101873-8

Court of Appeals No. 83089-9-I

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON DEPARTMENT OF REVENUE

Respondent,

v.

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

Petitioner.

PETITION FOR REVIEW

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A. Introduction

Washington business and occupation ("B&O") and sales taxes are excise taxes on the privilege of engaging in specific activities in Washington. Under this Court's precedent, analysis of whether these taxes apply must start with identifying the taxpayer's activities and the relationship between the parties. In this case, the Court of Appeals failed to apply this analysis, creating a conflict with this Court's decisions and upholding a sales tax assessment that violates the United States Constitution's Supremacy Clause.

Petitioner, Assurance Wireless, L.P., F/K/A Virgin Mobile USA, L.P. ("Assurance"), participates in the federal Lifeline program and receives disbursements out of the federal Universal Service Fund ("USF") for its participation. Congress delegated Lifeline to the Federal Communications Commission ("FCC") with the goal of making essential communications services available to low-income individuals. Through Lifeline, Assurance provides ***free*** wireless service to eligible low-income

individuals. Separately, Assurance submits monthly forms to the FCC and receives disbursements out of the USF. These Lifeline disbursements are not tied to individual Lifeline recipients' free Lifeline services. Yet, the Court of Appeals erroneously held Assurance's receipt of disbursements are "retail sales" of taxable telecommunications services.

The Court of Appeals refused to identify the "buyer" in the retail sale from whom Assurance was supposed to collect sales tax. In doing so, it misapplied this Court's precedent. Sales tax is imposed on the "buyer," with the seller only having an obligation to collect and remit sales tax when there is a taxable sale. Without a "buyer," there can be no retail sale and Assurance cannot be held secondarily liable for failing to collect sales tax from an unidentified buyer.

If there was any buyer of free Lifeline service, it is the FCC. The FCC controls who is eligible to provide and receive Lifeline, and the amount and manner of the disbursements that come out of the USF. Rather than address the constitutional

implications of imposing sales tax on the FCC, the Court of Appeals stated that the buyer was ***either*** Lifeline recipients or the Universal Service Administrative Company ("USAC"). USAC is a non-profit entity created exclusively to perform administrative functions for USF-funded programs. USAC is subordinate to the FCC, and has no authority, discretion, or funding independent of the federal government. Deeming USAC the buyer of a taxable service effectively and unconstitutionally imposes tax on the FCC.

The Court of Appeals' decision undermines the purposes of the federal Lifeline program. It puts Lifeline carriers in the untenable position of being required to collect sales tax without knowing from whom to collect the tax: either low-income Lifeline recipients, for whom the extra cost would be a deterrent from accessing communications services, or USAC, which effectively taxes the federal government. Not being able to collect sales tax from the buyer as required under Washington

law would have a chilling effect on Lifeline carriers' voluntary participation in Lifeline.

This Court should accept this appeal to address the statutory and constitutional problems created by the Court of Appeals' decision.

B. Identity of Petitioner

Assurance asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part C.

C. Court of Appeals Opinion

On December 27, 2022, the Court of Appeals, Division I, issued a published opinion affirming the Washington Board of Tax Appeals' decision. *Assurance Wireless, USA, LP v. State of Washington, Department of Revenue*, No. 8309-9-1 (Div. 1 Published Opinion, Dec. 27, 2022) [the "Opinion"]. Appendix A-1–18. On March 8, 2023, the Court of Appeals denied Assurance's Motion for Reconsideration. Appendix A-19.

D. Issues Presented for Review

1. Low-income individuals receive free Lifeline service as part of a federal government assistance program. Are these Lifeline recipients' receipt of free Lifeline service taxable "retail sales" even though there is no valuable consideration exchanged for the service?

2. The Court of Appeals summarily ruled that there was a "retail sale" without identifying the buyer liable for sales tax. Sales tax is imposed on the buyer of a taxable service and collected by the seller. Are Lifeline carriers liable for sales tax when there is no buyer identified from whom the seller would collect sales tax?

3. Congress delegated Lifeline to the FCC, which then designated USAC to perform ministerial functions subject to the FCC's oversight. Does Washington violate the United States Constitution's Supremacy Clause if it requires Assurance to collect sales tax from USAC on Lifeline disbursements?

E. Statement of the Case

1. Assurance Chooses to Participate in Lifeline

Assurance provides ***free*** access to communications services to hundreds of thousands of low-income Washington residents annually. Clerk's Papers ("CP") 302–98 [Partial Stipulations of Facts and Exhibits ("Stip.") ¶ 9]. Telecommunications carriers, like Assurance, that choose to participate in the Lifeline program must receive regulatory certification as an eligible telecommunications carrier ("Carrier"). 47 C.F.R. §§ 54.201–202. The Washington Utilities and Transportation Commission designated Assurance as a Carrier to provide Lifeline service to qualified low-income individuals. CP 303 [Stip. ¶¶ 7–8].

Lifeline aims to make communications services accessible and affordable for low-income consumers. CP 303 [Stip. ¶ 4]. The FCC's Lifeline program began in 1985 and was codified by Congress in 1996 as 47 U.S.C. § 254(b). *Nat'l Lifeline Ass'n v.*

FCC, 983 F.3d 498, 503 (D.C. Cir. 2020). "Lifeline is a government assistance program." 47 C.F.R. § 54.405(c).

The FCC determines Lifeline recipients' eligibility criteria. 47 C.F.R. §§ 54.404, 54.409. Lifeline recipients certify eligibility annually. 47 C.F.R. § 54.410(f). Once enrolled with Assurance, Lifeline recipients receive ***free*** monthly service consisting of voice minutes, text messages, and data. CP 303 [Stip. ¶ 9]. The plan renews monthly unless the Lifeline recipient terminates service. *See* 47 C.F.R. §§ 54.408, 54.411.

Lifeline is funded by the FCC through the USF. CP 304 [Stip. ¶ 10]. Congress created the USF and requires telecommunications companies to contribute to the USF. 47 U.S.C. § 254(d); 47 C.F.R. § 54.706. While nearly all telecommunications companies contribute to the USF, participation as a Lifeline Carrier is voluntary for carriers that comply with the FCC's requirements. *See* 47 C.F.R. § 54.201.

2. The FCC Disburses Support to Lifeline Carriers

The FCC authorizes Carriers to receive Lifeline support measured by the number of "actual qualifying low-income customers it serves directly as of the first day of the month." 47 C.F.R. § 54.407(a). The FCC fixes the support amount at $9.25 per active Lifeline recipient per month. 47 C.F.R. § 54.403(a)(1). To receive Lifeline disbursements, the Carrier must file FCC Form 497 (Lifeline Worksheet). 47 C.F.R. § 54.407(d); CP 137–41. FCC Form 497 requires the Carrier to report an aggregate number of Lifeline recipients, but not to itemize individual Lifeline recipients. CP 137–141.

The FCC designated USAC as the administrator of USF-funded programs. 47 C.F.R. § 54.701(a). USAC receives the FCC Form 497s and makes disbursements to Carriers. CP 137–41. USAC's only role with respect to Lifeline or any USF programs is ministerial and limited by FCC regulation. 47 C.F.R. § 54.702.

3. The Department Assessed Sales Tax on the FCC's Lifeline Disbursements

The Department audited Assurance's excise tax records for January 2010 through December 2016. CP 304–05 [Stip. ¶¶ 14–15]. The Department issued two sales tax assessments based on the amount of Lifeline disbursements Assurance received for this period.[1] After an administrative protest, Assurance appealed to the Board of Tax Appeals ("BTA"). CP 305 [Stip. ¶ 18]. Assurance paid the assessed amounts as required by RCW 82.03.180. CP 430.

On June 29, 2021, the BTA issued its decision, granting the Department's motion for summary judgment. CP 10–29. The BTA ruled that USAC is the "likely buyer" of Lifeline, because "USAC is legally obligated to pay [Assurance] the contracted amount for the agreed-upon services provided to others." CP 22.

[1] The Department also issued retailing B&O tax assessments. Assurance does not dispute that the disbursements are subject to B&O tax, but they are subject to tax under the other services classification (RCW 82.04.290), not the retailing B&O classification (RCW 82.04.250).

Assurance appealed the BTA's decision to the Superior Court of King County, which transferred the case to the Court of Appeals. CP 1–37. The Court of Appeals affirmed the BTA's decision.

F. Argument Why Review Should Be Accepted

1. Washington Law Imposes Sales Tax Liability on the Buyer, but the Court of Appeals Did Not Identify a Buyer

Before tax can apply, the court "must first identify a business activity and then determine which tax measure and rate applies." *Steven Klein, Inc. v. Dep't of Revenue*, 183 Wn.2d 889, 357 P.3d 59 (2015); *FPR II, LLC v. Dep't of Revenue*, 16 Wn. App. 2d 706, 714, 482 P.3d 320 (2021). Sales tax is only due if the activity at issue is a "sale at retail." RCW 82.08.020(1). When sales tax is due, it is imposed on the buyer. RCW 82.08.050(1). The seller's role is to collect the sales tax from the buyer on whom it is imposed and remit the collected tax to the Department. RCW 82.08.050(2). The Court of Appeals' Opinion contravenes this binding precedent, because the court

failed to analyze the business activity, the buyer, the time of the sale, and the service purportedly being sold. Instead, the court summarily concluded Assurance is liable for sales tax, without identifying the buyer from whom Assurance should have collected the sales tax.

The sales tax is a transactional tax imposed on the "selling price" of a "retail sale." Tax is imposed on the sale of specified services, including telecommunications services. RCW 82.08.020(1), 82.04.050(5), 82.04.065(27). A "sale" means any transfer of the ownership of, title to, or possession of property for ***valuable consideration***. RCW 82.04.040(1), 82.08.010(6).

The "buyer" of a taxable good or service is liable for sales tax. RCW 82.08.050(1); *Murray v. State*, 62 Wn.2d 619, 623, 384 P.2d 337 (1963). If the buyer fails to pay the tax to the seller, then the Department may pursue either the buyer or the seller for the tax. RCW 82.08.050(3, 10). Until the buyer pays the tax to the seller, the tax constitutes a debt from the buyer to the seller. RCW 82.08.050(8). If no buyer pays valuable consideration in

exchange for a taxable service, there is no retail sale and the seller has no obligation to collect sales tax. *See* RCW 82.08.050(10). And if there were a retail sale, Assurance, a seller, cannot be liable for sales tax without a buyer that is primarily liable for the tax and who is statutorily obligated to repay the tax assessed against Assurance.

i. Assurance Lifeline Plans Are Free

Lifeline recipients receive ***free*** prepaid wireless services. CP 303 [Stip. ¶ 9]. "Prepaid wireless calling services" are a transfer of "the right to use mobile wireless service as well as other nontelecommunication services . . . which must be paid for in advance and that is sold in predetermined units or dollars of which the number declines with the use in a known amount." RCW 82.04.065(22). Assurance's Lifeline plans are "prepaid wireless calling services" because they have a predetermined number of units that decline with the plan's use.

As the Department of Revenue stipulated and the Court of Appeals acknowledged, Lifeline plans are ***free***. Opinion 2. When

a consumer receives a free service, there is no valuable consideration. The federal government's promise to eventually issue disbursements is not valuable consideration for the ***free*** Lifeline services that Assurance provides to individual Lifeline recipients. *See Activate Inc. v. Dep't of Revenue*, 150 Wn. App. 807, 818, 209 P.3d 524 (2009) (concluding that a customer's promise to enter into a service agreement with a third party does not constitute valuable consideration to the seller).

