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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Overpayment of New Cingular Wireless PCS, LLC Into the Utah Universal Service Support Fund	Docket No. 24-087-02 NEW CINGULAR WIRELESS PCS, LLC'S LEGAL BRIEF ADDRESSING QUESTIONS POSED BY THE COMMISSION
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New Cingular Wireless PCS, LLC (“Company”) hereby submits this legal brief in response to the Commission’s May 3, 2024 Request for Legal Briefing to address two legal issues relating to the Company’s Application filed in this docket. Section I of this brief will discuss the legal authority pursuant to which the Commission, as opposed to a court of general jurisdiction, has jurisdiction to address legal issues in this docket. Section II of this brief will address the legal authority that provides substantive support for the Company’s request for recovery.

I. THE COMMISSION HAS EXCLUSIVE JURISDICTION TO ADDRESS LEGAL ISSUES IN THIS DOCKET

The legal issues raised by the Company's overpayment to the Utah Universal Service Fund ("UUSF") and request for a refund of the excess amounts paid fall within the broad jurisdictional authority granted to the Commission to manage and administer the UUSF. "[T]he PSC's general jurisdiction is 'broad and sweeping in scope.'" *Beaver v. Qwest, Inc.*, 2001 UT 81, ¶ 10, 31 P.3d 1147 (quoting *Utah Power & Light Co. v. Pub. Serv. Comm'n*, 152 P.2d 542, 555). Utah appellate courts have held that "courts are prohibited from exercising the powers properly belonging to the PSC, which is an arm of the legislative branch of government." *Id.* The Utah legislature has delegated broad jurisdictional authority to this Commission. For example, the Commission "is charged with discharging the duties and exercising the legislative, adjudicative, and rule-making powers committed to it by law and may sue and be sued in its own name." Utah Code § 54-1-1(2). In addition, the Commission "shall succeed to all powers and discharge all duties and perform all the functions which by existing and continuing law are conferred upon and required to be discharged or performed by the . . . Commission." *Id.* § 54-1-2(1). As set forth below, the Commission has jurisdiction to address legal issues in this docket because (A) the Commission has broad authority to manage and administer the UUSF, (B) the legal issues raised by the Company's request for relief fall well within the Commission's broad management and administrative authority over the UUSF, and (C) the Commission has previously exercised jurisdiction to manage UUSF overpayments.

A. The Legislature Delegated to the Commission Broad and Exclusive Authority to Administer the UUSF.

In addition to the Commission's broad jurisdictional powers discussed above, the Utah legislature also specifically delegated to the Commission the duty to administer the UUSF. In

Utah Code § 54-8b-15 (“UUSF Statute”), the legislature established the UUSF and directed the Commission to “develop, by rule . . . policies and procedures to govern the administration of the fund.” *Id.* § 54-8b-15(2)(c). The legislature also granted to the Commission specific powers regarding UUSF contributions and the use of UUSF funds. For example, the legislature required that “each access line provider and each connection provider shall contribute to the [UUSF] through an explicit charge,” *id.* § 54-8b-15(8)(a), and then directed the Commission to “calculate the amount of each explicit charge . . . using a method developed by the commission by rule.” *Id.* § 54-8b-15(9). The legislature further granted the Commission the authority to impose “applicable penalties” on any entity “that fails to make a required contribution to the fund . . . or that fails to comply with a commission directive concerning the person’s books, records, or other information required by the commission to administer” the UUSF. *Id.* § 54-8b-15(13). The legislature also directed the Commission to utilize UUSF funds for certain enumerated purposes and requires the Commission to oversee UUSF disbursements to carry out those purposes. *See, e.g., id.* § 54-8b-10(6) (empowering Commission to utilize UUSF funds to provide telecommunications devices to enable deaf, hard of hearing, or severely impaired individuals to utilize phone and to “create disbursement criteria and procedures by rule” for administering funds for this purpose); *Id.* § 54-8b-15(3) to (7) (directing Commission to utilize UUSF to fund specific services, to determine provider’s “reasonable cost” of providing such services, and to utilize UUSF to reimburse providers for such reasonable costs).

