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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE)
UTAH UNIVERSAL SERVICE FUND) DOCKET NO. 18-054-01
RECOMMENDATION FOR)
UNION TELEPHONE COMPANY, INC.)

**COMMENTS OF UNION TELEPHONE COMPANY IN RESPONSE TO THE
“CALL FOR COMMENTS” ISSUED BY THE
UTAH PUBLIC SERVICE COMMISSION**

Union Telephone Company (“Union”) by and through its undersigned counsel, hereby provides the following Comments in response to the “Utah Universal Service Fund Recommendation for Union Telephone Company, Inc.” issued by the Division of Public Utilities (“DPU”)¹ which opened the above captioned docket at the Utah Public Service Commission (“Commission”).

I. Introduction and summary of Union’s Comments.

At this writing, north of Manila, Utah, trenchers are readying to plow fiber-optic cable from Union facilities in Wyoming to Manila and Christmas Meadows, Utah. The new fiber facilities will significantly upgrade telecommunications service in these communities. They are made possible by initiatives of the Federal Communications Commission (FCC) in providing funding pursuant to its Connect America Fund (CAF) and Alternative Connect America Cost Model (A-CAM). Although the communities of Manila and Christmas Meadows are the beneficiaries of these funding mechanisms, the

¹ In re USF recommendation for Union Telephone Company, 2019 Utah universal service fund recommendation for Union Telephone Company, Inc., Docket number 18 – 054 – 01, October 4, 2018.

construction of facilities is jeopardized by the recommendation of the DPU in negating universal service funding designated for Union.

The DPU Recommendation ² reduces Union's funding that it receives from the Utah Universal Public Telecommunications Service Support Fund (UUSF) by including A-CAM funding that Union receives in its UUSF calculations. In point of fact, while Union reports A-CAM revenues, it removes the associated costs from these revenue streams as part of its separations process. As a result of this there is a mismatch in the DPU review that must be addressed. Union believes that the Commission needs to carefully consider the review process as well as the interpretation of the UUSF statute and implementing regulations to ensure that they are consistent with federal initiatives. Accordingly, Union recommends that the Commission review the law and process, in light of the information presented herein.

II. Procedural Background

The DPU on October 4, 2018 issued its "2019 Utah Universal Service Fund Recommendation for Union Telephone Company, Inc." in which it provided the preliminary 2019 UUSF to be received by Union.³ In the DPU's comments it recommended Union's UUSF be reduced to \$0.00. The DPU mentioned increased federal interstate universal service fund revenue that Union received in 2017 as a reason for the reduction as it "materially impacted Union Telephone's draw on the Utah Universal Service Fund." The difficulty with the DPU recommendation was that it failed to recognize that Union had previously removed the associated costs from the equation. In the "Corrected DPU Comments" on UUSF status dated the same day on Docket No. 18-999-09⁴ the DPU identified three issues that need resolved where the DPU and providers have disagreed.⁵ These issues are: "Interest Synchronization"; "Prospective or Retroactive UUSF payments"; and "Excess Deferred Income Tax (EDIT)".⁶ While Union

² id

³ id.

⁴ corrected DPU comments on UUSF status, Utah PSC, Docket number 18-999-09, October 9, 2018.

⁵ id at pp. 2- 3

⁶ while unions main objection to the recommendation of the DPU relates to the inclusion of a cam funding, it joins with the Utah rural telephone Association (URTA) in addressing these 3 issues. In addition, union believes that the UUSF process must be reviewed to ensure that it is consistent with federal initiatives.

agrees that these issues should be reviewed, in addition, Union recommends that the Commission consider its actual process and regulations to ensure that they are correct and consistent with federal initiatives and that continued UUSF funding is stable, appropriate, consistent and predictable

III. Overview of FCC Reforms for Rate-of-Return Carriers

Initially, to understand Union's position on the UUSF, it is necessary to understand the present federal funding system. The Federal Communications Commission ("FCC") created the High Cost Universal Service program in 1997 after Congress directed it to replace its system of implicit telephone subsidies with "specific, predictable, and sufficient...mechanisms to preserve and advance universal service."⁷ In response, the FCC created the Federal Universal Service Fund ("FUSF"), whose High Cost mechanism would provide subsidies to telecommunications carriers serving rural, insular, and other areas where the cost to provide telephone service is high.⁸

For rate-of-return carriers, the FCC initially decided that support would ultimately be determined by a forward-looking cost model. In the interim, the FCC provided for High Cost Loop Support ("HCLS") to be paid based on embedded costs subject to an indexed cap, and other components to recover certain other types of costs.⁹ In 2001, the FCC released a pair of orders that reformed the embedded-cost methodology¹⁰ and added a new component, Interstate Common Line Support, ("ICLS")

⁷ 47 U.S.C. § 254(b)(5).

