if a change is made, it should be accompanied by rules requiring supported providers to extend broadband to geographic areas where federal support is unavailable and to demonstrate having done so.

5. **CTIA – The Wireless Association.** CTIA suggests that the PSC is required to use the same funding mechanism as is used by the FCC to fund the federal USF, indicating that the PSC may not migrate to a per-connection surcharge unless the FCC does so first.
6. **Comcast.** Comcast recommends that the PSC delay changing the UUSF funding mechanism until it has first devised and conducted a full investigation that will allow it to ensure that any proposed methodology:
  - a. is effective and efficient;
  - b. limits the burden on consumers;
  - c. minimizes interference with marketplace forces;
  - d. does not unfairly advantage or disadvantage one provider or technology over another;
  - e. minimizes the possibility that entities with UUSF obligations will compete directly with entities without such obligations;
  - f. promotes broadband adoption and broadband investment in unserved areas;
  - g. does not create an economic disincentive for unsubsidized providers to build infrastructure with private capital;
  - h. is sustainable in an industry characterized by rapid technological change;
  - i. does not increase the size of the UUSF;
  - j. is consistent with the federal contribution mechanism;

- k. decreases the financial burden of the UUSF contributions on consumers and businesses; and
  - l. minimizes the impact on economic decisions made by providers and their customers.
7. **CenturyLink.** CenturyLink recommends that the PSC migrate to a per-line/per-connection surcharge as the only reasonable mechanism for assessing VoIP providers, as required under S.B. 130.
8. **Jive Communications, Inc.** Jive suggests that the PSC cannot ensure that a per-connection assessment is competitively neutral unless it first undertakes a full investigation of some sort.

Having carefully considered the issues raised by the comments, we have determined to move forward with a rule change that will fund the UUSF through a per-connection surcharge rather than through a revenue-based remittance, based on the location of a physical or billing address within Utah associated with an access line.

First, we emphasize that we are required to consider the Legislature's actions in promulgating S.B. 130 to be constitutional and otherwise in compliance with federal law. We are also required to comply with the Legislature's requirement that we assess a surcharge through all providers of "access lines," regardless of the technology used by the providers. We do not see in S.B. 130 any provision that would allow us to delay our compliance until such time as the FCC provides guidance as to whether—and in what manner—access lines may be assessed by the States. We are particularly concerned that the FCC has been taking comments on this and related issues for almost 14 years, but has yet to provide any definitive guidance. Further, we do not read

the plain language of the Telecommunications Act of 1996 as requiring us to use precisely the same funding mechanism as is used by the FCC in funding the federal USF. Rather, we consider that we have explicit authority under 47 U.S.C. § 254(f) to determine the "manner" through which "preservation and advancement of universal service" will be accomplished in Utah.

Second, we have carefully reviewed the federal case law adjudicating mechanisms for funding state USFs, particularly regarding States' attempts to compel VoIP providers to contribute to the construction and maintenance of the broadband networks on which they rely. S.B. 130 requires us to assess the UUSF surcharge for VoIP providers. In doing so, we have analyzed and considered that case law and conclude that the proposed rule filing, assessing VoIP end-users on the basis of connections, is the best and most sustainable course.

Third, we are not convinced that migrating to a per-connection system of assessment will be as onerous to providers as some of the comments suggest. We note that affected providers contribute both to the UUSF and to the Relay Utah fund, the latter of which is funded through a per-connection charge. We recognize that there could be some burden on providers. However, we also note that providers have been on notice since at least March 25, 2017 that the change might occur. We therefore consider that providers have had a reasonable period of time to plan for such a change and that they should be prepared to proceed without undue disruption to their operations. We also note that our rule allows providers to retain up to 1.31% of the total monthly surcharge collections to offset administrative costs. We conclude that amount is reasonable based on the practice of the Utah State Tax Commission with respect to sales tax collections.<sup>2</sup>

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<sup>2</sup> Some comments also have raised the issue of electronic payment of surcharge revenue to the PSC, and potential collection of that revenue by the Utah State Tax Commission. With respect to electronic payments, the PSC will

Fourth, we wish to address the comments that ask us to study and assess the propriety of current UUSF disbursements. We assure concerned commentators that every disbursement has been calculated after a thorough review of the provider's financial records. All revenue from federal support mechanisms has been considered and weighed. *See* Utah Administrative Code R746-360-2(B). In each UUSF docket, we have made a finding that the approved disbursement is just, reasonable, and in the public interest. Absent data or other facts to demonstrate that our findings were incorrect when made, we have no reason to revisit those dockets, and we decline to do so. Nevertheless, those disbursements will require future assessments to ensure compliance with the changes mandated by S.B. 130.

Finally, S.B. 130 provides for Lifeline support to wireless providers and requires a new evaluation of potential additional uses of UUSF support. At a future stage of rulemaking, when we will establish rules to address other provisions of S.B. 130, we will implement rules related to wireless Lifeline support and other types of UUSF support. Those changes, along with reassessment of disbursements to ILECs, will require regular and ongoing evaluation of the surcharge and the types of projects that promote universal service.

