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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CTIA–THE WIRELESS ASSOCIATION®, Plaintiff, vs. THAD LEVAR, in his official capacity as a Chair and Commissioner of the Utah Public Service Commission; DAVID R. CLARK, in his official capacity as a Commissioner of the Utah Public Service Commission; and JORDAN A. WHITE, in his official capacity as a Commissioner of the Utah Public Service Commission, Defendants.	**VERIFIED COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF** Case No. 2:18-cv-00302-EJF Magistrate Judge Evelyn J. Furse **JURY DEMANDED**

Plaintiff CTIA–The Wireless Association® ("CTIA") brings this Complaint for declaratory relief and injunctive relief to prevent Defendants Thad LeVar, David R. Clark, and Jordan A. White, each in his official capacity as a Commissioner of the Utah Public Service Commission (the "Commission" and Defendants LeVar, Clark, and White, collectively, "Commissioners"), from continuing, in contravention of federal law, to give effect to or enforce the rule that the Commission made effective in its October 11, 2017 Notice That Proposed Rules Have Been Made Effective, issued in Docket No. 17-R360-01, *In the Matter of the Utah Administrative Code R746-360 Universal Public Telecommunications Service Support Fund*, as such rule was amended by certain revisions made effective in the Commission's Notice That Proposed Rules Have Been Made Effective and Order of Clarification, issued in the same docket on December 22, 2017 (collectively, "PSC Rule").[1] The PSC Rule is inconsistent with the Communications Act of 1934, as amended, 47 U.S.C. § 151, *et. seq.* (the "Communications Act"); in particular, 47 U.S.C. §§ 254 and 332.

[1] The challenged PSC Rule was made effective October 11, 2017, and a subsequent amendment was made effective December 22, 2017. The entirety of R746-360 was later repealed and re-codified under R746-8 of the Utah Administrative Code. *See In re Utah Administrative Code R746-8, Proposing Repeal R746-360, R746-341, and R746-343*, Docket No. 17-R008-01. The current version of the PSC Rule, codified under R746-8, is attached as **Exhibit A**. CTIA also attaches the Commission's Notice Application for Rehearing Will Be Denied by Operation of Statute and Order Denying Request for Stay ("Notice of Denial") (**Exhibit B**); CTIA's Application for Rehearing and Request for Stay ("Rehearing Application") (**Exhibit C**); and the Commission's Notice That Proposed Rules Have Been Made Effective and Order of Clarification ("Clarification") (**Exhibit D**).

PARTIES

1. Plaintiff CTIA is a non-profit corporation founded in 1984 with its principal place of business in Washington, D.C. CTIA, as a trade association, represents the U.S. wireless communications industry and companies throughout the mobile ecosystem. CTIA's members include wireless carriers, device manufacturers, and suppliers, as well as app and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment.

2. Several of CTIA's members deliver telecommunications services to Utah customers and therefore are subject to the requirements of the PSC Rule. In addition, the interests that CTIA seeks to protect in this lawsuit are germane to its members and to CTIA's purpose as a trade association for members of the wireless communications industry. Neither the claims that CTIA asserts nor the relief that CTIA requests requires the participation of individual members in this lawsuit.

3. Defendant Thad LeVar is a Commissioner and the Chair of the Utah Public Service Commission. Defendants David R. Clark and Jordan A. White are Commissioners of the Utah Public Service Commission. These Defendants are residents of Utah and are here named solely in their official capacities.

JURISDICTION AND VENUE

4. This Court has jurisdiction over CTIA's claims under 28 U.S.C. §§ 1331 and 1343(a), as CTIA's claims arise under the Constitution and the laws of the United

States, including the Communications Act of 1934 ("the federal Communications Act"), as amended, 47 U.S.C. § 151, *et seq.*, and specifically 47 U.S.C. §§ 254 and 332.

5. This Court has authority to issue declaratory judgments and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and the All Writs Act, 28 U.S.C. § 1651.

6. Venue is proper in this Court under 28 U.S.C. § 1391(a) as Defendants are all residents of this judicial district. Venue also is proper in this Court under 28 U.S.C. § 1391(b) because Defendants are government officials who perform official duties in this judicial district and because substantial parts of the events giving rise to CTIA's claims occurred in this judicial district.

