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ATTORNEY GENERAL

December 20, 2017

The Honorable William W. Wheeler, III, Member
South Carolina House of Representatives
District No. 50
422-D Blatt Building
Columbia, SC 29211

Dear Representative Wheeler:

You are requesting an opinion regarding an "unsettled question of South Carolina law." Your question is as follows:

> [a]re providers and resellers of wireless Lifeline services and their Lifeline subscribers eligible for support from the South Carolina Universal Service Fund's Lifeline program?

You note also that '[t]his question of South Carolina law impacts low income South Carolina residents who use the services of such providers. . . ." It is our opinion for the reasons that follow that providers and resellers, as well as subscribers, are eligible for support from the Fund.

Law/Analysis

Background of Universal Service Fund

The General Assembly mandated that the South Carolina Public Service Commission ("PSC") establish a universal service fund to support universal access to basic local exchange telephone services. Section 58-9-280(E) of the Code provides, in part, the following:

> In continuing South Carolina's commitment to universally available basic local exchange telephone service at affordable rates and to assist with the alignment of prices and cost recovery with costs, and consistent with applicable federal policies, the commission shall establish a universal service fund (USF) for distribution to a carrier of last resort.

As a result in 2001, the PSC established and implemented the State USF to provide "Universal Service – i.e., the provision of basic local exchange telephone service at affordable rates, upon reasonable request – to all residential and single-line business customers in South Carolina." Re

Intrastate Universal Service Fund, 2001 WL 897409 (June 6, 2001). Further, the creation of the State USF was consistent with the Federal Telecommunications Act of 1996's ("FTCA") directive that there be "specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." See 47 U.S. C. § 254(B)(5); Re Intrastate Universal Service Fund, at 32.

The South Carolina Code provides that the PSC shall "require all telecommunications companies providing telecommunications services within South Carolina to contribute to the USF as determined by the commission." S.C. Code Ann. § 58-9-280(E)(2). The Code defines "telecommunications services" as "services for the transmission of voice and data communications to the public for hire, including those nonwireline services provided in competition to landline services." S.C. Code Ann. § 58-9-10(15) (emphasis added).

As a result of a PSC Order in 2001, referenced above, until recently only wireline carriers and their customers were uniformly required to contribute to the State USF. See e.g., Order, supra at 36 ("We adopt the recommendation made by Staff and Verizon Wireless that we exclude wireless revenues from the base of contributions for the State USF at this time."). In that same Order, however, the PSC found that when a carrier applied for carrier of last resort ("COLR") or eligible telecommunications carrier ("ETC") status, the application would be considered a declaration of the carrier's intent to offer services in competition to landline services and it would be required, upon approval as a COLR or ETC, to contribute to the State USF. Id. at 41. Therefore, wireless carriers were addressed on a case by case basis if and when they applied to become a COLR or ETC.

On January 26, 2016, however, the PSC issued an order conclusively finding that wireless voice telecommunications services are "radio based local exchange services" provided in "competition to landline services in South Carolina." In Re: Petition of the South Carolina Telephone Coalition, 2016 WL 33712 (January 26, 2016). Therefore, the PSC determined that "wireless retail carriers operating in South Carolina are . . . required, pursuant to S.C. Code Ann. § 58-9-280(E)(2), to contribute to the State USF in the same manner that other telecommunications service providers contribute." Id.

Later in 2016, the South Carolina General Assembly enacted the "State Telecom Equity in Funding Act." See 2016 S.C. Act. No. 181. In that Act, the General Assembly reaffirmed the PSC's authority to "require all telecommunications companies providing telecommunications services in South Carolina within South Carolina to contribute to the USF as determined by the commission." S.C. Code Ann. § 58-9-280(E)(2). For prepaid wireless providers, however, the Act went a step further by specifically requiring such providers to contribute to the State USF. See S.C. Code Ann. § 58-9-280(E)(2)(b) ("USF contributions for service defined in Section 58-9-2510(17) must be collected pursuant to Section 58-9-280(E) from consumers, as defined in Section 58-9-2510(13), by person or entities defined in Section 58-9-2510(16).").

The South Carolina Office of Regulatory Staff ("ORS") began implementing PSC Order No. 2016-22 and the State Telecom Equity in Funding Act in January 2017. See In re: Proceeding To Establish Guidelines for an Intrastate Universal Service Fund (USF), 2016 WL 5621881 (September 27, 2016).

