

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



FILED

2-26-14
04:59 PM

Order Instituting Rulemaking Regarding
Revisions to the California Universal
Telephone Service (LifeLine) Program

R.11-03-013
(Filed March 24, 2011)

**AT&T CALIFORNIA (U 1001 C) AND AFFILIATED ENTITIES'
APPLICATION FOR REHEARING OF COMMISSION DECISION NO. 14-01-036**

Ramiz I. Rafeedie
AT&T Services, Inc.
525 Market Street, Suite 2024
San Francisco, CA 94105
Tel.: (415) 778-1465
Fax: (415) 543-0418
Email: ramiz.rafeedie@att.com

Attorney for AT&T

February 26, 2014

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. ARGUMENT.....	2
A. Standard on Application for Rehearing	2
B. The Final Decision Violates State Law.	2
C. The Final Decision Violates Federal Law	5
D. The FET Provisions of the Final Decision Violate Federal Law.....	6
III. CONCLUSION.....	8

TABLE OF AUTHORITIES

Page No(s).

Federal Constitutions and Statutes

26 U.S.C. section 42516

47 U.S.C. section 253(b).....5

26 U.S.C. section 254(f)5

California Constitutions and Statutes

Moore Universal Telephone Service Act, codified at Cal. Pub. Util. Code
section 871 *et seq.*..... *passim*

Cal. Pub. Util. Code, section 871.5(d) *passim*

Cal. Pub. Util. Code, section 1705..... 4-5

Cal. Pub. Util. Code, section 1757(a)(4).....4

California Cases

California Manufacturers Assn. v. Public Utilities Com. (1979), 24 Cal.3d 251 4

California Motor Transport Co. v. Public Utilities Com. (1963), 59 Cal.2d 2704

California Public Utilities Commission Decisions

Re Rulemaking to Consider Modifications to the Universal Lifeline Telephone Service Program
and General Order 153, Decision No. 00-10-028, Opinion, 2000 WL 1922282 (Cal.P.U.C.
Oct. 5, 2000) 6

Re Universal Lifeline Telephone Service Program, Decision No. 03-01-035, Opinion Denying
FONES4ALL's Amended Petition to Modify Decision 00-10-028 and Modifying ULTS
Administrative Expense Process, 2003 WL 221859 (Cal.P.U.C. Jan. 16, 2003)3, 5

Re Rulemaking to Assess and Revise the Regulation of Telecommunications Utilities, Decision
No. 06-08-030, Opinion, 2006 WL 2527822 (Cal. P.U.C. Aug. 24, 2006).....3

Re Review the Telecommunications Public Policy Programs, Decision No. 10-11-033, Decision Adopting Forward Looking Modifications to California Lifeline in Compliance with the Moore Universal Telephone Service Act, 2010 WL 4912458 (Cal.P.U.C. Nov. 19, 2010) 4-5

Re Revisions to the California Universal Telephone Service (LifeLine) Program, Decision No. 14-01-036, Decision Adopting Revisions to Modernize and Expand the California LifeLine Program, 2014 WL 469030 (Cal.P.U.C. Jan. 16, 2014) *passim*

Rules and Regulations

Cal. Pub. Util. Comm’n Rules of Practice and Procedure, Rule 16.1 1

Cal. Pub. Util. Comm’n Rules of Practice and Procedure, Rule 16.1(c) 2

Other Authorities

CPUC Resolution No. T-17321, Resolution Revising General Order 153 to Reflect Revisions to the California Lifeline Telephone Program as Adopted in Decision 10-11-033, 2011 WL 3375590 (Cal.P.U.C. July 28, 2011) 6

Pursuant to Rule 16.1 of the Commission’s Rules of Practice and Procedure, AT&T California and affiliated AT&T entities (“AT&T”)¹ hereby submit this Application for Rehearing (“Application”) of D.14-01-036, the final *Decision Adopting Revisions to Modernize and Expand the California LifeLine Program*, issued January 27, 2014 (“Final Decision”).