The Court of Appeals concluded that it need not "reach the more specific question whether the transaction qualifies as a taxable sale of 'prepaid wireless calling service.'" Opinion 10. Instead, the Court of Appeals presumed that because Assurance provides wireless service, and separately receives Lifeline disbursements, there is a taxable retail sale. *Id.* The Court of Appeals ignored the disconnect between the Lifeline recipient's receipt of free prepaid wireless services and Assurance's subsequent receipt of federal USF funds in exchange for its participation in Lifeline. Lifeline recipients receive service

irrespective of the Carrier's receipt of a Lifeline disbursement. Each disbursement is not directly related to an individual Lifeline recipient. The FCC Form 497 lists only an aggregate number of users, not individual recipients or transactions. CP 137. Nevertheless, the Court of Appeals concluded that the reimbursements are associated with particular Lifeline recipients, and a "retail sale" occurs ***either*** when the Lifeline recipient receives the service or when Assurance submits its FCC Form 497.

The consideration, the applicable local sales tax rate, and the timing of tax collection vary depending on who the buyer is, where the buyer is located, and the type of telecommunications service that they are buying. *See* RCW 82.32.520. If the Lifeline recipient is the buyer—for example, a low-income elderly woman who gets a "free" plan in Seattle, Assurance would not know what sales tax to charge her. Should she be charged the Seattle sales tax rate of 10.25% on the Lifeline disbursement Assurance expects to receive for her prepaid plan—$0.95

(10.25% x $9.25)? Should Assurance charge her immediately for the first month of service or wait over a month until Assurance receives disbursements from the FCC and charge her the $0.95 in arrears? Or should Assurance assume that she will continue to use her plan for a year and charge her $11.38 (10.25% x $9.25 x 12) immediately? Or should she get a $0.95 bill each month? What if the woman bought her phone in Seattle but lives in Olympia: should Assurance collect that lower sales tax rate (9.5%) or the Seattle rate?

Alternatively, if the FCC (or USAC) was the buyer, prepaid wireless service received at the D.C. business location would not be subject to Washington sales tax, but instead D.C. sales tax. Even if a $9.25 monthly disbursement were consideration for a Lifeline plan, it is undetermined what portion of that $9.25 would be taxable because a portion of the free Lifeline service is for non-taxable data.[2] By not identifying the

[2] Data, or Internet access services, are not subject to Washington

transaction subject to tax or the buyer liable for tax, the Court of Appeals' decision makes compliance with sales tax law impossible.

ii. Lifeline Disbursements Are in Exchange for Participating in Lifeline

Only providers that choose to participate in Lifeline and comply with the FCC's rules may receive Lifeline disbursements. 47 U.S.C. § 254(e). Carriers receive disbursements only after being authorized, providing qualifying services to Lifeline recipients, and submitting the requisite information to the FCC. 47 C.F.R. §§ 54.405, .407, .408, .420.

Lifeline disbursements are not in exchange for telecommunications services. The FCC regulations call disbursements a "Reimbursement for ***offering*** Lifeline." 47 C.F.R. § 54.407 (emphasis added). The "Universal Service support for providing Lifeline shall be provided directly to the

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sales tax pursuant to federal preemption. *See* Wash. Dep't of Revenue, Excise Tax Advisory 3047.2017 (May 10, 2017); RCW 82.04.065(27)(f).

eligible telecommunications carrier ***based*** on that number of actual qualifying low-income customers." *Id.* § 54.407(a) (emphasis added). Disbursements are ***not*** consideration for the transfer of ownership of, title to, or possession of a taxable service.

iii. Lifeline Recipients Are Not Liable for Sales Tax on Their Free Plans

The Court of Appeals' discussion of Lifeline disbursements as third-party consideration presupposes a retail sale occurs when no valuable consideration is exchanged. There is no consideration for Lifeline recipients' ***free*** plans. The court's characterization of disbursements as "third-party consideration" stems from a misreading of FCC Form 497, which says:

> I certify that my company will pass through the full amount of all . . . support for which it seeks reimbursement . . . to all qualifying low-income subscribers by an equivalent reduction in the subscriber's monthly bill for voice telephony service, ***or*** **by offering a pre-paid wireless plan**

> **that includes a set number of minutes of use per month.**

Opinion 3 (emphasis added). The Court of Appeals emphasized the form's language regarding "an equivalent reduction in the subscriber's monthly bill." However, that quoted language does ***not*** apply to Assurance's pre-paid Lifeline plans because there is no monthly billing. The disjunctive "***or***" differentiates between how the pass-through is made for post-paid versus pre-paid plans: billed on a monthly basis where a $9.25 discount must be passed through; ***or*** by offering a plan with *at least* $9.25 worth of minutes. For pre-paid Lifeline plans, FCC Form 497 requires a minimum number of minutes on the pre-paid plan, not a specific "price reduction or discount" as it does for monthly bills.

In this case, the pre-paid plans are free, so there is no price to reduce or discount. On its FCC Form 497, Assurance certifies only that it offers a pre-paid wireless plan that includes a set number of minutes. The $9.25 disbursement cannot be "***directly*** related to a price reduction or discount on the sale," a necessary

element of the statutory definition of third-party consideration in RCW 82.08.010(1)(c). Opinion 3. The FCC has stated the $9.25 disbursement is not based on the cost of Lifeline services. *In re Lifeline and Link Up Reform and Modernization*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd. 3962 ¶ 116 (2016). Moreover, a person who is not eligible for Lifeline cannot buy an "undiscounted" Lifeline plan for $9.25.

If disbursements were third-party consideration, Lifeline recipients would be saddled with the sales tax bill. Where a third-party reimburses the seller for another's purchase, the purchaser remains liable for sales tax at the time of the purchase. RCW 82.08.010(1)(c); WAC 458-20-108(3)(e) Example 1. The elderly woman, who thinks she is signing up for a free government assistance program, would be liable for an additional $0.95 per month. Such a hidden tax and financial burden would prevent the woman from obtaining the services the federal government sought to make accessible to her.

2. The FCC, Not USAC, Bears the Legal Incidence of Lifeline Disbursements

If the Court of Appeals were correct that a retail sale of taxable services occurs, the buyer is the FCC, not USAC. Congress created Lifeline, funded Lifeline, and delegated execution of the program to the FCC.

The FCC designates USAC to perform ministerial tasks to accomplish the FCC's statutory mandate of universal service, including Lifeline. 47 U.S.C. § 254. USAC has no funding other than federal funds and cannot be the buyer liable for sales tax. The Court of Appeals' holding would directly impose a tax on the FCC and a federal program, in violation of the U.S. Constitution's Supremacy Clause. U.S. Const. art. VI, § 2; *United States v. New Mexico*, 455 U.S. 720, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982).

i. Congress Delegated Lifeline to the FCC

The Court of Appeals stated that the FCC is undisputedly tax immune. Opinion 13. Avoiding this fact, the Court of Appeals summarily concluded "that the FCC is not the buyer of

Lifeline services." *Id*. The court ignored that Congress delegated all responsibility to the FCC to administer Lifeline and its congressionally-designated funding—making the FCC the only entity legally liable for Lifeline.

Congress codified the FCC's Lifeline program. 47 U.S.C. § 254. The FCC retains all authority to approve and disapprove of how USAC makes disbursements. 47 C.F.R. § 54.719. USAC is expressly prohibited from making any policy decisions. 47 C.F.R. § 54.702(c). A Carrier disputing disbursements does so by appealing USAC's decisions to the FCC, not by making a payment demand to USAC. 47 C.F.R. § 54.722. Neither the Department of Revenue nor a Carrier could seek to collect tax from USAC without going through the FCC. *See Achieve Telecom Network of MA, LLC v. USAC*, No. 09-10315-RWZ, 2009 WL 10694438 (D. Mass. Oct. 29, 2009) (dismissing an action against USAC to compel it to make disbursements). Any person seeking payment must do so directly from the federal government.

The FCC does not relinquish its ownership of Lifeline by designating USAC to perform administrative tasks any more than a business relinquishes responsibility for paying tax by hiring a bookkeeper. Since its creation, USAC has been entirely controlled and governed by the FCC's rules. In 1997, the FCC directed National Exchange Carrier Association ("NECA") to create an independently functioning, not-for-profit subsidiary. *Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776, 9216–17 ¶ 866 (1997). The resulting entity was USAC, which the FCC designated as the permanent administrator of all universal support mechanisms. *Changes to the Board of Directors of the NECA, Inc.*, 13 FCC Rcd. 25058, 25059–61 ¶¶ 2, 5, 20 (1998). The FCC "emphasize[d] that USAC's function under the revised structure will be exclusively administrative." *Id*. at 25067 ¶ 16.

The FCC enters into contracts with USAC, limiting USAC's authority and retaining the FCC's responsibility "for the overall management, oversight, and administration of the USF,

including all USF policy decisions." Memorandum of Understanding Between the Federal Communications Commission and the Universal Service Administrative Company, Dec. 19, 2018, at 2.[3] The FCC describes USAC's role as: '"billing' contributing carriers, 'collecting' universal service contributions, and 'disbursing' universal service funds." *Report on the Future of the Universal Service Fund*, FCC 22-67 (released Aug. 15, 2022)[4].

These limitations do not empower USAC to incur legal obligations or pay liabilities on behalf of the federal government, as the Court of Appeals erroneously ruled.

ii. Lifeline and USAC's Only Funding Is Federal Funds, Which Must Be Used for the Purposes Designated by Congress

The USF is a federal fund that funds Lifeline. The USF is created by federal statute and is treated as federal funds. Opinion

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[3] Available at https://www.fcc.gov/sites/default/files/usac-mou.pdf.

[4] Available at https://www.fcc.gov/document/fcc-reports-congress-future-universal-service-fund.

3. Congress regularly holds oversight hearings about these funds. *See, e.g.,* Angele A. Gilroy, Cong. Rsch. Serv., RL33979, *Universal Service Fund: Background and Options for Reform* 25-27 (2011).[5]

USAC has no funding other than the USF. USAC's administrative expense budget comes out of the USF and is approved by the FCC. 47 C.F.R. § 54.715(c). Lifeline's budget is also set by the FCC. 47 C.F.R. § 54.423. If Lifeline disbursements are subject to tax, the ***only*** source of the payment would be the USF. The Lifeline budget does not account for state taxes. Resulting taxes imposed on USAC could only come out of the USF, reduce available Lifeline funds, and diminish the ability of low-income Washington residents to access affordable communications services.

Moreover, using USF funding to pay state taxes is prohibited by federal law. USF funds may only go to eligible

[5] Available at https://sgp.fas.org/crs/misc/RL33979.pdf.

carriers for limited purposes that preserve and advance universal service. 47 U.S.C. § 254(e). USAC has no ability to pay additional amounts to a Carrier or the Department of Revenue. The FCC could not approve paying sales tax billed to USAC because it is constrained by federal statute. 47 U.S.C. § 254(b)(5), (d).

iii. USAC Is a Mere Administrator or Instrumentality of the FCC

The Court of Appeals erroneously relied on *New Mexico* as requiring a presumption against tax immunity because of USAC's administrative role in Lifeline. Opinion 12. *New Mexico* said that private construction contractors were not immune from tax simply because the federal government paid the contractors for their services. *New Mexico*, 455 U.S. at 737. In contrast, USAC exists exclusively to perform administrative tasks for federal programs with federal funding as its only revenue source. The government is not paying USAC to complete a project; the FCC controls and prescribes all of USAC's tasks.

USAC is so integrated into the FCC's federal function of ensuring access to communications services to low-income individuals that it is an instrumentality of the federal government. The Ninth Circuit rejected the Court of Appeals' conclusion that *New Mexico* controls the determination of whether an entity is an instrumentality. *United States v. City of Spokane*, 918 F.2d. 84, 87–88 (9th Cir. 1990). The appropriate evaluation of whether an entity is an instrumentality is if it stands in the shoes of the government. *Dep't of Emp't v. United States*, 385 U.S. 355, 87 S. Ct. 464, 17 L. Ed. 2d 414 (1966). Or "whether a corporation is performing sufficient secondary or derivative government functions to be shielded from state taxation." *Hall v. Am. Nat'l Red Cross*, 86 F.3d 919, 922 (9th Cir. 1996). USAC stands in the shoes of the FCC—it collects, bills, and disburses federal funds at the FCC's behest. USAC has no discretion over the programs it administers and is subject to complete oversight by the FCC.