Although wireless carriers are now uniformly required to contribute to the State USF, the South Carolina Code does not address whether they are entitled to distributions from the State USF. Likewise, the PSC has not dealt with this question. However, while the South Carolina Code provides for distributions under the State USF to "carrier[s] of last resort," it does not prohibit distributions to all entities that are now required to contribute to the State USF, including prepaid wireless providers and resellers. For the reasons outlined below, it is thus clear that state law and the legal mandates given to the PSC require that wireless providers be allowed to participate in the State USF Lifeline program.

As we understand it, although the Lifeline program's distributions are paid to the companies, low income South Carolina consumers are the ultimate beneficiaries of the distributions. As the South Carolina Code explains, qualifying carriers are entitled to "withdraw from the state USF all amounts needed to fund any state Lifeline match that is necessary to ensure that persons enrolled in the Lifeline program receive the maximum federally funded Lifeline credit amounts available." S.C. Code Ann. § 58-9-576(C)(9)(d); see also S.C. Ann. § 58-9-280(E)(5) (noting that nothing in that subsection "restricts the ability of any carrier to withdraw from the State USF all amounts approved by the commission to provide state funding for the Lifeline program for low income subscribers"). We will now address the legal principles which are controlling in this situation.

Governing Principles of Statutory Construction

We start with the fundamental principles of statutory construction. When construing this statute, of any other, certain rules of interpretation govern. As we stated in Op. S.C. Atty. Gen., 2006 WL 3199990 (October 19, 2006),

> When interpreting the meaning of a statute, certain basic principles must be observed. The cardinal rule of statutory interpretation is to ascertain and give effect to legislative intent. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). Additionally, a statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Cola. Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). As stated, "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003).
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> A court should not consider a particular clause or provision in a statute as being construed in isolation, but should read it in conjunction with the purpose of the statute and the policy of the law. State v. Gordon, 356 S.C. 143, 588 S.E.2d 105 (2003). As our Supreme Court has recognized, "[i]n ascertaining the intent of this

> Legislature, a court should not focus on a single section or provision but should consider the language of the statute as a whole." Croft v. Old Republic Ins. Co., 365 S.C. 402, 412, 618 S.E.2d 909, 914 (2005). Additionally, in determining legislative intent, a court will, if necessary, reject the literal import of words used in a statute. It has been said that "words ought to be subservient to the intent, and not the intent to the words." Arkwright Mills v. Murph, 219 S.C. 438, 443 44, 65 S.E.2d 665, 667 (1951) (quoting Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 816 (1942)).

Moreover, in previous opinions, we have applied the legal maxim "that which is not prohibited is permitted." Op. S.C. Atty. Gen., 2006 WL 2593082 (August 24, 2006) (quoting Witt v. Realist, Inc., 118 N.W.2d 85 (Wis. 1962). In this instance, as noted, there is no provision contained in the SCTCA or in any other provision of law prohibiting wireless providers or low income consumers of wireless services from participating in the State USF Lifeline program.

The SCTCA Directs that Its Provisions Should be Interpreted In a Manner Consistent with Corresponding Federal Law

The SCTA, as a whole, supports the conclusion that providers and resellers of wireless Lifeline services, including prepaid wireless providers, should be entitled to distributions from the State USF. A principal goal of the SCTCA, specifically through its creation of the State USF, is to provide telephone services to those of lower economic means and for those located in rural areas. See S.C. Code Ann. § 58-9-280(E); see also PSC Order No. 2001-419 at 25 ("The goal of Universal Service is to ensure the widespread availability of affordable local exchange service."). To further this purpose, the General Assembly created the State USF, wherein telecommunications providers contribute to the program, and are entitled to receive distributions form the State USF, in addition to the amounts they receive under the Federal USF. In 2017, wireless providers started contributing to the State USF. Neither the General Assembly nor the PSC, however, have faced the issue of whether wireless providers are entitled to receive distributions from the State USF. We believe they are.

Section 58-9-280(E) only explicitly references carriers of last resort when discussing distributions from the State USF. The South Carolina Code defines a "carrier of last resort" as a:

> Facilities-based local exchange carrier, as determined by the commission, no inconsistent with the federal Telecommunications Act of 1996, which has the obligation to provide basic local exchange telephone service, upon reasonable request, to all residential and single-line business customers within a defined service or geographic area.