PROCEDURAL BACKGROUND

7. The Commission issued a request for comments on March 27, 2017 regarding the implementation of Utah S.B. 130, a general session bill signed into law on March 25, 2017, which revises provisions related to the Utah Universal Public Telecommunications Service Support Fund ("UUSF"). After receiving comments, the Commission issued a Notice of Proposed Rule Amendment, along with the text of a proposed rule, R746-360-4. *In the Matter of the Utah Administrative Code R746-360 Universal Public Telecommunications Service Support Fund*, Docket No. 17-R360-01, Notice of Proposed Rule Amendment (rel. May 15, 2017) ("Proposed Rule").

8. CTIA filed multiple comments in the proceeding advising the Commission that the Proposed Rule, which would adopt a universal service contribution mechanism

based on a flat amount per connection, departing from a contribution mechanism based on a percentage of revenues, was inconsistent with various provisions of federal law.

9. CTIA advised the Commission, among other things, that the Proposed Rule would be inconsistent with the requirements related to the federal universal service Lifeline program. CTIA also advised the Commission that the Proposed Rule would illegally assess prepaid wireless services in a manner that was discriminatory and not competitively neutral, because the Proposed Rule would allow third-party retailers of prepaid wireless telecommunications services to avoid the UUSF surcharge, as the Commission lacked statutory authority to impose the surcharge on these providers. Nonetheless, in the course of these multiple rounds of comments, the Commission made only minor modifications to the Proposed Rule.

10. On September 5, 2017, the Commission, acknowledging that it did not have the statutory authority to assess surcharges on prepaid services purchased from non-carrier, third-party retailers, solicited further comment on its modified Proposed Rule language on this particular issue, requesting such comment by October 17, 2017. *In the Matter of the Utah Administrative Code R746-360 Universal Public Telecommunications Service Support Fund*, Request for Comments and Draft Language: UUSF Assessment of Prepaid Wireless; Notice of Proposed Rulemaking, Docket No. 17-R360-01 (rel. Sept. 5, 2017).

11. Then, less than one week before the October 17, 2017 date it had established to receive stakeholder comments and input on the issue concerning surcharges on prepaid services from non-carrier retailers, the Commission released a Notice stating that the modified Proposed Rule still under debate had already been made effective. *In the Matter of the Utah Administrative Code R746-360 Universal Public Telecommunications Service Support Fund*, Notice that Proposed Rules Have Been Made Effective, Docket No. 17-R360-01 (rel. Oct. 11, 2017).

12. Just thirteen days later, the Commission released another Notice with further amendments to the Proposed Rule. *In the Matter of the Utah Administrative Code R746-360 Universal Public Telecommunications Service Support Fund*, Notice of Rule Filing, Docket No. 17-R360-01 (rel. Oct. 24, 2017) ("Notice of PSC Rule"). This final version of the PSC Rule was published in the November 15, 2017 Utah State Bulletin and went into effect on December 22, 2017. (*See* Clarification, **Exhibit D**.)

13. The PSC Rule provides that, effective January 1, 2018, "providers shall remit to the Commission $0.36 per month per access line that, as of the last calendar day of each month, has a place of primary use in Utah in accordance with the Mobile Telecommunications Sourcing Act, 4 U.S.C. Sec. 116 et seq." R746-8-301(1)(a) (formerly R746-360-4(3)(a)). It also provides that "a provider of mobile telecommunications service shall consider the customer's place of primary use to be the

customer's residential street address or primary business street address." R746-8-301(1)(b)(ii) (formerly R746-360-4(3)(b)(ii)).

14. An "access line" is defined, per Utah Code, and as referenced by the PSC Rule, as "a circuit-switched connection, or the functional equivalent of a circuit-switched connection, from an end-user to the public switched network." Utah Code § 54-8b-2(1); R746-8-200(1)(a) (formerly R746-360-4(1)(a)). The PSC Rule further provides that the term "access line" is used in the rule "to the extent consistent with federal law." R746-8-200(1)(a) (formerly R746-360-4(1)(a)).

15. The only exceptions to the required $0.36 monthly assessment on all access lines are for access lines that generate revenue that is subject to a universal service fund surcharge in a state other than Utah, and for access lines not used to access Utah intrastate telecommunications services. R746-8-301(3)(a)(i)-(ii) (formerly R746-360-4(5)(a)(i)-(ii)).

16. In addition, specific to prepaid wireless service, the PSC Rule provides that "[a] provider that offers prepaid access lines or connections that permit access to the public telephone network shall remit to the Commission $0.36 per month per access line for such service (new access lines or connections, or recharges for existing lines or connections) purchased on or after January 1, 2018." R746-8-301(1)(e) (formerly R746-360-4(3)(e)).