The Court of Appeals focused on the fact the FCC has not expressly designated USAC as an "instrumentality." Opinion

15–16. Constitutional tax immunity does not apply only where the federal government expressly designates subordinate entities as instrumentalities. Although the FCC is not a party to this case, the FCC characterized USAC's role in Lifeline as purely ministerial, contradicting the Washington Court of Appeals' characterization of USAC as operating "independently from the federal government." Brief for Respondents at 20, 53–54, *Consumers' Research v. FCC*, No. 22-60008 (5th Cir. June 10, 2022); Opinion 16.

If, as the Court of Appeals stated, USAC is independent from the federal government, there would be another constitutional problem—the non-delegation clause prevents the FCC from delegating its power to another entity. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001). This limitation does not deny the FCC the flexibility and practicality to perform its functions through an administrator such as USAC. *Gundy v. United States*, 204 L. Ed. 2d 522, 139 S. Ct. 2116, 2123 (2019). The FCC may only subdelegate to

private entities that "function subordinately to" it. *Texas v. Rettig*, 987 F.3d 518, 532 (5th Cir. 2021). The Fifth Circuit Court of Appeals affirmed that the FCC "wholly subordinates USAC." *Consumers' Research v. FCC*, No. 22-60008, --- F.4th --- (5th Cir. Mar. 24, 2023). Courts "have a duty to construe an administrative rule or statute to avoid constitutional questions where such construction is reasonably possible." *Campbell v. Tacoma Pub. Sch*., 192 Wn. App. 874, 883, 370 P.3d 33 (2016). Therefore, the Court of Appeals' characterization of USAC as being able to independently incur liabilities on behalf of the FCC's Lifeline program must be reversed.

Congress also recognized USAC's role when it recently expressly authorized the FCC's use of USAC to implement the Affordable Connectivity Program. 47 U.S.C. § 1752. Because USAC has been in its administrative function on behalf of the FCC since 1997, Congress has acquiesced to USAC's role in administering the federal government's objective. *See In re*

Sehome Park Care Ctr., Inc., 127 Wn. 2d 774, 780, 903 P.2d 443 (1995).

3. The FCC's Immunity from Taxation Must Be Broadly Construed to Preserve the Federal Lifeline Program

The federal government's tax immunity should not be narrowly applied as the Court of Appeals ruled, because state taxation is traditionally viewed as a significant obstacle to an entity's ability to perform federal functions. *Spokane*, 918 F.2d at 86 (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431, 4 L. Ed. 579 (1819)). The Court of Appeals' severe constriction of tax immunity would undermine the federal government's operations and allow the State of Washington to impermissibly impose a direct burden on the federal government. *Cf. Columbia River Bridge Co. v. State*, 46 Wn.2d 385, 390, 282 P.2d 283 (1955).

The Court of Appeals' narrow application of tax immunity conflates an appealing taxpayer's burden with the appropriate legal evaluation for whether tax immunity applies. Defining the

scope of immunity requires going beyond state tax statutes to the real nature of the federal rights at issue and a tax's effect on that federal right. *United States v. City of Detroit*, 355 U.S. 466, 469, 78 S. Ct. 474, 2 L. Ed. 2d 424 (1958). The real nature of imposing sales tax on Lifeline disbursements is to directly tax the federal Lifeline program—the FCC and the federal government itself.

Instead of examining the burden of the tax, the Court of Appeals pronounced a new test: requiring Assurance to "show[ ] a clear congressional mandate that USAC or USF funds be exempt from state taxation." Opinion 17. Never has such an exacting standard been required for the federal government to enjoy constitutional protections from the intrusions of the state. Under this standard, the federal government could never involve private entities in executing its functions without an express statement that the Constitution applies. That amounts to a state court creating hurdles on how the federal government chooses to most efficiently operate.

The Court of Appeals' decision also undermines Lifeline. If Assurance and other Lifeline Carriers must collect sales tax from Lifeline recipients or USAC, it would significantly hinder the affordability and accessibility of communications services to low-income people. Aside from the poor policy of taxing needy individuals' free participation in a government program, practically, Carriers do not bill Lifeline recipients or have regular transactions on which to bill them sales tax. The upshot is that Lifeline Carriers are penalized through the exaction of a new tax imposed not on buyers in accordance with applicable statutes, but on Lifeline Carriers. Meanwhile, non-Lifeline carriers do not pay this tax because they collect the sales tax from their customers.

This new tax or the complicated process of attempting to bill low-income consumers and/or the federal government for Lifeline services would be a disincentive for carriers to participate in Lifeline. "Disincentivizing engagement in the Lifeline program would certainly interfere with collection,

distribution and administration of the Lifeline program." *Virgin Mobile USA, L.P. v. Keen*, 447 F. Supp. 3d 1071, 1092 (D. Kan. 2020). Carrier participation in Lifeline is voluntary, but the success of Lifeline's goal of providing communications services to more people would be diminished if carriers do not participate. The Opinion unconstitutionally undermines a federal program—Lifeline—and should be reversed.

G. Conclusion

For the foregoing reasons, Assurance respectfully requests that this Court grant this petition for review.

This document contains 4,998 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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Respectfully submitted this 7th day of April, 2023.

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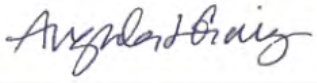
CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on April 7, 2023, I caused the foregoing Petition for Review to be field with the Supreme Court of the State of Washington, and caused a true and correct copy of same to be served upon the following person(s) as indicated below:

Charles E. Zalesky 7141 Cleanwater Drive SW P.O. Box 40123 Olympia, WA 98504-0123 chuck.zalesky@atg.wa.gov REVOlyEF@atg.wa.gov *Attorneys for Respondent, State of Washington, Department of Revenue*	☐ **by Appellate Web Portal** ☑ **by Electronic Mail** ☐ **by Facsimile Transmission** ☐ **by First Class Mail** ☐ **by Hand Delivery** ☐ **by Overnight Delivery**

DATED this 7th day of April, 2023 at Seattle, Washington.



Angela Craig, Legal Assistant

APPENDIX

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FILED
12/27/2022
Court of Appeals
Division I
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ASSURANCE WIRELESS, USA, LP, f/k/a VIRGIN MOBILE USA, LP, Appellant, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE, Respondent.	No. 83089-9-I DIVISION ONE PUBLISHED OPINION

BIRK, J. — Assurance Wireless is a telecommunications provider that participates in the Federal Communications Commission (FCC) "Lifeline" program, which is intended to aid qualifying low-income consumers in obtaining telecommunications services. The Washington State Department of Revenue (Department) assessed retailing business and occupation (B&O) taxes and sales taxes on funds Assurance received from the Universal Service Administrative Company (USAC) for its participation in the Lifeline program. Assurance appealed this assessment to the Board of Tax Appeals (Board), asserting that its receipt of funds from USAC is not associated with any retail sale as defined under Washington tax law, and, alternatively, that the taxes are unconstitutional because they fall on the federal government or an instrumentality of the federal government. The Board granted summary judgment to the Department. We agree there are no genuine issues of material fact and affirm the Board's determinations that a taxable

retail sale occurred and that the tax does not fall on the federal government or an instrumentality of the federal government.

I

Assurance Wireless USA LP is a telecommunications company that provides wireless telecommunications services to consumers in Washington and elsewhere, including Lifeline services. Lifeline is a federal program that is designed to make telecommunication services more affordable for qualifying low-income consumers. The FCC prescribes the minimum services that an eligible carrier must offer and regulates other aspects of the program, including consumer eligibility requirements. The Assurance Lifeline plan provides eligible consumers a free wireless phone and free monthly services that consist of a fixed amount of voice minutes, text messages, and data. A subscriber can purchase additional voice or text services if they desire a greater level of service than the baseline monthly plan.

The Lifeline program is administered by the USAC. USAC is "a not-for-profit, independently, wholly-owned subsidiary of the National Exchange Carrier Association, Inc." The record discloses that according to its website, "USAC is not a federal government agency or department or a government controlled corporation." USAC collects funds from telecommunications carriers, which are required by federal law to make contributions to the Universal Service Fund (USF) supporting the Lifeline program and other universal service programs. See 47 U.S.C. § 254(d) ("Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and

nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the [FCC] to preserve and advance universal service."). USAC administers the collection and disbursement of the USF funds. Id. The Congressional Budget Office treats USF funds as federal funds, though they are not federally-appropriated. 47 U.S.C. § 254(d); 47 C.F.R. § 54.706; Tex. Office of Pub. Util. Couns. v. Fed. Commc'ns Comm'n, 183 F.3d 393, 427 (5th Cir. 1999); In re LAN Tamers, Inc., 329 F.3d 204, 206 (1st Cir. 2003).

To receive reimbursements, Assurance must file FCC form 497. The form requires Lifeline providers to report the number of Lifeline subscribers as of the first day of the month. Assurance receives a reimbursement of $9.25[1] for each non-Tribal subscriber[2] who has used the service within the last 30 days, a reimbursement rate established by federal law. 47 C.F.R. § 54.403(a)(1). To receive Lifeline funds, Assurance must attest:

> I certify that my company will pass through the full amount of all Non-Tribal and Tribal federal Lifeline support for which it seeks reimbursement, as well as all applicable intrastate Lifeline support, to all qualifying low-income subscribers by *an equivalent reduction in the subscriber's monthly bill* for voice telephony service, or by offering a *pre-paid wireless plan* that includes a set number of minutes of use per month.

[1] This was the rate set by FCC regulation at the time of the proceedings before the Board. 47 C.F.R. § 54.403(a)(1). In its response in opposition to the Department's motion for summary judgment, Assurance notes that "Prior to September 2012, the reimbursement price was not fixed for all subscribers, and [Assurance] was receiving reimbursements of $9.79 per subscriber."

[2] Telecommunications companies receive reimbursement of $25.00 for each Tribal subscriber. 47 C.F.R. § 54.403(a)(3). Assurance does not provide Lifeline service for Washington Tribal residents.

(Emphasis added.) Assurance implements a business rule to exclude 2 percent of the total number of its Lifeline recipients in each state when submitting its attestation, to ensure that it does not claim more Lifeline funds than it is entitled to receive.

The Department audited Assurance's excise tax records for the period of January 2010 through December 2016 and issued assessments for B&O taxes, retail sales taxes, and interest. Assurance paid the assessments and sought refunds of $3,895,840 in taxes together with associated penalties and interest. Assurance appealed to the Department's Administrative Review and Hearings Division for review of the assessment. The Department denied Assurance's petitions and upheld the assessments. Assurance timely appealed the assessments to the Board.

The Department moved for summary judgment, arguing that the issues raised by Assurance were questions of law, not fact, and that the assessments should be upheld. The Board granted the Department's motion for summary judgment. The Board concluded that "the items that [Assurance] claims are material facts in dispute are actually legal arguments, and that there [were] no material facts in dispute." The Board concluded that "[t]here is no preemption that prohibits the state from applying its generally applicable retail sales tax to the sale of telecommunication services to consumers in Washington, even if the buyer is a third party." Assurance appeals, arguing that the evidence created "questions of fact" concerning whether there is any taxable "retail sale" involved in providing Lifeline plans to consumers. Alternately, Assurance argues Lifeline program funds

are immune from state tax under the supremacy clause of the United States Constitution.

II

This court reviews an order granting summary judgment de novo. Young v. Key Pharms., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989). We review the evidence in the light most favorable to the nonmoving party, here, Assurance. Id. Summary judgment is appropriate where the written record shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Blaise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). A material fact is one upon which the outcome of the litigation depends. Haines-Marchel v. Dep't of Corr., 183 Wn. App. 655, 662, 334 P.3d 99 (2014). In a summary judgment motion, the moving party bears the initial burden of showing the absence of any issue of material fact. LaPlanie v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). To defeat a motion for summary judgment, the nonmoving party must, by affidavits or as otherwise provided in CR 56, set forth specific facts establishing a genuine issue for trial. Young, 112 Wn.2d at 225-26.