S.C. Code Ann. § 58-9-10(10). Wireless providers generally are not considered "facilities-based local exchange carriers." Instead, these providers are "radio-based local exchange carriers." See, e.g., In Re Petition of the South Carolina Telephone Coalition, at 37 ("We conclude that wireless voice telecommunications services are radio-based local exchange services.").

However, regardless of whether wireless service is considered facilities-based or radio-based, both wireless providers and wireline providers ensure the widespread availability of affordable local exchange service. See S.C. Code Ann. § 58-9-280(E); see also In Re Petition of South Carolina Telephone Coalition, at 34 ("Voice telecommunications service (from both wireline and wireless providers) is available to subscribers, both residential and business, in South Carolina."). In fact, the PSC has found that "[w]ireless and landline voice telecommunications services are functionally equivalent services." Id. at 36 (emphasis added). As the PSC has explained:

> Wireless and landline voice telecommunications services are substitute services. . . . Not only can they be substituted for one another, but the evidence of record shows that they are, in fact, being substituted for one another, as customers port numbers from landline to wireless carriers, and as more and more South Carolina households become "wireless-only."

Id. (emphasis added).

Moreover, the definition of "carrier of last resort" specifically states that it is "not inconsistent with the federal Telecommunications Act of 1996." S.C. Code Ann. § 58-9-10(10). The Federal Telecommunications Act provides the following:

> A common carrier designated as an eligible telecommunications carrier under paragraph (2)(3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received –
>
> (A) Offer the services that are supported by Federal universal support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier; and
>
> (B) Advertise the availability of such services and the charges therefore using media of general distribution.

47 U.S.C. § 214(e)(1). Although Section 214(E)(1) discusses a telecommunications carrier "using its own facilities or a combination of its own facilities" and the resale of another's, the FCC has since ceased to apply the "facilities" requirement for purposes of the Lifeline program.

In 2005, the Commission agreed conditionally to forbear from the own-facilities requirement for the limited purpose of allowing TracFone [Wireless] to participate in the federal Lifeline program and receive Lifeline-only support." FCC Order No. 2012-11 at 106. Through this forbearance, TracFone applied for and became an ETC for Lifeline-only support. Id. The FCC then granted conditional forbearance from the facilities requirement to other carriers. Id.

After analyzing the results and impact of the conditional forbearances, in Order No. 2012-11, the FCC explicitly and conclusively held that:

> We forbear . . . from applying the Act's facilities requirement of section 214(e)(1)(A) to all telecommunications carriers that seek limited ETC designation to participate in the Lifeline program, subject to certain conditions noted below. For the reasons explained below, we find that all three prongs of section (10)(a) are satisfied and that, as a result, the Commission will forbear from the "own-facilities" requirement contained in section 214(e)(1)(A) for carriers that are, or seek to become, Lifeline-only ETCs, subject to the following conditions: (1) the carrier must comply with certain 911 requirements, as explained below; and (2) the carrier must file, and the Bureau must approve, a compliance plan providing specific information regarding the carrier's service offerings and outlining the measures the carrier will take to implement the obligations contained in this Order as well as further safeguards against waste, fraud and abuse the bureau may deem necessary.

Id. at 107.

The Federal Telecommunications Act specifically provides that where the FCC has issued a forbearance, "[a] State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section." 47 U.S.C. § 160(e). Therefore, for purposes of the Federal USF program, the PSC cannot continue to apply the facilities requirement.

In Section 58-9-280(F) of the SCTCA, the General Assembly explicitly provided that "[n]othing in [the SCTCA] shall be interpreted to limit or restrict any right that any local exchange carrier may have under federal law." Id. As stated by the PSC, "[w]e believe that it is essential to mesh the components of state and federal law and the Federal Communications Commission's (FCC's) Universal Service Order to the greatest extent possible so as to avoid inconsistencies and to seek and to optimize universal telecommunication service and universal service fund processes to the benefit of South Carolina consumers." See, In Re: Proceeding to Establish Guidelines for an Intrastate Universal Service Fund, 1997 WL 3501034 (September 3, 1997), at 7.

The SCTCA Should be Interpreted to Avoid Conflict with Federal Law

Likewise, Section 254(f) of the Federal Telecommunications Act authorizes state commissions to establish their own programs to advance universal service (including Lifeline programs), subject to the condition that any such regulations are "not inconsistent with the [FCC's] rules to preserve and advance universal service." 47 U.S.C. § 254(f). Although Section 254(f) does not expressly preempt state law or demonstrate Congress' intent to occupy the field, a provider or reseller of wireless Lifeline services nevertheless has an argument that South Carolina law should be interpreted in a way to avoid conflict with federal law. See Coll. Loan Corp., 396 F.3d at 596 (noting that state law is preempted under the Supremacy Clause "when a state law conflicts with federal law").

