**STATE OF MAINE**
**PUBLIC UTILITIES COMMISSION**

**Case No. 2017-00283**

**Amendment to Chapter 285 – Maine Telecommunications Education Access Fund**

**December 15, 2017**

---

## COMMENTS OF CTIA

CTIA[1] files these comments in response to the Notice of Rulemaking[2] in the above-captioned case ("Notice"), issued by the Maine Public Utilities Commission ("Commission") on November 6, 2017.

## I. INTRODUCTION AND SUMMARY

On June 21, 2017, the Maine Legislature enacted P.L. 2017, Ch. 244, "An Act to Ensure Continued Availability of High-speed Broadband Internet at Maine's Schools and Libraries" ("the MTEAF Act"), which requires the Commission to adopt a rule implementing a "per line or number" monthly surcharge, capped at $0.21 per month, on voice network service providers to fund the Maine Telecommunications Education Access Fund ("MTEAF").[3] Prior to the MTEAF Act, 35-A M.R.S. § 7104-B 3(A) required the Commission to fund the MTEAF by determining a contribution rate as a percentage of total intrastate revenues from certain two-way voice communications services. As the Commission observed in its Notice, the 0.7% statutory maximum rate had "generally provided sufficient funding to allow the MTEAF to be used to

---

[1] CTIA—The Wireless Association® ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

[2] Amendment to Chapter 285 – Maine Telecommunications Education Access Fund, Case No. 2017-00283, Notice of Rulemaking (filed November 6, 2017) ("Notice").

[3] "An Act to Ensure Continued Availability of High-speed Broadband Internet at Maine's Schools and Libraries," P.L. 2017, Ch. 244 (June 21, 2017).

'assist qualified schools and libraries in acquiring and using advanced telecommunications technologies.'"

Rather than raising the maximum surcharge percentage, the Maine Legislature has required the Commission to assess a monthly per-line or per-number assessment. The Proposed Rule as drafted, however, runs afoul of federal law.

As a preliminary matter, state universal service fund ("USF") programs should avoid discontinuity with the federal USF mechanism so that carriers do not face an inconsistent patchwork of state regulations. Second, any state universal service collection mechanism may not be inconsistent with, rely on, or burden the federal program. Third, states that elect to depart from the well-understood revenue-based collection methodology used for USF at the federal level should do so by implementing a methodology that treats all carriers in a manner that is competitively and technologically-neutral.[4]

CTIA is concerned that the Proposed Rule, as drafted, could run afoul of federal law by potentially burdening the federal program in some situations.[5] CTIA asks that the Commission amend the Proposed Rule to account for situations in which MTEAF contributions would impermissibly burden the federal USF program.

Additionally, CTIA asks that the Commission amend the proposed rule to ensure consistency with the Mobile Telecommunications Sourcing Act ("MTSA"), clarify reporting obligations, and avoid scenarios that would unfairly or illegally assess wireless consumers on

---

[4] CTIA recognizes that the Commission, under the Act, does not have discretion to avoid discontinuity with other states' programs. 35-A M.R.S. § 7104-B(3)(B) requires that funds to be "collected in a competitively neutral manner," and Maine's collection of USF at the point of sale promotes a program that is non-discriminatory.

[5] Amendment to Chapter 285 – Maine Telecommunications Education Access Fund, Case No. 2017-00283, Chapter 285 (Legislative Edit) (filed November 6, 2017) ("Proposed Rule"). The per line or per number amount does not apply to prepaid wireless telecommunications service providers under Section 3 of the Act, because prepaid wireless service providers are covered under Section 2 of the Act, which amends 35-A M.R.S. § 7104-B (2-A) and will require amendment of Chapter 284 of the Commission's Rules.

revenue outside the Commission's jurisdiction, potentially leaving those consumers vulnerable to double-taxation in violation of federal law.

Finally, the Commission should adopt a more reasonable timeline for carriers to comply with the new obligations in the Proposed Rule. The MTEAF Act imposes no deadline for the implementation of the new rules, but carriers will need significant time to implement necessary modifications to their billing systems. Accordingly, any per-connection charge should not begin until at least 120 days after publication of the final rule, and ideally, at the beginning of a fiscal quarter following that preparation period.

## II. THE COMMISSION SHOULD AMEND THE PROPOSED RULE TO AVOID BURDENING FEDERAL USF COLLECTIONS

Under Section 254(f) of the federal Communications Act, as amended, state universal service mechanisms must be "not inconsistent" with the federal mechanism for calculating USF contributions and cannot "rely on or burden" the federal mechanism.[6] As the Commission is aware, the Federal Communications Commission ("FCC") calculates its USF contributions based upon interstate telecommunications revenues.[7] Accordingly, under Section 254(f), "state mechanism[s] that target[] the same revenues or services as the federal mechanism" have been struck down as a "burden" on the federal USF.[8] For example, in *AT&T Corp. v. Public Utility Commission of Texas*, the Fifth Circuit struck down a Texas USF regulation that would have assessed both interstate and intrastate calls as "an inequitable, discriminatory, and anti-

---

[6] *See* 47 U.S.C. § 254(f).