The proposed rule is attached as Exhibit A. It was filed with the Division of Administrative Rules on May 15, 2017 and will be published in the Utah State Bulletin on June 1, 2017. The comment period will conclude on July 3, 2017. We will consider all comments filed, but currently the first possible effective date we would contemplate for this rule filing is

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investigate that option and will inform parties if it becomes an option prior to the effective date of the proposed rule filing. With respect to collection of surcharge revenue by the Utah State Tax Commission, the PSC will participate in any discussions at the Utah Legislature around that potential statutory change.

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August 1, 2017. In the past, we have attempted to make any necessary changes to surcharges at the beginning of a fiscal quarter. Because S.B. 130 goes into effect on July 1, 2017 and there is at least some potential ambiguity in between that effective date and any rule implementation, we conclude that waiting until the beginning of a fiscal quarter might not be the best option in this instance. After the comment period ends on July 3, 2017, we intend to inform parties as soon as possible of our plans with respect to an effective date, but those who will be responsible for collecting and remitting the surcharge should anticipate the possibility of that occurring on August 1, 2017.

DATED at Salt Lake City, Utah, May 16, 2017.

/s/ Jennie T. Jonsson  
Administrative Law Judge

Approved and confirmed May 16, 2017 by the Public Service Commission of Utah.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg  
Commission Secretary  
DW#294003

**EXHIBIT A**

**R746. Public Service Commission, Administration.**

**R746-360. Universal Public Telecommunications Service Support Fund**

**R746-360-4. Application of Fund Surcharges to Customer Billings.**

~~[— A. Commencement of Surcharge Assessments — Commencing June 1, 1998, end user surcharges shall be the source of revenues to support the fund. Surcharges will be applied to intrastate retail rates, and shall not apply to wholesale services.~~

~~— B. Surcharge Based on a Uniform Percentage of Retail Rates — The retail surcharge shall be a uniform percentage rate, determined and reviewed annually by the Commission and billed and collected by all retail providers.~~

~~— C. Surcharge — The surcharge to be assessed is as follows:~~

~~— 1. through September 30, 2016, 1 percent of billed intrastate retail rates; and~~

~~— 2. beginning October 1, 2016, 1.65 percent of billed intrastate retail rates.]~~

(1)(a) "Access line" is defined at Utah Code Subsection 54-8b-2(1).

(b) For purposes of applying the statutory definition of "access line," the "functional equivalent of a circuit-switched connection from an end-user to the public switched network" means equipment or technology that allows an end-user to place or receive a real-time voice communication.

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

(2) Through July 31, 2017, providers shall remit to the Commission 1.65 percent of billed intrastate retail rates.

(3)(a) As of August 1, 2017, and unless Subsection R746-360-4(5) applies, providers shall collect from their end-user customers \$0.36 per month per access line:

(i) that has a physical endpoint within the State of Utah; or

(ii) as to which the provider has record of an associated address within the State of Utah.

(b) The surcharge shall apply directly to each end-user as a separate charge and shall not be included in, nor paid from, the provider's rates or telecommunications revenues.

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

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(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.

(5)(a) An end-user may petition the Commission for a waiver of the surcharge set forth in Subsection R746-360-4(3). Any such petition shall be adjudicated as an informal administrative proceeding.

(b) An end-user that petitions for a waiver of the surcharge has the burden to provide billing records or other substantial documentary evidence demonstrating that, at all times and continuously during the six calendar months preceding the date of petition, the access line being assessed was not used to access Utah intrastate telecommunications services.

(6)(a) An exemption granted under Subsection R746-360-4(5) is valid for a period of one calendar year from the date of issuance.

(b) Following the expiration of an exemption, and upon notice from the Commission, the end-user's provider shall assess the surcharge each month, until such time as the provider is notified by the Commission that a renewed exemption has been granted.

(c) Any assessment remitted to the Commission between the expiration of an exemption and the approval of a petition for renewal of the exemption shall be non-refundable.

(d)(i) The end-user shall bear the sole responsibility to know the expiration date of an exemption granted to the end-user and to ensure that an application for renewal is filed at least 30 days prior to the date of expiration.

(ii) At any proceeding to review a petition for renewal of an exemption, evidence that the end-user was unaware of the expiration date shall be inadmissible.

(iii) A petition for renewal of an exemption is deemed granted unless the Commission issues an order of denial within 30 days of the date on which the petition is filed.

**KEY: affordable base rate, public utilities, telecommunications, universal service fund**

**Date of Enactment or Last Substantive Amendment: [~~October 24, 2016~~]**

**Notice of Continuation: November 13, 2013**

**Authorizing, and Implemented or Interpreted Law: 54-3-1; 54-4-1; 54-8b-15[~~(8)~~]**

CERTIFICATE OF SERVICE

I CERTIFY that on May 16, 2017, a true and correct copy of the foregoing was served upon the following as indicated below:

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