Conflict preemption "occurs in one of two ways – either where compliance with both federal and state regulations is physically impossible or where the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Priester v. Cormer, 401 S.C. 38, 44, 736 S.E.2d 249, 252 (2012) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). Therefore, conflict preemption is "sometimes called 'obstacle' or 'frustration-of-purpose' preemption." Id. Because the federal program is open to all qualified providers, imposition of a requirement limiting availability of State USF support to COLRs would be inconsistent with the requirements governing the federal program. In light of Congress' express directive that state regulations should not be inconsistent with the FCC's rules preserving and advancing universal service, inconsistent USF requirements stand as an obstacle to the accomplishment of the objectives of the FTCA.

Therefore, in light of the aforementioned, and in reading the provision of the SCTCA establishing the State USF "in conjunction with the purpose of the whole stature and the policy of the law," see Jones, 364 S.C. at 232, 612 S.E.2d at 724, should a telecommunications carrier meet the requirements for the Lifeline program, it should therefore be entitled to distributions under the State USF program in a manner consistent with federal law.

The "Spirit" of the SCTCA and Federal Telecommunications Act Require Wireless Providers and Resellers of Lifeline Services Access to the State USF Lifeline Program

Although South Carolina's rules of statutory interpretation provide that generally "the words used in the statute must be given their ordinary meaning," courts have found that "[w]here . . . there is something about the statute that makes it clear the legislature did not intend the letter of the statute to prevail, the court can consider the spirit of the enactment." Soil Remediation Co. v. Nu-Way Envtl., Inc., 317 S.C. 274, 276, 453 S.E.2d 253, 254 (Ct. App. 1994), aff'd, 323 S.C. 454, 476 S.E.2d 149 (1996) (emphasis added). Thus, the courts will "'reject the ordinary meaning of words used in a statute' and apply the rule of construction according to the spirit of the law when to accept the ordinary meaning of such words 'would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature. '" Id. (quoting S.C. Bd. Of Dental Examiners v. Breeland, 208 S.C. 469, 480, 38 S.E.2d 644, 650 (1946)). For example, courts have interpreted "may" to mean "shall" where the court determines that the legislature intended for a provision to be mandatory. See T.W. Morton Builders, Inc. v. von Buedingen, 316 S.C. 388, 402, 450 S.E.2d 87, 95 (Ct. App. 1994). Furthermore, as the Court of Appeals has explained, "a statute does not apply only to facts in existence at the time of its adoption. Statutes must be updated functionally to reflect changes in technology, terminology, and the legal landscape." Brooks v. Northwood Little League, Inc., 327 S.C. 400, 406-07, 489 S.E.2d 647, 650-51 (Ct. App. 1997); see also City of Columbia v. Tatum, 174 S.C. 366, 177 S.E.541, 549-50 (1934) ("The language of the statute should be construed from a modern viewpoint, and not to prohibit progress in the public interest.").

The South Carolina Code defines a COLR, in part, as a "basic local exchange service," S.C. Code Ann. § 58-9-10(10), which is itself defined to include "access to basic voice grade local service, including available emergency services and directory assistance, access to operator services, and one annual director listing." S.C. Code Ann. § 58-9-10(9). With wireless service, there is no "local" or "long distance" service as exists in the wireline sector. Some providers of wireless Lifeline service, for example, permit their Lifeline customers to use their Lifeline benefits to call across the entire United States. Moreover, each of the service features included in the basic local exchange service definition are requirements for all Lifeline providers. See 47 C.F.R. § 54.202(a) and (d) (detailing requirements for FCC designation of eligible telecommunications carriers). Accordingly, there is no logical reason why distributions from the Lifeline program should be limited solely to COLRs.