I. INTRODUCTION

As detailed below, the Final Decision is legally erroneous because it violates both state and federal law. First, the Final Decision’s rate and support cap provisions run counter to the Moore Act’s requirement that the program be administered “fairly, equitably and without competitive consequences.”² The Final Decision caps support amounts for wireline providers and requires them to sell LifeLine service at \$6.84/month, raising the specter of wireline providers self-funding their LifeLine customers. Wireless providers, on the other hand, have no similar restrictions. They can sell LifeLine service at whatever price they want and rely on a fixed support amount. Unlike wireline LifeLine providers, wireless providers will never have to self-fund. Forcing wireline LifeLine providers to self-support will put them at a competitive disadvantage to wireless LifeLine providers, which is improper under the Moore Act.

Second, the Final Decision violates federal law, which requires that carriers contribute to universal service programs in a manner that is “equitable and nondiscriminatory.” Demanding that wireline providers contribute a disproportionate amount to the program in the form of increased subsidies to LifeLine customers violates the spirit, if not the letter, of this federal requirement.

¹ Pacific Bell Telephone Company d/b/a AT&T California (U 1001 C); AT&T Corp. f/k/a AT&T Communications of California, Inc. (U 5002 C); Teleport Communications America, LLC f/k/a TCG San Francisco (U 5454 C); and AT&T Mobility LLC (New Cingular Wireless PCS, LLC (U 3060 C), AT&T Mobility Wireless Operations Holdings, Inc. (U 3021 C), Santa Barbara Cellular Systems, Ltd. (U 3015 C), New Cingular Wireless PCS, LLC (U 3014)).

² See, e.g., Cal. Publ. Util. Code § 871.5(d).

Third, the Final Decision violates federal law by purporting to exempt LifeLine customers from paying the federal excise tax (“FET”). The FET must be paid, either by the LifeLine customer or by the carrier on behalf of the customer with reimbursement from the LifeLine fund. The Commission should amend the Final Decision to make clear that it does not change the status quo with respect to the FET – namely, that LifeLine customers pay the FET on the LifeLine rate, carriers remit the balance of the FET due and owing, and then get reimbursed by the fund.

II. ARGUMENT

A. Standard on Application for Rehearing

The “purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.”³

B. The Final Decision Violates State Law.

The Moore Act requires that “in administering the lifeline telephone service program, [the Commission] should implement the program in a way that is equitable, nondiscriminatory, and without competitive consequences for the telecommunications industry in California.”⁴ The Legislature clearly intended that all LifeLine participants be treated equally and that no provider be put at a disadvantage by participating in the program.

The Final Decision violates the plain language of the Moore Act because it overtly discriminates against wireline LifeLine providers by capping their rates and support amounts for the next year and a half (and possibly longer) while allowing wireless providers full pricing flexibility.⁵ Under the terms of the Final Decision, if a wireline provider’s basic service rate increases beyond a certain threshold, the wireline provider will automatically have to self-fund in

³ CPUC Rules of Practice and Procedure, Rule 16.1(c).

⁴ Cal. Publ. Util. Code § 871.5(d).

⁵ Final Decision, *mimeo*, pp. 37-41.

order to bring the LifeLine customer's monthly bill down to the fixed rate of \$6.84. Wireless LifeLine providers, on the other hand, have no pricing restrictions. They get a fixed support amount with no LifeLine rate cap. They will never have to self-fund. By forcing wireline LifeLine providers – who are required to participate in the program – to lose money on each of their LifeLine customers, while placing no similar restrictions on wireless providers, the Final Decision is putting wireline providers at a competitive disadvantage to wireless LifeLine providers.

The Commission has long held that this type of anti-competitive LifeLine regulation is improper under Section 871.5(d). In April 2002, for example, FONES4ALL requested the Commission approve a pilot project whereby CLECs – but not ILECs – would be reimbursed for LifeLine advertising and marketing costs. The Commission found that allowing one type of LifeLine provider to seek reimbursement for marketing expenses while forcing all other providers to self-fund their marketing costs was anti-competitive and would “violate[] § 871.5(d) of the Public Utilities Code.”⁶ Accordingly, the Commission rejected FONES4ALL's pilot project.

