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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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| Investigation into Potential Amendment to Utah Administrative Code R746-8-403, Lifeline Support | Docket No. 21-R008-02 COMMENTS |
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On April 30, 2021, the Public Service Commission of Utah (PSC) issued a Notice of Comment Period requesting comments on the effect of a Federal lifeline rule, 47 C.F.R. § 54.403—which terminates lifeline support for standalone voice service on December 1, 2021—on the PSC’s rule on Utah’s lifeline program, UTAH ADMIN. CODE r. 746-8-403, given that Utah Code § 15-8b-15(3)(b) provides that the PSC shall “fund a lifeline program . . . consistent with the Federal Communications Commission’s lifeline program for low-income consumers.”

Specifically, the PSC invited comments on:

1. Interpreting the phrase “consistent with” in Utah Code § 15-8b-15(3)(b).
2. Whether the December 1, 2021, changes in federal eligibility require or encourage any modification to Utah administrative Code R746-8-403.

In response to the PSC’s invitation, the Office of Consumer Services (OCS) submits these Comments.

1. Interpretation of the phrase “consistent with” in Utah Code § 15-8b-15(3)(b).

In interpreting a statute, the primary objective is to determine the intent of the legislature as evidence by plain meaning of the statutory language. *State v. Rushton*, 2017 UT 21, ¶ 11, 395 P.2d 92; *Monarrez v. Utah Dep’t of Transportation*, 2016 UT 21, ¶ 11, 368 P.3d 846. When addressing the plain meaning of a statutory term, the term must be read in the context of the statute, reading the statute as a whole and harmonizing the term with other terms in the statute and related statutes. *Rushton* 2017 UT 21, ¶ 11; *Monarrez*, 2016 UT 21, ¶ 11. Interpretations that render the statute inoperative or portions of the statute superfluous should be avoided. *Garfield County v. United States*, 2017 UT 41, ¶ 21, P.3d 92; *Rushton*, 2017 UT 21, ¶ 11; *Monarrez*, 2016 UT 21, ¶ 11.

The OCS has not found any Utah caselaw interpreting the term “consistent with” in any utility statute or statutes in general. However, the Merriam Webster Dictionary defines “consistent” as “a: marked by harmony, regularity, or steady continuity; free from variation or contradiction. b: marked by agreement: Compatible—usually used with *with*. c: showing steady conformity to character, profession, belief, or custom.” *Consistent Definition*, MERRIAM WEBSTER DICTIONARY, merriam-webster.com/dictionary/consistent. Black’s Law Dictionary defines it as: “Having agreement with itself or something else; accordant; harmonious; congruous; compatible; compliant; not contradictory.” BLACK’S LAW DICTIONARY 279 (5th ed. 1979).

While these definitions do not describe the term “consistent” with absolute precision, it is clear given the definitions of ordinary meaning of the term “consistent with” does not mean “identical to” but it cannot mean “conflicting with.” However, the precise contours of the meaning of “consistent with” need not to be determined here because, as discussed below,

Utah's rule on lifeline eligibility, rule 746-8-403, *conflicts* with Federal Communications Commission's (FCC) lifeline programs and therefore is inconsistent with section 15-8b-15(3)(b). Thus, the proper interpretation of the term "consistent with" read in harmony with the remainder of section 15-8b-15(3)(b), is that it means, at least, that Utah's and the FCC's lifeline programs cannot conflict. This interpretation is sufficient to answer the question of whether rule 746-8-403 must be modified in light of the FCC rule 47 C.F.R. § 54.403 and section 15-8b-15(3)(b)—it must be modified.

2. Rule 746-8-403 must be modified to prevent it from conflicting with the FCC's lifeline program and to remain consistent with section 15-8b-15(3)(b).