Furthermore, the need to allow providers and resellers of wireless Lifeline services access to the USF program is bolstered by the South Carolina Code's directive that "[n]othing in [the SCTCA] shall be interpreted to limit or restrict any right that any local exchange carrier may have under federal law," and that the State USF scheme should be "consistent with applicable federal policies." S.C. Code Ann. § 58-9-280(E) and (F). As a result, it is reasonable to conclude the General Assembly did not intend that an obsolete COLR reference would be strictly adhered to, but rather contemplated that the State USF scheme would change over its lifespan to conform to the parallel federal scheme. To do otherwise would interfere with the purpose of the SCTCA and the State USF program, which is to further South Carolina's commitment to provide "basic local exchange telephone service at continuing South Carolina's commitment to universally available basic local exchange telephone service at affordable rates and to assist with the alignment of prices and cost recovery with costs." Id. In order to accomplish this well-expressed and broad purpose, providers and resellers of wireless Lifeline services should have the ability to receive State USF Lifeline distributions.

Finally, the PSC's order requiring wireless carriers to contribute to the State USF cited to Section 254 of the Federal Telecommunications Act in several instances, noting that the principles articulated by that section supported its conclusion. See In Re: Petition of the South Carolina Telephone Coalition, supra. Section 254 sets forth the universal service principles, the first of which is "the first of which is that quality services should be available at just, reasonable, and affordable rates." Id. (citing 47 U.S.C. § 254(b)(1)). Likewise, this section provides that there should be "specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service, and that all providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service." Id. (citing 47 U.S.C. § 254(b)(4)-(5)). The PSC reasoned that, in light of these principles, it was fair and equitable to require wireless carriers to contribute to the State USF. See In Re: Petition of the South Carolina Telephone Coalition, supra. These very same guiding principles also support that it would be fair and equitable to permit these carriers to receive distributions from the Lifeline program. This is the best result for the customers in South Carolina who depend on the Lifeline program.

Guidance from Other States

Several states' agency equivalents to the South Carolina PSC have examined whether a provider or seller of wireless Lifeline services should be entitled to distributions under their respective state USF programs.

For example, in a 2014 Order, Kentucky's Public Service Commission found that Sage Telecom Communications, LLC a reseller of commercial mobile radio service, was eligible to receive both federal low income and state USF support as a wireless Lifeline service provider. See In the Matter of: Application of Sage Telecom Commc'ns, LLC for Designation As an Eligible Telecommunications Carrier in the Commonwealth of Kentucky for the Ltd. Purpose of Offering Wireless Lifeline Serv., 2013-00482, 2014 WL 310375, at *1 (July 3, 2014). The Kentucky Commission explained, however, that support under the Kentucky USF was "subject to the submission of and approval by the Commission for a Kentucky specific Lifeline plan for Kentucky subscribers which provides benefits commensurate with the amount of Kentucky USF support." Id. at *10. After Sage filed a state specific Lifeline plan with the Commission, the Commission issued a second order finding that Sage was "eligible to receive federal and Kentucky USF support for Lifeline." In the Matter of: Application of Sage Telecom Commc'ns, LLC for Designation As an Eligible Telecommunications Carrier in the Commonwealth of Kentucky for the Ltd. Purpose of Offering Wireless Lifeline Serv., 2013-00482, 2014 WL 4102473, at *2 (Aug. 15, 2014).

Moreover, in a 2017 Order, Nebraska's Public Service Commission addressed the eligibility of a prepaid reseller of commercial radio service, Boomerang Wireless, LLC d/b/a Touch Wireless, for state and federal USF distributions. See In the Matter of the Application of Boomerang Wireless, LLC d/b/a Entouch Wireless, Hiawatha, Iowa, Seeking Designation As an Eligible Telecommunications Carrier in the State of Nebraska for the Ltd. Purpose of Offering Wireless Lifeline Serv. To qualified Households., C-4852/NUSF-105, 2017 WL 587399, at *1 (Feb. 7, 2017). After reviewing the application, the Commission found that the reseller met the applicable requirements and thus was "declared to be a Nebraska Eligible Telecommunications Carrier for the limited purpose of receiving state universal service support to participate in the Nebraska Telephone Assistance Program." Id.

Further, in 2015, the California Public Utilities Commission ("CPUC") conditionally approved TracFone, a prepaid wireless provider as an "authorized California Lifeline Provider to provide discounted pre-paid wireless telephone services to eligible California households throughout California. See CPUC Resolution T-17467 at *1. The CPUC stated that the effective date would be held until TracFone demonstrated via Advice Letter that "unlocked Handsets are available for its eligible California Lifeline/Lifeline subscribers." Id. The CPUC noted that there were a number of rules and requirements that a Lifeline provider must comply with to be eligible, and determined that TracFone met each of these requirements. See generally id..