The legislature’s broad delegation to the Commission of administrative authority over the UUSF, combined with the specific grants of power listed above, evidence an intent that UUSF oversight is a function exclusive to the Commission. The Utah Supreme Court addressed powers delegated exclusively the Commission in *Beaver v. Qwest*, 2001 UT 81, 31 P.3d 1147. In *Beaver*,

the Court ruled that the Commission had exclusive jurisdiction to determine the proper disposition of a \$16.9 million award to Qwest resulting from an overpayment of property taxes to various counties. *Id.* 2001 UT 81, ¶¶ 1-9. The counties stipulated that Qwest had overpaid its property taxes but deposited the \$16.9 million overpayment with the district court and asserted that the funds should be paid to the taxpayers rather than to Qwest because Qwest had already recovered the overpayment amount from its ratepayers through rates. *Id.*, ¶ 3. Actions were filed both in district court and with this Commission regarding the matter, and the district court asserted that it lacked subject matter jurisdiction on the grounds that the remedy sought by the counties required rate making or rate adjustments, which were “legislative functions delegated exclusively to the PSC and the court’s exercise of the rate making function would violate the constitutional principle of separation of powers.” *Id.* ¶ 4.

The Utah Supreme Court agreed, ruling on appeal that “any resolution of the Counties’ claim would require inquiry into Qwest’s rate structure and other regulatory matters,” that “courts are prohibited from exercising the powers properly belonging to the PSC, which is an arm of the legislative branch of government,” and that “the legislature specifically outlined rate making as a delegated function exclusive to the Commission.” *Id.* ¶¶ 9-11. The Court rejected the counties’ arguments claiming that the district court had jurisdiction over the matter, noting that “[t]he case at bar does not involve a claim of tort or breach of contract” over which courts and not the Commission have jurisdiction, and noted that “the decision regarding whether a tax refund to Qwest from the Tax Commission was considered in assessing rates charged to ratepayers is an issue inextricably intertwined with an investigation in to the makeup of rates charged by Qwest” and that, therefore, “jurisdiction properly lies with the PSC.” *Id.* ¶ 17.

As with rate making and rate adjustments, administration of the UUSF is a function delegated exclusively to the Commission. *See* Utah Code § 54-8b-15(2)(c) (requiring Commission to develop rules “to govern the administration of the fund.”). In delegating authority to state agencies, the legislature may delegate exclusive powers to one agency or may “create[] a statutory scheme that contemplates proceedings in different tribunals affording possibly different remedies.” *Mack v. Utah State Dept. of Commerce, Division of Securities*, 2009 UT 47, ¶ 33, 221 P.3d 194 (outlining split of adjudicative authority in Securities Act). When delegating administrative authority over the UUSF to the Commission, the legislature did not—either expressly or impliedly—split authority between the Commission and some other legislative or adjudicative body. The UUSF Statute reserves no role for the district courts to administer or manage the UUSF. Rather, the legislature delegated exclusive authority to the Commission to address matters affecting the UUSF.

The Commission has previously acknowledged that the UUSF Statute granted to it the broad authority to “manage” the UUSF. *See Investigation into Management of the Utah Universal Service Fund Contribution Method*, Docket No. 18-999-15, Notice of Investigation and Comment Period dated October 9, 2018 (“Utah Code Ann. § 54-8b-15 requires the Public Service Commission of Utah (‘PSC’) to manage the Universal Public Telecommunications Service Support Fund, commonly referred to as the Utah Universal Service Fund (‘UUSF’).”).

As set forth below, the legal issues raised in this docket—whether the Company paid an amount to the UUSF that exceeds the “explicit charge” set by the Commission and whether the Commission should grant a refund of that overpayment—are “inextricably intertwined” with the Commission’s administration of the UUSF and, therefore, the Commission has exclusive

jurisdiction to address those issues. *Beaver*, 2001 UT 81 ¶ 17 (noting that Commission has exclusive jurisdiction when remedy is “inextricably intertwined” with rate making function).

B. The Company’s Request for Relief Falls Well Within the Commission’s Broad Authority to Manage and Administer the UUSF.

