

NO. 83089-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ASSURANCE WIRELESS USA, L.P. F/K/A VIRGIN
MOBILE USA, L.P.

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE

Respondent.

BRIEF OF *AMICUS CURIAE*
AMERICANS FOR TAX REFORM

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As an *amicus curiae*, Americans for Tax Reform (“ATR”) offers the following argument to the Court on this important matter:

IDENTITY AND INTEREST OF *AMICUS CURIAE*

ATR’s identity and its interest in this appeal are set forth in ATR’s Motion for Leave to File Brief of *Amicus Curiae*.

INTRODUCTION

ATR respectfully submits that this is a simple dispute that is easily resolved.

The Washington Board of Tax Appeals (“BTA”) started with the basic premise that, under Washington law, the “buyer” for the purposes of sales taxes is the person who pays for the product or service, even if not the person who uses the service. Brief of Respondent (“Resp. Br.”) at 18-19. For distributions to phone carriers like Appellant Assurance Wireless USA L.P. (“Assurance”) under the “Lifeline” program of the Federal Communications Commission (“FCC”), the BTA appeared to adopt Respondent’s position that the Universal Service

Administrative Company (“USAC”) is the “buyer.” *See id.* at 21. That conclusion plainly is wrong.

As expressly established by the agreement between the USAC and the FCC, USAC is merely the “agent” of the FCC for distributing “support payments from the [Universal Service Fund (“USF”),” which includes the federal funds distributed for the Lifeline support payments at issue in this case. USAC must obtain FCC approval for USAC’s distribution of these funds. Because the FCC is immune from state sales taxes, USAC has no authority from the FCC to use these federal funds to pay state sales taxes.

Therefore, if this Court adopts the Respondent’s contention that Lifeline is a three-party transaction involving Assurance (as the seller), the Lifeline subscriber (as the user of the service), and a third party (as the “buyer” of the service), then the Court should conclude that the FCC is the “buyer” and thus reverse the BTA’s decision.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR AND STATEMENT OF THE CASE

ATR defers to Appellant's description of the Issues Pertaining to Assignments of Error and the Statement of the Case. *See* Brief of Appellant ("App. Br."), at 6-8.

ARGUMENT

I. THE FCC APPOINTED USAC AS ITS AGENT FOR DISTRIBUTING FEDERAL FUNDS FROM THE UNIVERSAL SERVICE FUND

ATR respectfully submits that the BTA has misconstrued the actual relationship between the FCC and USAC.

The FCC (not USAC) created Lifeline in 1985 and the program was later codified by Congress. App. Br. at 11-12. The FCC regulates Lifeline as part of the federal Universal Service program. *Id.* Lifeline is a "government assistance program" for low-income citizens. 47 C.F.R. § 54.405(c). The FCC (not USAC) decided that carriers may receive moneys from the FCC's USF for each Lifeline subscriber, and the FCC sets the service requirements that carriers must meet in order to receive those funds. App. Br. at 12-13 & 14 n.4; Resp. Br. at 6

& 8. Carriers must apply to the FCC (not USAC) for these payments. App. Br. at 13. The FCC appointed USAC as the “permanent Administrator” of support payments from the USF. 47 C.F.R. § 54.701(a).

For the purposes of distributing federal moneys out of USF for Lifeline and other programs, USAC’s relationship with the FCC is governed by the “Memorandum of Understanding Between the Federal Communications Commission and the Universal Service Administrative Company” (“MOU”) and FCC regulations.¹ The MOU has several provisions that are critical to understand that relationship.

The MOU establishes that USAC is merely the FCC’s agent for distributing federal funds. It states, “[a]s part of its duties and subject to the Commission’s rules and oversight, USAC . . . administers the disbursement of universal service support payments,” for which USAC serves “*as the*

¹ The current MOU is available at <https://www.fcc.gov/sites/default/files/usac-mou.pdf>.

Commission’s agent.” App. Br. at 2 (emphasis added). These funds for Lifeline and other Universal Service programs “are maintained at the U.S. Treasury” and “*are federal funds.*” *Id.* (emphasis added).

The FCC controls USAC’s use of these federal funds. To disburse any of these federal funds for Lifeline, USAC must “submit[] all necessary documentation to the Commission’s certifying officials who review and certify all disbursements of USF support payments from the U.S. Treasury.” *Id.* The MOU further provides that “USAC understands and agrees that *all disbursements from the USF Treasury account require approval by an FCC certifying official.*” *Id.* at 12.

Separately, the MOU also recognizes that USAC will engage in purchases for its operations. *Id.* at 5-9. These provisions governing USAC’s procurements are entirely distinct from its provisions governing USAC’s distribution of USF funds for Lifeline and other Universal Service programs (*id.* at 1-2). Nothing in the MOU suggests that the FCC

considers distribution of USF funds for Universal Service programs to constitute procurements by USAC.