Here, the parties do not dispute the material facts or the reasonable inferences that can be drawn from them. There is no dispute about the process through which Lifeline services are provided and the Lifeline funds are received. Assurance bears the burden to prove that it is entitled to the tax refund it is claiming. Everi Payments, Inc. v. Dep't of Revenue, 6 Wn. App. 2d 580, 590, 432 P.3d 411 (2018). The issue before us is whether the Board correctly determined that Assurance had not met its burden to prove it is entitled a tax refund, which is

a question of law that we review de novo. See Bravern Residential II, LLC v. Dep't of Revenue, 183 Wn. App. 769, 776, 334 P.3d 1182 (2014). Statutory interpretation is a question of law that we review de novo. Ekelmann v. City of Poulsbo, 22 Wn. App. 2d 798, 807, 513 P.3d 840 (2022).

A

A person[3] making retail sales in Washington is subject to retailing B&O tax and is also required to collect retail sales tax, unless an exemption applies. RCW 82.04.220; RCW 82.08.020, .050(1). The retailing B&O tax is imposed on the seller as a percentage of a business's gross receipts, and the retail sales tax is a percentage of the selling price on each retail sale. RCW 82.04.250; RCW 82.08.020. The retail sales tax must be paid by the buyer to the seller, and the seller must collect the full amount of tax payable. RCW 82.08.050. If the seller fails to collect the tax, whether as the result of the seller's own acts or the result of acts or conditions beyond the seller's control, the seller is personally liable to the state for the amount of the tax. RCW 82.08.050(3).

A "retail sale" is the sale of tangible personal property to all persons, unless it is a sale that qualifies for an exception. RCW 82.04.050(1)(a). Under RCW 82.04.050(5), retail sales include providing "telecommunications service." "Telecommunications service" is defined as "the electronic transmission, conveyance, or routing of voice, data, audio, video, or other information or signals to a point, or between or among points." RCW 82.04.065(27). "Prepaid wireless

[3] RCW 82.04.030 defines "person" to include any "firm, copartnership, joint venture, club, company . . . limited liability company, association . . . or any group of individuals acting as a unit."

calling service" is a telecommunication service that "provides the right to use mobile wireless service as well as other nontelecommunication services . . . which must be paid for in advance and that is sold in predetermined units or dollars of which the number declines with use in a known amount." RCW 82.04.065(22). Both mobile wireless services and prepaid wireless calling services are considered telecommunications services. WAC 458-20-245(103)(a) (Table A).

The "gross proceeds" of a retail sale includes the "value proceeding or accruing from the sale of tangible personal property . . . and/or for other services." RCW 82.04.070. "Selling price" for purposes of the sales tax includes "consideration received by the seller from a third party" if four conditions are met: (i) the seller actually receives consideration from a party other than the purchaser, and the consideration is directly related to a price reduction or discount on the sale, (ii) the seller has an obligation to pass the price reduction or discount through to the purchaser, (iii) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser, and (iv) one of three additional criteria is met. RCW 82.08.010(1)(c)(i)-(iv). Relevant here, the fourth element is met when the purchaser identifies himself or herself to the seller as a member of a group or organization entitled to a price reduction or discount. RCW 82.08.010(1)(c)(iv)(B).

Assurance argues that there are two separate transactions that facilitate its providing Lifeline services and that neither of these transactions is a "sale" under Washington law. Assurance argues that, in what it calls "business activity 1," it provides free services to Lifeline consumers and, because Assurance receives no

consideration from the consumer, there is no sale at that stage. Assurance then argues that, in what it calls "business activity 2," "[d]ivorced from the consumer's enrollment and use of the prepaid telecommunication services" Assurance receives Lifeline payments from USAC as "an incentive to encourage participation in Lifeline." Presumably because there is no service provided to any person in the receipt of funds that Assurance describes as "business activity 2," Assurance argues it also is not a sale.

The language of FCC form 497, required under federal law, shows there is a retail sale occurring under Washington law, and undermines Assurance's assertion that funds are an incentive unrelated to the consumer's use of Lifeline services. Assurance certifies on FCC form 497 that it will pass through the full amount of Lifeline funds received either by reducing a qualifying subscriber's bill, or by providing a prepaid wireless plan. Congress expected that Lifeline funds would be applied to the consumer's bill, which presupposes a sale, or toward providing a prepaid wireless plan, which also falls under the definition of a retail sale according to Washington law. RCW 82.04.050(5), RCW 82.04.065(21). Federal law describes the Lifeline program as a "retail service offering" that is provided to qualifying low-income consumers. 47 C.F.R. § 54.401(a)(1). The funds Assurance receives from USAC are based directly on the number of qualifying Lifeline plans that Assurance certifies it is providing. See Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n, 983 F.3d 498, 503 (D.C. Cir. 2020) (explaining that under both the monthly fee-for-service structure and the prepaid plan structure carriers "receive Lifeline support payments for their active Lifeline subscribers.").

Instead of there being two unrelated activities, the amount of Lifeline funding Assurance receives is directly tied to the number of Lifeline plans it provides. That Assurance may voluntarily reduce this number, and that there is some time period between the time when Assurance provides Lifeline service and the time it receives funds from USAC do not, separately or together, attenuate the connection between these two "activities" such that there is no retail sale as defined by Washington tax law.

The Department argues that Assurance is selling telecommunications services in a three party transaction, rather than engaging in two nonsale business activities. It argues Assurance is the seller, USAC is the buyer, and the user of lifeline services is the consumer. Washington law recognizes that a retail sale may occur when the seller receives consideration from a third party. RCW 82.08.010(1)(c)(i)-(iv). In Murray v. State, the court explained that the "buyer" is the person "legally obligated to pay the seller in any transaction." 62 Wn.2d 619, 624, 384 P.2d 337 (1963). In AARO Medical Supplies, Inc. v. Department of Revenue, the court stated that " 'consumers' " and " 'buyers' " are not statutory equivalents in Washington. 132 Wn. App. 709, 718 n.5, 132 P.3d 1143 (2006) (quoting Murray, 62 Wn.2d at 623). In AARO, vendors sold durable medical equipment to Medicare beneficiaries and were paid by the federal government via assignment. Id. at 711-12. The vendors did not collect sales tax on the transactions. Id. at 712. The court held that "for the purposes of RCW 82.08.050, the Medicare beneficiaries, not the federal government, [were] the buyers. Because RCW 82.08.050 require[d] a vendor to remit sales tax to the Department,

regardless of whether the vendor collect[ed] the sales tax from the purchaser," summary judgment in favor of the Department was appropriate. AARO, 132 Wn. App. at 711.

Here, there is no disagreement about whether Assurance is providing telecommunications services to Washington consumers. Under Washington law, providing telecommunications services, like those provided through the Lifeline program, is a retail sale. RCW 82.04.050(5), RCW 82.04.065(22). The statutory conditions for a retail sale based on third party consideration are likewise met. See RCW 82.08.010(1)(c)(i)-(iv). Assurance received consideration from a party other than the Washington consumer and attested in its FCC filing to the consideration being related to the services provided. Assurance had an obligation to—and represented to the FCC that it would—pass through the Lifeline funds to qualifying consumers. The amount Assurance was eligible to receive for providing each lifeline plan, $9.25, was fixed and determinable at the time the plan was provided to the consumer. And the transaction depended on the consumers identifying themselves as members of a group entitled to receive Lifeline plans because they met specific criteria as low-income consumers.

Because we conclude that Assurance's providing mobile wireless service together with receiving Lifeline funds from USAC is a taxable retail sale, we do not need to reach the more specific question whether the transaction qualifies as a taxable sale of "prepaid wireless calling service" as defined in state law. Before the Board, the Department argued Assurance's Lifeline plans were prepaid plans. In its opening brief, Assurance describes its Lifeline recipients as receiving "free

prepaid telecommunication services." In its reply, Assurance argues that its Lifeline recipients nevertheless do not receive "prepaid wireless calling service" as defined under RCW 82.04.065(22), because it receives funds from USAC after, not before, it provides services. Assurance's internal accounting is at odds with both characterizations, because Assurance uses accrual accounting to recognize Lifeline revenue at the time it provides the service. Nevertheless, Assurance certifies to the FCC in form 497 that it is passing through to its customers the "full amount" for which it seeks "reimbursement" from USAC, either by reducing the subscriber's bill or by offering a prepaid plan. Whether Assurance seeks "reimbursement" based on its having provided service for which the recipient incurred a "bill," or based on its having provided the recipient a prepaid plan, in either case it has provided the recipient "telecommunications service" under RCW 82.04.050(5) and received associated "reimbursement." We affirm the Board's conclusion that this was a taxable retail sale.

B

Assurance argues the Board's decision violates the United States Constitution, "because it seeks to impose tax on the federal government or an instrumentality thereof, in violation of the . . . Supremacy Clause." U.S. CONST. art. VI, § 2. To establish that a state tax assessment violates the supremacy clause, Assurance must show that the tax falls directly on the federal government or an instrumentality of the federal government. Assurance argues that tax immunity is triggered, because if there is a retail sale, the buyer is the FCC, a federal agency, or USAC, which Assurance asserts is an instrumentality of the federal government.

The Board concluded the buyer is USAC, and concluded that USAC is not an instrumentality of the federal government having tax immunity. On appeal, the Department argues that the buyer is either the consumer or USAC and that, because neither is entitled to tax immunity, it is not necessary to determine which is the buyer. We agree with the Department.

States are constitutionally prohibited from directly taxing the federal government, or its instrumentalities. United States v. New Mexico, 455 U.S. 720, 733, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982). Taxes are not prohibited if they merely have an effect on the United States, even if the economic burden is on the federal government. Id. "[S]o long as the tax is not directly laid on the Federal Government, it is valid if nondiscriminatory." Washington v. United States., 460 U.S. 536, 540, 103 S. Ct. 1344, 75 L. Ed. 2d 264 (1983). Assurance does not argue that the taxes at issue are discriminatory.

In United States v. New Mexico, the federal government argued that its contractors were entitled to tax immunity because they drew checks directly on federal funds. 455 U.S. at 737. The Supreme Court rejected this argument, stating "we cannot believe that an immunity of constitutional stature rests on such technical considerations." Id. The Supreme Court outlined a narrow approach to governmental tax immunity, which "accords with competing constitutional imperatives, by giving full range to each sovereign's tax authority." Id. at 735-36. The court stated "tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as

separate entities, at least insofar as the activity being taxed is concerned." Id. at 735. A finding of constitutional tax immunity "requires something more than the invocation of traditional agency notions: to resist the State's taxing power, a private taxpayer must actually 'stand in the government's shoes.' " Id. at 736 (quoting City of Detroit v. Murray Corp., 355 U.S. 4489, 503, 78 S. Ct. 486, 2 L. Ed. 2d 460 (1958)). "[A]bsent congressional action, we have emphasized that the States' power to tax can be denied under only 'the clearest constitutional mandate.' " Id. at 738 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 293, 96 S. Ct. 535, 46 L. Ed. 2d 495 (1976)).

The parties do not dispute that the FCC would be exempt from direct state taxation. Assurance argues that because the FCC maintains authority over the Lifeline program, the Lifeline funds are immune from sales tax. However, Assurance falls short of showing that the legal incidence of the challenged tax falls on the FCC. It is undisputed that the funds are paid by the wireless carriers into the USF, and disbursed from the fund directly to Lifeline carriers, including Assurance. Assurance has not shown that the FCC at any point incurs the "legal obligation to pay the tax." Everi Payments, 6 Wn. App. 2d at 591. We conclude that the FCC is not the buyer of Lifeline services.