The Company’s request that the Commission refund the amounts that the Company overpaid to the UUSF directly implicates the Commission’s management and administrative authority over the UUSF and falls well within the Commission’s jurisdiction. The “functions . . . conferred upon and required to be discharged or performed by the . . . Commission,” include the requirement that the Commission manage and administer the UUSF and, therefore, the Commission “shall succeed to all powers and discharge all duties and perform all the functions,” associated with administering the UUSF, which include the power to address the legal issues and grant the relief requested here. Utah Code § 54-1-2(1).

The Commission has jurisdiction to grant remedies that implicate regulatory powers within its jurisdiction but lacks authority to grant remedies for claims of tortious conduct or contract liability unrelated to Commission regulation. *See Beaver*, 2001 UT 81, ¶ 9, 31 P.3d 1147 (ruling that district court lacked jurisdiction over disposition of utility’s property tax overpayment amount because “any resolution of the Counties’ claim would require inquiry into Qwest’s rate structure and other regulatory matters” which are subject to exclusive PSC jurisdiction); *Garkane Power Ass’n v. Public Service Commission*, 681 P.2d 1196, 1207 (Utah 1984) (noting that “not every contract entered into by a public utility is subject to the jurisdiction of the PSC,” but Commission has jurisdiction when the contract “dispute is clearly one that involves the validity of electric rates” and, therefore had power to order a utility to issue a refund when it overcharged a customer); *Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 334 (Utah 1985) (“A utility’s actions which give rise to tortious or contractual liability and which do not call in question the

validity of orders of the PSC or trench upon its delegated powers are subject to the jurisdiction of the district court.”); *McCune v. Mountain Bell Telephone*, 758 P.2d 914, 916 (Utah 1988) (noting that PSC “may order the restoration of service and the removal of improper charges” imposed on a customer, but that “[i]t is the district court, not the Commission, that has jurisdiction to consider claims for damages for wrongful disconnection or other torts committed by a public utility.”). The Company’s request for a refund of amounts overpaid to the UUSF is not a claim for tort damages but, rather, is within the Commission’s jurisdiction because it implicates the Commission’s role as UUSF administrator.

The Application calls on the Commission to review the Company’s UUSF contributions from June 2021 through June 2023 and to compare those amounts with the amounts the Company *should have* contributed had it utilized the proper UUSF surcharge. Decisions that impact UUSF balances are within the Commission’s role in administering the UUSF. *WWC Holding Co., Inc. v. PSC*, 2002 UT 23, ¶¶ 15-16, 44 P.3d 714 (noting that “the PSC could legitimately consider impact on the [UUSF] in determining public interest” when making decision regarding ETC designation). Determining the amount the Company *should have* remitted is within the Commission’s exclusive jurisdiction. *See* Utah Code § 54-8b-15(13) (“A person that fails to make a required contribution to the fund created by this section, or that fails to comply with a commission directive concerning the person’s books, records, or other information required by the commission to administer this section, is subject to applicable penalties.”). The Company’s requested remedy is “inextricably intertwined” with the Commission’s authority to administer the UUSF and, therefore, the Commission has exclusive jurisdiction to grant that remedy. *See Beaver*, 2001 UT 81, ¶ 17 (finding PSC has exclusive jurisdiction remedy sought is “inextricably intertwined” with regulatory function delegated to it).

Neither the UUSF Statute nor the rules enacted by the Commission to administer the UUSF specifically address what action the Commission should take when a provider inadvertently contributes amounts to the UUSF in excess of the amounts it is required to contribute. The lack of specific guidance on this issue does not mean that the Commission lacks jurisdiction over it. *See White River Shale Oil Corp. v. Public Service Commission*, 700 P.2d 1088, 1092 (Utah 1985) (“The legislature need not lay down a detailed and specific set of guidelines which covers every conceivable problem that might arise in implementing the legislation. It is sufficient if there are general policies and standards articulated which provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.”).

