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 **CTIA'S APPLICATION FOR REHEARING AND REQUEST FOR STAY**

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APPLICATION FOR REHEARING AND REQUEST FOR STAY

Pursuant to Utah Code § 54-7-15, CTIA submits this Application for Rehearing and Request for Stay ("Application for Rehearing") of the proposed rules that the Public Service Commission of Utah ("Commission") made effective in its October 11, 2017 Notice in this docket.[1] The Notice indicates that the Proposed Rule published June 1, 2017 and the Change in Proposed Rule published September 1, 2017 (collectively, "Effective Rule") have been made effective. For the reasons discussed herein, the Commission should grant rehearing of the Effective Rule, reject the Effective Rule in favor of a revenue-based mechanism, and stay the Effective Rule pending such action.

I. INTRODUCTION AND SUMMARY

The Commission's decision to announce the effectiveness of the Effective Rules places CTIA and other stakeholders in this proceeding in an odd position because the Commission's work in this proceeding is ongoing. Indeed, subsequent to the October Notice announcing the Effective Rules on October 11, 2017, the Commission released additional proposed changes to

[1] *In the Matter of the Utah Administrative Code R746-360 Universal Public Telecommunications Service Support Fund*, Docket No. 17-R360-01, Notice that Proposed Rules Have Been Made Effective (Oct. 11, 2017) ("October Notice").

the *same regulations* on October 25, 2017.[2] Given the deadlines for rehearing and judicial appeal,[3] however, CTIA is obligated at this time to file this Application for Rehearing challenging the Effective Rule in order to preserve its rights.

The Effective Rule is not competitively neutral and non-discriminatory as between prepaid and postpaid providers;[4] does not comply with Senate Bill 130 ("S.B. 130")[5] and its requirement of compliance with the Mobile Telecommunications Sourcing Act ("MTSA");[6] and would impermissibly burden the federal Universal Service Fund ("USF"). Because these issues, raised throughout the proceeding, continue to exist in the Effective Rule, CTIA urges the Commission to stay the Effective Rule and retain its current revenue-based approach that is expressly permitted under Utah Code § 54-8b-2(9)(c)(i).[7]

II. THE EFFECTIVE RULE IS NOT EQUITABLE, NON-DISCRIMINATORY, OR COMPETITIVELY NEUTRAL AS REQUIRED BY LAW

A. The Effective Rule Discriminates Between Prepaid and Postpaid Providers

As discussed in more detail below, many sales of prepaid wireless products involve retailers rather than carriers, and the Commission concedes that it does not have jurisdiction to assess Utah Universal Public Telecommunications Service Support Fund ("UUSF") surcharges

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[2] Notice of Proposed Rule Amendment, DAR 42265 (rel. Oct. 25, 2017).

3 See Utah Code § 54-7-15.

4 See Utah Code § 54-8b-15(9)(a)-(b).

5 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."

6 See 4 U.S.C. §§ 106-252 (2017).

7 Utah Code § 54-8b-2(9)(c)(i)-(iii). 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.

on these third parties.[8] Until the Commission is given the authority to require collection of UUSF surcharges at the point-of-sale by third-party retailers, millions of dollars in revenues from prepaid services will be omitted from assessments, imperiling UUSF funding and creating discrimination and inequity among providers in violation of Utah Code § 54-8b-15.[9] Thus, CTIA has previously urged the Commission, prior to its promulgation of the Effective Rule, to "maintain its current revenue-based approach … at least until such time as the Commission has the authority to assess *all* providers of intrastate telecommunications services on a per-line basis."[10]

Prepaid mobile services are a significant and growing segment of the wireless marketplace, comprising approximately one-third of all mobile consumers as of 2013.[11] Prepaid mobile services are sold directly to consumers by either carriers or third-party retailers. Under a prepaid wireless service plan, providers charge consumers up front for a certain amount of voice, text, and data services, with any additional usage credits purchased separately. These prepaid credits are sold by carriers, but a significant portion of credit sales come from third-party retailers, often in the form of "top-up cards." In these cases, the retailer will typically collect the customer's payment in the first instance and share some portion of that payment with the carrier.

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[8] *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.

[9] *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").

[10] CTIA Reply Comments (Oct. 14, 2017) at 1 (emphasis added).

[11] 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; *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.