17. The required $0.36 per month per access line UUSF assessment therefore applies to all Utah access lines, except as noted in R746-8-301(3)(a) (formerly R746-360-4(5)), as described, *supra*.

18. The required $0.36 per month per access line UUSF assessment therefore applies to federal Lifeline connections. The federal Lifeline program is discussed in more detail herein.

19. The required $0.36 per month per access line UUSF assessment therefore also applies to access lines that generate less than $0.36 per month of revenue attributable to intrastate telecommunications services.

20. Although providers are allowed to omit the UUSF surcharge for access lines that do not access Utah intrastate telecommunications services during a given month, per R746-8-301(3)(a) (formerly R746-340-4(5)(a)), the PSC Rule includes no mechanism for a provider to assert that its revenue attributable to Utah intrastate telecommunications services for a given access line exists, but is less than the required $0.36 per month per access line assessment.

21. The required $0.36 per month per access line UUSF assessment also applies to prepaid wireless access lines, per R746-8-301(1)(e) (formerly R746-360-4(3)(e)), and therefore would apply to access lines offered by prepaid wireless sales through retail sellers who are not themselves prepaid wireless providers.

22. The Commission has since conceded in a subsequent Order of Clarification that the PSC Rule needs further refinement, and that the Commission intends to improve the PSC Rule in its ongoing rulemaking proceedings. (*See* Clarification, **Exhibit D**.) However, the Commission did not stay the PSC Rule in the interim, and the current rule has been in effect, and has remained in effect, since December 22, 2017. Per the PSC Rule, the connections-based UUSF surcharge assessment of $0.36 per month per access line has been in place since January 1, 2018.

23. CTIA timely sought reconsideration, rehearing, and stay of the PSC Rule on November 13, 2017. (Rehearing Application, **Exhibit C**.) The Commission denied CTIA's Rehearing Application on November 30, 2017. (Notice of Denial, **Exhibit B**.)

FACTUAL AND FEDERAL REGULATORY BACKGROUND

A. THE FEDERAL UNIVERSAL SERVICE MODEL

24. In the Telecommunications Act of 1996, Congress codified the Federal Communications Commission's ("FCC's") commitment to advancing the availability of telecommunications services to all Americans by establishing principles upon which "the [FCC] shall base policies for the preservation and advancement of universal service." 47 U.S.C. § 254(b).

25. Among other things, Congress articulated in the Telecommunications Act national goals that services should be available at "affordable" rates and that "consumers

in all regions of the nation, including low-income consumers, should have access to telecommunications and information services." *Id.* § 254(b)(1) & (3).

26. To advance these goals, the FCC has established a number of programs, including the Connect America Fund, Lifeline, the Schools and Libraries (or "E-rate") and Rural Health Care programs. These federal universal service fund ("USF") programs are funded by a federal USF surcharge levied on providers of telecommunications services based on their interstate and international end-user revenues.

B. THE FEDERAL LIFELINE PROGRAM

27. The FCC first implemented the Lifeline program in 1985 as part of its longstanding mission to promote "universal service" by ensuring that low-income Americans who meet established eligibility criteria have affordable access to telephone services.

28. The federal Lifeline program provides a monthly subsidy of $9.25 per customer that is applied to reduce the service rate that Eligible Telecommunications Carriers ("ETCs") would otherwise charge Lifeline enrollees for telecommunications service. The subsidy is funded by the federal USF surcharge on interstate telecommunications revenues.

29. Enrollment in the Lifeline program is available only to low-income households that meet federal or state eligibility criteria. Prospective enrollees must apply for admission to the Lifeline program, a process that includes completing a detailed Lifeline eligibility certification form and submitting documentation demonstrating

eligibility to enroll in the Lifeline program. Enrollees must also annually verify their continued eligibility for participation in the Lifeline program.

30. CTIA members currently offer wireless telephone service plans that rely on the federal Lifeline subsidy to provide eligible low-income Utahan Lifeline enrollees with wireless telephone service, often at no charge to the customer. They are able to offer no-charge, and other low-charge, Lifeline service because the $9.25 subsidy provides carriers the funding they require in order to provide such Lifeline plans to eligible consumers.

31. Carriers providing such no-charge Lifeline-supported wireless plans often do not even have a billing relationship with the customer, as the carrier does not render a bill to the customer.