Here, the situation is analogous. The Commission cannot cap rates and support amounts for one class of LifeLine provider, while at the same time granting complete pricing flexibility to another class of provider. To do so would be to allow the Commission to pick and choose winners and losers in the market for LifeLine customers, the very type of technology-specific, anticompetitive, asymmetrical regulation the Commission vowed to eliminate.⁷

⁶ *Re Universal Lifeline Telephone Service Program*, Decision No. 03-01-035, *Opinion Denying FONES4ALL's Amended Petition to Modify Decision 00-10-028 and Modifying ULTS Administrative Expense Process*, 2003 WL 221859 (Cal.P.U.C. Jan. 16, 2003), *mimeo*, p. 42 (Conclusion of Law 2).

⁷ *See generally Re Rulemaking to Assess and Revise the Regulation of Telecommunications Utilities*, Decision No. 06-08-030, *Opinion*, 2006 WL 2527822 (Cal. P.U.C. Aug. 24, 2006).

Indeed, four years ago, in the 2010 Decision,⁸ the Commission determined that a fixed specific support amount for Lifeline providers was the “best option” for complying with the Moore Act and with the Commission’s universal service goals.⁹ The Commission, as it stated at the time, found that a fixed support amount “will provide the greatest flexibility to low-income customers to select the communication service that best meets their unique needs.”¹⁰ A fixed support amount ensures that “every carrier, including wireless and VoIP providers, gets the same per California Lifeline customer subsidy from the fund.”¹¹ The Commission recognized explicitly that the competitive neutrality of the fixed support amount was necessary to comply with section 871.5(d) of the Moore Act, stating that “[t]he Specific Support Amount is both provider– and technology–neutral consistent with Section 871.5(d).”¹² By departing from that 2010 Decision, the Commission commits legal error in favor of an approach that discriminates against wireline carriers and that is not supported either by any evidence in the record or by adequate findings.

The Commission, in the Final Decision, has not proceeded in the manner required by law and has not regularly pursued its authority because the decision to cap wireline support amounts is not supported by substantial evidence or by adequate findings.¹³ The decision to cap wireline rates was based generally on “comments from the parties and from the public” at the various public participation hearings.¹⁴ The decision to cap the support amount, however, was based on

⁸ *Re Review the Telecommunications Public Policy Programs*, Decision No. 10-11-033, *Decision Adopting Forward Looking Modifications to California Lifeline in Compliance with the Moore Universal Telephone Service Act*, 2010 WL 4912458 (Cal.P.U.C. Nov. 19, 2010) (“2010 Decision”).

⁹ *Id.* at 46-47 (this determination was made, moreover, after studying “these issues closely over the course of this proceeding” and with the support of the “majority of parties...”).

¹⁰ *Id.* at 46.

¹¹ *Id.* at 50.

¹² *Id.* at 51 (footnote omitted).

¹³ Pub. Util. Code §§ 1705, 1757(a)(4); *e.g.*, *California Motor Transport Co. v. Public Utilities Com.* (1963), 59 Cal.2d 270, 277; *California Manufacturers Assn. v. Public Utilities Com.* (1979), 24 Cal.3d 251, 258-60.

¹⁴ Final Decision, *mimeo*, p. 37.

no evidence or record at all, and as such is arbitrary and capricious. The Code requires the Commission to make and separately state findings of fact and conclusions of law on all issues material to the decision.¹⁵ There is no evidence, findings, or even any discussion of the Commission's basis for deviating from the 2010 Decision to provide a fixed specific support amount or to treat Lifeline service providers differently by placing wireline providers at a competitive disadvantage.