Prepaid plans have a number of benefits that make them an increasingly favorable option for consumers; they 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, students, service members, and travelers have traditionally favored prepaid plans in lieu of post-paid plans that often price-in hefty handset costs or require a permanent address, minimum credit score, or a credit card.[12] However, changes in handset marketing and advancements in mobile payment and cellular technologies have made prepaid plans an increasingly popular and consumer-friendly option for higher income consumers as well.[13] As a result, prepaid consumers have grown into a highly desirable consumer base with average revenue per user comparable to that of postpaid consumers,[14] and the five largest prepaid wireless carriers now have a combined 75.61 million subscribers in the United States.[15]

The Commission concedes that it currently lacks the authority to require collection of surcharges from non-carrier retailers, such as at the point of sale.[16] Despite that acknowledgement in this proceeding, however, and the unique ability of the Legislature to remedy it, the Commission neglected to raise this important issue in its recent Report to the

[12] *See* Lifsher, *supra* note 10*;* 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.

[13] 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/.

[14] *Id.* at 1; "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.

[15] 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.

[16] Notice at 3.

Legislature on the UUSF.[17] Without legislative changes to address this issue, the sizeable revenue from prepaid wireless sales by third party retailers will be excluded from the obligation to contribute to the UUSF,[18] while revenue from prepaid wireless service sold directly by carriers would remain subject to surcharge, though the products and services sold are the same. This asymmetrical regulation would discriminate against connections purchased from carriers directly, as compared to those purchased through third party retailers, running afoul of the requirement for competitive neutrality found in Utah Code § 54-8b-15.[19]

Even if there were a way to assess all prepaid wireless sales, a per-connection approach still would lead to inequitable and discriminatory results.[20] For example, as CTIA noted in its July 3, 2017 comments, many prepaid customers purchase top-up cards at irregular intervals—on biweekly paydays or as needed—not necessarily on a monthly basis.[21] Thus, even if point-of-sale collection were permitted, implementation of the Effective Rule would result in customers that purchase top-up cards more than once a month being assessed multiple surcharges per month. Conversely, customers that purchase top-up cards less than monthly would be assessed fewer surcharges, effectively creating a partial exemption from the surcharge for such customers. In either case, the outcome would violate the statutory requirements for a non-discriminatory and competitively neutral surcharge.

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[17] Public Service Commission, Report from Public Service Commission Under Utah Code Ann. § 54-8b-15(16) (Oct. 30, 2017).

[18] The Legislature has provided such an approach for 911 fees. *See* Utah Code § 69-2-5.7.

[19] *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).

[20] Collecting surcharges from retail sales of top-up cards also could lead to significant practical problems, such as the elimination of national pricing for Utah consumers.

[21] CTIA Comments (July 3, 2017) at 1.

The Commission's statement that it will "engage in one more stage of rulemaking" to address prepaid-related concerns[22] does not allow it to adopt a rule that, on its face, violates the requirement for competitive neutrality found in Utah Code § 54-8b-15,[23] and it is unclear whether further proceedings will resolve the problem. The Commission should grant this Application for Rehearing, reconsider the rule, and stay the rule pending these proceedings.

B. The Effective Rule Is Not Competitively Neutral Because It Omits Contributions From Other Providers

In addition to the problems it creates with respect to prepaid wireless services, the Effective Rule also would be illegal because it would fail to assess providers of intrastate Utah telecommunications that do not also offer connections. For instance, interexchange carriers offer intrastate telecommunications services, but not connections. Under a per-connection assessment, they would be excluded from any contribution obligation. A similar result would obtain as to over-the-top interconnected voice over Internet protocol ("VoIP") providers such as Vonage.[24]

Exclusion of a group of telecommunications providers from the obligation to contribute to the UUSF would violate the requirement that the calculation of UUSF charges must be "competitively neutral"[25] because both interexchange carriers and over-the-top VoIP providers provide services that compete with services offered by telecommunications carriers in Utah, including CTIA's member companies. Because the Effective Rule would fail to assess telecommunications carriers that provide intrastate telecommunications services in Utah but do

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[22] October Notice at 1.

[23] *See* Utah Code § 54-8b-15(9)(a)-(b).

[24] CTIA notes that while VoIP has not been classified as either a telecommunications or an information service, the FCC has determined that revenues from interconnected VoIP are subject to state USF contribution obligations. To the extent interconnected VoIP providers' contribution obligations mirror those of telecommunications providers, the statutory non-discrimination requirement must reasonably be interpreted as applying to interconnected VoIP providers.

[25] Utah Code § 54-8b-15(9)(b).

not provide connections, it would violate state statute and therefore must be reconsidered by the Commission.