Rule 746-8-403 conflicts with the federal lifeline program because rule 47 C.F.R. § 54.403's termination of support for voice only services is not a minor or ancillary feature of the FCC's lifeline program but a central component of the program that is based on policy decisions at the heart of the FCC's governance of federal lifeline support. Thus, because of the central importance of terminating voice services to the FCC's program, if Utah continues to offer lifeline support for voice only services indefinitely, Utah's lifeline program would conflict with the FCC's program and rule 746-8-403 would be inconsistent with section 15-8b-15(3)(b).

The FCC set out the policy determinations behind the promulgation of 47 C.F.R. § 54.403 in their April 27, 2016, Order of *In the Matter of Lifeline and Link Up Reform and Modernization Telecommunications Carriers Eligible of Universal Service Support Connect America Fund, Third Report and Order, Further Report and Order, and Order on Reconsideration*, WC Docket Nos. 11-42, 09-197, 10-90, 31 FCC Rcd. 7048 (April 27, 2016). There, the FCC unambiguously announced a strong stance for the discontinuation of voice only services based on the statutory policies underlying the lifeline program and the predominance of broadband in the modern economy. Accordingly, the exclusion of stand-alone voice services

from the federal lifeline program in connection with expanding broadband access is based on the purposes underlying the lifeline program, i.e., to provide low-income consumers access to modern forward-looking telecommunication services where affordability prevents widespread adoption of essential technology.

As part of our modernization efforts, and with a keen view toward directing Lifeline funds toward services in a way that reflects the technological and marketplace evolution toward data services, we find that Lifeline services must include a broadband offering To be sustainable and achieve our goals of providing low-income consumers with robust, affordable, and modern service offerings, a forward-looking Lifeline program must focus on broadband services. Therefore, based on the record before us, we conclude that it is necessary that going forward the Lifeline discount will no longer apply to a voice-only offering

Id.

The FCC based its determination that the Lifeline program must focus on broadband services on the finding that “broadband has evolved into the essential communications medium of the digital economy, continuing to transform the landscape of America even more rapidly and pervasively than earlier infrastructure networks. . . . Access to broadband shortens the distance to high-quality education, meaningful employment, and reliable healthcare.” *Id.* at 12. The FCC relied on the fact that, rather than voice services, broadband “is now the dominant technology used to communicate, educate, inform, and entertain. Congress recognized this in 2009 when it directed the Commission to develop a National Broadband Plan ensuring that every American has “access to broadband.” *Id.*

In addition to predominance and forward-looking nature of broadband, the FCC also stressed that affordability is a leading factor in preventing widespread adoption of broadband technology and the fact that voice services are now reasonably affordable.

Affordability must remain a central touchstone within the Lifeline program. Mindful Congress’s section 254 mandate that “[q]uality services should be

available at just, reasonable and affordable rates” we believe that the Lifeline program should directly support those services that are otherwise unaffordable to consumers, but for a Lifeline discount. We also find that continuing to support a voice-only product that is reasonably priced will result in a Lifeline program that fails to deliver the “evolving level” of services that “*are being deployed*” (emphasis added). While much of the Lifeline market is competitive, we are concerned that continuing to support a voice-only service would artificially perpetuate a market with decreasing demand and incent Lifeline providers to avoid adjusting their business practices. Instead, these Lifeline providers may have an incentive to maintain the *status quo* and avoid providing low-income customers with modern services as Congress intended. For these reasons, we do not believe it is consistent with Congress’ directive to continue providing support to voice-only service within the Lifeline program

Id. at ¶ 57.

Accordingly, because of this strong policy which underlies the entire federal lifeline program, in order not to conflict with the FCC’s program, Utah’s program must also require a broadband offering to qualify for lifeline support.¹ There is also a twist with the above analysis. Not only did the FCC terminate support for voice only services as of December 1, 2021, but the April 27, 2016, Order also implemented a glide path to the eventual discontinuation of voice only services. The FCC recognized “that a transition is necessary to avoid undue consumer disruption and to allow Lifeline providers sufficient time to adjust operations as the Commission moves from a primarily voice-only Lifeline program to a Lifeline program embracing broadband services.” *Id.* at ¶ 61. *Id.* at ¶ 61. This transition is effectuated “by gradually reducing the monthly support level for voice-only service. At the same time, . . . phase-in higher mobile broadband minimum service standards.” *Id.* at ¶ 61. Specifically, the FCC ruled:

prior to December 1, 2019, voice-only service meeting the minimum service standards shall be supported by \$9.25 per month. From December 1, 2019