The broad authority delegated to the Commission to administer the UUSF includes the power to take corrective action in an adjudicative setting such as this one when amounts contributed to the UUSF exceed the amount required by the UUSF Statute. *See Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245, 1253 (Utah 1992) (“Rules of law developed in the context of agency adjudication are as binding as those promulgated by agency rulemaking.”). The Commission is authorized by the Utah Administrative Rulemaking Act to enact a decisional rule in this docket indicating how it will handle funds contributed to the UUSF in excess of the UUSF surcharge. *See Utah Code § 63G-3-201(6)* (“Each agency shall enact rules incorporating the principles of law not already in its rules that are established by final adjudicative decisions within 120 days after the decision is announced in its cases.”). In short, the Commission has exclusive administrative authority to issue the refund sought by the Company in this docket.

C. The Commission has Previously Exercised Jurisdiction to Manage Overpayments To and From the UUSF.

The Company is aware of two previous dockets in which the Commission has been asked to exercise its UUSF administrative powers to correct mistakes or imbalances regarding UUSF

payments. In both dockets, the Commission exercised jurisdiction to address the legal issues raised and ordered refunds either to or from the UUSF to address the overpayments.

In Docket No. 15-999-03, the Company notified the Commission that it had improperly calculated its UUSF obligations and that, as a result, had overpaid amounts into the UUSF. *See Ex. 1 (In the Matter of Overpayment of New Cingular Wireless PCS, LLC Into the Utah Universal Support Fund, Docket No. 15-999-03, Order issued Jan. 7, 2016)*. The Commission confirmed the overpayment and granted the Company's request for a refund in the amount of \$29,129.58. *Id.* at 1. The Commission found that the refund was "justified and in the public interest," and that the "requested refund [was] to be given as a one-time credit" against the Company's next UUSF remittance payment. *Id.* at 2. In short, the Commission in Docket No. 15-999-03 exercised its jurisdiction to issue a refund of amounts overpaid into the UUSF. In the present docket, the Company seeks the same type of remedy it requested in Docket No. 15-999-03 and the Commission jurisdiction over this issue, just as it had jurisdiction in 2015.

The Commission has also exercised its UUSF management authority to order a provider to refund to the UUSF a portion of UUSF distributions it had received that the Commission later determined were in excess of the proper amounts. In Docket No. 08-046-01, the Commission adjudicated Manti Telephone Company's request for a rate increase and, during the course of that docket, considered and approved various settlement stipulations. Among the issues addressed in the docket was an interim award of UUSF funds that exceeded the amount the Commission ultimately determined was proper. This determination "necessitated a repayment of the excess UUSF received." *See Ex. 2 (In the Matter of Manti Telephone Company's Application for Increased USF Eligibility, Docket No. 13-046-01, Report and Order Approving Settlement Stipulation dated Feb. 19, 2014, at 1 (summarizing UUSF repayment orders in Docket No. 08-*

046-01). In short, the Commission in Docket No. 08-046-01 exercised its jurisdiction to require a recipient of UUSF distributions to repay a portion of those excess UUSF distributions when the amounts distributed were incorrect.

Both prior Commission dockets referenced above demonstrate that the Commission has exercised its jurisdictional authority to order remedies to address situations in which amounts have been overpaid to or from the UUSF. The Commission's authority to address these situations stems from its role as the administrator of the UUSF.

D. Conclusion

As set forth above, the UUSF Statute grants the Commission broad and exclusive authority to administer the UUSF, the legal issues raised in this docket call on the Commission to exercise its exclusive administrative authority over the UUSF, and the relief sought herein is identical to UUSF issues adjudicated by this Commission in prior dockets. For these reasons, the Commission has jurisdiction to address the legal issues raised and to grant the relief sought in this docket.