32. These no-charge wireless service plans further the aims of the Lifeline program and the FCC's universal service mandate because they help ensure that the thousands of low-income Utah households have access to the public telecommunications network in order to pursue employment, remain in contact with family, and access critical medical, social, and emergency services without economically burdening such vulnerable consumers.

33. Many Utahans who receive Lifeline-subsidized wireless telephone services provided by CTIA members are likely to have no other phone service. Many low-income

consumers have stated before the FCC that without a Lifeline subsidy, they would be unable to afford service.

C. UNIVERSAL SERVICE JURISDICTIONAL SEPARATIONS

34. As previously stated, federal USF programs are funded by a federal USF surcharge levied on providers of telecommunications services based on their interstate and international end-user revenues. The federal USF surcharge does not apply to intrastate telecommunications service revenues.

35. Because the federal USF surcharge does not apply to intrastate revenues, and because most wireless service plans at present contain a mix of revenues generated from intrastate and interstate services, carriers must determine a method to separate their intrastate and interstate revenues. The following process for jurisdictional separation of revenues is illustrative of the process wireless carriers may use and it arises from the FCC's universal service program:

a. Carriers first identify the various services offered under a service plan. Examples may include: data, text, voice, voicemail, call forwarding, call waiting, etc.

b. Carriers then determine the value of each of the various services, with the total of the assigned values equaling the total of the overall service plan. This process is conducted by carriers' business experts and is highly proprietary.

c. Carriers next categorize the various services within a plan as assessable services (generally, telecommunications services), non-assessable services (such as broadband Internet access service) and other non-assessable revenue items (equipment sales or leasing, equipment insurance, etc.).

d. After these steps are conducted, carriers calculate the interstate and intrastate portion of each assessable service. To calculate the jurisdictional amounts, the FCC permits use of one of three methods:

i. Carriers may use the FCC's defined safe harbor (37.1% of revenues are deemed interstate), or

ii. Carriers may study their own traffic (and such studies are highly confidential) to determine the jurisdictional split between interstate and intrastate revenues, or

iii. Carriers may use any other reasonable method to determine the jurisdictional split between interstate and intrastate traffic.

36. Once the amount of interstate and intrastate revenue subject to surcharge is determined, carriers then apply the federal surcharge – a percentage of revenue – to their in**ter**state revenues. In almost every state with a state universal service fund other than Utah, carriers also apply a state surcharge – a percentage of revenue – to their in**tra**state revenues. When state and federal universal service programs are consistent and collect

universal service funds based on jurisdictional revenues, there is no risk of state surcharges applying to in**ter**state revenues.

D. THE UUSF ASSESSMENT PRESENTS A HOBSON'S CHOICE BETWEEN LEGALLY INFIRM ALTERNATIVES

37. As CTIA states in its claims for relief, the Commission's UUSF surcharge requires wireless carriers who provide Lifeline services at no-charge to eligible consumers, or at a rate that does not generate $0.36 of intrastate revenue, with a multi-faceted Hobson's choice of alternatives for funding the required UUSF $0.36 surcharge that are all legally infirm:

a. If the Commission requires wireless providers to increase rates for Lifeline services to at least a level generating $0.36 of intrastate revenue subject to surcharge in order to cover the monthly UUSF assessment, that would violate 47 U.S.C. § 332(c)(3)(A), as stated in Count I below.

b. If the Commission requires such wireless providers to impose the $0.36 monthly UUSF surcharge on Lifeline customers as a direct surcharge (leaving aside that carriers often have no billing relationship with these customers), that would violate 47 U.S.C. § 254(f) and 47 C.F.R. § 54.403, as inconsistent with, relying on, and burdening the federal universal mechanism, as stated in Counts II and III below.

c. If the Commission requires wireless providers receiving Lifeline support to pay the $0.36 monthly UUSF assessment for access lines out of the $9.25 monthly federal Lifeline support, that would equally violate 47 U.S.C. § 254(f) and 47

C.F.R. § 54.403, as inconsistent with, relying on, and burdening the federal universal mechanism, as stated in Counts II and III below.

d. If the Commission requires such wireless providers simply to fund the $0.36 monthly UUSF assessment out of their own pockets, or indirectly through charges on other customers, that would be discriminatory, and violate 47 U.S.C. § 254(f) as stated in Count IV below, because providers of other services who can pass through the UUSF surcharge to customers will not be similarly required to absorb the monthly UUSF surcharge.