[7] *See* 47 C.F.R. § 54.709.

[8] *See, e.g.*, *AT&T Corp. v. Public Utility Commission of Texas*, 373 F.3d 641 (5th Cir. 2004) (holding that 47 U.S.C. § 254(f) preempts the state from assessing state USF fees against interstate telecommunications services because such assessments improperly "rely on" the same revenues against which federal USF fees are assessed); *AT&T Communs., Inc. v. Eachus*, 174 F. Supp. 2d 1119, 1120 (D. Or. 2001) (holding that § 254(f) preempts the state from assessing state USF fees against interstate telecommunications services because such assessments improperly "rely on" the same revenues against which federal USF fees are assessed); *accord. Global NAPs, Inc. v. Mass. Dep't of Telcoms. & Energy*, 427 F.3d 34, 47 (1st Cir. 2005) ("While [the Communications Act] prevents states and localities from passing laws 'having the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service,' it allows 'a State to impose, on a competitively neutral basis . . ., requirements necessary to preserve and advance universal service ...") (internal citations omitted).

competitive regulatory scheme … [that] conflicts with § 254(f), and thus is preempted by federal law."[9] Thus, MTEAF assessments must remain coordinated with the federal mechanism to avoid unlawful overlapping assessment by state and federal entities for USF contributions from the same revenues.

As discussed above, Section 3 of the Proposed Rule establishes a "per month per line or number" surcharge, capped at $0.21, pursuant to the MTEAF Act. Such a flat-rate assessment may inadvertently apply to interstate revenues to the detriment of the federal USF. As drafted, the Proposed Rule does not address situations where the full contribution amount cannot legally be collected. It is conceivable that service offerings comprising a very limited amount of intrastate telecommunications service could generate less than 21 cents per month per line of intrastate telecommunications service revenue; or, alternately, that the carrier generates intrastate revenues close enough to 21 cents that the surcharge represents an excessive proportion of the carrier's revenues for Maine and would fall within the percentage for the FCC's "safe harbor" to determine wireless interstate revenues.[10] In such situations, a flat-rate surcharge would necessarily be paid out of, and therefore illegally burden, interstate revenues. This cannot be permitted, and the Commission should develop steps to ensure that carriers can obtain relief from contribution obligations if such scenarios were to arise. Although CTIA concedes that such a result, given the 21 cent cap, is unlikely, the Commission would be wise to evaluate the issue, even if only to conclude that a surcharge at or below the cap does not burden the federal program, and to provide guidance on how it would address such issue were the cap to increase subsequently. At a minimum, the Commission should establish a process by which carriers can

---

[9] *See AT&T Corp. v. PUC*, 373 F.3d at 647.

[10] *See Federal-State Joint Board on Universal Service et al.*, CC Docket No. 96-45 et al., Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952 (2002); *see also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252, 21258-60, paras. 11-15 (1998).

alert the PSC that the flat-rate surcharge does, or imminently threatens to, apply to interstate revenues.

## III. THE COMMISSION MUST AMEND THE PROPOSED RULE TO ENSURE CONSISTENCY WITH THE MTSA

Under the Mobile Telecommunications Sourcing Act, states are only permitted to assess charges on mobile services if the "customer's place of primary use" is in the state.[11] The term "place of primary use" is in turn defined to mean "the street address representative of where the customer's use of the mobile telecommunications service primarily occurs, which must be (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."[12] The MTSA ensures that the rules for universal service collection are harmonized among states, establishing safe harbors that prevent multiple jurisdictions from assessing overlapping contribution obligations on the same intrastate revenue.[13]

In contrast, the Proposed Rule establishes two different standards, neither of which references or ensures conformity with the MTSA.[14] The Proposed Rule requires providers to report and assess wireless customers "whose primary billing address is in Maine" "and/or" customers who have "a telephone number assigned from the 207 area code", which serves Maine

---

[11] 4 U.S.C. § 117.

[12] *Id.*

[13] Indeed, for this reason, the FCC has recommended that states model their universal service contribution obligations on the 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.")

[14] *See* 4 U.S.C. §§ 106-252 (2017).