II. UTAH LAW SUPPORTS THE COMPANY'S REQUEST FOR A REFUND OF EXCESS AMOUNTS CONTRIBUTED TO THE UUSF

Utah law requires the Company to contribute to the UUSF based only on the "explicit charge" set by the Commission and requires the Commission to implement the explicit charge in a competitively neutral manner, which would include ordering a refund of all amounts the Company contributed in excess of that explicit charge. The UUSF Statute requires that "each access line provider and each connection provider shall contribute to the [UUSF] through an explicit charge assessed by the commission." Utah Code § 54-8b-15(8)(a). This explicit charge is to be set based on a "method developed by the commission" in its role as UUSF administrator. *Id.* § 54-8b-15(9). In developing this explicit charge, the Commission must ensure that it "does not discriminate against: (i) any access line or connection provider; or (ii) the technology used by

any access line or connection provider;” and that it “is competitively neutral.” *Id.* § 54-8b-15(9)(a)-(b). The mandate that the explicit charge shall not discriminate against any provider and that it be competitively neutral requires the Commission to impose the same UUSF surcharge on all providers. As set forth below, (A) a Commission order granting the Company’s request for relief gives effect to the UUSF Statute, and (B) the UUSF Statute does not authorize the Commission to retain amounts overpaid into the UUSF.

A. A Commission Order Granting the Company’s Request for Relief Gives Effect to the UUSF Statute.

A Commission order granting the Company’s request for a refund of the amounts it overpaid to the UUSF from June 2021 through June of 2023 would give effect to the “explicit charge” set by the Commission during this period and would ensure that the charge applied to the Company is non-discriminatory and competitively neutral. As noted above, the UUSF Statute requires providers to contribute to the UUSF “through an explicit charge assessed by the Commission.” Utah Code § 54-8b-15(8)(a). The explicit charge assessed by the Commission during the period in question was \$0.36 per access line. The Company remitted to the UUSF an amount equivalent to \$0.54 per access line. The Company seeks a refund of the amount it paid in excess of the applicable \$0.36 per access line charge. A Commission order granting the requested refund ensures that the Company contributes to the UUSF through the “explicit charge” without contributing more than that “explicit charge.” As such, a Commission order granting the requested refund gives effect to its order reducing the UUSF surcharge from \$0.54 to \$0.36 per access line.

Moreover, a Commission order granting the requested refund further gives effect to the requirement that the explicit charge be non-discriminatory and competitively neutral. As noted above, the Commission must impose the same UUSF surcharge on all access line and connection providers. The Commission imposed a \$0.36 per access line surcharge on all providers. An order

granting the Company's refund request would ensure that the Company remits the same surcharge during the relevant period as did all other providers.

In addition, a Commission order granting the Company's request for a refund would also give effect to the Commission rule setting the explicit charge. The UUSF surcharge is set forth in Utah Administrative Code § R746-8-301(1). When the Commission changed the per access line UUSF surcharge from \$0.54 per to \$0.36, it set forth the explicit charge in Subsection (1)(a) of the Rule. *See Ex. 3 (Proposed Amendment to Utah Admin. Code R746-R008-01, Calculation and Application of UUSF Surcharge, Docket No. 21-R008-01, Final Notice of Proposed Rule Amendment dated April 28, 2021)*. It then indicated in Subsection (1)(e)(iii) that "\$0.36 per month is both the maximum and minimum of remittance necessary for any single access line." *Id.* That is, the Commission rule confirms that \$0.36 per access line was the maximum amount any provider is required to contribute to satisfy the requirement that it "contribute to the [UUSF] through an explicit charge assessed by the commission." Utah Code § 54-8b-15(8)(a). A Commission order granting the Company's requested refund would give effect to the Commission rules by affirming that \$0.36 per access line is the maximum amount the Company is required to submit for the period July 2021 through June 2023.

Finally, a Commission order granting the Company's request for a refund of the amounts overpaid to the UUSF is consistent with the Commission's prior actions in addressing an identical factual situation. As discussed in Section I.C., above, in Docket No. 15-999-03 the Commission granted a refund of the Company's overpayment to the UUSF in a factual scenario that is substantially similar to the one presented in this docket. *See Ex. 1 (Docket No. 15-999-03, Order issued Jan. 7, 2016)*. In that docket, the Company notified the Commission that it had improperly calculated its UUSF obligations and, therefore, had overpaid amounts to the UUSF. The

Commission confirmed the overpayment and granted the Company's request for a refund, finding that the refund (issued as a one-time credit against future UUSF obligations) was "justified and in the public interest." *Id.* at 2. The Commission should grant the Company's request for a refund in this docket because it is consistent with the Commission's prior practice and there is no fair and rational basis for the Commission to deviate from its prior practice on this issue.