⁸ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 (1997) ("*First Report and Order*"). As it undertook to develop the new explicit support mechanisms, the FCC clarified that it did not have the authority to move all explicit subsidies into the federal mechanisms; as such, it did not "attempt to identify existing implicit universal service support presently effected through intrastate rates or other state mechanisms ... [or] to convert such implicit intrastate support into explicit federal universal service support." *Id.* at 8785.

⁹ *First Report and Order*, 12 FCC Rcd at 8929-30 paras. 281-82

¹⁰ See *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 96-45, CC Docket No. 00-256, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244 (2001) (*Rural Task Force Order*).

to allow carriers to recover interstate loop costs previously recovered through the Carrier Common Line charge.¹¹

As use of high-speed Internet access became more prevalent, the FCC adopted the USF/ICC Transformation Order, which comprehensively reformed and modernized the High Cost FUSF to support networks capable of providing both telecommunications and broadband service.¹² Among other things, the FCC created the Connect America Fund (“CAF”), which would serve as a modernized version of the High Cost FUSF. This included model-based support for price cap carriers (CAF Phases I and II) and Mobility Fund support for mobile wireless carriers. For rate-of-return carriers, the FCC adopted a series of measures, including broadband public interest obligations and new limits on various reimbursable expenses.

In 2016, having successfully implemented the model-based CAF support for price cap carriers, the FCC released an order that made significant changes to the FUSF mechanisms for rate of return carriers. Most importantly, the *Rate-of-Return Reform Order* offered such carriers the opportunity to voluntarily elect to receive support pursuant to a cost model, called the Alternative Connect America Cost Model (“A-CAM”).¹³ Carriers that did not opt into A-CAM would continue to receive HCLS as well as a modified form of support, called CAF Broadband Loop Support (“CAF-BLS”), that would replace the High Cost support component then known as ICLS.¹⁴ Both mechanisms were intended to:

¹¹ *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers et al.*, CC Docket No. 00-256 et al., 16 FCC Rcd 19613 (2001).

¹² See *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17668, para. 5 (2011) (*USF/ICC Transformation Order and/or FNPRM*); *aff’d sub nom.*, *In re: FCC 11- 161*, 753 F.3d 1015 (10th Cir. 2014) (*In re: FCC 11-161*).

¹³ *Connect America Fund et al.*, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3096, para. 20 (2016) (“*Rate-of-Return Reform Order*”).

¹⁴ See *id.* at 3117, para. 80.

...modernize the rate-of-return program to support the types of broadband offerings that consumers increasingly demand, efficiently target support to areas that need it the most, and establish concrete deployment obligations to ensure demonstrable progress in connecting unserved consumers.¹⁵

Carriers opting into A-CAM would receive model-based support for a term of 10 years on the condition that they deploy broadband-capable networks to a specific number of eligible locations.¹⁶ By providing this opportunity, the FCC hoped to “spur new broadband deployment in rural areas, which will help close the digital divide among rate-of-return carriers.”¹⁷ Support is not available in census blocks where an unsubsidized competitor is providing voice and qualifying broadband service.¹⁸

The support mechanism was designed to provide support for the cost of broadband-only loops, in addition to providing cost recovery for voice-only and voice-and-broadband loops.¹⁹ As with A-CAM, the FCC sought to “create appropriate incentives for carriers to deploy modern broadband-capable networks and to encourage consumer adoption of broadband services.”²⁰ At the same time, in a related proceeding the FCC set forth a new policy with respect to broadband internet access services (BIAS). In the recent net neutrality decision, the FCC found that broadband is an information service and not subject to regulation.²¹ Accordingly, as broadband services are not regulated, state regulation needs to be consistent with the federal policy.

IV. Utah’s Statutory and Regulatory Construct.

In the past, Utah’s legacy universal service fund was based on the traditional adjudicative rate-setting process. The system required the review of financial information provided to the Commission and determined as part of an adjudicative proceeding. As the UUSF legacy rate-setting process was thought to

¹⁵ *Id.* at 3087, para. 1.

¹⁶ *See id.* at 3096, para. 20.

¹⁷ *Id.*

¹⁸ *Id.* at 3102, para. 8.

¹⁹ *Id.* at 3120, para. 87.