FCC regulations also make clear that the FCC controls USAC's operations. For example, the Chairman of the FCC receives nominations for the USAC Board of Directors and selects the nominees. 47 C.F.R. § 54.703(c)(3). If the nominating groups cannot reach consensus on the nominee(s), the Chairman selects the board members. *Id.* Moreover, USAC's Board of Directors submits to the FCC Chairman a nominee for Chief Executive Officer ("CEO") of USAC who is responsible for managing USAC's operations. 47 C.F.R. § 54.704(b)(1). The Chairman has the right to approve or disapprove the nomination. 47 C.F.R. § 54.704(b)(2). If USAC's Board of Directors cannot or fails to nominate a candidate for CEO, the Chairman of the FCC selects the CEO. 47 C.F.R. § 54.704(b)(3).

FCC regulations also provide, among other responsibilities, that the FCC (not USAC) is responsible for

computing the required contributions to the universal service support programs (47 C.F.R § 54.709) and the amount that carriers are eligible to receive for each Lifeline subscriber (47 C.F.R. § 54.403). The FCC has the authority to initiate enforcement actions against carriers. 47 C.F.R. § 54.713(c).

II. IF THE BTA’S THREE-PARTY TRANSACTION THEORY IS CORRECT, THE FCC—NOT USAC— IS THE “BUYER” OF LIFELINE SERVICES

Assurance contends that its Lifeline service involves two transactions: (1) the provision of free monthly phone service by a carrier to a qualifying subscriber; and (2) a payment of federal funds from the FCC and USAC to incentivize carriers to participate in the Lifeline program. *See App. Br.*, at 39-55. If the Court agrees with Assurance, then the Court would reverse the BTA’s decision.

Alternatively, Respondent argues that Lifeline involves a single, three-party transaction among the carrier, the subscriber, and a third-party “buyer” that pays for the phone service. *Resp. Br.* at 17-18 & 26-28. If the Court accepts this notion of a

single, tripartite transaction, the question for this Court is whether the FCC or USAC is that third party. Given the unambiguous language of the MOU, it is the FCC and not its agent USAC that is the “buyer” for Lifeline services. App. Br. at 26 & 30-31.

The FCC and USAC agreed in the MOU that USAC is merely the FCC’s “agent” for the purpose of distributions from the USF, which includes the Lifeline support payments at issue here. USAC also agreed that all of its distributions from the USF are subject to FCC approval. Moreover, FCC regulations make it clear that the USAC operates under the direction and control of the FCC. That makes USAC, at least with respect to distributions from the USF, an agent of the FCC. *Moss v. Vadman*, 463 P.2d 159 (Wash. 1969) (agency exists where there is consent by agent and control by principal); *Barker v. Skagit Speedway, Inc.*, 82 P.3d 244, 248 (Wash. Ct. App. 2003) (“an agency relationship is created . . . ‘when one party acts at the insistence of and, in some material degree, under the

direction and control of another,” quoting *Stansfield v. Douglas Cnty.*, 27 P.3d 205, 215 (Wash. Ct. App. 2001)).

Where a party (USAC) makes purchases or obtains services as an “agent” for the federal government (FCC), the “legal incidence” of any sales tax would fall on the federal government and hence cannot be collected. *Kern-Limerick v. Scurlock*, 347 U.S. 110 (1954) (transaction by “agent” of government was exempt from sales tax); cf. *United States v. New Mexico*, 455 U.S. 720, 735-36 (1982) (distinguishing *Kern-Limerick* and finding transaction by federal contractors was not exempt from sales tax; stating in *dicta* that tax could have been avoided if the companies had been designated as “agents” of the government); accord *E.I. Du Pont de Nemours & Co. v. State*, 267 P.2d 667, 673 (Wash. 1954) (“Tax immunity could have been attained had Du Pont been designated and treated as an agent of the government in the performance of the work.”). Respondent’s misplaced reliance on cases about federal contractors (Resp. Br. at 42-47), which

are not “agents,” is further evidenced by its reliance on *South Carolina v. Baker*, 485 U.S. 505, 523 (1988), which concerns state taxes on private entities “with whom [the federal government] does business.” Here, USAC is not “doing business” with the federal government, it is acting as its *agent*.