In addition, in 2012 TracFone also received approval as a Lifeline provider eligible to receive support under the Idaho state USF. This approval resulted from a negotiated settlement between TracFone and the Iowa Public Utilities Commission Staff which, in part, provided that once designated as an ETC, TracFone would have "the same entitlement to receive support from the 'Idaho Telephone Assistance Program Act] fund as do other ETCs who provide Lifeline service in Idaho." See In the Matter of the Amended Application of Tracfone Wireless, Inc. for Designation As an Eligible Telecommunications Carrier, 32550, 2012 WL 1829663 (May 18, 2012). The Commission found the negotiated settlement to be fair, just, and reasonable in its final order and adopted its terms. Id. The Commission also agreed to designate TracFone as an ETC subject to annual review. Id.

Finally, in 2011 Wisconsin's Public Service commission ("WPSC") determined that Nsighttel Wireless LLC, d/b/a "Cellcom" qualified as an eligible telecommunications carrier, and that because it qualified as an ETC, it would be "eligible to receive state USF funding consistent with the [Wisconsin Code]." See WPSC Order 5-TI-2052.

In our opinion, each of these administrative decisions support our conclusion that providers and resellers of wireless Lifeline services should be permitted to access the State USF.

Equal Protection and Due Process Doctrines Provide Additional support for State USF Lifeline Distributions to Providers and Resellers of Wireless Lifeline Services

A. Equal Protection

Both the United States and South Carolina Constitutions provide that no "person shall be denied the equal protection of the laws." U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. "The sine qua non of an equal protection claim is a showing that similarly situation persons received disparate treatment." Grant v. S.C. Coastal Council, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995); see also Sloan v. Bd. Of Physical Therapy Exam'rs, 370 S.C. 452, 481, 636 S.E.2d 598, 613 (2006) ("A crucial step in the analysis of any equal protection issue is the identification of the pertinent class. . . ."). In other words, "[t]he Equal Protection Clause applies to government classifications, which occur when government action imposes a burden or confers a benefit on one class of persons to the exclusion of others." Doe v. State, No. 2015-001726, 2017 WL 3165132, at *2-3 (S.C. July 26, 2017).

"A government classification does not violate the Equal Protection Clause, however, if the classification can survive the applicable level of scrutiny." Id. "So long as the statute 'does not implicate a suspect class or abridge a fundamental right, the rational basis test is used' to determine whether the classification falls into the prohibited group." Bodman v. State, 403 S.C. 60, 69-70, 742 S.E.2d 363, 367-68 (2013) (quoting Denene, Inc. v. City of Charleston, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004)). "A classification will survive rational basis review when it

bears a reasonable relation to the legislative purpose sought to be achieved, members of the class are treated alike under similar circumstances, and the classification rests on a rational basis." Id.

The courts give "great deference to the General Assembly's decision to create a classification." Id. Thus, "[t]he fact that the classification may result in some inequity does not render it unconstitutional." Davis v. Cnty. Of Greenville, 313 S.C. 459, 465, 443 S.E.2d 383, 386 (1994). Ultimately, the "entire equal protection inquiry revolves around interplay between the specific classification created and the purported basis for it, with a challenger coming under rational basis review facing a steep hill to climb." Bodman, 403 S.C. at 70, 742 S.E.21d at 368.

A provider or reseller of wireless Lifeline services would likely assert an equal protection claim as a basis to compel distributions under the State USF Lifeline program. Here, the rational basis test would almost certainly apply because a provider or reseller of wireless Lifeline services is not a member of a protected class and no fundamental constitutional rights are at issue.

Under the rational basis test, a provider or seller of wireless Lifeline services would first need to show that the classification of carriers of last resort confers a benefit on one class of providers to the exclusion of other similarly situated providers. Here, the Code specifically grants carriers of last resort the right to receive funds from the State USF to the exclusion of other telecommunications providers. A wireless Lifeline service provider would surely have a good faith position that this classification does not bear a relation to the legislative purpose sought to be achieved by the State USF, which was created as a result of South Carolina's commitment to "universally available basic local exchange telephone service at affordable rates." S.C. Code Ann. § 58-9-280(E). This is particularly the case if the wireless Lifeline service provider is willing and able to provide such service, and does in fact provide such service, but is prohibited from receiving distributions from the State USF which would help it further this goal. Thus, a provider or seller of wireless Lifeline services may properly argue that the limitation of State USF Lifeline distributions to COLRs does not bear a reasonable relation to the legislative purpose sought to be achieved.

