
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

REPLY COMMENTS OF CTIA

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CTIA – The Wireless Association[®] (“CTIA”) files these reply comments in response to the Order on Request to File Reply Comments¹ in the above-captioned Docket (“Order on Request”), issued by the Public Service Commission of Utah (“Commission” or “PSC”) on July 12, 2017.

I. INTRODUCTION AND SUMMARY

In its Order on Request, the Commission granted CenturyLink’s petition for reply comments in this proceeding, and particularly solicited replies addressing (1) the comments from AT&T and CTIA, and (2) legal issues affecting the assessment of VoIP contributions.²

As discussed in more detail below, the comments from AT&T raise a number of issues regarding the Commission’s proposed decision (“Proposed Rule” or “Rule”) to adopt a per-connection assessment for the Utah Universal Public Telecommunications Service Support Fund (“UUSF”). Specifically, the proposed UUSF contribution mechanism is discriminatory and not competitively neutral as required under Utah law;³ fails to clarify adequately that surcharges are

¹ Notice of Rulemaking and Response to Comments, *In the Matter of the Utah Administrative Code R746-360 Universal Public Telecommunications Service Support Fund*, Docket No. 17-R360-01 (issued July 12, 2017) (“Order on Request”).

² Order on Request at 1.

³ See Utah Code § 54-8b-15(9)(a)-(b).

limited to those services subject to state assessment under Utah and federal law; does not comply with S.B. 130⁴ and its requirement of compliance with the Mobile Telecommunications Sourcing Act (“MTSA”);⁵ and unfairly or inequitably burdens the many Utah consumers who take advantage of all-in, flat-rate plans.

With regard to interconnected voice over Internet protocol (“VoIP”), the scope of the Commission’s authority to require contributions is clear, but the proposed shift to a per-connection assessment will complicate, not facilitate, ensuring contributions consistent with governing law. CTIA also clarifies that it has not argued that federal law requires the Commission to use the same contribution methodology as the Federal Communications Commission (“FCC”); rather, federal law simply requires the Commission to ensure that its methodology does not burden the federal mechanism – which the Commission has not done.

II. AT&T’S COMMENTS RAISE IMPORTANT CONCERNS THAT THE COMMISSION SHOULD ADDRESS

As AT&T observes in its comments,⁶ the Proposed Rule leaves unresolved many important questions that must be answered before the Commission can require carriers to comply with new obligations. Perhaps most significantly, the current definitions of “access lines”⁷ and “connections”⁸ require amendment and clarification so that they do not impose contribution

⁴ 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 [Mobile Telecommunications Sourcing Act].”

⁵ See 4 U.S.C. §§ 106-252 (2017).

⁶ Reply Comments of AT&T, Utah Public Services Commission Docket No. 17-R360-01 (filed July 3, 2017) (“AT&T Reply Comments”).

⁷ Under Utah Code § 54-8b-2(1), “access line” means a circuit-switched connection, or the functional equivalent of a circuit-switched connection, from an end-user to the public switched network. *Id.*

⁸ Under Utah Code § 54-8b-15(1)(c), “connection” means an authorized session that uses Internet protocol or a functionally equivalent technology standard to enable an end-user to initiate or receive a call from the public switched network. *Id.*

obligations that are inconsistent with the Utah Code,⁹ the Mobile Telecommunications Sourcing Act,¹⁰ and federal law. Further, the Rule’s requirement that the UUSF surcharge be imposed as a charge separate from “the provider’s rates or telecommunications revenues”¹¹ may interfere with the sale and availability of all-inclusive flat-rate service plans that are popular with Utah consumers, particularly low-income consumers. Left unresolved, these issues would leave the Proposed Rule vulnerable to legal challenge, carriers unsure as to their regulatory obligations, and Utah’s consumers with fewer and more costly service options.

