Gary A. Dodge, #0897
Phillip J. Russell, #10445
HATCH, JAMES & DODGE
10 West Broadway, Suite 400
Salt Lake City, UT 84101
Telephone: 801-363-6363
Facsimile: 801-363-6666
Email: gdodge@hjdlaw.com
prussell@hjdlaw.com

Attorneys for the AT&T Companies

BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Utah Administrative Code R746-360 Universal Public Telecommunications Service Support Fund	DOCKET NO. 17-R360-01 **COMMENTS OF THE AT&T COMPANIES IN RESPONSE TO NOTICE OF CHANGE IN PROPOSED RULE**

The certificated AT&T Companies, together with AT&T wireless providers, including AT&T Corp., Teleport Communications America, LLC, New Cingular Wireless PCS, LLC, and Cricket Wireless, LLC (collectively, "AT&T" or the "AT&T Companies") submit these Comments in response to the Notice of Change in Proposed Rule regarding Utah Administrative Code R746-360-4 issued August 14, 2017 (the "Notice"). The Notice invited written comments from the public by October 2, 2017 regarding amendments to Proposed Rule R746-360-4, titled "Application of Fund Surcharges to Customer Billings" ("Proposed Rule"), meant to comply with Senate Bill 130 ("SB 130") which gives the Public Service Commission of Utah ("Commission") more flexibility in funding the Utah Universal Public Telecommunications Service Support Fund ("UUSF").

Introduction

The newly amended Proposed Rule still does not address significant concerns raised by AT&T in its earlier comments. As currently written, the Proposed Rule would still assess non-assessable services and require an implementation that cannot be technologically neutral and non-discriminatory without passage of additional legislation requiring non-carrier retailers of prepaid wireless services to collect and remit the UUSF surcharge. AT&T also suggests further amending the Proposed Rule to clarify how providers will receive notice of granted waivers. Finally, AT&T suggests that the term "place of primary use" in the Proposed Rule be replaced by "primary place of use" consistent with the Mobile Telecommunications Sourcing Act ("MTSA") and defined by statutory reference to the MTSA.

I. The Proposed Rule must be amended to exclude one-way VoIP from assessment.

Subsections (1)(A) and (1)(B) of the Proposed Rule should be amended to ensure exclusion of non-assessable services, specifically one-way VoIP which, as discussed in AT&T's previous comments, is not assessed at the federal level, and accordingly, should also not be assessed by states for USF contributions.

Subsection (1)(A) of the Proposed Rule defines "access line" by referring to the statutory definition at Utah Code Subsection 54-8b-2(1), "a circuit-switched connection, or the functional equivalent of a circuit-switched connection, from an end-user to the public switched network." Subsection (1)(B) of the Proposed Rule defines "connection," "[f]or purposes of applying the statutory definition of 'access line'" by referring to the statutory definition of "connection" at Utah Code Subsection 54-8b-15(1)(c), "an authorized session that uses Internet protocol or a functionally equivalent technology standard to enable an end-user to *initiate or receive* a call from the public switched network" (emphasis added).

Referring to the statutory definitions of "access line" and "connection" does not avoid the problem in the originally drafted Proposed Rule of inadvertently assessing one-way VoIP. Like the originally drafted Proposed Rule, the statutory definition of "connection" also includes the disjunctive "initiate *or* receive a call from the [PSTN]" (emphasis added). As discussed in AT&T's July 3 comments, employing the disjunctive "place or receive" or "initiate or receive" to describe which "access lines" or "connections" must contribute to the UUSF erroneously includes one-way VoIP:

> [T]he Proposed Rule would impose the assessment upon non-interconnected, *i.e.*, one-way VoIP services, and other services beyond the jurisdictional authority of the Commission. For example, a non-cellular iPad using Skype or FaceTime over a wireless network to video chat in real-time arguably qualifies as 'technology or equipment that allows an end-user to place or receive a real-time voice connection' and therefore would be subject to UUSF assessment, even though the Commission has no authority to assess such services.[1]

And as also discussed in AT&T's July 3 comments, the FCC does not assess one-way, non-interconnected VoIP services, and for that reason, nor should states:

> The FCC itself does not assess one-way VoIP services for the federal USF; only interconnected VoIP services are assessable for federal USF purposes. In its Declaratory Ruling In the Matter of Universal Service Contribution Methodology ("*KS/NE Declaratory Ruling*"), the FCC identified the compliance parameters for states that wish to assess VoIP services for their state USFs and addressed only the issue of state USF assessments for interconnected VoIP, not one-way VoIP. While the *KS/NE Declaratory Ruling* allows states to assess interconnected VoIP for state USFs, it also acknowledges that "'the FCC has made clear it, and not state commissions, has the responsibility to decide' whether intrastate VoIP services should be subject to universal service assessments.'" As one-way VoIP is not assessed for the federal USF, and the FCC has not allowed assessment of one-way VoIP, Utah is likewise limited in its ability to assess this service.[2]

[1] Comments of the AT&T Companies in Response to Notice of Rulemaking, p. 3 (July 3, 2017) ("AT&T July 3 Comments").

[2] AT&T July 3 Comments, pp. 3-4 (citations omitted). See also Reply Comments of the AT&T Companies in Response to Order on Request to File Reply Comments, pp. 4-5 ("AT&T August 2 Comments") ("[O]ne-way VoIP is not assessed by the FCC for federal USF purposes, and state USF requirements must be consistent with the federal USF. Because the FCC does not do so, Utah is therefore also limited in its ability to assess one-way VoIP.") (citations omitted).

For these reasons, to avoid conflict with federal law, AT&T suggests amending the currently drafted Proposed Rule as follows:

> (1)(A) "Access line" is defined at Utah Code Subsection 54-8b-2(1) to the extent consistent with federal law.
>
> (1)(B) For purposes of applying the statutory definition of "access line," the term "connection" is defined at Utah Code Subsection 54-8b-15(1)(c) to the extent consistent with federal law.

II. The Proposed Rule does not and cannot assess prepaid wireless services in a non-discriminatory or competitively neutral manner as required by statute.

The newly amended Proposed Rule still does not adequately address the assessment of prepaid wireless services. As discussed in AT&T's earlier comments, the Commission does not have the jurisdiction to require all sellers of prepaid wireless services to collect the surcharge from end users to remit to the UUSF.[3] In particular, the Commission cannot require non-carrier retailers of prepaid wireless services such as top-up cards to collect and remit UUSF surcharges.

However, Utah Code Subsections 54-8b-15(9)(a)-(b) require that the UUSF contribution methodology "not discriminate against: (i) any access line or connection provider; or (ii) the technology used by any access line or connection provider" and be "competitively neutral." If the Commission amends the Proposed Rule to exclude contributions from all prepaid wireless end users, this would unfairly discriminate against end users and providers not only of wireless postpaid services but also of all other telecommunications and interconnected VoIP services that are required to contribute, and which compete with prepaid wireless services. If the Commission decides to collect the UUSF surcharge from those prepaid wireless end users who purchase services directly from carriers, the Commission is nevertheless unable to collect the surcharge from end users who purchase their prepaid wireless services from non-carrier retailers, thereby

[3] AT&T July 3 Comments, p. 6; AT&T August 2 Comments, p. 3.

discriminating against carriers and their customers who contribute to the UUSF. This would give prepaid wireless services of non-carrier retailers a competitive advantage over all other competing services that do not contribute. UUSF contribution obligations should not drive purchasing decisions. But they may well do so under the Proposed Rule.

As discussed in AT&T's earlier comments, AT&T supports establishing a point of sale UUSF collection methodology for prepaid wireless services as well as additional legislation to enable the collection of the UUSF surcharge from end users who purchase their prepaid wireless services from non-carrier retailers.[4] Additionally, because there is no "primary place of use" for consumers of prepaid services who are not required to provide an address upon purchase, AT&T suggests that any rule or law that will address a POS methodology also specify that the UUSF surcharge will apply if the prepaid wireless services are purchased at a Utah retail location.

Until additional legislation is passed to permit collection of UUSF surcharges from end users who purchase prepaid wireless services from non-carrier retailers, there is no way for the Proposed Rule to be amended to make its implementation competitively and technologically neutral and non-discriminatory. Moreover, because not all end users will contribute to the UUSF under the Proposed Rule as written, the end users who do contribute will have to pay a greater amount to make up for those who do not. To avoid these problems, the Commission could implement a rule by December 31, 2017 that does not mandate any change in contribution methodology or rate until the Legislature passes additional legislation that would equitably assess *all* retailers of prepaid wireless services at the point of sale as a growing number of states have done.

[4] AT&T July 3 Comments, p. 6; AT&T August 2 Reply Comments, p. 3.

