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 Request for Comments and Draft Rule Language ("Request")[2] in the above-captioned Docket, issued by the Public Service Commission of Utah ("Commission") on September 5, 2017.

I. INTRODUCTION AND SUMMARY

CTIA commends the Commission for taking steps to address the significant issues associated with prepaid wireless services and changes to the Utah Universal Service Fund ("UUSF"). Traditionally, prepaid wireless service plans were primarily popular among low and fixed income consumers. However, changes in handset marketing and technological advancements have made prepaid plans more attractive to a broader consumer base. As of 2013, one in three mobile wireless consumers was a prepaid subscriber,[3] and, since that time, wireless

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[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] *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.

[3] Marc Lifsher, "More cellphone users switch to prepaid plans," LA Times (Feb. 19, 2013), http://articles.latimes.com/2013/feb/19/business/la-fi-0220-prepaid-cellphone-boom-20130220.

service providers have competed aggressively to capture this growing consumer base.[4] As such, prepaid wireless services are an increasingly sizeable part of the overall wireless telecommunications marketplace, and their substantial revenues must be addressed in a manner that is consistent with the objectives of the UUSF and Utah Code § 54-8b-15.[5] Unfortunately, the Request will not lead to a rule that achieves these goals.

As discussed in more detail below, many sales involving prepaid wireless products involve retailers rather than carriers, and the Commission does not have jurisdiction to assess surcharges on these third parties.[6] Thus, under the Commission's current proposed rules, millions of dollars in revenues from prepaid services will be excluded from the UUSF surcharge until the Utah legislature so empowers the Commission. Leaving an entire category of prepaid transactions out of the UUSF surcharge regime would treat providers unequally and discriminatorily in violation of Utah Code § 54-8b-15.[7] The Commission should also recognize that its unfamiliarity with prepaid offerings may lead to inaccurate revenue projections and the risk of under-collecting UUSF funds. Thus, CTIA urges that, at least until such time as the Commission has the authority to assess all providers of intrastate telecommunications services on

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[4] *See* "Competition Intensifies in the U.S. Wireless Prepaid Market," Zacks (Apr. 12, 2017), https://www.zacks.com/stock/news/256231/competition-intensifies-in-the-us-wireless-prepaid-market.

[5] *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").

[6] *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 at 3 (issued Aug. 14, 2017) ("Notice"), https://pscdocs.utah.gov/Rules/17R36001/29595217R36001noctprartrc8-14-2017.pdf.

[7] *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").

a per-line basis, it should maintain its current revenue-based approach as permitted in Utah Code § 54-8b-2(9)(c)(i).

II. PREPAID WIRELESS SERVICES ARE AN IMPORTANT PART OF THE UTAH AND NATIONAL COMMUNICATIONS MARKETS

Comprising approximately one third of all mobile wireless consumers as of 2013, prepaid subscribers are an important and growing part of the wireless market and the nationwide communications market.[8] Whereas a contract-based postpaid wireless service provider charges based on consumers' usage of voice, text, and data services within a billing period, a provider of prepaid wireless services charges consumers up front for a certain amount of services, with any additional usage credits purchased separately. Prepaid service plans can either be sold directly to consumers by carriers or sold by online or brick-and-mortar third-party retailers, e.g., Walmart or Best Buy, on behalf of the carrier.[9] In such cases, the retailer typically will collect the customer's payment in the first instance and share some portion of that money with the carrier.

Prepaid credits for voice, text, and data services are likewise sold by carriers, but a significant portion of sales come from retailers on behalf of the carriers, often in the form of "top-up cards." As these examples illustrate, prepaid wireless products and services are frequently sold to customers by retailers rather than carriers.

Prepaid plans allow consumers to limit their spending, control usage, and avoid the burdens and financial costs of long-term contracts. Accordingly, low and fixed-income consumers often favor prepaid plans for their cheaper rates and lower contractual hurdles – as opposed to post-paid plans that may price-in handset costs or require a permanent address,

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[8] Lifsher, *supra* note 3.