A. The Commission’s Proposal is Discriminatory and not Competitively Neutral, and Therefore Unlawful

As AT&T points out, the Proposed Rule provides no explanation of how per-access-line surcharges should be assessed and collected on the revenues from prepaid wireless services.¹² The Proposed Rule requires providers to “collect [UUSF surcharges] from their end-user customers,” but many customers on prepaid service plans replenish their accounts through “top-up” or refill cards sold at third-party retailers.¹³ The Commission does not currently have the authority to require point-of-sale collection of surcharges from non-carrier retailers, and Utah would need to enact specific legislation to empower the PSC to provide for point-of-sale surcharge collection. Until such legislation is promulgated, however, the ongoing failure to assess the large market segment for prepaid wireless services could result in an underfunded UUSF.

⁹ *Id.*, § 54-8b-15(9)(a)-(b).

¹⁰ 4 U.S.C. §§ 106-252.

¹¹ Proposed Rule, R746-360-4(3)(b).

¹² AT&T Comments at 4-6.

¹³ *Id.*, § (3)(a).

Moreover, during any period in which prepaid wireless connections were excluded from UUSF surcharges, providers of prepaid wireless connections would be unfairly advantaged. Utah Code Section 54-8b-15 requires contributions to be assessed on a non-discriminatory basis, and the Commission’s proposed methodology would be neither fair nor competitively neutral.¹⁴ And there is no apparent way of amending the Proposed Rule to take account of prepaid services accurately, predictably, and equitably. The Proposed Rule rests on the notion that providers bill their subscribers each month, such that each monthly bill would include a separate UUSF surcharge line-item. This notion is wholly misaligned with prepaid service. Prepaid subscribers do not purchase service on a monthly basis, and thus are not billed for service on a monthly basis. Some prepaid subscribers may purchase multiple top-up cards in a month, and some may purchase no top-up cards at all. Because each consumer effectively controls his or her own billing cycle, there is no way to incorporate a UUSF collection mechanism that assumes a monthly billing cycle for each subscriber. A revenue-based approach is the only appropriate methodology for assessing UUSF in the prepaid context.¹⁵ Given the popularity of prepaid service, especially among low-income consumers, as well as the nondiscrimination requirements of the Utah Code, the Commission should maintain the existing UUSF collection mechanism.

Because the Proposed Rule inadequately addresses the prepaid wireless market and runs afoul of statutory provisions requiring non-discriminatory and competitively neutral surcharges,

¹⁴ Utah Code § 54-8b-15(9)(a)-(b). *See also* 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”) (quoting Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 47 (1997)).

¹⁵ As noted *supra*, collection of surcharges at the point of sale is the most appropriate mechanism for collection of surcharges from prepaid wireless carriers’ customers, but without a legislative change, such an approach cannot be implemented. And even were a point of sale approach implemented, a revenue-based collection methodology would still be needed to avoid inequitable application of surcharges based on purchasing patterns.

the Commission should not depart from the current revenue-based model until appropriate legislation permitting point-of-sale UUSF surcharge collection has been enacted.

B. The Commission’s Proposal Exceeds its Jurisdiction by Imposing UUSF Contribution Obligations Upon Providers of Certain “Equipment or Technology”

AT&T also points out that Section (1)(b) of the Proposed Rule adopts the statutory definition of “access line,”¹⁶ yet it needlessly and problematically adds that the definition includes “equipment or technology that allows an end-user to place or receive a real-time voice communication.”¹⁷ The Proposed Rule’s definition of “access line” must be modified to ensure that only intrastate telecommunications *services* subject to the Commission’s jurisdiction are assessed for UUSF contributions.

CTIA agrees with both AT&T and URТА that the Commission does not have jurisdiction to assess UUSF contribution obligations on “equipment or technology.”¹⁸ As URТА observes in its comments, Utah Code Section 54-8b-15 was drafted carefully to ensure that “equipment providers whose equipment merely facilitates connection to the public switched network would not be subject to the surcharge unless they also provide the service that permits connection to the public switched network.”¹⁹ Because Section (1)(b) of the Proposed Rule potentially imposes the UUSF surcharge on providers of equipment “that allow[] users to place or receive ... real-time voice communication[s]”, such as mobile device manufacturers, CTIA agrees with URТА that this Section should be struck from the Proposed Rule.²⁰

¹⁶ Utah Code § 54-8b-2; *see also supra* note 8.