C. The Effective Rule Does Not Make the UUSF More Competitively Neutral Than the Current System, But in Any Event, That Is Not the Statutory Standard

In the October Notice, the Commission incorrectly asserts that the Effective Rule changes "have made the UUSF surcharge more competitively neutral than it has been in the past."[26] The Commission does not explain why it believes this to be true, but it is incorrect in any event. To the extent that the Commission is lending credence to the ILECs' suggestion that the revenue-based system is somehow inequitable because wireless carriers' revenues have shifted towards data services in response to consumer demand,[27] CTIA wishes to reiterate that this theory is inaccurate.[28] The ILECs' revenues have dropped even more than wireless carriers',[29] and it is also equitable that wireless carriers' contribution obligations to the UUSF should fall as they collect less revenue for services that are subject to this Commission's jurisdiction. Indeed, a system that singles wireless carriers out to pay a disproportionately larger share towards UUSF would clearly be *inequitable*, in addition to being unlawfully discriminatory.

Regardless, even if it were true that the Effective Rule would lead to a "*more* competitively neutral" assessment than under the current system, this would not be sufficient to save the flawed Effective Rule. S.B. 130 requires that the Commission's rule be "competitively neutral"—there is no qualification on this requirement. Statutory fidelity is not a game of horseshoes; the Commission must meet the statutory standard, or the action is invalid. As

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[26] October Notice at 1.

[27] *See, e.g.,* URTA Comments (April 26, 2017) at 6-8; CenturyLink Comments (June 30, 2017) at 2-3.

[28] *See* CTIA Reply Comments (May 11, 2017) at 4-8.

[29] *See* AT&T Comments at 6 (April 26, 2017).

explained above, because the Effective Rule is not competitively neutral, it does not meet the requirements of S.B. 130 and is therefore unlawful.

II. THE EFFECTIVE RULE IDENTIFIES UTAH ACCESS LINES FOR SURCHARGE IN A WAY THAT IS INCONSISTENT WITH THE MTSA

As CTIA has already observed, the Effective Rule does not limit the jurisdictional scope of the UUSF assessment in a manner consistent with the Mobile Telecommunications Sourcing Act ("MTSA") as S.B. 130 requires.[30] The Commission, pursuant to S.B. 130, can only assess universal service obligations "to the extent permitted by MTSA."[31] 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, and the MTSA further defines "place of primary use" to mean "the street address representative of where the customer's use of the mobile telecommunications service primarily occurs, which must be (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."[32]

The Effective Rule's definition for "primary place of use" diverges from the MTSA by omitting MTSA's requirement that the place of primary use be "within the licensed service area of the home service provider."[33] Because the Effective Rule could lead to assessments that are not "permitted by the MTSA" (for example, where a customer's address is outside the licensed service area of the home service provider), the Effective Rule is impermissibly inconsistent with the enabling statute. However, if the Commission were to fully adopt the MTSA's definitions, the Commission could follow the federal design and ensure that its rules for universal service

[30] As CTIA has pointed out previously, the Commission's October 25, 2017 Notice of Proposed Rule Amendment in this proceeding also does not resolve this problem.

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

[32] 4 U.S.C. § 117 (emphasis added).

[33] October Notice at 1.

were harmonized with other states, thereby preventing the UUSF from assessing overlapping contribution obligations on the same intrastate revenue with other jurisdictions following the MTSA.[34]

III. THE EFFECTIVE RULE ILLEGALLY BURDENS THE FEDERAL UNIVERSAL SERVICE FUND

A. The Effective Rule Taxes Federal Lifeline Support

In contrast to the rules applicable to other state universal service funds, the Effective Rule does not exempt Lifeline connections from UUSF surcharges, in contravention of Section 254(f) of the federal Communications Act, as amended.[35] Many Lifeline providers offer services at no charge to the consumer, funded entirely by the Lifeline subsidy from the federal universal service fund. Because the customer is not charged, carriers often have no established billing relationships with such customers. Thus, if the Commission obligates carriers to remit surcharges on such lines, there will be no source other than the federal subsidy revenues, and so the Commission would be directly surcharging the federal support mechanism, illegally burdening the federal Lifeline program.[36] Further, such an approach would also be inconsistent with the Effective Rule itself because the carriers would be collecting surcharges from subsidy revenues—not "from their end-user customers" as the Rule itself requires. These collections

[34] For this reason, the FCC has recommended that states model their universal service contribution obligations on the MTSA in the context of interconnected VoIP services. *See* Declaratory Ruling, *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*, 25 FCC Rcd. 25651, ¶ 21 (2010) ("*KS/NE Declaratory Ruling*") ("[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.").