In short, the Company's request for a refund of the overpayment to the UUSF is supported by the UUSF Statute, the Commission rules implementing the UUSF Statute, and the Commission's prior practice in addressing a factual scenario substantially similar to the one presented in this docket.

B. The UUSF Statute Does Not Authorize the Commission to Retain Amounts Overpaid into the UUSF.

When a provider contributes to the UUSF amounts that exceed the explicit charge set by the Commission, neither the UUSF Statute nor Commission rules support a Commission decision to decline a refund request and retain the overpayment amounts. A Commission decision to decline to issue a refund to a provider that contributes to the UUSF in excess of the explicit charge set by the Commission would have the effect of (1) imposing a UUSF surcharge on the provider that exceeds the explicit charge set by the Commission, (2) imposing a UUSF surcharge on the provider that is different from the UUSF surcharge that is imposed on all other providers and (3) establishing a practice that will lead to "unreasonable balances".

First, the Commission may not impose on any provider a UUSF surcharge that exceeds the "explicit charge assessed by the Commission." Utah Code § 54-8b-15(8)(a). The Commission declares the "explicit charge" that it sets to be the "maximum and the minimum" amount a provider is required to contribute to the UUSF. Utah Admin. Code R746-8-301(1)(e)(iii). An order declining to grant a refund to a provider that contributes amounts that exceed the explicit charge

would have the same effect as imposing a UUSF surcharge that exceeds the maximum amount a provider is required to contribute to the UUSF.

Second, the Commission may not impose a UUSF surcharge on one provider that is different from the UUSF surcharge that is imposed on all other providers. The Commission is directed to set the “explicit charge” that providers must pay, but that explicit charge must be one that “does not discriminate against any access line or connection provider” and that is “competitively neutral.” Utah Code § 54-8b-15(9)(a)-(b). An order declining to grant a refund to a provider that contributes amounts that exceed the explicit charge would have the same effect as imposing a UUSF surcharge on that provider that differs from the UUSF surcharge imposed on all other providers and would violate the UUSF Statute.

Third, a Commission order declining to issue a refund to a provider that contributes UUSF amounts in excess of the explicit charge set by the Commission would establish a standard that would create unreasonable balances in the UUSF. In its 2021 Notice indicating its intent to amend the per access line UUSF surcharge from \$0.54 to \$0.36, the Commission acknowledged that it sets the surcharge to enable it to accomplish the goal of funding the UUSF without accruing an unreasonable UUSF balance. Specifically, the Commission modified the “remittal amount from \$0.54 to \$0.36 per access line to ensure the UUSF remains at a manageable level to meet the fund’s statutory obligations and does not accrue unreasonable balances beyond those obligations.” Ex. 3 (21-R008-01 Notice issued April 26, 2021 at 1 (noting “Purpose of the new rule or reason for the change”)). A Commission order that declines to refund excess amounts contributed to the UUSF would result in the accrual of unreasonable UUSF balances beyond that necessary to meet the obligations delegated to the Commission in the UUSF Statute. Nothing in the UUSF Statute authorizes the Commission to retain the excess funds or to accrue such unreasonable balances.

C. Conclusion

The UUSF Statute and Commission rules adopted to govern administration of the UUSF support a Commission order granting the Company's request for relief in this docket. A Commission order granting a refund of amounts contributed to the UUSF in excess of the UUSF surcharge ensures that the UUSF surcharge is applied in a non-discriminatory and competitively neutral manner and is consistent with the Commission's prior practice. There is no authority in the UUSF Statute or Commission rules that would permit the Commission to retain the excess funds contributed by the Company and, as such, Utah law supports the Company's request for relief.

DATED this 30th day of May 2024.

Respectfully submitted,



/s/

Phillip J. Russell

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Certificate of Service
Docket No. 24-087-02

I hereby certify that a true and correct copy of the foregoing was served by email this 30th day of May 2024 on the following:

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