38. The Commission asserts that the rule does no more than "require wireless providers receiving Lifeline support, including those currently offering Lifeline service at no cost to the customer, to make a business decision about how to price its plans." (*See* Clarification, **Exhibit D**, at 4.) Each of the alternatives discussed above to fund the $0.36 monthly UUSF assessment for wireless Lifeline access lines, however, would violate federal law as set forth in CTIA's Claims for Relief. The Commission has identified no other way by which wireless Lifeline service providers could pay the $0.36 monthly UUSF assessment, and in fact, there is none.

CLAIMS FOR RELIEF

COUNT I
(Violation of 47 U.S.C. § 332(c)(3)(A) Prohibition Against State Regulation of Wireless Rates)

39. CTIA incorporates the preceding paragraphs by reference as though set forth fully herein.

40. 47 U.S.C. § 332(c)(3)(A), entitled "State Preemption," provides in pertinent part that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service. . . ."

41. The PSC Rule requires payment of the UUSF surcharge on no-charge Lifeline plans that are supported only by the federal Lifeline subsidy. The Commission rule thereby impermissibly interferes with or prevents such no-charge Lifeline offers.

42. Similarly, by requiring payment of the UUSF surcharge on Lifeline connections, the PSC Rule impermissibly interferes with or prevents any low-rate Lifeline account for which there is less than at least $0.36 of intrastate revenue from which to collect the surcharge. And while a surcharge that collects all or nearly all of a carriers' jurisdictional revenue may also be unlawful, that particular issue is not pled herein.

43. Ironically, for the sake of collecting surcharges that are intended to keep rates affordable, the Commission has effectively increased the minimum rate for those most in need of affordable rates — low-income households enrolled in the Lifeline program — by effectively increasing the minimum Lifeline service rate in Utah to $0.36. This effective floor on Lifeline rates prevents the offering of no-charge, or very low charge, Lifeline wireless service and serves to regulate the rates charged by wireless providers, in contravention of 47 U.S.C. § 332(c)(3)(A).

44. The PSC Rule's $0.36 monthly UUSF surcharge on Lifeline wireless access lines cannot be saved by the Commission's suggestion that a provider should determine how to pay the surcharge by simply "mak[ing] a business decision about how to price its plans," essentially suggesting carriers can just raise their rates to cope with the impact of the surcharge. (*See* Clarification, **Exhibit D**, at 4.)

45. The legally infirm options to collect UUSF subsidies from wireless Lifeline customers, and no-charge Lifeline customers in particular, as described *supra*, would all lead to absurd real world results. Participants in these programs are frequently members of "unbanked" communities, and even a monthly rate of $0.36 may prove an insurmountable obstacle to participation in the Lifeline program. Those without bank accounts or a credit card have no effective means to remit a surcharge of $0.36. If they choose to mail cash, they would have to spend more on postage than on the surcharge itself. Or they may need to purchase a money order, if such are available in increments of $0.36, and pay both the charges applicable to obtaining a money order and the cost of postage – all well in excess of the $0.36 due under the PSC Rule.

46. Additionally, by forcing carriers to choose among only surcharge collection methods that cannot be imposed without violating federal law, the PSC Rule has a chilling effect on the introduction of service offers in the market today. Carriers that have an interest in introducing innovative service plans that have or are likely to have intrastate revenues near, at, or below $0.36 will have to determine whether to select a collection

method illegally imposed on them under the PSC Rule or to not offer such service plans at all. These consequences violate the spirit, if not the letter, of the prohibition under 47 U.S.C. § 332(c)(3)(A) against states regulating wireless carriers' rates.

47. Because the PSC Rule therefore operates to prevent wireless carriers from charging a particular rate (zero), and would require wireless providers offering Lifeline service to charge at least a particular rate ($0.36), it violates, and is preempted by, federal law prohibiting state regulation of wireless rates, 47 U.S.C. § 332(c)(3)(A).

COUNT II
(Violation of 47 U.S.C. § 254(f) Requirement That State USF Mechanisms Must Be Consistent with the Federal USF Mechanism)

48. CTIA incorporates the preceding paragraphs by reference as though set forth fully herein.

49. The federal Communications Act authorizes states, like Utah, to create their own supplemental support mechanisms to further the same goal of universal service embodied by 47 U.S.C. § 254, *provided* that those mechanisms are "not inconsistent" with federal mechanisms, require carriers to contribute to such state support mechanisms on "an equitable and nondiscriminatory basis," and do not "rely on or burden Federal universal service support mechanisms." 47 U.S.C. § 254(f).