Assurance argues that tax immunity would be triggered if USAC is the buyer, characterizing USAC as "a payment processor or claims agent" for the FCC, and arguing that USAC is an instrumentality of the federal government. Relying on Lewis v. United States, 680 F.2d 1239, 1242 (9th Cir. 1982), Assurance argues that the federal government's tax immunity should be liberally applied, and that the

test for determining whether an entity is a federal instrumentality protected from state taxation is " 'whether the entity performs an important governmental function.' " In Lewis, the court held that a federal reserve bank was not a federal agency for purposes of the Federal Tort Claims Act, 28 U.S.C. § 1346(b). Id. at 1241-42. The court distinguished case law holding that the federal reserve banks were federal instrumentalities for some purposes, including immunity from state taxation. Id. at 1242. The court reasoned that the test for determining whether an entity is a federal instrumentality for state tax immunity is "very broad," "liberally applied," and turns on whether the entity "performs an important governmental function." Id. In Lewis, that function was the federal reserve banks' role in implementing national fiscal policy. Id.

Lewis does not support Assurance's argument that USAC enjoys federal tax immunity. Lewis was published only a few weeks after United States v. New Mexico, in which the Supreme Court clarified that constitutional tax immunity derived from the supremacy clause is neither very broad nor liberally applied, but requires a "narrow approach" giving "full range to each sovereign's taxing authority." 455 U.S. at 735-36. Lewis does not mention the constitutional standard established by the Supreme Court only a few days before its publication. This court is bound to follow United States v. New Mexico, but there is a further distinction between Lewis and the present case. The statements in Lewis on which Assurance relies concerned express congressional exemptions from state tax, rather than immunity strictly under the supremacy clause. Lewis applied the statutory terms of the Federal Tort Claims Act to determine if the federal reserve

bank was a covered agency. Its comments about the broad scope of tax immunity did not refer to the constitutional principle of tax immunity, but rather to decisions that had found tax immunity for federal land banks based on an express statutory exemption from state tax established by Congress. 680 F.2d at 1242-43 (citing Fed. Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 99, 62 S. Ct. 1, 86 L. Ed. 65 (1941) ("The unqualified term 'taxation' used in section 26 clearly encompasses within its scope a sales tax such as the instant one."); Fed. Land Bank of St. Louis v. Priddy, 295 U.S. 229, 235, 55 S. Ct. 705, 79 L. Ed. 1408 (1935) ("There is thus a specific grant of immunity from taxation.")). Assurance does not point to any statutory exemption from state taxation, but relies exclusively on the constitutional principle derived from the supremacy clause. To the extent Lewis referred to "broad" and "liberally applied" immunities from state taxation, it referred to cases discussing only an express statutory exemption, which is absent here. In contrast, United States v. New Mexico determines the applicability of the constitutional immunity from taxation on which Assurance relies.

Under United States v. New Mexico, Assurance has not demonstrated that USAC "stands in the shoes" of the federal government as an instrumentality. Assurance invokes traditional notions of agency when it argues that because the FCC has delegated functions to USAC and because USAC operates under the authority of the federal government, USAC is an instrumentality of the FCC for the purposes of state tax immunity. But United States v. New Mexico holds that this is insufficient to establish tax immunity. 455 U.S. at 736.

USAC does not describe itself as an instrumentality of the federal government. It is uncontested that USAC is a wholly-owned subsidiary of a trade association that has been given the responsibility to collect, pool, and disburse the USF funds contributed by carriers. See In re Incomnet, Inc. v. Post-Confirmation Comm. of Unsecured Creditors of Incomnet Commc'ns Corp., 463 F.3d 1064, 1067 (9th Cir. 2006). While USAC must comply with FCC regulations in carrying out those responsibilities, the record shows that USAC has expressed publicly on its website that it is "not a federal government agency or department or a government controlled corporation." While the manner in which USAC holds itself out is not dispositive, it demonstrates USAC's intent to operate independently from the federal government and demonstrates that USAC does not "stand in the shoes" of the federal government.

Quoting 47 U.S.C. § 254(f), (j), Assurance argues that Congress intended to shelter Lifeline from state taxation, stating, "Congress explicitly recognized the importance of preserving federal immunity over Lifeline by prohibiting states from adopting regulations 'inconsistent with the Commission's rules to preserve and advance universal service' or doing anything that 'shall affect the collection, distribution, or administration of the Lifeline Assistance Program.' " But Assurance overlooks that 47 U.S.C. § 254(f) goes on to say, "A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal services within that State . . . that do not rely on or burden Federal universal service support mechanisms." In the same statute, subsection (j) reads, "Nothing in this section shall affect the collection, distribution, or administration of

the Lifeline Assistance Program provided for by the Commission under [other regulations]." 47 U.S.C. § 254 (j). When read in its entirety, this statute does not support Assurance's argument because it does not contain a clear statement of preemption of state tax.

If Congress had intended to establish USAC as an instrumentality of the federal government, it could have followed a statutory route for doing so. It did not. The Government Corporation Control Act of 1945 provides that "[a]n agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action." 31 U.S.C. § 9102. Congress has defined "agency" for purposes of Title 31 of the United States Code as a "department, agency, or instrumentality of the United States Government." 31 U.S.C. § 101. Assurance has not shown a clear congressional mandate that USAC or USF funds be exempt from state taxation.

As a result, the tax immunity of the federal government would not be triggered if USAC is the buyer. No party argues tax immunity would be triggered if the consumer is the buyer. AARO explained that RCW 82.05.050 requires a vendor to remit sales tax to the Department, regardless of whether the vendor collects the sales tax from the purchaser. 132 Wn. App. at 711. In AARO, where the two possible purchasers were either Washington consumers or the federal government, it was necessary to identify the buyer because one of the two possible buyers was immune. See id. at 720. It is not so here. Of the potential buyers remaining after the FCC has been eliminated (USAC or Washington consumers), neither is the federal government or an instrumentality of the federal government

and neither is immune from sales tax. We affirm the Board's conclusion that the federal government's tax immunity is not triggered.

III

We affirm the Board's conclusions that a retail sale occurred when Assurance provided Lifeline plans to Washington consumers and received Lifeline funds, and that these sales are not exempt from tax by virtue of the buyer being the federal government or an instrumentality thereof.

Affirmed.

Birk, J.

WE CONCUR:

Mann, J.

Dwyer, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ASSURANCE WIRELESS, USA, LP, f/k/a VIRGIN MOBILE USA, LP, Appellant, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE, Respondent.	No. 83089-9-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Assurance Wireless, USA, LP, filed a motion for reconsideration. The respondent, Department of Revenue, has filed an answer. The court has considered the motion pursuant to RAP 12.4 and has determined the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Bile, J.

Judge

CONSTITUTION OF THE UNITED STATES OF AMERICA—1787[1]

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE. I.

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION. 2. [1]The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[2]No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3]Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.[2] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4]When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[5]The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. [1]The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof,[3] for six Years; and each Senator shall have one Vote.

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[1]This text of the Constitution follows the engrossed copy signed by Gen. Washington and the deputies from 12 States. The small superior figures preceding the paragraphs designate clauses, and were not in the original and have no reference to footnotes.

In May 1785, a committee of Congress made a report recommending an alteration in the Articles of Confederation, but no action was taken on it, and it was left to the State Legislatures to proceed in the matter. In January 1786, the Legislature of Virginia passed a resolution providing for the appointment of five commissioners, who, or any three of them, should meet such commissioners as might be appointed in the other States of the Union, at a time and place to be agreed upon, to take into consideration the trade of the United States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States such an act, relative to this great object, as, when ratified by them, will enable the United States in Congress effectually to provide for the same. The Virginia commissioners, after some correspondence, fixed the first Monday in September as the time, and the city of Annapolis as the place for the meeting, but only four other States were represented, viz: Delaware, New York, New Jersey, and Pennsylvania; the commissioners appointed by Massachusetts, New Hampshire, North Carolina, and Rhode Island failed to attend. Under the circumstances of so partial a representation, the commissioners present agreed upon a report, (drawn by Mr. Hamilton, of New York,) expressing their unanimous conviction that it might essentially tend to advance the interests of the Union if the States by which they were respectively delegated would concur, and use their endeavors to procure the concurrence of the other States, in the appointment of commissioners to meet at Philadelphia on the Second Monday of May following, to take into consideration the situation of the United States; to devise such further provisions as should appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled as, when agreed to by them and afterwards confirmed by the Legislatures of every State, would effectually provide for the same.

Congress, on the 21st of February, 1787, adopted a resolution in favor of a convention, and the Legislatures of those States which had not already done so (with the exception of Rhode Island) promptly appointed delegates. On the 25th of May, seven States having convened, George Washington, of Virginia, was unanimously elected President, and the consideration of the proposed constitution was commenced. On the 17th of September, 1787, the Constitution as engrossed and agreed upon was signed by all the members present, except Mr. Gerry of Massachusetts, and Messrs. Mason and Randolph, of Virginia. The president of the convention transmitted it to Congress, with a resolution stating how the proposed Federal Government should be put in operation, and an explanatory letter. Congress, on the 28th of September, 1787, directed the Constitution so framed, with the resolutions and letter concerning the same, to ''be transmitted to the several Legislatures in order to be submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the convention.''

On the 4th of March, 1789, the day which had been fixed for commencing the operations of Government under the new Constitution, it had been ratified by the conventions chosen in each State to consider it, as follows: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 2, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 25, 1788; and New York, July 26, 1788.

The President informed Congress, on the 28th of January, 1790, that North Carolina had ratified the Constitution November 21, 1789; and he informed Congress on the 1st of June, 1790, that Rhode Island had ratified the Constitution May 29, 1790. Vermont, in convention, ratified the Constitution January 10, 1791, and was, by an act of Congress approved February 18, 1791, ''received and admitted into this Union as a new and entire member of the United States.''

[2]The part of this clause relating to the mode of apportionment of representatives among the several States has been affected by section 2 of amendment XIV, and as to taxes on incomes without apportionment by amendment XVI.

[3]This clause has been affected by clause 1 of amendment XVII.

States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2]In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3]The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION. 3. [1]Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2]The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE. IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION. 2. [1]The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2]A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[3]No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[11]

SECTION. 3. [1]New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2]The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

[11]This clause has been affected by amendment XIII.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE. VI.

[1]All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2]This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[3]The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth IN WITNESS whereof We have hereunto subscribed our Names,

G[O]. WASHINGTON—*Presid[t]*.
and deputy from Virginia

[Signed also by the deputies of twelve States.]

New Hampshire

JOHN LANGDON

spection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) "Incumbent local exchange carrier" defined

For purposes of this section, the term ''incumbent local exchange carrier'' has the meaning provided in section 251(h) of this title.

(June 19, 1934, ch. 652, title II, § 252, as added Pub. L. 104–104, title I, § 101(a), Feb. 8, 1996, 110 Stat. 66.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (g), was in the original ''this Act'', meaning act June 19, 1934, ch. 652, 48 Stat. 1064, known as the Communications Act of 1934, which is classified principally to this chapter. For complete classification of this Act to the Code, see section 609 of this title and Tables.

§ 253. Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

(June 19, 1934, ch. 652, title II, § 253, as added Pub. L. 104–104, title I, § 101(a), Feb. 8, 1996, 110 Stat. 70.)

§ 254. Universal service

(a) Procedures to review universal service requirements

(1) Federal-State Joint Board on universal service

Within one month after February 8, 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) of this title a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c) of this title, one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after February 8, 1996.

(2) Commission action

The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advance-

ment of universal service on the following principles:

(1) Quality and rates

Quality services should be available at just, reasonable, and affordable rates.

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h) of this section.

(7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

(c) Definition

(1) In general

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services—

(A) are essential to education, public health, or public safety;

(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

(C) are being deployed in public telecommunications networks by telecommunications carriers; and

(D) are consistent with the public interest, convenience, and necessity.

(2) Alterations and modifications

The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

(3) Special services

In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h) of this section.

(d) Telecommunications carrier contribution

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

(e) Universal service support

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

(f) State authority

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

(g) Interexchange and interstate services

Within 6 months after February 8, 1996, the Commission shall adopt rules to require that the

rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.

