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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Investigation into Potential Amendments 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 (Commission) issued a Notice of Comment Period seeking comments related to the Federal Lifeline program and the pending termination of support for voice only service. The Commission requested comments on two issues:

1. Interpretation of the phrase “consistent with” in Utah Code Ann. § 54-8b-15(3)(b); and
2. Whether the December 1, 2021 changes in federal eligibility require or encourage any modification to Utah Administrative Code R746-8-403.

The Division of Public Utilities (Division) files these Comments in response.

- I. The Phrase “consistent with” in Utah Code Ann. §54-8b-15(3)(b) is Best Interpreted to Require Alignment with FCC Lifeline Changes.

The interpretation of the phrase “consistent with” when used in Utah law, such as Utah Code Ann. §54-8b-15(3)(b) may be applied in 3 different scenarios relating to comparison

between the federal rule and state rule. The first would be the scenario where the state rule follows or tracks the federal rule. The answer is easy. The state rule is consistent with the federal rule. The second is when the two are conflicting is similarly easy. The state rule is inconsistent with the federal rule. The third scenario is not so clear, when the state rule neither tracks the federal rule nor conflicts with the federal rule. It might be defined as, “not inconsistent with” the federal rule. This scenario is where the “consistent with” language is likely subject to interpretation and there is little guidance on interpretation of that condition in Utah law.

Under a plain language reading of the statute “consistent” would likely look to the common dictionary definition of “being marked by harmony, regularity, or steady continuity: free from variation or contradiction.” Under this view, simply not being in contradiction is not enough to remain consistent with. Arguably, that would only be “not inconsistent with” rather than affirmatively “consistent with.” This subtle distinction is found in Utah law where some statutes such as §54-8b-15(15) require consistency whereas §78A-2-203 provides courts authority to develop rules “not inconsistent” with Utah law.

There are examples where courts have used the two phrases interchangeably.¹ *See Ex. New York v. Adamowicz*, 932 F. Supp. 2d 340, 346 (E.D.N.Y. 2013) (Discussing application of a statutory *not inconsistent* the court referred to precedential court orders that “similarly require only conformity or consistency with...”) There are also cases where the two phrases are given distinctly different meanings. *United States v. Hines*, 563 F.2d 737, 740 (5th Cir. 1977) (“Proof of circumstances which, while consistent with guilt, are not inconsistent with innocence, will not support a conviction.”)

The Division suggests that §54-8b-15(15) is best interpreted with the assumption the legislature chose its words intentionally and intended to mean that the Utah Lifeline must be affirmatively consistent with the federal Lifeline. However, the distinction may be unnecessary given the clear language from the FCC regarding support for voice-only service.

II. The December 1, 2021 Changes in Federal Eligibility Require Modification to Utah Administrative Code R746-8-403.

The December 1, 2021 phase out of federal Lifeline support for voice only service will result in Utah Admin. Code R746-8-403 becoming inconsistent with the federal Lifeline program and therefore inconsistent with Utah Code §54-8b-15(15). The FCC has not made a determination that state support for voice only service is inconsistent with the FCC's Lifeline. The FCC has however repeatedly stated in its orders that voice only telephone support is inconsistent with the federal Lifeline program's goals. The FCC is seeking to encourage Lifeline customers to switch to broadband plans. The comments regarding voice only service support indicate that state support of voice only service would likely be considered contradictory to the federal Lifeline program goals.

The FCC in its *2016 Lifeline Modernization Order* addressed the question of compatibility of continued federal Lifeline support for voice only telephone service with the goal of improved broadband and advanced service offerings.² The FCC concluded that to provide modernized service for low-income customers, it was necessary to phase out Lifeline support for voice only service.³

² *Lifeline and Link Up Reform and Modernization et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd. 3962, (2016) (“*2016 Lifeline Modernization Order*”).

³ *Id.* at ¶52.

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 outside of the transition period discussed below.