[9] Examples of less widely known prepaid services include (i) wireless home phone plans, (ii) flat rate per minute plans for voice services, and (iii) flat rate daily plans to customers that include unlimited talk and text that are billed only on those days talk or text is used. The prepaid market is dynamic, and new service offers come to market frequently.

minimum credit score, and/or a credit card.[10] Prepaid plans are also traditionally popular among students, service members, and other frequent travelers who, as they relocate, may wish to retain the flexibility to switch carriers to obtain better local coverage in lieu of committing to a particular carrier for a longer term.[11]

Changes in handset marketing and advancements in mobile payment and cellular technologies have made prepaid plans an even more popular and consumer-friendly option, while wireless service providers have competed aggressively to capture this growing consumer base.[12] Removable and interchangeable SIM cards have enabled customers to use their unlocked smartphones with different carriers with ease, unmooring customers from their carriers and feeding a growing secondary market of less-expensive secondhand mobile devices.[13] Customers may now bring their own phone and purchase a SIM kit from a carrier to activate prepaid service. As prepaid providers have supported more and more upscale devices, used mobile devices have become increasingly available, and handset churn has risen, swaths of consumers have exited long-term plans that subsidize phone costs to embrace no-contract plans and purchase their phones outright or under an alternative financing arrangement.[14] Moreover, the rise of convenient, app-based mobile payment technologies has made replenishing prepaid accounts even more convenient and accessible.

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[10] *Id.*

[11] Susan Johnston Taylor, "The Rise of No-Contract Cellphones," US News (Sept. 16, 2013), https://money.usnews.com/money/personal-finance/articles/2013/09/16/the-rise-of-no-contract-cellphones.

[12] Colin Gibbs, "T-Mobile and AT&T are killing the gap between prepaid and postpaid," Fierce Wireless (May 4, 2017), http://www.fiercewireless.com/wireless/t-mobile-and-at-t-are-killing-gap-between-prepaid-and-postpaid/.

[13] "Wireless Industry Continues to Evolve: Prepaid/No Contract a Favorite Consumer Choice," Prepaid Wireless, http://www.prepaidpress.com/features/wireless-industry-continues-to-evolve.html.

[14] Gibbs, *supra* note at 11.

In short, prepaid consumers have grown into a highly desirable consumer base with average revenue per user comparable to that of postpaid consumers.[15] As of mid-2016, the five largest prepaid wireless carriers boasted a total of 75.61 million subscribers in the United States.[16]

III. THE PROPOSED RULE WOULD FAIL TO ASSESS SOME OR ALL PREPAID WIRELESS SERVICES, IN VIOLATION OF THE STATUTE

The request acknowledges that prepaid services pose several unique issues under the revised proposed rule that was issued on August 14, 2017. Although the Commission has taken the position that developing and "*implementing* a per-access line surcharge cannot be delayed beyond January 1, 2018,"[17] the statute mandates just as clearly that the Commission's contributions be assessed through an "explicit charge" that collects a UUSF contribution "from [e]ach access line provider and each connection provider" and that the charge must be "assessed by the commission on the access line provider or connection provider."[18] Further, the adopted methodology cannot "discriminate against: (i) any access line or connection provider; or (ii) the technology used by any access line or connection provider" and it must be "competitively neutral."[19]

As discussed above, a significant portion of prepaid wireless sales occur via third-party retailers over whom the Commission concedes that it has no authority to impose a surcharge.[20]

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[15] *Id.* at 1.

[16] Dennis Bournique, "First Quarter 2016 Prepaid Mobile Subscriber Numbers By Operator," Prepaid Phone News (May 3, 2016), http://www.prepaidphonenews.com/2016/05/first-quarter-2016-prepaid-mobile.html.

[17] Notice at 3 (emphasis added).

[18] Amended Utah Code § 54-8b-15(8); *see* Comments of CTIA, Docket No. 17-R360-01 at 4 (filed October 2, 2017), discussing the interpretation and application of "provider" as used in Amended Utah Code § 54-8b-15(9).

