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 **COMMENTS OF CTIA**

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CTIA[1] files these comments in response to the Notice of Change to Proposed Rule and Response to Reply Comments[2] in the above-captioned Docket, issued by the Public Service Commission of Utah ("Commission") on August 14, 2017.

I. INTRODUCTION AND SUMMARY

The proposed amendments to R746-360-4 ("Proposed Rule") reflect many improvements upon the previous iteration of this Rule, but work remains in order to bring the Proposed Rule into compliance with Utah statute. Although the Commission has taken the position that developing and "*implementing* a per-access line surcharge cannot be delayed beyond January 1, 2018,"[3] the statute merely mandates development of a surcharge methodology by that date.[4] The statute is clear that the Commission can base surcharges on annual intrastate revenue,[5] which is the basis for collections in Utah, and nationally, today. Further, the statute clearly also mandates

[1] CTIA—The Wireless Association® ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

[2] *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 (issued Aug. 14, 2017) ("Notice"), https://pscdocs.utah.gov/Rules/17R36001/29595217R36001noctprartrc8-14-2017.pdf.

[3] Notice at 3 (*emphasis added*).

[4] Utah Code § 54-8b-15(10).

[5] Utah Code § 54-8b-15(9)(c)(i).

that the Commission's methodology "(a) does not discriminate against: (i) any access line or connection provider; or (ii) the technology used by any access line or connection provider; [and] (b) is competitively neutral."[6] As discussed further below, the new Proposed Rule continues to retain significant flaws that will hamper implementation, impose costly burdens upon providers, raise prices for vulnerable consumers, and may expose the rules to future legal challenge on state and federal grounds.

The task before the Commission involves more than simply to pick and choose among the statutorily permitted methodologies listed in S.B. 130. The Commission also must ensure that its rules do not create an asymmetrical and discriminatory surcharge structure, including for prepaid providers. Further, it must ensure that its rules comply with applicable federal law, such as the Mobile Telecommunications Sourcing Act ("MTSA"),[7] and create a regime that does not impermissibly burden the federal Universal Service Fund ("USF"). If the Commission insists upon retaining its proposed, cumbersome exemption scheme, providers also require clear guidance from the Commission in order to comply with its proposed waiver process. In order to carefully analyze these many issues and prudently craft new rules, the Commission should consider delaying the *implementation* date of its final rules beyond January 1, 2018 – an approach that would not violate the statutory requirement that the Commission "develop the method" to fund the Utah USF ("UUSF") by this deadline.

II. IMPLEMENTING A DISCRIMINATORY SURCHARGE TO MEET THE STATUTORY DEADLINE WOULD STILL VIOLATE THE STATUTE

Despite making some positive amendments to its original proposed rule, the Commission acknowledges in the Notice that significant issues remain regarding the assessment of prepaid

[6] S.B. 130, Utah Reg. Session 2017 (Utah 2017) ("S.B. 130"), new § 54-8b-15(9) (effective July 1, 2017).

[7] *See* 4 U.S.C. §§ 106-252 (2017).

lines under the per-access line contribution mechanism.[8] Previously, CTIA had noted that the earlier proposed rules' requirement for the collection of UUSF surcharges "as a separate charge" would interfere with providers' ability to market and sell popular, all-inclusive rate plans to Utah citizens.[9] To address these concerns, Section 3 of the Notice and the new Proposed Rule contemplate changes that will allow providers to incorporate the UUSF surcharge into their charges for flat-rate plans.[10] Nonetheless, Section 5 of the Notice also acknowledges problems with the equitable assessment of prepaid telecommunications services that the Commission hopes to address in its September 5th Request for Comments and Draft Rule Language ("Request").[11] CTIA intends to respond fully to the Request via separate comments; regardless, in brief, CTIA believes that the Commission's lack of authority to impose UUSF surcharge obligations on third-party retail sellers of prepaid wireless products could result in the inequitable and discriminatory application of this rule upon only certain providers, in contravention of Utah Code § 54-8b-15.[12] As the Commission has itself noted, "current Utah law does not allow a point-of-sale assessment" for the UUSF, and therefore the Utah legislature would need to act to empower the Commission to impose this form of UUSF surcharge collection.[13] Despite the Commission's desire to promulgate its rules by January 1, 2018, legislation necessary to enable point-of-sale assessment of UUSF surcharges will all but certainly

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[8] Notice at 3.