(h) Telecommunications services for certain providers

(1) In general

(A) Health care providers for rural areas

A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

(B) Educational providers and libraries

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3) of this section, provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall—

(i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

(ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

(2) Advanced services

The Commission shall establish competitively neutral rules—

(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries; and

(B) to define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users.

(3) Terms and conditions

Telecommunications services and network capacity provided to a public institutional telecommunications user under this subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value.

(4) Eligibility of users

No entity listed in this subsection shall be entitled to preferential rates or treatment as required by this subsection, if such entity operates as a for-profit business, is a school described in paragraph (7)(A) with an endowment of more than $50,000,000, or is a library or library consortium not eligible for assistance from a State library administrative agency under the Library Services and Technology Act [20 U.S.C. 9121 et seq.].

(5) Requirements for certain schools with computers having Internet access

(A) Internet safety

(i) In general

Except as provided in clause (ii), an elementary or secondary school having computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the school, school board, local educational agency, or other authority with responsibility for administration of the school—

(I) submits to the Commission the certifications described in subparagraphs (B) and (C);

(II) submits to the Commission a certification that an Internet safety policy has been adopted and implemented for the school under subsection (*l*) of this section; and

(III) ensures the use of such computers in accordance with the certifications.

(ii) Applicability

The prohibition in clause (i) shall not apply with respect to a school that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.

(iii) Public notice; hearing

An elementary or secondary school described in clause (i), or the school board, local educational agency, or other authority with responsibility for administration of the school, shall provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy. In the case of an elementary or secondary school other than an elementary or secondary school as de-

fined in section 8801[1] of title 20, the notice and hearing required by this clause may be limited to those members of the public with a relationship to the school.

(B) Certification with respect to minors

A certification under this subparagraph is a certification that the school, school board, local educational agency, or other authority with responsibility for administration of the school—

(i) is enforcing a policy of Internet safety for minors that includes monitoring the online activities of minors and the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene;

(II) child pornography; or

(III) harmful to minors;

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors; and

(iii) as part of its Internet safety policy is educating minors about appropriate online behavior, including interacting with other individuals on social networking websites and in chat rooms and cyberbullying awareness and response.

(C) Certification with respect to adults

A certification under this paragraph is a certification that the school, school board, local educational agency, or other authority with responsibility for administration of the school—

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene; or

(II) child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.

(D) Disabling during adult use

An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.

(E) Timing of implementation

(i) In general

Subject to clause (ii) in the case of any school covered by this paragraph as of the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certification under subparagraphs (B) and (C) shall be made—

(I) with respect to the first program funding year under this subsection following such effective date, not later than 120 days after the beginning of such program funding year; and

(II) with respect to any subsequent program funding year, as part of the application process for such program funding year.

(ii) Process

(I) Schools with Internet safety policy and technology protection measures in place

A school covered by clause (i) that has in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C) shall certify its compliance with subparagraphs (B) and (C) during each annual program application cycle under this subsection, except that with respect to the first program funding year after the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certifications shall be made not later than 120 days after the beginning of such first program funding year.

(II) Schools without Internet safety policy and technology protection measures in place

A school covered by clause (i) that does not have in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C)—

(aa) for the first program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C); and

(bb) for the second program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is in compliance with subparagraphs (B) and (C).

Any school that is unable to certify compliance with such requirements in such second program year shall be ineligible for services at discount rates or funding in lieu of services at such rates under this subsection for such second year and all subsequent program years under this subsection, until such time as such school comes into compliance with this paragraph.

(III) Waivers

Any school subject to subclause (II) that cannot come into compliance with subparagraphs (B) and (C) in such second year program may seek a waiver of subclause (II)(bb) if State or local procurement rules or regulations or competitive

[1] See References in Text note below.

bidding requirements prevent the making of the certification otherwise required by such subclause. A school, school board, local educational agency, or other authority with responsibility for administration of the school shall notify the Commission of the applicability of such subclause to the school. Such notice shall certify that the school in question will be brought into compliance before the start of the third program year after the effective date of this subsection in which the school is applying for funds under this subsection.

(F) Noncompliance

(i) Failure to submit certification

Any school that knowingly fails to comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates or funding in lieu of services at such rates under this subsection.

(ii) Failure to comply with certification

Any school that knowingly fails to ensure the use of its computers in accordance with a certification under subparagraphs (B) and (C) shall reimburse any funds and discounts received under this subsection for the period covered by such certification.

(iii) Remedy of noncompliance

(I) Failure to submit

A school that has failed to submit a certification under clause (i) may remedy the failure by submitting the certification to which the failure relates. Upon submittal of such certification, the school shall be eligible for services at discount rates under this subsection.

(II) Failure to comply

A school that has failed to comply with a certification as described in clause (ii) may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal to the Commission of a certification or other appropriate evidence of such remedy, the school shall be eligible for services at discount rates under this subsection.

(6) Requirements for certain libraries with computers having Internet access

(A) Internet safety

(i) In general

Except as provided in clause (ii), a library having one or more computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the library—

(I) submits to the Commission the certifications described in subparagraphs (B) and (C); and

(II) submits to the Commission a certification that an Internet safety policy has been adopted and implemented for the library under subsection (*l*) of this section; and

(III) ensures the use of such computers in accordance with the certifications.

(ii) Applicability

The prohibition in clause (i) shall not apply with respect to a library that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.

(iii) Public notice; hearing

A library described in clause (i) shall provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.

(B) Certification with respect to minors

A certification under this subparagraph is a certification that the library—

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene;

(II) child pornography; or

(III) harmful to minors; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors.

(C) Certification with respect to adults

A certification under this paragraph is a certification that the library—

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene; or

(II) child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.

(D) Disabling during adult use

An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.

(E) Timing of implementation

(i) In general

Subject to clause (ii) in the case of any library covered by this paragraph as of the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certification under subparagraphs (B) and (C) shall be made—

(I) with respect to the first program funding year under this subsection following such effective date, not later than 120 days after the beginning of such program funding year; and

(II) with respect to any subsequent program funding year, as part of the application process for such program funding year.

(ii) Process

(I) Libraries with Internet safety policy and technology protection measures in place

A library covered by clause (i) that has in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C) shall certify its compliance with subparagraphs (B) and (C) during each annual program application cycle under this subsection, except that with respect to the first program funding year after the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certifications shall be made not later than 120 days after the beginning of such first program funding year.

(II) Libraries without Internet safety policy and technology protection measures in place

A library covered by clause (i) that does not have in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C)—

(aa) for the first program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C); and

(bb) for the second program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is in compliance with subparagraphs (B) and (C).

Any library that is unable to certify compliance with such requirements in such second program year shall be ineligible for services at discount rates or funding in lieu of services at such rates under this subsection for such second year and all subsequent program years under this subsection, until such time as such library comes into compliance with this paragraph.

(III) Waivers

Any library subject to subclause (II) that cannot come into compliance with subparagraphs (B) and (C) in such second year may seek a waiver of subclause (II)(bb) if State or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required by such subclause. A library, library board, or other authority with responsibility for administration of the library shall notify the Commission of the applicability of such subclause to the library. Such notice shall certify that the library in question will be brought into compliance before the start of the third program year after the effective date of this subsection in which the library is applying for funds under this subsection.

(F) Noncompliance

(i) Failure to submit certification

Any library that knowingly fails to comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates or funding in lieu of services at such rates under this subsection.

(ii) Failure to comply with certification

Any library that knowingly fails to ensure the use of its computers in accordance with a certification under subparagraphs (B) and (C) shall reimburse all funds and discounts received under this subsection for the period covered by such certification.

(iii) Remedy of noncompliance

(I) Failure to submit

A library that has failed to submit a certification under clause (i) may remedy the failure by submitting the certification to which the failure relates. Upon submittal of such certification, the library shall be eligible for services at discount rates under this subsection.

(II) Failure to comply

A library that has failed to comply with a certification as described in clause (ii) may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal to the Commission of a certification or other appropriate evidence of such remedy, the library shall be eligible for services at discount rates under this subsection.

(7) Definitions

For purposes of this subsection:

(A) Elementary and secondary schools

The term ''elementary and secondary schools'' means elementary schools and secondary schools, as defined in section 7801 of title 20.

(B) Health care provider

The term ''health care provider'' means—

(i) post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;

(ii) community health centers or health centers providing health care to migrants;

(iii) local health departments or agencies;

(iv) community mental health centers;

(v) not-for-profit hospitals;

(vi) rural health clinics; and

(vii) consortia of health care providers consisting of one or more entities described in clauses (i) through (vi).

(C) Public institutional telecommunications user

The term ''public institutional telecommunications user'' means an elementary or secondary school, a library, or a health care provider as those terms are defined in this paragraph.

(D) Minor

The term ''minor'' means any individual who has not attained the age of 17 years.

(E) Obscene

The term ''obscene'' has the meaning given such term in section 1460 of title 18.

(F) Child pornography

The term ''child pornography'' has the meaning given such term in section 2256 of title 18.

(G) Harmful to minors

The term ''harmful to minors'' means any picture, image, graphic image file, or other visual depiction that—

(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

(ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and

(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

(H) Sexual act; sexual contact

The terms ''sexual act'' and ''sexual contact'' have the meanings given such terms in section 2246 of title 18.

(I) Technology protection measure

The term ''technology protection measure'' means a specific technology that blocks or filters Internet access to the material covered by a certification under paragraph (5) or (6) to which such certification relates.

(i) Consumer protection

The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.

(j) Lifeline assistance

Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.

(k) Subsidy of competitive services prohibited

A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

***(l)* Internet safety policy requirement for schools and libraries**

(1) In general

In carrying out its responsibilities under subsection (h) of this section, each school or library to which subsection (h) of this section applies shall—

(A) adopt and implement an Internet safety policy that addresses—

(i) access by minors to inappropriate matter on the Internet and World Wide Web;

(ii) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications;

(iii) unauthorized access, including so-called ''hacking'', and other unlawful activities by minors online;

(iv) unauthorized disclosure, use, and dissemination of personal identification information regarding minors; and

(v) measures designed to restrict minors' access to materials harmful to minors; and

(B) provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.

(2) Local determination of content

A determination regarding what matter is inappropriate for minors shall be made by the school board, local educational agency, library, or other authority responsible for making the determination. No agency or instrumentality of the United States Government may—

(A) establish criteria for making such determination;

(B) review the determination made by the certifying school, school board, local educational agency, library, or other authority; or

(C) consider the criteria employed by the certifying school, school board, local educational agency, library, or other authority in the administration of subsection (h)(1)(B) of this section.

(3) Availability for review

Each Internet safety policy adopted under this subsection shall be made available to the Commission, upon request of the Commission, by the school, school board, local educational agency, library, or other authority responsible for adopting such Internet safety policy for purposes of the review of such Internet safety policy by the Commission.

(4) Effective date

This subsection shall apply with respect to schools and libraries on or after the date that is 120 days after December 21, 2000.

(June 19, 1934, ch. 652, title II, § 254, as added Pub. L. 104–104, title I, § 101(a), Feb. 8, 1996, 110 Stat. 71; amended Pub. L. 104–208, div. A, title I, § 101(e) [title VII, § 709(a)(8)], Sept. 30, 1996, 110 Stat. 3009–233, 3009–313; Pub. L. 106–554, § 1(a)(4) [div. B, title XVII, §§ 1721(a)–(d), 1732], Dec. 21, 2000, 114 Stat. 2763, 2763A–343 to 2763A–350; Pub. L. 107–110, title X, § 1076(hh), Jan. 8, 2002, 115 Stat. 2094; Pub. L. 110–385, title II, § 215, Oct. 10, 2008, 122 Stat. 4104.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (b)(7), was in the original ''this Act'', meaning act June 19, 1934, ch. 652, 48 Stat. 1064, known as the Communications Act of 1934, which is classified principally to this chapter. For complete classification of this Act to the Code, see section 609 of this title and Tables.