¹⁷ Proposed Rule, R746-360-4(1)(b). *See also* AT&T Comments at 3-4.

¹⁸ AT&T Reply Comments at 3; Comments of URТА at 2-3 (“URТА Comments”), Utah Public Service Commission Docket No. 17-R360-01 (filed July 3, 2017).

¹⁹ URТА Comments at 3.

²⁰ *Id.* at 2-3.

Indeed, although CTIA disagrees with URTA regarding the adoption of a connections-based methodology, CTIA generally finds URTA’s proposed modifications to the Proposed Rule to be constructive.²¹ That said, CTIA rejects any implication that providers of broadband connections over which VoIP services are provided should be required to contribute to the UUSF.²² The FCC in 2015 explicitly preempted “the imposition of [new] state-level contributions on broadband providers” with regard to universal service.²³ Accordingly, the final rule must unambiguously affirm that broadband-only connections are not subject to UUSF assessment.

C. The Commission’s Proposal Fails to Conform to the MTSA, in Violation of S.B. 130

AT&T also correctly observes that the Proposed Rule does not limit the jurisdictional scope of the UUSF assessment in a manner consistent with the Mobile Telecommunications Sourcing Act (“MTSA”), as both S.B. 130 and the MTSA require.²⁴ Under S.B. 130, the Commission can only assess universal service obligations “to the extent permitted by MTSA.”²⁵ 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.²⁶ In this way, the MTSA ensures that the rules

²¹ See URTA Comments at 2-4.

²² See *id.* at 3.

²³ Report and Order on Remand, Declaratory Ruling, and Order, *In the Matter of Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, ¶¶ 431-32 (2015) (“With respect to universal service, we conclude that the imposition of state-level contributions on broadband providers that do not presently contribute would be inconsistent with our decision at the present time to forbear from mandatory federal USF contributions, and therefore we preempt any state from imposing any new state USF contributions on broadband.”) See also *infra* Section IV.

²⁴ AT&T Comments at 8-9. S.B. 130 requires the Commission to assess universal service “only to the extent permitted by the MTSA.” Utah Code § 54-8b-10(11) (2016).

²⁵ See 4 U.S.C. §§ 106-252 (2017).

²⁶ 4 U.S.C. § 117. Under MTSA, “the term ‘place of primary use’ means the street address representative of where the customer’s use of the mobile telecommunications service primarily occurs, which must be

for universal service programs are harmonized among the states, preventing multiple jurisdictions from assessing overlapping contribution obligations on the same intrastate revenue.²⁷

The Proposed Rule diverges from the MTSA and establishes two different standards: surcharged access lines could either have “a physical endpoint within the State of Utah” or could have “record of an associated address within the State of Utah,”²⁸ Both of these standards could lead to the assessment of connections that do not have their place of primary use in Utah, in violation of the MTSA. As CTIA previously explained, notwithstanding a user’s “place of primary use” in another state or country, “vacationers or other visitors to Utah could make use of access lines that only briefly have endpoints in the state. Conversely, customers who retain Utah billing addresses but who have temporarily or permanently left Utah—for example, for college or military service—would also be subject to UUSF surcharges.”²⁹ Customers in these common circumstances would be concurrently assessed for universal service contributions in more than one state, in clear contravention of federal law.³⁰

(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.” *Id.*

²⁷ Indeed, for this reason, the FCC has recommended that states model their universal service contribution obligations on MTSA for interconnected VoIP services as well. *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.”)

²⁸ Proposed Rule, R746-360-4(3)(a)(i)-(ii).

²⁹ Comments of CTIA (“CTIA Comments”), Utah Public Services Commission Docket No. 17-R360-01 (filed July 3, 2017).

³⁰ *See KS/NE Declaratory Ruling*, ¶¶ 19-21.