[9] CTIA Comments at 6.

[10] *Id.* at 3(c)(ii) ("A provider may include the surcharge in an all-inclusive plan.")

[11] *In the Matter of the Utah Administrative Code R746-360 Universal Public Telecommunications Service Support Fund*, Request for Comments and Draft Rule Language, Docket No. 17-R360-01 (issued Sept. 6, 2017) ("Request"), https://pscdocs.utah.gov/Rules/17R36001/29646817R36001rfcadrluusfaopwnopr9-5-2017.pdf.

[12] *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").

[13] Notice at 3.

not be enacted by that date. Any interim UUSF surcharge regime that affords disparate treatment to only certain providers, including prepaid providers, would be premature, non-technologically neutral, and discriminatory in violation of Utah law.

Moreover, it is uncertain whether the proposed consumer surcharge would comply with section §54-8b-15(8) of Utah Code, which requires the UUSF surcharge to be assessed on "each access line *provider* and each connection *provider.*"[14] No Utah court or other controlling precedent has held that a "consumer" surcharge satisfies a statutory requirement for a "provider" surcharge.[15] The Notice recognizes that "if the surcharge is not assessed to end users, then it is inevitably paid from providers' general revenues," and goes on to acknowledge that assessing carriers' general revenues may implicate the "requirement to separate interstate and intrastate revenues in funding universal service."[16] As CTIA has previously noted, states are prohibited from "rely[ing] on" or "burden[ing]" the federal program, including by imposing state USF obligations on interstate revenues.[17] Thus, even this revised Proposed Rule may still violate both state and federal law.

CTIA has argued that the existing revenue-based mechanism for UUSF assessment raises none of these legal and practical issues, and it requires no further enabling legislation from Utah lawmakers. The current contribution methodology further satisfies the requirements of S.B. 130 and the policy objectives of the Commission. S.B.130 permits the Commission to fund the UUSF through a surcharge that is based upon "a provider's intrastate revenue," as it also

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[14] Utah Code § 54-8b-15(8) (emphasis added); Notice at Section 3.

[15] *Cf.* Notice at 2, *citing* The Utility Reform Network v. California PUC, 26 F. Supp. 2d 1208 (N.D. Cal. 1997).

[16] *Id.*

[17] *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.")

contemplates a contribution model based on the number of access lines or connections maintained by a provider in the state or a combination of the two methodologies.[18] Indeed, the record shows that the UUSF currently is over-collecting by over $150,000 per month, [19] demonstrating that the program funding is hardly imperiled under the current methodology.

Despite all of the concerns raised in the record by CTIA and other commenters, the Commission has stated that it is committed to "implementing a per-access line surcharge" by January 1, 2018, which it argues is the date "mandated by statute."[20] Of course, the Commission's stated desire to meet the January 1 deadline does not relieve the Commission of its equal obligation under law to find an approach that is also non-discriminatory and competitively neutral.[21] The statute mandates development of a rule, by January 1, 2018, that complies with all relevant statutory authority – state and federal. Promulgation of a rule that at its inception violates provisions of the very statute under which it arises cannot be what the legislature intended. Indeed, it would be illogical for the legislature to direct the Commission to develop a new rule that relies on a legislative grant of authority – the ability to impose a point-of-sale collection – in order to be compliant with state and federal law, and then not grant that authority. The Commission must avoid such an illogical and impermissible interpretation of the statute.

If the Commission does not wish to retain its current revenue-based system—which the revised statute plainly contemplates, and the legislative mandate suggests—the Commission may develop and finalize the new rules by January 1, 2018 with *implementation* to be delayed until

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[18] Utah Code § 54-8b-15.

