

- 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 CHANGE TO  
PROPOSED RULE AND RESPONSE  
TO REPLY COMMENTS

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ISSUED: August 14, 2017

On May 15, 2017, the Public Service Commission of Utah (PSC) filed with the Utah Division of Administrative Rules a rule amendment that would implement a per-access line surcharge as the funding mechanism for the Utah Universal Service Fund (UUSF). The rule amendment was published in the Utah State Bulletin on June 1, 2017, and the statutory comment period expired on July 3, 2017. Utah Code § 63G-3-301(11). Several interested persons submitted comments, which prompted the PSC to delay implementation of a per-access line surcharge and establish an extended comment period.

Having reviewed the final reply comments, the PSC has determined to file a change to the rule proposed, as follows:

**1. Definition of "connection."**

- a. URTA, CenturyLink, AT&T, and CTIA all commented that the phrase "equipment and technology" raises concerns.
- b. The PSC has modified this section of the rule to define the term "connection" by reference to Utah Code Subsection 54-8b-15(1)(c).

**2. Terminology for concision.**

- a. As initially drafted, the rule stated: "Providers of access lines and functionally equivalent connections are hereafter referred to jointly as 'providers.'" URTA commented that the use of the conjunctive "and" possibly creates a loophole and suggested that the disjunctive "or" be used. URTA also suggested that the

modifier "functionally equivalent" is unnecessary, given the statutory definition of "access line."

- b. The PSC has addressed these issues through the following amendments:  
"Providers of access lines and providers of [~~functionally equivalent~~] connections are hereafter referred to jointly as 'providers.'"
- c. The PSC has also added new language to address a similar concern raised by URITA. The new subsection reads: "Access lines and connections are hereafter referred to jointly as 'access lines.'"

### **3. End-user surcharge.**

- a. URITA and CenturyLink commented that the PSC should not mandate that the surcharge be assessed to end-users: (a) to allow providers some flexibility in administering the surcharge; and (b) because the statute states that the PSC must assess "providers." Other commenters also suggested that specifying an "end-user" surcharge might be considered contrary to statute.
- b. CenturyLink, AT&T, and CTIA all commented that the surcharge should not be mandated as a "separate charge" because some providers offer all-inclusive billing plans.
- c. The PSC has modified the language to state that the surcharge may be included in an all-inclusive billing plan, but has retained the requirement of an end-user surcharge. The PSC intends the rule to be clear that the assessment is not revenue-based. If the surcharge is not assessed to end-users, then it inevitably is paid from providers' general revenues, potentially raising legal issues regarding the FCC requirement to separate interstate and intrastate revenues in funding universal service.

The PSC is aware of persuasive case law (Utility Reform Network v. California PUC, 26 F. Supp. 2d 1208 (U.S. District Court – Northern District of California, July 1, 1997)) holding that an end-user surcharge satisfies a statutory requirement to assess "providers."

### **4. Identifying and counting assessable access lines.**

- a. URITA, CenturyLink, AT&T, and CTIA commented that the surcharge should apply only to access lines with a Utah primary place of use, per the Mobile Telecommunications Sourcing Act (MTSA).

- b. URTA suggested that the rule should specify when, during any given month, a provider is required to count the number of access lines subject to the surcharge, and recommended that the count be performed on the last calendar day of each month.
- c. Comcast suggested that, as to a multi-line service, the PSC apply the surcharge to the total number of "concurrent real-time voice communication call sessions that end-users can place to or receive from the public switched telephone network." URTA suggested an alternative approach, recommending that the rule include a definition for "authorized session," as follows: "each possible simultaneous call to the public switched network permitted by the provider."
- d. The PSC has adopted all three suggestions, using Comcast's language regarding multi-line services.

**5. Prepaid wireless.**

- a. URTA suggested that prepaid wireless providers should be assessed the surcharge on all plans that have a positive cash balance as of a specific date each month.
- b. AT&T and CTIA suggested that the PSC delay implementing a per-access line surcharge until after legislative action is taken to allow a point-of-sale assessment of prepaid wireless.
- c. CTIA further commented that, unless the rule applies to prepaid wireless, it will violate statutes requiring a technologically-neutral assessment.
- d. The PSC is willing to consider all issues concerning prepaid wireless through a separate rule-making docket and/or through legislative action. However, the PSC considers that implementing a per-access line surcharge cannot be delayed beyond January 1, 2018. That date is mandated by statute, and is also necessary to allow the PSC to move forward on other rulemaking related to the 2017 legislation. Current Utah law does not allow a point-of-sale assessment, and for reasons discussed in this notice, the PSC has determined to assess the UUSF surcharge as an end-user surcharge, a model into which URTA's suggestion does not easily fit. However, the PSC invites further comment about URTA's suggestion during the next phase of the rulemaking required by statute, which the PSC intends to commence after the surcharge rule is effective.

**6. Non-interconnected VoIP.**

- a. CenturyLink, AT&T, and CTIA all commented that the rule as initially drafted might be read to require non-interconnected VoIP providers to collect and remit the surcharge.
- b. The PSC has addressed this issue by modifying the definition of "connection."