Ignoring that USAC is merely the FCC’s agent for Lifeline distributions, Respondent’s analysis cuts the FCC out of the picture and wrongly pretends that USAC and Assurance had some kind of direct contractual relationship—which they do not. For instance, Respondent states that USAC “agrees to pay” and “took on the responsibility to pay” USF funds in a “course of dealing . . . consistent with a buyer and seller.” Resp. Br. at 17 & 20. The relationship of the FCC, USAC and Assurance bears no resemblance to a traditional purchase; no contract or agreement exists between Assurance and USAC. Instead, the “agreements” were between:

- (1) The FCC and Lifeline carriers — The FCC sets the requirements that Assurance had to meet to be eligible

to provide Lifeline service to customers and to receive Lifeline support payments; and

(2) The FCC and USAC—Through its regulations and the MOU, the FCC (not Assurance) directed USAC to use federal funds to make the distributions to carriers, like Assurance, that participate in the Lifeline program, and to subsidize low-income customers.

USAC was only “responsible” *to the FCC* to make the distributions because the FCC’s regulations and the MOU required USAC to do so; Assurance has no enforceable agreement with USAC. *See App. Br. at 33.* Because virtually all legal authority associated with this program to purchase services remained with the FCC rather than USAC, USAC’s role in the transactions included almost none of the characteristics associated with being a buyer.²

² Respondent relies on *In re Incomnet, Inc.*, 463 F.3d 1064 (9th Cir. 2006), which has nothing to do with legal incidence of sales taxes. *Incomnet* was a bankruptcy decision applying the “dominion” test for purposes of determining whether USAC is

Finally, three further points prove the illogic of Respondent's arguments.

1. Respondent relies on authorities that federal contractors owe state sales taxes when they make purchases on their federal contracts. Resp. Br. at 36-38. But, as noted earlier, the MOU expressly *distinguishes* between (1) USAC's agency for the FCC when distributing USF funds for Lifeline and (2) its procurements for its operations (*see* App. Br. at 34). Thus, Respondent's argument actually reinforces the conclusion that USAC's distribution of federal funds as the FCC's agent for the Lifeline program is *not* like states taxing purchases by federal contractors. *See New Mexico*, 455 U.S. at 735-36.

a "transferee" under 11 U.S.C. §§ 547 and 550. Critically, *Incomnet* involves two competing federal statutes—the Bankruptcy Code and the Communications Act—and so there were no possible concerns about sovereign immunity or federalism, quite different from this State attempting to apply a sales tax to a distribution of federal funds by an agent of the federal government.

2. If USAC is the buyer, then each carrier providing Lifeline services in Washington must bill USAC for sales taxes. *See* Resp. Br. at 28-29. But USAC has *no authority* to pay such an invoice. As the MOU states, USAC needs federal approval for “all disbursements” from the USF, which are “federal funds.” Thus, the FCC would need to authorize USAC’s payment of sales taxes. Because the federal government does not pay state sales taxes as Respondent necessarily concedes, Resp. Br. at 34-36, and the FCC does not include state sales taxes in the budget of the USF, USAC cannot and would not receive the FCC’s permission to pay Assurance’s invoices for sales taxes. *See* 47 C.F.R. § 54.715(c). Proving that no good deed goes unpunished, designating USAC as the buyer will thus result in the manifest injustice: by agreeing to provide Lifeline services for *free* to low-income Washington residents, Assurance may have to dip into its own pocket to pay sales taxes that USAC and the FCC inevitably will refuse to pay for past services (and Assurance will have to bill the low-income

Lifeline subscribers directly for this additional sales tax in the future).

3. Respondent's arguments run counter to nationwide practices. Respondents have not cited a single instance when USAC has ever paid sales taxes to any carrier anywhere in the country. It would be illogical to conclude that numerous major phone companies, with their legions of lawyers, have been simultaneously delinquent in not billing USAC for state sales taxes for Lifeline all across the country for decades. *Cf. In re IntraMTA Switched Access Charges Litig.*, 961 F.3d 691, 716 (5th Cir. 2020) (rejecting interpretation of FCC regulations regarding access charges by two major phone companies that for 21 years acted contrary to the interpretation they were espousing in the litigation).

CONCLUSION

For these reasons, ATR respectfully submits that the Court should reverse the BTA's decision and, instead, hold that the sales tax was not applicable to Lifeline distributions to

Assurance. Alternatively, the BTA's apparent misunderstanding of the actual relationship between the FCC and USAC demonstrates that, at a minimum, the Court should reverse the BTA's decision and remand for further fact-finding.

DATED this 16th day of May, 2022.

I certify that this brief contains 2,296 words, in compliance with the limits in RAP 18.17(c)(6) of 5,000 words for an *amicus* brief.

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CERTIFICATE OF SERVICE

I, Jeff Lombard, declare under penalty of perjury under the laws of the State of Washington that I am an associate in the law firm of Cooley LLP, at all times hereinafter mentioned, I was and am a resident of the State of Washington, over the age of 18 years, not a party to the above-entitled action, and competent to be a witness herein.

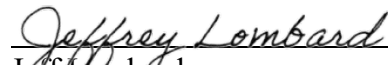
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