²⁰ *Id.*

²¹ Order on Broadband Internet Service, 80 3FR7852-01, 2018 WL 995055 (F. R.), February 22, 2018.

be cumbersome and expensive, the Utah legislature amended the enabling statute to provide for a simplified and fixed process. On July 1, 2017, Senate Bill 130 went into effect as codified in Utah code section 54-8B-15.²² The new statute eliminated much of the review process associated with the then existing process, including the traditional rate-making tools associated with the adjudicative process. It adopted a rigid cost recovery analysis based on the federal HCLS analysis. The new methodology, while untested, was designed to reduce costs and expenses associated with the rate-setting process and assist companies in establishing UUSF qualifications. The Utah universal service statute known as the Utah Universal Telecommunications Public Support Service Fund states, in pertinent part as follows:

(2) (a) There is established an expendable special revenue fund known as the "Universal Public Telecommunications Service Support Fund."

(b) The fund shall provide a mechanism for a qualifying carrier of last resort to obtain specific, predictable, and sufficient funds to deploy and manage, for the purpose of providing service to end-users, networks capable of providing:

- (i) access lines;
- (ii) connections; or
- (iii) wholesale broadband Internet access service.

(c) The commission shall develop, by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, and consistent with this section, policies and procedures to govern the administration of the fund.

(3) Subject to this section, the commission shall use funds in the Universal Public Telecommunications Service Support Fund to:

- (a) fund the hearing and speech impaired program described in Section 54-8b-10;
- (b) fund a lifeline program that covers the reasonable cost to an eligible telecommunications carrier, as determined by the commission, to offer lifeline service consistent with the Federal Communications Commission's lifeline program for low-income consumers;
- (c) fund, for the purpose of providing service to end-users, a rate-of-return regulated or non-rate-of-return regulated carrier of last resort's deployment and management of networks capable of providing:
 - (i) access lines;
 - (ii) connections; or
 - (iii) wholesale broadband Internet access service that is consistent with Federal Communications Commission rules; and

* * * *

(4) (a) A rate-of-return regulated carrier of last resort is eligible for payment from the Universal Public Telecommunications Service Support Fund if:

- (i) the rate-of-return regulated carrier of last resort provides the services described in Subsections (3)(c)(i) through (iii); and
- (ii) the rate-of-return regulated carrier of last resort's reasonable costs, as determined by the commission, to provide public telecommunications service and wholesale broadband internet access service are greater than the sum of:

²² Utah Code section 54-8B-15.

- (A) the rate-of-return regulated carrier of last resort's revenue from basic residential service considered affordable by the commission;
- (B) the rate-of-return regulated carrier of last resort's regulated revenue derived from providing other public telecommunications service;
- (C) the rate-of-return regulated carrier of last resort's revenue from rates approved by the Federal Communications Commission for wholesale broadband Internet access service; and
- (D) the amount the rate-of-return regulated carrier of last resort receives from federal universal service funds.
- (5)** A rate-of-return regulated carrier of last resort that qualifies for funds under this section:
 - (a) is entitled to a rate of return equal to the weighted average cost of capital rate of return prescribed by the Federal Communications Commission for rate-of-return regulated carriers; and
 - (b) may use any depreciation method allowed by the Federal Communications Commission²³

The UUSF statute proves that the Commission shall promulgate regulations to implement the provisions of the statute. Accordingly, the Commission promulgated Regulations that define the process used in determining the amount allocated to carriers for the maintenance of universal service. The applicable Regulation, R746-8-401, contains this description:

- (1) A rate-of-return regulated provider is eligible for ongoing UUSF support pursuant to Utah Code Section 54-8b-15 if the provider:
 - (a) is a carrier of last resort;
 - (b) is in compliance with Commission orders and rules;
 - (c) unless a petition brought pursuant to Subsection R746-8-401(2) is granted after adjudication, charges, at a minimum, \$18 per access line;
 - (d) offers Lifeline service on terms and conditions prescribed by the Commission;
 - (e) operates as a facilities-based provider, not a reseller; and
 - (f) in compliance with R746-8-401(3), demonstrates through an adjudicative proceeding that its costs as established in Utah Code Section 54-8b-15 exceed its revenues as established in Utah Code Section 54-8b-15.
- (2)(a) A rate-of-return regulated provider may petition the Commission to deviate from the affordable base rate set forth in Subsection R746-8-401(1)(c).
- (b) A rate-of-return regulated provider that files a petition to deviate from the affordable base rate shall:
 - (i) demonstrate that the affordable base rate is not reasonable in the provider's designated support area; or
 - (ii) impute income up to the affordable base rate in calculating the provider's UUSF disbursement.
- (3) The calculation of a rate-of-return regulated provider's ongoing UUSF distribution shall conform to the following standards:
 - (a) The provider's state rate-of-return shall be equal to the weighted average cost of capital rate-of-return prescribed by the FCC for rate-of-return regulated carriers, as of the date of the provider's application for support, and as follows:
 - (A) beginning July 1, 2016: 11.0%
 - (B) beginning July 1, 2017: 10.75%;
 - (C) beginning July 1, 2018: 10.5%;

²³ Id.