III. The Proposed Rule should be amended to require the Commission to notify relevant providers when waivers are granted.

Although the waiver process in Subsection (5)(b)(iv) contemplates the Commission giving notice to the end user's provider upon *expiration* of the exemption, the Proposed Rule as amended is still completely silent on how the provider should receive notice of the Commission's granting an exemption in the first place. Because the Commission determines when exemptions are granted, AT&T suggests further amending the Proposed Rule to require the Commission to give notice of an end-user's exemption to the provider and permit the provider to implement the exemption within two or three monthly billing cycles. The Proposed Rule should also address cases where end users switch providers in the middle of the year-long exemption by requiring the Commission to provide notice to the new provider of the end user's exempt status.

IV. The definition of "primary place of use" should be amended to refer to the MTSA definition and not attempt to re-define the term within the Proposed Rule.

Utah Code § 54-8b-10(11) requires the Commission to assess universal service "only to the extent permitted by the Mobile Telecommunications Sourcing Act…" Congress passed the *Mobile Telecommunications Sourcing Act* ("MTSA") in 2000, codified in 47 U.S.C. §§ 116-126, which determined, among other things, that a single location for sourcing taxes and fees upon wireless carriers would be based on the customers' place of primary usage (either residential street address or primary business street address). Because many states have adopted rules that follow the MTSA sourcing rules, in particular the MTSA's definition and use of "primary place of use" ("PPU"), to determine who contributes to state USF funds,[5] the Proposed Rule should not attempt to re-define PPU within the Rule itself. Rather, the Proposed Rule should define PPU by reference to the MTSA definition to encourage consistency with other states and to avoid

[5] *See, e.g.*, Ark. Code § 23-17-404; Cal. Pub. Util. Code § 247.1; Tex. Admin. Code, title 16, § 26.420(f); Tex. Tax Code § 151.061; and 30 Vt. Stat. Ann. § 7521.

potential duplicative assessments by more than one state of an end user,[6] an outcome the FCC has preempted.[7] To that end, AT&T recommends replacing "primary place of use" with "place of primary use" throughout the Proposed Rule, striking Subsection (3)(b) of the Proposed Rule as recently amended, and amending Subsection (3)(a) as follows:

> 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~~ place of primary use in Utah in accordance with the Mobile Telecommunications Sourcing Act, 4 U.S.C. Sec. 116 et seq.

Conclusion

For the reasons argued herein, AT&T urges the Commission to further amend the Proposed Rule to avoid assessing services that should not be assessed or assessing end users who may be subject to assessments by multiple states, ensuring consistency with the FCC. AT&T also suggests further amendment of the Proposed Rule to clarify how providers will receive notice of the Commission granting waivers to end users. Finally, while AT&T supports a POS collection methodology for prepaid wireless services, AT&T urges the Commission to amend the Proposed Rule to delay the effective date of the Proposed Rule until after additional legislation is passed requiring non-carrier retailers to collect the UUSF surcharge to ensure a non-discriminatory

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[6] *See 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*, WC Docket No. 06-122, *Declaratory Ruling*, 25 FCC Rcd. 15651, 51 Communications Reg. (P&F) 1073, FCC 10-185 (rel. Nov. 5, 2010) ("*KS/NE Declaratory Ruling*"), ¶ 21("Concern about potential double billing of intrastate revenues exists in the wireless context as well, because a wireless customer's principal place of use may be different from his or her billing address. Evidence in the record indicates that states have successfully resolved allocation of wireless intrastate revenues for purposes of state universal service contributions without the need for Commission intervention. In fact, an 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." (citations omitted)).

[7] *Id.* at ¶ 11.

application of the Proposed Rule that is competitively and technologically neutral. The AT&T Companies appreciate the opportunity to provide these comments.

DATED this 2nd day of October 2017.

HATCH, JAMES & DODGE

/s/_____
Gary A. Dodge
Attorney for AT&T Corp., Teleport Communications America, LLC, New Cingular Wireless PCS, LLC, and Cricket Wireless, LLC

MAILING CERTIFICATE

I hereby certify that I served a true and correct copy of the foregoing Comments of the AT&T Companies this 2nd day of October 2017, on the following by electronic mail:

Utah Division of Public Utilities
Patricia Schmid (pschmid@utah.gov)
Justin Jetter (jjetter@utah.gov)
Chris Parker (chrisparker@utah.gov)
Erika Tedder (etedder@utah.gov)