50. Specifically, 47 U.S.C. § 254(f) provides that: "A State may adopt regulations not inconsistent with the [FCC's] rules to preserve and advance universal service."

51. The PSC Rule is inconsistent with the FCC's rules to preserve and advance universal service in at least four ways:

a. *First*, the FCC funds the federal universal service mechanism through assessments based on a percentage of carriers' revenues. 47 C.F.R. § 54.709. By contrast, the PSC Rule imposes a connections-based UUSF surcharge assessment. The PSC Rule is therefore fundamentally inconsistent with the revenue-based assessment approach specified by the federal universal service mechanism.

b. *Second*, the PSC Rule fails to ensure that it does not impermissibly apply UUSF surcharges to interstate traffic. As explained *supra,* carriers determine their jurisdictional split of assessable interstate and intrastate revenue for USF purposes based on one of the separations methods permitted to be used under the federal universal service program. However, a carrier generating less than $0.36 of intrastate revenue on an access line in Utah would still be subject to the PSC Rule's $0.36 per month per access line UUSF surcharge. The difference between the carrier's intrastate revenue on an access line and the UUSF surcharge would then necessarily have to be assessed on interstate revenues, burdening the federal universal service mechanism, which is already assessing those revenues. The Commission has neither determined whether such situations would exist with any rate plans currently in the Utah market nor established a mechanism where carriers in such situations can request relief from such illegal collection of the UUSF surcharge.

c. *Third*, the PSC Rule is inconsistent with the federal Lifeline program administered as part of the federal universal service mechanism. FCC regulations require that ETCs offering Lifeline service must pass through the full amount of support from the federal universal program to the qualifying low-income consumer, in the form of qualifying Lifeline services. 47 C.F.R. § 54.403. The PSC Rule, however, obligates carriers to remit UUSF surcharges on Lifeline access lines provided at no cost to customers, or at a rate that generates less intrastate revenue than the $0.36 due for the UUSF surcharge. In each instance, the only revenue available for an ETC to pay the UUSF surcharge is the federal subsidy payment. Any state USF assessment on the federal Lifeline subsidy is therefore starkly inconsistent with the federal universal service mechanism.

d. *Fourth*, the PSC Rule is inconsistent with the purposes and objectives of the Communications Act and the FCC, among which are to: ensure that telecommunications services are universally available to consumers, including low-income consumers; develop a uniform national regulatory policy for the telecommunications industry; and prevent burdensome and unnecessary state regulations. In particular, by preventing CTIA members from continuing to offer no-charge or low-charge wireless services to Utah Lifeline enrollees, the PSC Rule will frustrate each of these federal purposes and objectives.

52. Because the PSC Rule is inconsistent with the federal universal service mechanism and the FCC's rules regarding the federal universal service mechanism in each of these ways, it violates, and is preempted by, 47 U.S.C. § 254(f).

COUNT III
(Violation of 47 U.S.C. § 254(f) Prohibition Against State USF Mechanisms Relying on or Burdening the Federal USF Mechanism)

53. CTIA incorporates the preceding paragraphs by reference as though set forth fully herein.

54. State universal service mechanisms are permissible, provided they "do not rely on or burden Federal universal service support mechanisms." 47 U.S.C. § 254(f).

55. Unlike the federal USF, the PSC Rule authorizes a per-connection assessment and does not explicitly exempt Lifeline access lines funded entirely or in part with federal universal service support from the surcharge, thereby impermissibly both relying on and burdening the federal USF.

56. Additionally, as noted in Count II, FCC regulations require that carriers offering Lifeline service must pass through the full amount of the monthly $9.25 in support from the federal universal service program to the qualifying low-income consumer, in the form of qualifying Lifeline services. 47 C.F.R. § 54.403.

57. The PSC Rule, however, now obligates carriers to remit UUSF surcharges for Lifeline access lines, including for no-charge Lifeline services.

58. The UUSF surcharge on Lifeline access lines under the PSC Rule thereby both relies on and burdens the federal universal service mechanism by requiring each

month, for every Lifeline access line in Utah, that $0.36 of the $9.25 federal Lifeline subsidy be paid over to the UUSF in violation of 47 C.F.R. § 54.403. This violation of FCC regulations, in turn, demonstrates that the PSC Rule therefore violates, and is preempted by, 47 U.S.C. § 254(f).