- (D) beginning July 1, 2019, 10.25%;
- (E) beginning July 1, 2020, 10.0%; and
- (F) beginning July 1, 2021, 9.75%.

(b) The provider's depreciation costs shall be calculated as established in Utah Code Section 54-8b-15.

- (4) Yearly following a change in the FCC rate-of-return, unless the provider applies with the Commission a petition for review of its UUSF disbursement, the Division shall make a recommendation of whether each provider's monthly distribution should be adjusted according to:
- (a) the current FCC rate-of-return as set forth in R746-8-401(3)(a); and
 - (b) the provider's financial information from its last Annual Report filed with the Commission.²⁴

A review of the statute and the implementing regulations shows that the UUSF is a fund designed to assist telecommunications companies in preserving universal service by assisting their customers who have relatively high rates for exchange services, as well as funding programs for low-income and disabled subscribers. As noted in the statute, rate-of-return carriers, such as Union, can receive funds from the UUSF but only after consideration of any contributions from the federal universal service fund. This is defined in the regulations as “the amount the rate-of-return carrier of last resort receives from federal universal service funds”. As the statute and implementing regulations are new, Union believes that any interpretation of the new law should be accomplished in light of federal initiatives to ensure that the UUSF is stable, consistent and predictable.

In this Docket, Union is concerned that the DPU analysis fails to account for the method Union uses to submit its financial results. As broadband is not subject to regulation, the Commission must take this into account. Certainly, there must be a correlation between revenues and expenses. If Union removes costs from its submittal as part of the separations process, the DPU must recognize this to ensure that the process is not mismatched. In addition, there needs to be a correlation between the state process and federal programs

The Commission, in interpreting UUSF provisions and its regulations, must interpret them ever mindful of the evolving federal framework as part of its charge to protect the public interest. Given this charge, Union is concerned with the DPU Union Recommendation. In the *2019 USF recommendation for*

²⁴ R746-8-401

Union Telephone Company,²⁵ the DPU found that: “5) increased federal USF: Union received a substantial increase in federal interstate universal service fund revenue in 2017. This materially impacted Union telephones draw on the Utah universal service fund.” As Union realized increased federal USF funding, its UUSF was decreased to \$0.00 by the DPU.²⁶ Union is concerned with the recommendation because; 1) it does not take into account the exclusion of broadband related costs in the separations process; 2) the inconsistency between the Utah Act/Regulation and federal policy; and 3) the need to ensure that the UUSF is stable, consistent and predictable.

Union does not report its costs associated with broadband internet service as part of its financial results. These costs are excluded as part of the separations process and are not included in Union’s annual report, nevertheless revenues are included. While it would appear that this mismatch should be recognized and addressed, the DPU has included federal broadband revenues without a corresponding inclusion of the associated costs. This is an issue that should be addressed as Union is concerned that the UUSF is properly implemented.

Next, there is at least one inconsistency between the Utah legislation and federal law. In the new amendment to title 54-8B-15 effective 7/1/2017, it provides at Utah code section 54-8B-15 (1) (a) as follows: “Broadband Internet Access Service” means the same as that term is defined in 47 CFR Sec. 8.2,²⁷ notwithstanding this provision in the Utah statute, in the net neutrality order, the FCC held that broadband was not to be regulated. The FCC removed the definition of “broadband internet access service” from the CFR.²⁸ In explaining its decision, the FCC indicated that it was reclassifying broadband internet access service as a lightly regulated information service and ending public utility regulation of the

²⁵ 2019 USF recommendation for Union Telephone Company, you PSC, Docket number 18-054-01, October 4, 2019.

²⁶ Id at p. 2.

²⁷ broadband Internet access service is then defined in the rule at our 746-8-200 (1) (B) (3) as: "broadband Internet access service" is defined at Utah code subsection 54-8B-15 (1).