Utah Office of Consumer Services
Steven Snarr (ssnarr@utah.gov)
Robert Moore (rmoore@utah.gov)
Michele Beck (mbeck@utah.gov)
Cheryl Murray (cmurray@utah.gov)

Bob Kraut (bob@atcnet.net) - Albion Telephone Company, Inc.
Jenny Prescott (jenny.prescott@allwest.com) - All West Utah, Inc.
Janet McFarland (j.mcfarland@centracom.com) - Bear Lake Communications
Bryan Scott (bscott@beehive.net) - Beehive Telecom, Inc.
Brock Johansen (bjohansen@emerytelecom.com) - Carbon-Emery Telecom Inc.
Blake Madsen (bmad@cut.net) - Central Utah Telephone
Ted Hankins (ted.hankins@centurytel.com) - CenturyTel of Eagle, Inc.
Kirk Lee (kirk.lee@ftr.com) - Citizens Telecommunications Company of Utah
Diane (diane@directcom.com) - Direct Communications Cedar Valley, LLC
J. Frandsen (jfrandsen@emerytelcom.com) - Emery Telephone
Douglas G. Pace (dpace@ftitel.net) - Farmers Telephone Company, Inc.
Kent Sanders (kent@gtelco.net) - Gunnison Telephone Company
D. Woolsey (dwoolsey@emerytelcom.com) - Hanksville Telecom, Inc.
Dallas Cox (dallasc@mail.manti.com) - Manti Telephone Company
Barbara Saunders (west.consumer.relations@czn.com) - Navajo Communications Company, Inc.
Jim Farr (james.farr@centurylink.com) - Qwest Communication, QC dba CenturyLink QC
Blake Madsen (bmad@cut.net) - Skyline Telecom
Alan Torgersen (alant@socen.com) - South Central Utah Telephone Association, Inc.
Jerilyn Hyder (jhyder@stratanetworks.com) - UBTA-UBET Communications, Inc.
John Woody (jowoody@union-tel.com) - Union Telephone Company
James Woody (jwoody@union-tel.com) - Union Telephone Company
Brett N. Anderson (bretta@blackburn-stoll.com)
Vicki Baldwin (vbaldwin@parsonsbehle.com)
Sharon Bertelsen (bertelsens@ballardspahr.com)
Larry Bowman (larry.bowman@charter.com)
Brian W. Burnett (bburnett@kmclaw.com)
cflregulatory@chartercom.com
Eddie L. Cox (ecox@cut.net)
William J. Evans (bevans@parsonsbehle.com)
James Farr (james.farr@centurylink.com)
Amy Gross (agross@tminc.com)

Alan Haslem (ahaslem@mleainc.com)
Ray Hendershot (ray.hendershot@beehive.net)
William Huber (william.huber@questar.com)
Bill Hunt (williamp.hunt@dish.com)
David R. Irvine (D@aol.com)
Kristin L. Jacobson (Kristin.l.jacobson@sprint.com)
Brock Johansen (bjohansen@emerytelcom.com)
Dawn Kubota (kubotad@ballardspahr.com)
Jasen Lee (jlee@desnews.com)
Kirk Lee (kirk.lee@ftr.com)
Shirley Malouf (srmalouf@stoel.com)
Jennifer H. Martin (jhmartin@stoel.com)
Steve Mecham (sfmecham@gmail.com)
Gregory Monson (gbmonson@stoel.com)
Thorvald Nelson (tnelson@hollandhart.com)
Sheila Page (spage@utah.gov)
Mike Peterson (mpeterson@utahcooperatives.org)
Pam Pittenger (pam.pittenger@ftr.com)
Jenny Prescott (jenny.prescott@allwest.com)
Bruce Rigby (bruce@ucmc-usa.com)
Gary Sackett (gsackett@joneswaldo.com)
Kira Slawson (kiram@blackburn-stoll.com)
Alan L. Smith (alanakaed@aol.com)
Ted D. Smith (tsmithlaw@earthlink.net)
Kendra Thomas (kthomas@kfrservices.com)
Bruce H. Todd (btodd@stratanetworks.com)
Jake Warner (jakew@beehive.net)
Benjamin J. Aron (baron@ctia.org) - CTIA
Matthew DeTura (mdetura@ctia.org) - CTIA
Margaret Thomson (mt4348@att.com) - AT&T
Janice Ono (jo5243@att.com) – AT&T
John Sisemore (js2023@att.com) – AT&T

/s/_____
Gary A. Dodge