[19] S.B. 130§ 3, Utah Reg. Session 2017 (Utah 2017) ("S.B. 130"), new § 54-8b-15(9) (effective July 1, 2017); amended Utah Code § 54-8b-15(8)-(9).

[20] Notice at 3.

As a result, the revenue from prepaid wireless sales at these retailers will escape the obligation to contribute to the UUSF, unless and until the Utah legislature passes point-of-sale legislation,[21] while postpaid and direct-billed prepaid revenue would be surcharged for the same services.

This asymmetrical regulation discriminates against access lines or connections for which carriers bill customers directly, as compared to those sold via third-party retailers, in clear violation of the requirement for competitive neutrality in Utah Code § 54-8b-15.[22] Moreover, even if the Commission were to amend its Proposed Rule and immediately require prepaid providers to remit surcharges for customers who purchase top-up cards from third-party retailers, the result would still be discriminatory: prepaid providers would be required to remit UUSF surcharges without any ability to recover those sums directly from their end users, while other providers would remain free to recover the surcharges directly from their customers.

Indeed, the definitions of "access line" and "connection" under the proposed rules may exclude "top-up" minutes, and therefore may not be subject to UUSF surcharges by operation of the proposed rules. Because such minutes compete with postpaid and direct-billed prepaid plans – which would clearly be surcharged as "access lines" or "connections" under the proposed rules – it would not be competitively neutral to allow prepaid top-up minutes to escape contribution obligations. As above, excluding certain popular prepaid products from UUSF assessment would not only risk underfunding the UUSF, but it would also discriminate against other competing providers – here, providers of postpaid and direct-billed prepaid access lines or connections.

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[21] As discussed in more detail below, the Legislature has provided such an approach for 911 fees. Utah Code § 69-2-5.7. *See also infra* Section IV.

[22] *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").

IV. A REVENUE-BASED CHARGE IS CONTEMPLATED IN THE STATUTE AND AVOIDS THE STATUTORY PROBLEMS IN THE PROPOSED RULE

While the success of this new contribution mechanism is fraught with practical and legal uncertainties, S.B. 130 explicitly permits the Commission to assess UUSF funding based on intrastate revenues.[23] Specifically, Utah law provides that the Commission may fund the UUSF through a surcharge that is based upon (i) a provider's intrastate revenue, (ii) the number of access lines or connections maintained by a provider in the state, or (iii) a combination of the two methodologies.[24] As discussed in Section III, it is doubtful that the Commission can implement a connections-based approach without violating Utah law.

Notwithstanding clear guidance from the legislature empowering the Commission to avoid this debate and retain its existing methodology, the Commission has insisted on pursuing a novel and untested per-connection approach, despite the statutory violations that would result (as discussed in Section III). Instead, and at least pending point-of-sale legislation, the Commission should retain a revenue-based approach. Such point-of-sale legislation already exists in the 911 context. Utah Code § 69-2-405 sets out a point-of-sale collection method for E911 surcharges. This charge is assessed as a percentage of the sales price per transaction (i.e., revenue based), rather than as a regressive flat fee per transaction. This legislation ensures that prepaid wireless services contribute on an equitable basis to E911 services, and it could be used as a model to ensure that prepaid wireless services are fair and equal participants in UUSF.

V. CONCLUSION

The proposed rule would violate Utah Code § 54-8b-15 and S.B. 130 in a number of respects with regard to prepaid wireless services. Absent a legislative solution to collect UUSF

[23] Utah Code § 54-8b-2(9)(c)(i) (effective July 1, 2017); *accord.* Comcast Comments at 3.

[24] Utah Code § 54-8b-2(9)(c)(i)-(iii).

surcharges from prepaid wireless service customers at the point-of-sale, a revenues-based approach remains the only approach that is demonstrably consistent with the statute. For the forgoing reasons, the Commission should not alter the UUSF contribution mechanism for prepaid wireless services at this time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 4, 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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