A wireless Lifeline service provider would also need to show that members of the class are treated differently under similar circumstances. Again, a wireless Lifeline service provider can effectively argue that although wireless carriers are often treated as interchangeable by both the applicable regulatory bodies and consumers (and are, in fact, required to contribute to the USF because of this), they are treated differently than carriers of last resort for purposes of State USF distributions.

Finally, a provider of wireless Lifeline services would need to show that this classification does not rest on a rational basis. Here, such a provider would argue that the COLR classification is not grounded on a rational basis because it conflicts with and limits the basic statutory purpose. This conflict would also render the definition arbitrary, which also supports that no rational basis exists. See Foster v. S.C. Dep't of Highways & Pub. Transp., 306 S.C. 519,

526, 413 S.E.2d 31, 36 (1992) (noting that a party asserting an equal protection challenge to a statutory classification must show that it is "essentially arbitrary and without any reasonable basis"). As detailed above, wireless entities have perfected technology after 1996 which rendered obsolete the definitions written at the time of the initial adoption of the SCTCA. This was recognized on the payment side by the General Assembly in 2016 via the State Telecom Equity in Funding Act, which found that prepaid wireless providers must contribute to the State USF. However, the ability to receive disbursements was not expressly addressed in the new Act. Therefore, in light of the General Assembly's recognition of the changes in technology, any continuation to restrict distributions to COLRs, as defined in 1996, would be deemed arbitrary by a court. While, of course, this Office must presume the statutes to be valid, most certainly, a credible Equal Protection claim could be mounted in court.

B. Due Process

A provider or seller of wireless Lifeline services could also advance a due process argument regarding the State USF Lifeline distributions. The United States and South Carolina Constitutions affirm that "[n]o person shall be deprived of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1; S.C. Const. art. I, 3. "In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." Moore v. Moore, 376 S.C. 467, 472-73, 657 S.E.2d 743, 746 (2008) (citation omitted).

"Substantive due process protects a person from being deprived of life, liberty or property for arbitrary reasons." Worsley Companies, Inc. v. Town of Mount Pleasant, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000). To advance a substantive due process claim, "[a] plaintiff must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." Id. The Supreme Court of South Carolina has held that "the standard for reviewing all substantive due process challenges to state statutes, including economic and social welfare legislation, is whether the statute bears a reasonable relationship to any legitimate interest of government." Sunset Cay, LLC v. City of folly Beach, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004).

"Procedural due process requirements are not technical; no particular form of procedure is necessary." In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003). However, at a minimum certain elements must be present: "(1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Id.

In this instance, a wireless Lifeline service provider could advance a substantive due process argument as well as an Equal Protection claim. The wireless provider is not facing a future governmental taking of its property such that the requisite procedural safeguards would be implicated. Rather, it desires to advance the position that the SCTCA arbitrarily and capriciously deprives it of a property interest. As detailed previously, there is a good faith position that the

SCTCA's restriction of State UF funds to COLRs only is arbitrary and irrational, particularly in light of the PSC's recent interpretation requiring wireless carriers to contribute to the fund. Likewise, the PSC's findings that wireless and wireline providers are interchangeable further supports a conclusion that the General Assembly's restriction of distributions to only wireline providers is arbitrary and irrational.

Conclusion

It is our opinion that the SCTCA should be interpreted to allow providers and resellers of wireless Lifeline services, as well as their customers, to receive support under the State Lifeline program. The SCTCA does not prohibit such support and thus we apply the legal maxim of "that which is not prohibited is permitted." Op. S.C. Att'y Gen., 2006 WL 2593082 (August 24, 2006). There is no provision contained in the SCTCA or in any provision of law prohibiting wireless providers or low income consumers of wireless services from participating in the State USF Lifeline program.

Moreover, we must interpret the SCTCA in a constitutional manner. State v. Peake, 353 S.C. 499, 579 S.E.2d 297 (2003) [statute must be interpreted consistent with State Constitution]. Interpreting the SCTCA not to allow providers and resellers of wireless Lifeline services, as well as their customers, would raise serious Equal Protection and Due Process concerns as discussed herein. The most appropriate way to avoid such concerns is to interpret SCTCA in a constitutional manner. Thus, we so construe the Act.

Sincerely,

Robert D. Cook
Solicitor General