²⁸ in its order on broadband Internet service, 47 CFR section 8.2, the FCC on Thursday, February 22, 2018 ruled in 80 3FR7852-01, 2018 WL 995055 (F. R.) That it was ending public utility regulation of the Internet and reinstating the information service classification of broadband Internet access service consistent with the Supreme Court’s holding in *Brand X*. Consequently, the definition of broadband Internet access service was removed from the Code of Federal Regulations.

Internet. As a deregulated service, Union does not report the costs associated with broadband internet service to the Utah Commission. As there is an inconsistency between the Utah statute and federal law in the classification of broadband internet access service, the Commission must recognize it as a deregulated service and adjust its regulation.

Finally, Union's primary concern is that as the Act is implemented, it must be established to ensure that it is stable, consistent and predictable. As Union extends broadband services to its customers in Utah's rural communities, it must be able to rely on a regulatory regime that is consistent. Union is expending its resources to benefit its customers, it must be able to rely on a regulatory regime that will be available to it when funds have been expended in reliance on the system.

V. The UUSF must protect Utah Consumers.

Ultimately, the question for the Commission must be consistent with the public interest. As part of this analysis, the Commission must be aware of Union's efforts to provide enhanced services to its customers-including those customers who were soon to receive enhanced digital broadband services. This is consistent with the federal effort to expand broadband service. As noted above, the FCC in its "*Rate-of-Return Reform Order*" wanted to modernize the rate of return program in order to support greater broadband offerings-the type of advanced technologies that consumers were increasingly demanding. In electing to receive A-CAM funding, Union was required to complete the criteria that had been established by the FCC in its Order. In the short period of time that Union has been receiving A-CAM funding, its deployment of broadband and other technologically advanced services has been very beneficial to the customers in its service area.

Union's landline operations consist of 18 landline exchange areas spanning 7,400 square miles in Wyoming, Utah and Colorado. Four (4) of those exchanges, covering an area of 1,481 square miles, are in the North Eastern quadrant of Utah. Since Union accepted A-CAM funding, the company has deployed almost 20 new Digital Subscriber Line Access Multiplexer (DSLAMs) and invested nearly Two Million Dollars (\$2,000,000) installing fiber and upgrading backhaul and distribution plant to support further

DSLAMs and other high speed Broadband Loop deployment. Of great interest to its subscribers, Union just recently began a Passive Optical “Fiber to the Home” (FTTH) trial that is achieving in-excess of 900 Mbs transmission rate.

In extending these services, Union is meeting one of the core objectives of the *Rate-of-Return Reform Order* in that it is closing the gap for those parts of rural Utah/America that are in need of acceptable broadband. The *Rate-of-Return Reform Order* is directly aligned with Union’s broadband construction plans; as Union is moving forward in extending and expanding its broadband network relying on the UUSF and the continued receipt of universal service funding-whether state or federal. It would be a devastating blow to Union and its customers and contrary to the intent of the FCC rate-of-return reforms and Utah Code R746-8-401 (3)(a), to have its funding reduced while engaged in the very activity directed by the FCC and the policy of the state of Utah. Moreover, Union has made commitments to the FCC in receiving A-CAM funding that would be jeopardized by a reduction in UUSF funding.

VI. An adjudicative hearing in this matter may be necessary.

Union is appreciative for the opportunity to comment in this proceeding. Unfortunately, Union does not believe, given the context and importance of the issue, that the procedure outlined by the Commission is sufficient. As the DPU Recommendation was issued on October 4th and this initial brief is due on October 30; that is not sufficient time to adequately review or comment on an issue that is of such great importance to Union and other carriers. Accordingly, Union reserves the right to request an adjudicative hearing in this Docket.

While Union believes that it has a right to a hearing, Union persists in its position that the DPU recommendation should be revisited. Particularly, Union requests that any determination in regard to the UUSF methodology ensure that the future process will be stable, consistent and predictable. If the Commission takes the position in this proceeding that federal funding, including A-CAM funding, will be reported, that an adjustment needs to be made to broadband costs and more importantly, the same procedure must be applicable in the future.

VI. Contact Information.

In addition to counsel, the following can be contacted in regard to the representations contained herein:

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VII. Conclusion.

As Union is preparing to construct new and enhanced broadband facilities for its customers, consistent with federal initiatives, the UUSF should be consistent with these initiatives and encourage the deployment of these broadband facilities. As Union has a concern with the manner in which the UUSF is being implemented, as it impedes broadband investment, Union recommends that the Commission revisit and revise the UUSF regulation, recommendations and methodology to ensure that it is stable, predictable and consistent.

Dated this 30th day of October, 2018.

s/ Bruce S. Asay

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Union Comments was served the 30th day of October, 2018 as follows:

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