As AT&T notes, the proposed waiver and exemption procedure is no solution: the Commission cannot adopt a mechanism that will inevitably conflict with state and federal law based on a promise to come into compliance if and when end users object via a waiver request. Further, the waiver procedure itself is impracticable, burdensome, and time-consuming to implement.³¹ In order to obtain a one-year waiver, an end-user petitioner must demonstrate that an access line “was not used to access Utah intrastate telecommunications services” for the “six calendar months preceding the date of the petition” in an “informal administrative proceeding.”³² As AT&T aptly observes, the Proposed Rule imposes upon carriers the enormous burden of constantly monitoring potentially thousands of waivers and then manually exempting individual customers from UUSF assessments: certainly, a “burdensome” task “for any company, especially those whose systems and processes are scaled to deliver services to tens of millions of customers.”³³ Thus, to comply with S.B. 130 and the MTSA, and to avoid any onerous waiver procedures, the Commission can simply align the geographic scope of the Proposed Rule with the MTSA.

D. The Commission Should Not Require UUSF Contributions to be Reflected ‘as a Separate Charge’

The Proposed Rule’s requirement that UUSF surcharges be collected from end-user customers “as a separate charge ... not included in, nor paid from, the provider’s rates or telecommunications revenues”³⁴ would mean the end of wireless carriers’ popular flat-rate service plans,³⁵ to the detriment of the many low- and fixed-income citizens of Utah that favor

³¹ See AT&T Comments at 9.

³² Proposed Rule, R746-360-4(5)-(6).

³³ AT&T Comments at 9.

³⁴ Proposed Rule, R746-360-4(3)(b).

³⁵ See AT&T Comments at 10.

such plans. These plans—which include nearly all prepaid plans and many post-paid plans—are advertised under an all-inclusive, single price and do not impose separate charges and fees. As a result, these plans are extremely popular with consumers, particularly those who wish to cap their spending and usage. Carriers, however, would be barred from continuing to offer these popular flat-rate plans in Utah because of the Rule’s requirement that carriers must collect the UUSF surcharge “as a separate charge” in addition to the advertised price.³⁶ CTIA has therefore suggested that the Commission permit carriers to ‘roll-in’ the UUSF surcharge as part of the advertised all-inclusive amount, if they so choose.

III. TO ENSURE CONFORMITY WITH FEDERAL LAW, THE COMMISSION SHOULD CLARIFY THAT ASSESSMENT OF VOIP SERVICES IS LIMITED TO INTERCONNECTED VOIP, AND THAT ASSESSMENTS SHALL NOT BE APPLIED TO THE UNDERLYING BIAS OVER WHICH VOIP SERVICE IS PROVIDED OR NON-INTERCONNECTED VOIP SERVICES

The Commission’s authority to require contributions from interconnected VoIP providers is clearly set out under federal law. In the *KS/NE Declaratory Ruling*, the FCC declined to preempt states “from imposing universal service contribution requirements on ... intrastate revenues of nomadic interconnected VoIP providers,” so long as the states follow policies that prevent them from making universal service assessments on interconnected VoIP revenue that has already been “properly allocated to another state under that state’s rules.”³⁷ *Non-interconnected* VoIP and broadband internet access services (“BIAS”), however, remain interstate services that are preempted from state-level assessments.³⁸ The Commission should, therefore, clarify that under its definition of “access lines” in Section (1)(b) only interconnected

³⁶ *See id.*

³⁷ *See KS/NE Declaratory Ruling*, ¶ 21.

³⁸ Report and Order on Remand, Declaratory Ruling, and Order, *In the Matter of Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, ¶ 431 (2015).

VoIP is assessed, and not one-way VoIP services or the underlying BIAS upon which VoIP service is provided—given that such services can arguably be used to “place or receive a real-time voice connection,” e.g., via an over-the-top communication application, such as Skype.³⁹

CTIA recognizes the concern that some VoIP providers’ pricing structures have made it difficult for the Commission to ascertain and independently verify interconnected VoIP providers’ intrastate assessable revenues under the current revenues-based system.⁴⁰ Switching to a per-connections approach, however, would create more problems than it would solve. One VoIP provider in this proceeding provided a helpful illustration:

Business A has 100 employees, and each has a phone on his or her desk. Business A’s employees share 23 analog phone line channels. This means Business A’s employees can have, at most, 23 concurrent phone calls—a constraint that has never been a problem for Business A. Business B also has 100 employees, and each employee also has a phone on his or her desk. But Business B subscribes to hosted VoIP service which can technically accommodate unlimited concurrent calls, subject only to available broadband bandwidth.⁴¹

Under the Proposed Rule, it is possible that Business A’s service provider may be charged only for its 23 phone line channels, while Business B’s service provider may be assessed one charge for its high-capacity connection, or assessed for 100 access lines or connections.⁴² This hypothetical echoes CTIA’s previously-stated concerns: a per-line or per-connection charge may disparately treat “functionally equivalent” connections that rely upon different underlying technologies.⁴³ The need to address these and other issues is a further reason for the

³⁹ See AT&T Reply Comments at 3.

⁴⁰ See, e.g., Comments of CenturyLink at 2-3 (“CenturyLink Comments”), Utah Public Services Commission Docket No. 17-R360-01 (filed June 30, 2017).

⁴¹ Reply Comments of Jive at 3 (“Jive Reply Comments”), Utah Public Services Commission Docket No. 17-R360-01 (filed May 11, 2017).

⁴² See, e.g., *id.* at 2-4.

⁴³ Reply Comments of CTIA at 5 (“CTIA Reply Comments”), Utah Public Services Commission Docket No. 17-R360-01 (filed May 11, 2017).

Commission to reconsider the decision to shift to a connections-based approach for contributions at this time.

IV. THE UUSF MAY NOT BURDEN THE FEDERAL USF, AND THE COMMISSION HAS FAILED TO CONSIDER THE ISSUE

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.⁴⁴ Contrary to CenturyLink’s assertions, CTIA has never asserted that the Commission is obligated to “utilize the same funding mechanism used for Federal USF.”⁴⁵ Rather, we simply have observed that retaining a revenue-based system—consistent with the federal USF mechanism and all other states that maintain a USF—would ensure that the UUSF continues to comply with Section 254(f) and the relevant case law interpreting it.

The FCC calculates its USF contributions from interstate telecommunications revenues, and the Rule’s proposed “per line” or “per connection” mechanism may inadvertently—and illegally—assess UUSF surcharges on the USF contribution base.⁴⁶ As CTIA explained in its comments, the UUSF simply must avoid running afoul of established federal law that prohibits state USFs from burdening the federal mechanism.⁴⁷ The Commission has not taken any steps to ensure this.

⁴⁴ 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.”)

⁴⁵ CenturyLink Comments at 3.

⁴⁶ CTIA acknowledges that S.B. 130 empowers the Commission “to adopt a surcharge mechanism based on the number of lines and connections.” *Id.*

⁴⁷ See, e.g., CTIA Comments at 4-5; CTIA Reply Comments at 2-4. *Accord.* 47 U.S.C. § 254(f).

Over the past decades, federal and state administrative agencies and courts have developed a robust record of guidance on how to address the myriad practical issues that arise in administering the USF and its state analogues. Wireless carriers allocate their revenues for state and federal USF programs consistent with this guidance. CenturyLink suggests that wireless carriers have manipulated “what they deem an assessable revenue” to their competitive advantage,⁴⁸ but to the contrary, wireless carriers have followed the guidance of state and federal regulatory authorities, in addition to judicial precedent, in objectively determining which revenues are properly assessed for UUSF purposes. The Proposed Rule’s rejection of the familiar and well-established revenue-based mechanism in favor of a novel per-connection mechanism would isolate Utah—and Utah alone—from this precedent, leaving it to address inevitable future issues from scratch. Accordingly, the Commission should maintain a revenue-based system for UUSF contributions.

⁴⁸ See CenturyLink comments at 2.

V. CONCLUSION

For the foregoing reasons, the Commission should maintain its current, successful UUSF contribution mechanism rather than adopt any novel and untested approach. CTIA appreciates the opportunity to provide these reply comments.

Respectfully submitted,

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August 2, 2017

CERTIFICATE OF SERVICE

I certify that on August 2, 2017, a true and correct copy of the foregoing Reply Comments of CTIA in Docket No. 17-R360-01 was delivered to the following by electronic mail:

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