**7. Exemption.**

- a. URTA recommended eliminating the exemption procedure set forth in the initial rule draft. URTA argued that using the MTSA language and identifying affected access lines through a primary place of use analysis eliminates the need for any additional exemption process. URTA also argued that the surcharge should apply to any access line that can be used for telecommunications, whether or not it is.
- b. The PSC has not adopted this suggestion. The PSC has carefully reviewed the federal case law adjudicating revenue-based assessments on access lines that are used for both telecom services and information services. The case law does not adjudicate how to make the separation between telecom revenues and data revenues, leaving that function to the discretion of providers. However, it is clear that courts expect a separation to be made because revenues from data usage may not be assessed. While a federal court could uphold a per-access line surcharge on a mixed-use access line, the PSC is not confident that the surcharge would be allowed on an access line that is used exclusively for data traffic. Further, the PSC is aware that regulators in other states are concerned about this issue and the legal risks. Therefore, the PSC considers it prudent to foreclose the issue by providing an exemption mechanism. The PSC recognizes that the exemption mechanism is involved, but wishes to allow providers to shift to the PSC the administrative burden of identifying access lines that qualify.

The exemption section has been modified as follows:

- The exemption language is expanded to state that a provider may omit the surcharge in billing an access line that generates revenue that is subject to a universal service surcharge in another state.
- The exemption language is expanded to state that an end-user may receive an exemption by providing billing records demonstrating payment of a universal service surcharge to another state.

- The exemption provision is modified to state that providers may not seek an exemption on behalf of their customers. If a customer believes an exemption is warranted, the burden is on the customer to so demonstrate.

#### **8. Role of the Division of Public Utilities.**

- a. URTA and CenturyLink recommended that the PSC authorize the Division to develop payment and reporting requirements that comply with federal law, rather than attempting to comply within the rule itself. In making this recommendation, CenturyLink noted past rulemaking, in which the PSC did not set forth in rule all of the requirements that a petitioner must meet in order to receive approval for a pole attachment agreement.
- b. The PSC has not adopted this suggestion. The PSC understands that it is impossible to address in rule every detail that might arise in administering a complicated policy. CenturyLink is correct that some of the PSC's rules lack specificity to one degree or another. However, the PSC considers it important that the surcharge rule be defensible—on its face—under both federal law and FCC requirements. While the Division will certainly play an important role in administering a per-access line surcharge, the PSC must set in rule the parameters for administration, and those parameters must reflect understanding of and compliance with all applicable laws and regulations.

#### **9. FCC requirements.**

- a. CTIA and AT&T argued that the PSC's proposed per-access line surcharge is not certain to pass muster under federal law mandating that a state universal funding mechanism not be inconsistent with, rely on, or burden the federal funding mechanism, which is currently revenue-based. Therefore, CTIA and AT&T recommended that the PSC direct its efforts toward participating in FCC proceedings that might eventually result in clear direction regarding if and how a state may implement a per-access line surcharge, rather than attempting to blaze the trail.
- b. The PSC has not adopted this suggestion. Rather, the PSC has made every effort to include in the rule provisions that legally separate the UUSF surcharge from any and all interstate revenues.

**10. Assessment of business lines.**

- a. CenturyLink recommended "a higher assessment to providers for business lines/connections as compared to residential lines/connections."
- b. The PSC has not adopted this suggestion. The statute does not explicitly allow a distinction among customer classes in setting a per-access line surcharge. Further, the PSC does not have before it data to demonstrate that a higher rate for business lines is just and reasonable. However, if CenturyLink and other interested persons wish to pursue this approach, the PSC is open to further consideration of this issue.

The amended rule is attached to this notice. It will be filed with the Division of Administrative Rules no later than August 15, 2017. The first possible effective date will be October 9, 2017.

DATED at Salt Lake City, Utah, August 14, 2017.

/s/ Jennie T. Jonsson  
Administrative Law Judge

Approved and confirmed August 14, 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#295952

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.**

(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 ~~["functionally 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] term "connection" is defined at Utah Code Subsection 54-8b-15(1)(c).

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

~~(1) Access lines and connections are hereafter referred to jointly as "access lines."~~

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

(3) As of January 1, 2018, the Utah Universal Public Telecommunications Service Support Fund (UUSF) shall be funded as follows.

~~(a) [As of August 1, 2017, and u]~~Unless Subsection R746-360-4(5) applies, providers shall collect from their end-user customers \$0.36 per month per access line that, as of the last calendar day of each month, has a primary place of use[:

~~(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)(i) "Primary place of 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 primary place of 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 primary place of 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.

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

(ii) A provider may include the surcharge in an all-inclusive 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.

(4)(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.

(5)(a) A provider may omit the UUSF surcharge in billing an access line that:

(i) is described in Subsection R746-360-4(3); and

(ii) generates revenue that is subject to a universal service fund surcharge in a state other than Utah.

(b)(i) 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)(ii)~~ (ii) An end-user that petitions for a waiver of the surcharge has the burden to provide [billing records or other substantial documentary evidence]:

(A) call records 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; or

(B) billing records demonstrating that the access line is assessed a universal service fund surcharge in a state other than Utah.

(iii) A provider may not petition the Commission under Subsection R746-360-4(5)(b) for a waiver of the surcharge on behalf of:

(A) a customer; or

(B) a group of customers.

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

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

~~(c)~~ (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)~~ (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)~~ (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)~~ (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: 2017**

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

**Authorizing, and Implemented or Interpreted Law: 54-3-1; 54-4-1; 54-8b-15**



CERTIFICATE OF SERVICE

I CERTIFY that on August 14, 2017, a true and correct copy of the foregoing was served upon the following as indicated below:

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