– regardless of whether the customer's "place of primary use" is actually in Maine under the MTSA's definition.[15]

This could lead to the assessment of connections that are not truly "within" Maine for the purposes of the MTSA.[16] For example, customers who retain Maine billing addresses but who have temporarily or permanently left Maine—for example, for college or military service—would also be subject to MTEAF surcharges, in contravention of the MTSA. Conversely, given the nature of mobile telephone services and the widespread availability of number portability for mobile consumers, there are certainly a number of customers with a "207 number" who do not reside in or place calls in the state of Maine. Likewise, access lines with the customer's place of principal use in Maine, assessable under the MTSA, might not have a primary billing address in Maine or a "207 number." These situations would all lead to the Commission under- or over-collecting for the MTEAF. Further, without a nexus under the MTSA, the Commission does not have the jurisdiction to assess an MTEAF surcharge on such a consumer.[17] As a result, a consumer in these examples is likely to be illegally double-taxed on the same services if their primary place of use, outside the state of Maine, is also assessing state-specific surcharges on their wireless bill.

Accordingly, the Commission's rules must reference the MTSA's definition for a "place of primary use" for post-paid carriers, rather than a connection's area code, for determining a mobile connection's primary place of use and assessability of the MTEAF surcharge. Ideally, the rule would explicitly reference the MTSA (rather than, for example, attempting to recreate its language).

---

[15] Proposed Rule at § 3(B)(3).

[16] 4 U.S.C. §§ 106-252.

[17] A state tax will only withstand scrutiny under the Commerce Clause if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Goldberg v. Sweet*, 488 U.S. 252, 263 (1983).

Even if the Proposed Rule was lawful under the MTSA, the Proposed Rule's "and/or" language leaves unclear whether the provider has a choice of which group of customers to report and assess – the customers with a primary billing address in Maine or the customers with a 207 area code number – or if they must report and assess both. Although CTIA doubts the Commission so intends, the plain and obvious interpretation of the use of the word "and" in Section 3(B)(3) is that carriers are intended to count customers using both methods: any other interpretation renders the "and" superfluous in contravention of established canons of statutory interpretation.[18] However, if carriers must report both groups of customers, those customers will suffer discrimination in the form of double assessment, once for each category. Wireless carriers, too, would suffer discrimination as the surcharge applicable to wireless service would be double that applicable to other services. Because CTIA does not believe this is the Commission's intent, the rules should, at minimum, be clarified to remove "and/or" from Section 3(B)(3) and replace it with "or."

These proposed changes would not only harmonize Maine's programmatic rules with the laws of other states and the federal government, but also rectify the ambiguous "and/or" language in the Proposed Rule and avoid any resulting errors or misunderstandings.

## IV. THE COMMISSION SHOULD GIVE CARRIERS ENOUGH TIME TO IMPLEMENT THE PROPOSED RULES

In adopting new rules for the per-line or per-connection assessment, the Commission must ensure that carriers have sufficient time to implement the substantial changes to their billing and record-keeping systems. The Proposed Rule imposes new burdens that will require lead time to implement, and the proposed ninety-day grace period for the MTEAF contribution

[18] *See, e.g.*, *Wheeling & Lake Erie Ry. Co. v. Keach (In re Montreal, Me. & Atl. Ry.)*, 799 F.3d 1, 3 (1st Cir. 2015) ("There is a general canon of statutory construction which teaches that courts should construe statutes to avoid rendering superfluous any words or phrases therein.")

preceding the effective date of the Rule's new obligations is inadequate notice.[19] Carriers will need time to modify their billing systems to impose a new, Maine-specific line item charge, train their customer-facing representatives regarding the change, update customer facing materials, and otherwise modify financial recordkeeping and reporting processes as necessary to revise their systems for the new rule. Further, carriers still need to know how to address any significant questions raised in this rulemaking pertaining to how to assess and surcharge intrastate voice network services. Although the challenges to implementation will vary from provider to provider, no provider will be able to implement the Proposed Rule without considerable effort and expense.

Importantly, the MTEAF Act imposes no specific deadline for the effective date of the new rules. As a result, the Commission should use its discretion to consult with industry stakeholders to determine a reasonable timeframe for providers to comply with these new obligations. At a minimum, a change of this significance should not go into effect before a 120 day preparation period, but ideally, following that period the final rule should not go into effect until the start of a new fiscal quarter, to allow for consistency in accounting.

[19] Notice at 5.

## V. CONCLUSION

For the forgoing reasons, the Commission should adopt these modifications to ensure that the Proposed Rule is consistent with existing federal obligations, provides meaningful clarity to providers, and crafts a reasonable implementation timeline. CTIA appreciates the opportunity to provide these comments, and it urges the Commission to continue to investigate and solicit stakeholder participation on the issues raised herein.

Respectfully submitted,

**CTIA**

*/s/ Benjamin J. Aron*

Benjamin J. Aron
Matthew DeTura
CTIA
1400 16th Street NW, Suite 600
Washington, DC 20036
(202) 736-3683
baron@ctia.org
mdetura@ctia.org

December 15, 2017

## CERTIFICATE OF SERVICE

Service is effectuated via the Commission's online filing system pursuant to § 4.B.1 of the Commission's Rules of Practice and Procedure.

*/s/ Benjamin J. Aron*
Benjamin J. Aron

AM 67650473.1