[19] Comments of Utah Division of Public Utilities, Utah Public Services Commission Docket No. 17-R360-01 at 5 (filed April 26, 2017).

[20] *Id.* at 3.

[21] S.B. 130, Utah Reg. Session 2017 (Utah 2017) ("S.B. 130"), new § 54-8b-15(9) (effective July 1, 2017).

such time as the Utah legislature passes legislation empowering the Commission to impose a point-of-sale collection on prepaid plans.[22] In any event, however, "timely" implementing rule changes that are discriminatory and not competitively neutral is a statutory violation just as much as ignoring the January 1, 2018 rule *promulgation* deadline would be.

III. THE PROPOSED RULE WOULD NOT RELIABLY EXCLUDE ASSESSMENTS ON ONE-WAY VOIP, BROADBAND INTERNET ACCESS SERVICE, OR LIFELINE CUSTOMERS

The Proposed Rule requires further modification to ensure that UUSF surcharges are not imposed on non-interconnected voice over Internet protocol ("VoIP") connections, broadband Internet access service ("BIAS"), or Lifeline customers.

The Commission correctly acknowledged its obligation to avoid assessing non-interconnected VoIP, and proposed to address this issue by changing the definitions of "connection" and "access line" to refer to Utah Code Subsections 54-8b-15(1)(c) and 54-8b-2(i).[23] However, the statutory definition of "connection" includes services that "enable an end-user to initiate *or* receive a call from the public switched network" (emphasis added). The Commission should, therefore, clarify that its definition of "access lines" in Section (1)(b) includes interconnected VoIP, excludes one-way VoIP services, and excludes the underlying BIAS upon which VoIP service is provided—even though BIAS can arguably be used to "enable an end-user to initiate *or* receive a call from the public switched network," e.g., via an over-the-top communication application, such as Skype.[24] Thus, the Commission must at minimum make clear that a connection must enable *both* calls *to* and *from* the PSTN in order to be assessed, and excludes BIAS.

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[22] During such interim period, the current UUSF collection methodology would continue to apply.
[23] Notice at 4.
[24] *See* AT&T Reply Comments at 3.

Moreover, nothing in the Proposed Rule appears to ensure that the UUSF assessment will not be imposed on Lifeline customers. Because Lifeline customers represent a cost-sensitive and vulnerable population, the Proposed Rule should be modified to ensure that Lifeline service is not rendered less affordable by the imposition of UUSF surcharges. This is consistent with the approach in the universal service funds administered by the FCC and other states.[25]

IV. THE GEOGRAPHIC SCOPE OF THE UUSF SHOULD BE DETERMINED WITH REFERENCE TO THE MTSA AND ANY EXEMPTION PROCESS MUST BE ADMINISTRABLE

As this Commission is aware, the Commission can assess universal service obligations "only to the extent permitted by Mobile Telecommunications Sourcing Act" ("MTSA"),[26] as required by S.B. 130.[27] 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.[28] The new Proposed Rule, however, make no reference to the MTSA.[29] Moreover, the Commission attempts to elaborate on this definition in a manner that diverges from the MTSA.[30] CTIA agrees that the new Proposed Rule addresses CTIA's concerns that a conflicting state and federal geographical scope

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[25] *See, e.g.,* 47 C.F.R. §§ 69.131, 69.158; *Federal-State Joint Board on Universal Service et al.,* Order and Second Order on Reconsideration, 18 FCC Rcd 4818, 4822 ¶ 10 (2003).

[26] *See* 4 U.S.C. §§ 106-252 (2017).

[27] 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."

[28] 4 U.S.C. § 117. Under the MTSA, "the term 'place of primary use' means the street address representative of where the customer's use of the mobile telecommunications service primarily occurs." *Id.*

[29] *See* 4 U.S.C. § 117; Proposed Rule R746-360-4(b)(ii). Although the Proposed Rule echoes MTSA's "primary place of use" requirement and definition as "the street address representative of where the customer's use of the mobile telecommunications service primarily occurs," a safer course would be to simply cross-reference the MTSA – for example, in the event that the MTSA definition changed, the Commission's authority nevertheless would be bound by the amended federal law, per S.B. 130.