The Library Services and Technology Act, referred to in subsec. (h)(4), is subtitle B (§§ 211–263) of title II of Pub. L. 94–462, as added by Pub. L. 104–208, div. A, title I, § 101(e) [title VII, § 702], Sept. 30, 1996, 110 Stat. 3009–233, 3009–295, which is classified generally to subchapter II (§ 9121 et seq.) of chapter 72 of Title 20, Education. For complete classification of this Act to the Code, see Short Title note set out under section 9101 of Title 20 and Tables.

Section 8801 of title 20, referred to in subsec. (h)(5)(A)(iii), was repealed by Pub. L. 107–110, title X, § 1011(5)(C), Jan. 8, 2002, 115 Stat. 1986. See section 7801 of Title 20, Education.

For the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, referred to in subsec. (h)(5)(E), (6)(E), as 120 days after Dec. 21, 2000, see § 1(a)(4) [div. B, title VII, § 1721(h)] of Pub. L. 106–554, set out as an Effective Date of 2000 Amendment note below.

The effective date of this subsection, referred to in subsec. (h)(5)(E), (6)(E), probably means the effective date of subsec. (h)(5) and (6) which is 120 days after Dec. 21, 2000, see § 1(a)(4) [div. B, title VII, § 1721(h)] of Pub. L. 106–554, set out as an Effective Date of 2000 Amendment note below.

AMENDMENTS

2008—Subsec. (h)(5)(B)(iii). Pub. L. 110–385 added cl. (iii).

2002—Subsec. (h)(7)(A). Pub. L. 107–110 substituted ''section 7801'' for ''paragraphs (14) and (25), respectively, of section 8801''.

2000—Subsec. (h)(4). Pub. L. 106–554, § 1(a)(4) [div. B, title XVII, § 1721(d)], substituted ''paragraph (7)(A)'' for ''paragraph (5)(A)''.

Subsec. (h)(5). Pub. L. 106–554, § 1(a)(4) [div. B, title XVII, § 1721(a)(2)], added par. (5). Former par. (5) redesignated (7).

Subsec. (h)(6). Pub. L. 106–554, § 1(a)(4) [div. B, title XVII, § 1721(b)], added par. (6).

Subsec. (h)(7). Pub. L. 106–554, § 1(a)(4) [div. B, title XVII, § 1721(a)(1)], redesignated par. (5) as (7).

Subsec. (h)(7)(D) to (I). Pub. L. 106–554, § 1(a)(4) [div. B, title XVII, § 1721(c)], added subpars. (D) to (I).

Subsec. (*l*). Pub. L. 106–554, § 1(a)(4) [div. B, title XVII, § 1732], added subsec. (*l*).

1996—Subsec. (h)(4). Pub. L. 104–208 substituted ''library or library consortium not eligible for assistance from a State library administrative agency under the Library Services and Technology Act'' for ''library not eligible for participation in State-based plans for funds under title III of the Library Services and Construction Act (20 U.S.C. 335c et seq.)''.

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–110 effective Jan. 8, 2002, except with respect to certain noncompetitive programs and competitive programs, see section 5 of Pub. L. 107–110, set out as an Effective Date note under section 6301 of Title 20, Education.

EFFECTIVE DATE OF 2000 AMENDMENT

Pub. L. 106–554, § 1(a)(4) [div. B, title XVII, § 1721(h)], Dec. 21, 2000, 114 Stat. 2763, 2763A–350, provided that: ''The amendments made by this section [amending this section and enacting provisions set out as notes under this section and section 7001 of Title 20, Education] shall take effect 120 days after the date of the enactment of this Act [Dec. 21, 2000].''

REGULATIONS

Pub. L. 106–554, § 1(a)(4) [div. B, title XVII, § 1721(f)], Dec. 21, 2000, 114 Stat. 2763, 2763A–350, provided that:

''(1) REQUIREMENT.—The Federal Communications Commission shall prescribe regulations for purposes of administering the provisions of paragraphs (5) and (6) of section 254(h) of the Communications Act of 1934 [47 U.S.C. 254(h)], as amended by this section.

''(2) DEADLINE.—Notwithstanding any other provision of law, the Commission shall prescribe regulations under paragraph (1) so as to ensure that such regulations take effect 120 days after the date of the enactment of this Act [Dec. 21, 2000].''

Pub. L. 106–554, § 1(a)(4) [div. B, title XVII, § 1733], Dec. 21, 2000, 114 Stat. 2763, 2763A–351, provided that: ''Not later than 120 days after the date of enactment of this Act [Dec. 21, 2000], the Federal Communications Commission shall prescribe regulations for purposes of section 254(*l*) of the Communications Act of 1934 [47 U.S.C. 254(*l*)], as added by section 1732 of this Act.''

SEPARABILITY

Pub. L. 106–554, § 1(a)(4) [div. B, title XVII, § 1721(e)], Dec. 21, 2000, 114 Stat. 2763, 2763A–350, provided that: ''If any provision of paragraph (5) or (6) of section 254(h) of the Communications Act of 1934 [47 U.S.C. 254(h)], as amended by this section, or the application thereof to any person or circumstance is held invalid, the remainder of such paragraph and the application of such paragraph to other persons or circumstances shall not be affected thereby.''

DISCLAIMERS REGARDING INTERNET ACCESS AND PRIVACY

Pub. L. 106–554, § 1(a)(4) [div. B, title XVII, § 1702], Dec. 21, 2000, 114 Stat. 2763, 2763A–336, provided that:

''(a) DISCLAIMER REGARDING CONTENT.—Nothing in this title [see Short Title of 2000 Amendments note set out under section 6301 of Title 20, Education] or the amendments made by this title shall be construed to prohibit a local educational agency, elementary or secondary school, or library from blocking access on the Internet on computers owned or operated by that agency, school, or library to any content other than content covered by this title or the amendments made by this title.

''(b) DISCLAIMER REGARDING PRIVACY.—Nothing in this title or the amendments made by this title shall be construed to require the tracking of Internet use by any identifiable minor or adult user.''

EXPEDITED REVIEW

Pub. L. 106–554, § 1(a)(4) [div. B, title XVII, § 1741], Dec. 21, 2000, 114 Stat. 2763, 2763A–351, provided that:

''(a) THREE-JUDGE DISTRICT COURT HEARING.—Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title [see Short Title of 2000 Amendments note set out under section 6301 of Title 20, Education] or any amendment made by this title, or any provision thereof, shall be heard by a district court of three judges convened pursuant to the provisions of section 2284 of title 28, United States Code.

''(b) APPELLATE REVIEW.—Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of three judges in an action under subsection (a) holding this title or an amendment made by this title, or any provision thereof, unconstitutional shall be reviewable as a matter of

right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.''

UNIVERSAL SERVICE FUND PAYMENT SCHEDULE

Pub. L. 105–33, title III, § 3006, Aug. 5, 1997, 111 Stat. 269, related to appropriations to the Universal Service Fund in support of programs established pursuant to rules implementing this section and adjustment of payments by telecommunications carriers and other providers of interstate telecommunications prior to repeal by Pub. L. 105–119, title VI, § 622, Nov. 26, 1997, 111 Stat. 2521. Section 622 of Pub. L. 105–119 provided further that: ''This section shall be deemed a section of the Balanced Budget Act of 1997 [Pub. L. 105–33, see Tables for classification] for the purposes of section 10213 of that Act (111 Stat. 712) [2 U.S.C. 902 note], and shall be scored pursuant to paragraph (2) of such section.''

§ 255. Access by persons with disabilities

(a) Definitions

As used in this section—

(1) Disability

The term ''disability'' has the meaning given to it by section 12102(2)(A)[1] of title 42.

(2) Readily achievable

The term ''readily achievable'' has the meaning given to it by section 12181(9) of title 42.

(b) Manufacturing

A manufacturer of telecommunications equipment or customer premises equipment shall ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable.

(c) Telecommunications services

A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.

(d) Compatibility

Whenever the requirements of subsections (b) and (c) of this section are not readily achievable, such a manufacturer or provider shall ensure that the equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, if readily achievable.

(e) Guidelines

Within 18 months after February 8, 1996, the Architectural and Transportation Barriers Compliance Board shall develop guidelines for accessibility of telecommunications equipment and customer premises equipment in conjunction with the Commission. The Board shall review and update the guidelines periodically.

(f) No additional private rights authorized

Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

[1] See References in Text note below.

(June 19, 1934, ch. 652, title II, § 255, as added Pub. L. 104–104, title I, § 101(a), Feb. 8, 1996, 110 Stat. 75.)

REFERENCES IN TEXT

Section 12102 of title 42, referred to in subsec. (a)(1), was amended generally by Pub. L. 110–325, § 4(a), Sept. 25, 2008, 122 Stat. 3555, and, as so amended, provisions formerly appearing in par. (2)(A) are now contained in par. (1)(A).

§ 256. Coordination for interconnectivity

(a) Purpose

It is the purpose of this section—

(1) to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services to public telecommunications networks used to provide telecommunications service through—

(A) coordinated public telecommunications network planning and design by telecommunications carriers and other providers of telecommunications service; and

(B) public telecommunications network interconnectivity, and interconnectivity of devices with such networks used to provide telecommunications service; and

(2) to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks.

(b) Commission functions

In carrying out the purposes of this section, the Commission—

(1) shall establish procedures for Commission oversight of coordinated network planning by telecommunications carriers and other providers of telecommunications service for the effective and efficient interconnection of public telecommunications networks used to provide telecommunications service; and

(2) may participate, in a manner consistent with its authority and practice prior to February 8, 1996, in the development by appropriate industry standards-setting organizations of public telecommunications network interconnectivity standards that promote access to—

(A) public telecommunications networks used to provide telecommunications service;

(B) network capabilities and services by individuals with disabilities; and

(C) information services by subscribers of rural telephone companies.

(c) Commission's authority

Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before February 8, 1996.

(d) "Public telecommunications network interconnectivity" defined

As used in this section, the term ''public telecommunications network interconnectivity'' means the ability of two or more public telecommunications networks used to provide telecommunications service to communicate and

RCW 82.08.010 Definitions. For the purposes of this chapter:

(1)(a)(i) "Selling price" includes "sales price." "Sales price" means the total amount of consideration, except separately stated trade-in property of like kind, including cash, credit, property, and services, for which tangible personal property, extended warranties, digital goods, digital codes, digital automated services, or other services or anything else defined as a "retail sale" under RCW 82.04.050 are sold, leased, or rented, valued in money, whether received in money or otherwise. Except as otherwise provided in this subsection (1), no deduction from the total amount of consideration is allowed for the following: (A) The seller's cost of the property sold; (B) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller; (C) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges; (D) delivery charges; and (E) installation charges.

(ii) When tangible personal property is rented or leased under circumstances that the consideration paid does not represent a reasonable rental for the use of the articles so rented or leased, the "selling price" must be determined as nearly as possible according to the value of such use at the places of use of similar products of like quality and character under such rules as the department may prescribe;

(b) "Selling price" or "sales price" does not include: Discounts, including cash, term, or coupons that are not reimbursed by a third party that are allowed by a seller and taken by a purchaser on a sale; interest, financing, and carrying charges from credit extended on the sale of tangible personal property, extended warranties, digital goods, digital codes, digital automated services, or other services or anything else defined as a retail sale in RCW 82.04.050, if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser; and any taxes legally imposed directly on the consumer, or collected from the consumer pursuant to RCW 35.87A.010(2)(b), that are separately stated on the invoice, bill of sale, or similar document given to the purchaser;

(c) "Selling price" or "sales price" includes consideration received by the seller from a third party if:

(i) The seller actually receives consideration from a party other than the purchaser, and the consideration is directly related to a price reduction or discount on the sale;

(ii) The seller has an obligation to pass the price reduction or discount through to the purchaser;

(iii) The amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and

(iv) One of the criteria in this subsection (1)(c)(iv) is met:

(A) The purchaser presents a coupon, certificate, or other documentation to the seller to claim a price reduction or discount where the coupon, certificate, or documentation is authorized, distributed, or granted by a third party with the understanding that the third party will reimburse any seller to whom the coupon, certificate, or documentation is presented;

(B) The purchaser identifies himself or herself to the seller as a member of a group or organization entitled to a price reduction or discount, however a "preferred customer" card that is available to any patron does not constitute membership in such a group; or

(C) The price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser;

(2)(a)(i) "Seller" means every person, including the state and its departments and institutions, making sales at retail or retail sales to a buyer, purchaser, or consumer, whether as agent, broker, or principal, except as otherwise provided in this subsection (2).