And

Encouraging use of such voice-only service indefinitely is inconsistent with the Act’s guidance that ‘[u]niversal service is an evolving level of telecommunications services’ that ‘are being deployed in public telecommunications networks.’⁴

After its analysis, the FCC Ordered,

On December 1, 2021, no support generally shall be provided for voice-only service except in certain circumstances where voice is the only service available, or unless the Commission, having considered the recommendations of State of the Lifeline Marketplace Report, orders otherwise.⁵

The FCC not only discontinued the federal Lifeline support for voice only service, it also made it clear that supporting voice only service would be contrary to goals that the federal Lifeline program was intended to advance. If the FCC had been silent on the reasoning for phasing out support for voice only service or it had ended the support due to a lack of funding or a variety of other reasons it might be the case that continued state UUSF support could be considered consistent with or the arguably lesser standard of not inconsistent with the federal

⁴ *Id.* at ¶61.

⁵ *Id.*

Lifeline program. The reasoning for phasing out of voice only service was explicit in the orders and intended to incent customers and providers to move on from voice only service offerings to more modern telecommunications services. The continued state support of voice only service would be contrary to the federal Lifeline program.

Utah Admin. Code R746-8-403(2)(a)(i) includes in the eligibility for state Lifeline support a definition of eligible service that includes wireline voice only service. As soon as the federal Lifeline program ceases to support voice only service, the provision of the state Lifeline rule will be inconsistent with federal Lifeline program. And it will therefore be inconsistent with Utah Code §54-8b-15(15)(a). Rules that are inconsistent with statute must yield to the statute. The Commission should consider changes to the rule to realign with the federal Lifeline program.

III. Division Recommended Rule Language.

The Division's proposal for an amended rule is to simplify the rule to directly match that of the FCC. The minimum service quality standards that were higher than those of the FCC when promulgated are now significantly less than those required by the FCC for eligibility. The Division recommends deleting those requirements. Moreover, because the FCC will continue to support voice only in areas where voice is the only available service aligning the rule with the FCC eligibility will allow state Lifeline to continue support for those customers as well. The FCC identified a list of approximately 16,000 census blocks in Utah where it would continue supporting voice through November 30, 2022.⁶ Additionally there is a pending Petition for

⁶ See *Wireline Competition Bureau Announces Census Blocks in Which Eligible Lifeline Consumers Can Continue to Receive Discounted Voice-Only Lifeline Servs.*, No. 09-197, 2021 WL 2261586, at 1 (OHMSV June 1, 2021).

Reconsideration of the phase out of federal Lifeline support for voice-only service.⁷ Directly tying the Utah support eligibility to the FCC will result in the Utah rule continuing to remain consistent with the FCC if it changes course and delays or modifies the phase out of voice-only support.

The Division proposes the following amendments to the rule:

Legislative Redline:

(2)(a) The support claimed under this Subsection R746-8-403 may not exceed \$3.50 per Lifeline subscriber per month of subscription to a service that ~~:(i) provides service over landlines; or~~ meets FCC broadband Lifeline ~~requirements~~minimum service standards as set forth in 47 C.F.R. 54.408; ~~and~~

~~(B) for wireless Lifeline, allows, at no charge beyond the basic monthly fee, unlimited texting and at least 750 voice minutes per month; or~~

~~(iii) — (A) meets FCC broadband Lifeline requirements as set forth in 47 C.F.R. 54.408; and~~
~~(B) does not include a voice component.~~

(b) Lifeline distributions will be based on eligible Lifeline subscribers as of the first day of each month, with no prorated discounts.

Clean Version:

(2)(a) The support claimed under this Subsection R746-8-403 may not exceed \$3.50 per Lifeline subscriber per month of subscription to a service meets FCC broadband Lifeline minimum service standards as set forth in 47 C.F.R. 54.408.

(b) Lifeline distributions will be based on eligible Lifeline subscribers as of the first day of each month, with no prorated discounts.

⁷ Petition of NASUCA for Reconsideration, WC Docket No. 11-42 (filed June 23, 2016).

Submitted this 24th day of June 2021.

/s/ Justin C. Jetter
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