[30] *Compare* 4 U.S.C. § 117 ("(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") *with* Proposed Rule R746-360-4(b)(ii)-(iii) ("(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").

could lead to both over- and under-collection of eligible UUSF surcharges. However, the Commission should make explicit its intent to harmonize the Proposed Rule's definitions with the MTSA and its definitions. Moreover, the Proposed Rule should make no attempt to further define or modify key terms, such as "place of primary use," beyond a cross-reference to those terms as used in the MTSA.

By fully and explicitly adopting the MTSA's definitions, the Commission will ensure that its rules for universal service assessments are harmonized with other states and with federal law, thereby preventing it from assessing overlapping contribution obligations on the same intrastate revenue assessed by other jurisdictions following the MTSA.[31]

Hewing to the MTSA also eliminates a need for the proposed exemption process.[32] As CTIA has previously emphasized, the proposed exemption process will be "prohibitively impracticable, burdensome, and time-consuming to implement."[33] Further, the exemption does not correct the inconsistencies with state and federal law brought up by the proposed rule, as noted *supra* and in previous comments.[34]

To the extent that the Commission retains a waiver process, however, the Commission must further modify the Proposed Rule so that carriers can administer it. The Commission must bear in mind that, even if the Commission grants exemptions to customers, it is carriers that will

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[31] For this reason, the FCC has recommended that states model their universal service contribution obligations on MTSA in the context of interconnected VoIP services. *See KS/NE Declaratory Ruling*, 25 FCC Rcd. at ¶ 21 (2010) ("[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.").

[32] *See* Notice at 4.

[33] CTIA Reply Comments at 7.

[34] *See* CTIA Comments at 11-12 (explaining the inconsistency between the waiver process and the MTSA); CTIA Reply Comments at 8 ("As AT&T notes, the proposed waiver and exemption procedure is no solution: the Commission cannot adopt a mechanism that will inevitably conflict with state and federal law based on a promise to come into compliance if and when end users object via a waiver request.")

be assessing the surcharges, and therefore must know which customers have exemptions in order to avoid assessing surcharges on exempt customers. Thus, the Proposed Rule must establish a clear obligation for the Commission to communicate to service providers the exemptions that the Commission has granted to customers, as well as notice of when exemptions expire or are renewed. For example, the Proposed Rule calls for notice to carriers of renewals, but not waivers in the first instance. This omission must be corrected if an exemption process is retained.

Further, the Commission must provide sufficient lead time for service providers to implement exemptions that are granted, terminated, or expired. As CTIA previously has noted, carriers will need at least three months' advance notice to implement or remove an exemption from a customer account. The Proposed Rule should provide for such notice of exemptions to carriers.

V. CONCLUSION

CTIA applauds the Commission's efforts to address the commenters' concerns and rectify the ambiguities and legal issues identified in its earlier proposed rules, but significant issues remain. CTIA urges the Commission to further modify the Proposed Rule consistent with these comments.

Respectfully submitted,

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October 2, 2017

CERTIFICATE OF SERVICE

I certify that, on October 2, 2017, a true and correct copy of the foregoing Comments of CTIA in Docket No. 17-R360-01 was delivered to the following by electronic mail:

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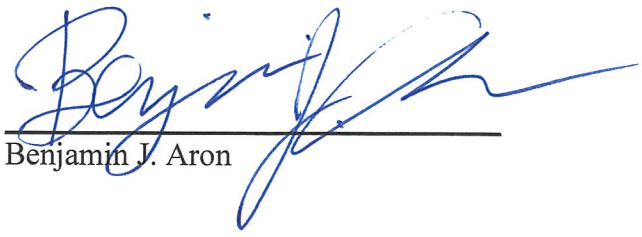

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