[35] In addition, in its October 24, 2017 Notice of Rule Filing in this docket, the Commission affirmatively "declined to accept the suggestion to exempt access lines that receive a Lifeline subsidy from the UUSF surcharge."

[36] *See* 47 U.S.C. § 254(f).

would, in turn, violate S.B. 130, as they would discriminatorily require certain carriers to remit surcharges from subsidy revenues while other carriers could collect such surcharges directly "from their end-user customers." Conversely, if the Commission intended to level the playing field by requiring all carriers to somehow collect UUSF surcharges from Lifeline customers with whom they have no established billing relationship, this would also violate federal law. Surcharging such customers would be inconsistent with and burden the federal Lifeline program by making federally-funded Lifeline service less affordable for consumers.

For all these reasons, the Commission should grant this Application for Rehearing, reconsider the Effective Rule, and stay its effectiveness in the interim.

B. Development of The Effective Rule Included No Consideration As To Whether It Otherwise Burdens the Federal USF Program

Under Section 254(f) of the federal Communications Act, as amended, state universal service mechanisms such as the UUSF cannot be "inconsistent" with, "rely on," or "burden" the federal mechanism for calculating USF contributions.[37] The FCC calculates USF contributions from interstate telecommunications revenue, and the Effective Rule's proposed "per line" or "per connection" mechanism may inadvertently—and illegally—assess UUSF surcharges on the same base of revenue that the FCC assesses for the federal fund.[38] Because the federal fund is based on interstate revenue and has mechanisms (safe harbor, traffic study, etc.) for determining the jurisdictional allocation of revenue, states cannot ignore the federal mechanism and the amount of revenue allocated to the intrastate jurisdiction. For instance, if $0.75 of revenue is allocated to

[37] *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.").

[38] CTIA acknowledges that S.B. 130 empowers the Commission "to adopt a surcharge mechanism based on the number of lines and connections." *Id.*

the intrastate jurisdiction, a state may not apply a surcharge of $1.00 because a portion of the surcharge ($0.25) would be applied impermissibly to interstate revenue. The Commission's decision to implement a per-connections mechanism does not insulate it from ensuring that its surcharge does not burden the federal program by imposing surcharges on interstate revenue. Whether through a per-connection or revenue-based surcharge, the Commission must ensure that its surcharge – in all instances – is not in excess of revenue allocated to the intrastate jurisdiction. However, the Commission has made no effort to determine whether the per-connection charge in the Effective Rule will burden the federal universal service program by assessing UUSF fees upon the same revenue assessed by the federal government. The fact that the Effective Rule applies a per-connection assessment does not immunize the rule from violating the proscriptions of Section 254 of the federal Communications Act.

Although the $0.36 surcharge in the Effective Rule may not attach federal revenues in all cases, there certainly may be low-revenue accounts, both wireline and wireless, where the charge does indeed impinge on the federal revenue base.[39] The problem is that the Commission has not done any analysis of whether the Effective Rule will or could burden the federal fund. The Commission also has not established any safeguards to prevent such from occurring.

In part, this uncertainty flows solely and directly from the Commission's decision to reject familiar and well-established revenue-based mechanisms in favor of a novel per-connection mechanism. Accordingly, the Commission should proceed cautiously, grant this Application for Rehearing, and stay the Effective Rule until it has found a lawful path forward.

[39] It is easier to see, however, that if the Commission imposed a UUSF surcharge of $9.00, and a wireless service plan cost $10, the Commission clearly would burden the federal mechanism because it would be assessing the same base of revenue as the federal program.

IV. CONCLUSION

The Commission is rushing to implement the Effective Rule despite serious concerns about its legality. CTIA urges the Commission to abandon its efforts to fix what is not broken, create uncertainty where there is certainty, and risk underfunding where there is surplus, by retaining Utah's current, successful UUSF contribution mechanism. For the forgoing reasons, the Commission should grant this Application for Rehearing and Request for Stay, reconsider the Effective Rule, and stay the Effective Rule in the interim.

Respectfully submitted,

By: /S/

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CERTIFICATE OF SERVICE

I certify that, on November 13, 2017, a true and correct copy of the foregoing Application for Rehearing and Request for Stay in Docket No. 17-R360-01 were delivered to the following by electronic mail:

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