COUNT IV
(Violation of 47 U.S.C. § 254(f) Requirement That State USF Mechanisms Must Be Non-Discriminatory)

59. CTIA incorporates the preceding paragraphs by reference as though set forth fully herein.

60. Under federal law, state universal service mechanisms are permissible provided that all providers of intrastate telecommunication services contribute "on an equal and nondiscriminatory basis." 47 U.S.C. § 254(f).

61. The PSC Rule violates 47 U.S.C. § 254(f) to the extent that it requires prepaid Lifeline service providers to pay the required $0.36 per month UUSF surcharge directly, whereas other providers are able to pass the surcharge through to their end-user customer.

62. In addition, the PSC Rule violates 47 U.S.C. § 254(f) because it discriminates with regard to prepaid wireless services.

63. Prepaid wireless service plans, where customers pay up front for service as opposed to being billed after the fact, are a significant and growing segment of the wireless marketplace.

64. Prepaid service plans are sold directly to consumers, either by carriers, or by third-party retailers on behalf of carriers, and after their initial purchase customers can purchase additional credits as needed. In the case of third-party retail sales, the retailer collects the customer's payment at the point of sale.

65. Third-party retailers, however, are not subject to the Commission's jurisdiction, a fact that the Commission has acknowledged.

66. There is therefore no mechanism for the Commission to require and ensure that third-party retailers selling prepaid wireless plans remit the required $0.36 per month UUSF surcharge, and so third-party retailers of prepaid telecommunications services can escape the UUSF assessment that service providers must remit for such services.

67. Further, requiring the underlying wireless carrier to pay the required $0.36 per month UUSF surcharge in such third-party retail prepaid situations would not cure this discrimination, as the wireless carrier generally has no billing relationship with the end-user customer, and therefore no ability to pass the charge through to the end-user customer. Requiring wireless carriers to remit the UUSF surcharge in those situations, notwithstanding their inability to pass the surcharge through to the end-user customer, is equally discriminatory vis-à-vis service providers who can pass through the UUSF surcharge to customers.

68. In addition, because prepaid customers may purchase prepaid wireless plans or recharge credits on such plans at irregular intervals, the monthly $0.36 UUSF

assessment is further discriminatory. Although the PSC Rule exempts providers from contributing multiple times in the same month if customers purchase additional minutes, wireless providers are required to remit the monthly $0.36 surcharge even in months during which they have obtained no revenues; whereas other providers have a monthly billing relationship with their customers that enable them to collect the UUSF surcharge from those customers monthly.

69. These and other similar instances of discrimination relating to prepaid wireless services cannot be avoided until and unless the Utah Legislature authorizes collection of UUSF surcharges at the third-party retailer point of sale.

70. For all these reasons, the PSC Rule is discriminatory and violates, and is preempted by, 47 U.S.C. § 254(f).

PRAYER FOR RELIEF

WHEREFORE, CTIA respectfully requests that this Court:

A. enter judgment in CTIA's favor on all claims asserted herein;

B. declare that the PSC Rule violates and is preempted by federal law as pleaded herein;

C. permanently enjoin each and all of the Commissioners, their officers, agents, subordinates, employees, and all acting in concert with any of the foregoing from enforcing, or proposing to enforce, the PSC Rule (**Exhibit A**);

D. award CTIA its costs and reasonable attorneys' fees, to the extent allowed by law; and

E. grant such additional relief as this Court may deem just and appropriate.

JURY DEMAND

Pursuant to Fed. R. Civ. P. 38(b), Plaintiff hereby demands a trial by jury on any issue triable of right by jury.

DATED: April 10, 2018

PARSONS BEHLE & LATIMER

/s/ Adam E. Weinacker
William J. Evans
Adam E. Weinacker

Philip J. Roselli (*pro hac vice* pending)
WILKINSON BARKER KNAUER, LLP

Benjamin J. Aron (*pro hac vice* pending)
CTIA–The Wireless Association®

Attorneys for Plaintiff CTIA–The Wireless Association®

VERIFICATION

I, Benjamin J. Aron, hereby verify under penalty of perjury that I have read the foregoing Verified Complaint and that its factual allegations are true and correct to the best of my knowledge and belief.

Executed this 10th day of April, 2018.

By: _____

Benjamin J. Aron
Director, State Regulatory and External Affairs
CTIA – The Wireless Association®