¹ There is, however, one exception to the FCC’s analysis. Support for ETC’s who offer voice only service will be allowed “in those Census blocks where the ETC is the only Lifeline service provider in that given Census block.” *Id.* at ¶ 48. Therefore, the PSC could carve out a similar exception in the Utah lifeline program without running afoul of section 15-8b-15(3)(b).

through November 30, 2020, voice-only service meeting the minimum service standards shall be supported by \$7.25 per month. From December 1, 2020 through November 30, 2021, voice-only service meeting the minimum service standards shall be supported by \$5.25 per month. On December 1, 2021, no support generally shall be provided for voice-only service

Id. at ¶ 57. 47 C.F.R. § 54.403 essentially codified this timeline.

Thus, there is a conflict in the statutory analysis: to comply with section 54-8b-15(3)(b) and not conflict with the federal lifeline program as set out in *In the Matter of Lifeline and Link Up Reform* and 47 C.F.R. § 54.403, the PSC’s lifeline program should arguably not support voice-only services past December 1, 2021. However, terminating lifeline support for voice-only service without a transition path also arguably conflicts with *In the Matter of Lifeline and Link Up Reform* and 47 C.F.R. § 54.403. Because of this conflict the purpose of section 54-8b-15(3)(b) cannot have its intended effect.

When confronted with a conflict in applying a statutory provision which prevents the statute from having its full effect, Utah law provides that the courts, and in this case the PSC, should fashion an interpretation that give full operative effect to the statute under consideration, even when such an approach may be inconsistent with a literal meaning of a statutory term when the term is viewed in isolation. *Garfield County*, 2017 UT 41. ¶ 21. In *Garfield County*, the Utah Supreme Court “reformed” the statute by interpreting language that unambiguously established a statute of repose as a statute of limitation in order to “preserve the statute as an operative legislative enactment.” *Id.*

However, such an extreme approach is unnecessary in the instant case. Here, all that is needed to interpret section 54-8b-15(3)(b) in a way that gives operative effect to the term “consistent with the Federal Communications Commission’s lifeline program” is to interpret the phrase to mean “not in conflict” with the policies underlying rule 47 C.F.R. § 54.403 but “not identical” with the precise deadlines outlined in rule 47 C.F.R. §

54.403. Certainly, cases such as *Garfield County* give the PSC this much flexibility in interpreting statutes in cases where the operational effect of a statute cannot be realized without this approach.

Accordingly, while the PSC cannot maintain lifeline support for voice only services indefinitely without violating section 54-8b-15(3)(b), interpreting section 54-8b-15(3)(b) in a flexible manner in order to give operational effect to the statute allows the PSC to institute a transition period in accordance with the policies behind the transition period contained in *In the Matter of Lifeline and Link Up Reform* and 47 C.F.R. § 54.403, if not identical with the precise timeline.

In sum, PSC Rule 746-8-403 must be modified to be “consistent with” the federal lifeline program. However, the PSC should modify it in a manner that allows a transition period in accordance with the policies leading to the FCC’s decision in *In the Matter of Lifeline and Link Up Reform*. This transition period need not be identical to any aspect of the federal transition program, indeed because the federal transition period was instituted five years ago it cannot be identical, as long as it is in accordance with the policies underlying the PSC’s approach in *In the Matter of Lifeline and Link Up Reform*. The precise timeline of the transition should be left to future rulemaking and the discretion of the PSC.

CONCLUSION

The PSC should initiate rulemaking to modify Rule 746-8-403 to provide for the termination of lifeline support for standalone voice services after a reasonable transition period.

Respectfully Submitted, June 24, 2021.

/s/ Robert J. Moore
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Services*