C. The Final Decision Violates Federal Law.

The rate and support cap provisions are also improper under federal law. Section 254(f) of the Telecommunications Act requires that intrastate carriers "shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State" to advance universal service. By requiring wireline providers to contribute more than wireless providers in the form of an artificially low, self-funded LifeLine rate, the Final Decision violates Section 254(f). Similarly, the Commission recognized in D.03-01-035 that when Congress enacted another statute, Section 253(b), "Congress said that states could impose 'requirements necessary to preserve and advance service' but only on a 'competitively neutral basis.'"¹⁶ The Commission found that reimbursing CLECs for LifeLine marketing expenses while forcing ILECs to pay out of pocket violated Section 253(b), as well as Section 871.5(d) of the Moore Act.¹⁷

In order to conform to the strictures of federal law, LifeLine providers must be treated similarly. In this context, that means no \$6.84 LifeLine rate cap and a set support amount based on the provisions of the 2010 LifeLine Decision.

¹⁵ See Pub. Util. Code § 1705.

¹⁶ D.03-01-035, *mimeo*, p. 19.

¹⁷ See *id.* at 42 (Conclusions of Law 1-2).

D. The FET Provisions of the Final Decision Violate Federal Law.

Federal law requires persons paying for “local telephone service” to pay a federal excise tax (“FET”). 26 U.S.C. § 4251. While there are exemptions from the tax, none of them apply to subscribers, such as California LifeLine participants, who purchase unbundled wireline local telephone service. Carriers such as AT&T are required by federal law to collect and remit to the appropriate federal agency the FET.

The Commission addressed the calculation of FET in 2000.¹⁸ Since then, the Commission has required LifeLine providers to collect the FET on the LifeLine services portion of the participant’s bill only.¹⁹ Providers were not allowed to assess the FET on the subsidized portion of the LifeLine participant’s bill. Although it collects the FET on only a portion of the LifeLine customer’s bill, the provider actually remits to the federal agency the total amount of FET that would have been due from the LifeLine customer. The provider is then reimbursed by the LifeLine fund the amount of FET remitted but not actually collected by the provider – the so-called “pass through.”

The Final Decision seemingly changes all of this. Ordering Paragraph 24(k) purports to exempt California LifeLine customers from the FET altogether. Yet under federal law AT&T must (and will) continue to collect and remit the applicable FET from California LifeLine

¹⁸ See, e.g., *Re Rulemaking to Consider Modifications to the Universal Lifeline Telephone Service Program and General Order 153*, Decision No. 00-10-028, *Opinion*, 2000 WL 1922282 (Cal.P.U.C. Oct. 5, 2000), *mimeo*, pp. 24-26.

¹⁹ The FET is also assessed on the ILEC’s bill and keep/rate case surcharge/surcredit, local call allowance, and regrade charges. See CPUC Resolution No. T-17321, *Resolution Revising General Order 153 to Reflect Revisions to the California Lifeline Telephone Program as Adopted in Decision 10-11-033*, 2011 WL 3375590 (Cal.P.U.C. July 28, 2011), Attachment B, p. B-5, and General Order 153, § 9.3.5.1.

customers, as it does today. AT&T will also continue to remit to the IRS the total amount of FET due and owing the LifeLine customer, even if not actually paid by the customer.

Unfortunately, the Final Decision is silent about whether the Commission will continue to reimburse LifeLine providers for the FET paid to the IRS, as it does now.

So as not to run afoul of federal law or create unnecessary tension between providers' obligations under the law and Commission rules, on rehearing the Commission must make it clear that it did not intend to change the current practice regarding the collection and remission of the FET for LifeLine customers – namely that (1) as required by federal law, California LifeLine providers must collect and remit the FET on the LifeLine service paid by customers; and (2) providers will be reimbursed by the LifeLine fund any FET remitted to the IRS that was not actually collected from the customer. Any other solution would be inequitable and impractical: Inequitable because wireline LifeLine providers would have to remit the FET on the customer's entire bill without ever getting reimbursed from the fund – a violation of Section 871.5(d). Impractical because changing the way LifeLine providers collect and remit the FET would require expensive billing system changes that would serve no discernible purpose. The Commission should not change the status quo.