(ii) "Seller" includes marketplace facilitators, whether making sales in their own right or facilitating sales on behalf of marketplace sellers.

(b)(i) "Seller" does not include:

(A) The state and its departments and institutions when making sales to the state and its departments and institutions; or

(B) A professional employer organization when a covered employee coemployed with the client under the terms of a professional employer agreement engages in activities that constitute a sale at retail that is subject to the tax imposed by this chapter. In such cases, the client, and not the professional employer organization, is deemed to be the seller and is responsible for collecting and remitting the tax imposed by this chapter.

(ii) For the purposes of this subsection (2)(b), the terms "client," "covered employee," "professional employer agreement," and "professional employer organization" have the same meanings as in RCW 82.04.540;

(3) "Buyer," "purchaser," and "consumer" include, without limiting the scope hereof, every individual, receiver, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, corporation, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise, municipal corporation, quasi municipal corporation, and also the state, its departments and institutions and all political subdivisions thereof, irrespective of the nature of the activities engaged in or functions performed, and also the United States or any instrumentality thereof;

(4) "Delivery charges" means charges by the seller of personal property or services for preparation and delivery to a location designated by the purchaser of personal property or services including, but not limited to, transportation, shipping, postage, handling, crating, and packing;

(5) "Direct mail" means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addressees on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items are not billed directly to the recipients. "Direct mail" includes tangible personal property supplied directly or indirectly by the purchaser to the direct mail seller for inclusion in the package containing the printed material. "Direct mail" does not include multiple items of printed material delivered to a single address;

(6) The meaning attributed in chapter 82.04 RCW to the terms "tax year," "taxable year," "person," "company," "sale," "sale at wholesale," "wholesale," "business," "engaging in business," "cash discount," "successor," "consumer," "in this state," "within this state," "cannabis," "useable cannabis," and "cannabis-infused products" applies equally to the provisions of this chapter;

(7) For the purposes of the taxes imposed under this chapter and under chapter 82.12 RCW, "tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. Tangible personal property includes electricity, water, gas, steam, and prewritten computer software;

(8) "Extended warranty" has the same meaning as in RCW 82.04.050(7);

(9) The definitions in RCW 82.04.192 apply to this chapter;

(10) For the purposes of the taxes imposed under this chapter and chapter 82.12 RCW, whenever the terms "property" or "personal property" are used, those terms must be construed to include digital goods and digital codes unless:

(a) It is clear from the context that the term "personal property" is intended only to refer to tangible personal property;

(b) It is clear from the context that the term "property" is intended only to refer to tangible personal property, real property, or both; or

(c) To construe the term "property" or "personal property" as including digital goods and digital codes would yield unlikely, absurd, or strained consequences; and

(11) "Retail sale" or "sale at retail" means any sale, lease, or rental for any purpose other than for resale, sublease, or subrent.

(12) The terms "agriculture," "farming," "horticulture," "horticultural," and "horticultural product" may not be construed to include or relate to cannabis, useable cannabis, or cannabis-infused products unless the applicable term is explicitly defined to include cannabis, useable cannabis, or cannabis-infused products.

(13)(a) "Affiliated person" means a person that, with respect to another person:

(i) Has an ownership interest of more than five percent, whether direct or indirect, in the other person; or

(ii) Is related to the other person because a third person, or group of third persons who are affiliated persons with respect to each other, holds an ownership interest of more than five percent, whether direct or indirect, in the related persons.

(b) For purposes of this subsection (13):

(i) "Ownership interest" means the possession of equity in the capital, the stock, or the profits of the other person; and

(ii) An indirect ownership interest in a person is an ownership interest in an entity that has an ownership interest in the person or in an entity that has an indirect ownership interest in the person.

(14) "Marketplace" means a physical or electronic place, including, but not limited to, a store, a booth, an internet website, a catalog or a dedicated sales software application, where tangible personal property, digital codes and digital products, or services are offered for sale.

(15)(a) "Marketplace facilitator" means a person that:

(i) Contracts with sellers to facilitate for consideration, regardless of whether deducted as fees from the transaction, the sale of the seller's products through a marketplace owned or operated by the person;

(ii) Engages directly or indirectly, through one or more affiliated persons, in transmitting or otherwise communicating the offer or acceptance between the buyer and seller. For purposes of this subsection, mere advertising does not constitute transmitting or

otherwise communicating the offer or acceptance between the buyer and seller; and

(iii) Engages directly or indirectly, through one or more affiliated persons, in any of the following activities with respect to the seller's products:

(A) Payment processing services;

(B) Fulfillment or storage services;

(C) Listing products for sale;

(D) Setting prices;

(E) Branding sales as those of the marketplace facilitator;

(F) Taking orders; or

(G) Providing customer service or accepting or assisting with returns or exchanges.

(b)(i) "Marketplace facilitator" does not include:

(A) A person who provides internet advertising services, including listing products for sale, so long as the person does not also engage in the activity described in (a)(ii) of this subsection (15) in addition to any of the activities described in (a)(iii) of this subsection (15); or

(B) A person with respect to the provision of travel agency services or the operation of a marketplace or that portion of a marketplace that enables consumers to purchase transient lodging accommodations in a hotel or other commercial transient lodging facility.

(ii) The exclusion in this subsection (15)(b) does not apply to a marketplace or that portion of a marketplace that facilitates the retail sale of transient lodging accommodations in homes, apartments, cabins, or other residential dwelling units.

(iii) For purposes of this subsection (15)(b), the following definitions apply:

(A) "Hotel" has the same meaning as in RCW 19.48.010.

(B) "Travel agency services" means arranging or booking, for a commission, fee or other consideration, vacation or travel packages, rental car or other travel reservations or accommodations, tickets for domestic or foreign travel by air, rail, ship, bus, or other medium of transportation, or hotel or other lodging accommodations.

(16) "Marketplace seller" means a seller that makes retail sales through any marketplace operated by a marketplace facilitator, regardless of whether the seller is required to be registered with the department under RCW 82.32.030.

(17) "Remote seller" means any seller, including a marketplace facilitator, who does not have a physical presence in this state and makes retail sales to purchasers or facilitates retail sales on behalf of marketplace sellers. [2022 c 16 § 144; 2021 c 225 § 3; 2019 c 8 § 105; 2014 c 140 § 11; 2010 c 106 § 210; 2009 c 535 § 303; 2007 c 6 § 1302; (2007 c 6 § 1301 expired July 1, 2008); 2006 c 301 § 2; 2005 c 514 § 110; 2004 c 153 § 406; 2003 c 168 § 101; 1985 c 38 § 3; 1985 c 2 § 2 (Initiative Measure No. 464, approved November 6, 1984); 1983 1st ex.s. c 55 § 1; 1967 ex.s. c 149 § 18; 1963 c 244 § 1; 1961 c 15 § 82.08.010. Prior: (i) 1945 c 249 § 4; 1943 c 156 § 6; 1941 c 178 § 8; 1939 c 225 § 7; 1935 c 180 § 17; Rem. Supp. 1945 § 8370-17. (ii) 1935 c 180 § 20; RRS § 8370-20.]

Intent—Finding—2022 c 16: See note following RCW 69.50.101.

etroacti e ap lication—Effective date—2021 c 225: See notes following RCW 35.87A.010.

Effective date—2019 c 8 §§ 105, 301, 302, 401, and 704: "Sections 105, 301, 302, 401, and 704 of this act are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and take effect July 1, 2019." [2019 c 8 § 805.]

Existing rights and liability—Retroactive application—2019 c 8: See notes following RCW 82.02.250.

Effective date—2010 c 106: See note following RCW 35.102.145.

Intent—Construction—2009 c 535: See notes following RCW 82.04.192.

Part headings not law—Savings—Effective date—Severability—2007 c 6: See notes following RCW 82.32.020.

Findings—Intent—2007 c 6: See note following RCW 82.14.390.

Expiration date—2007 c 6 § 1301: "Section 1301 of this act expires July 1, 2008." [2007 c 6 § 1706.]

Effective date—Act does not affect application of Title 50 or 51 RCW—2006 c 301: See notes following RCW 82.32.710.

Effective date—2005 c 514: See note following RCW 82.04.4272.

Part headings not law—Severability—2005 c 514: See notes following RCW 82.12.808.

Retroactive effective date—Effective date—2004 c 153: See note following RCW 82.08.0293.

Effective dates—2003 c 168: "Sections 101 through 104, 201 through 216, 401 through 412, 501, 502, 601 through 604, 701 through 704, 801, 901, and 902 of this act take effect July 1, 2004. Sections 301 through 305 of this act take effect January 1, 2004." [2003 c 168 § 903.]

Part headings not law—2003 c 168: "Part headings used in this act are not any part of the law." [2003 c 168 § 901.]

Purpose—1985 c 2: "The purpose of this initiative is to reduce the amount on which sales tax is paid by excluding the trade-in value of certain property from the amount taxable." [1985 c 2 § 1 (Initiative Measure No. 464, approved November 6, 1984).]

Effective dates—1983 1st ex.s. c 55: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1983, except that section 12 of this act shall take effect January 1, 1984, and shall be

effective for property taxes levied in 1983, and due in 1984, and thereafter." [1983 1st ex.s. c 55 § 13.]

RCW 82.08.050 Buyer to pay, seller to collect tax—Statement of tax—Exception—Penalties. (1) The tax imposed in this chapter must be paid by the buyer to the seller. Each seller must collect from the buyer the full amount of the tax payable in respect to each taxable sale in accordance with the schedule of collections adopted by the department under the provisions of RCW 82.08.060.

(2) The tax required by this chapter, to be collected by the seller, is deemed to be held in trust by the seller until paid to the department. Any seller who appropriates or converts the tax collected to the seller's own use or to any use other than the payment of the tax to the extent that the money required to be collected is not available for payment on the due date as prescribed in this chapter is guilty of a gross misdemeanor.

(3) Except as otherwise provided in this section, if any seller fails to collect the tax imposed in this chapter or, having collected the tax, fails to pay it to the department in the manner prescribed by this chapter, whether such failure is the result of the seller's own acts or the result of acts or conditions beyond the seller's control, the seller is, nevertheless, personally liable to the state for the amount of the tax.

(4) Sellers are not relieved from personal liability for the amount of the tax unless they maintain proper records of exempt or nontaxable transactions and provide them to the department when requested.

(5) Sellers are not relieved from personal liability for the amount of tax if they fraudulently fail to collect the tax or if they solicit purchasers to participate in an unlawful claim of exemption.

(6) Sellers are not relieved from personal liability for the amount of tax if they accept an exemption certificate from a purchaser claiming an entity-based exemption if:

(a) The subject of the transaction sought to be covered by the exemption certificate is actually received by the purchaser at a location operated by the seller in Washington; and

(b) Washington provides an exemption certificate that clearly and affirmatively indicates that the claimed exemption is not available in Washington. Graying out exemption reason types on a uniform form and posting it on the department's website is a clear and affirmative indication that the grayed out exemptions are not available.

(7)(a) Sellers are relieved from personal liability for the amount of tax if they obtain a fully completed exemption certificate or capture the relevant data elements required under the streamlined sales and use tax agreement within ninety days, or a longer period as may be provided by rule by the department, subsequent to the date of sale.

(b) If the seller has not obtained an exemption certificate or all relevant data elements required under the streamlined sales and use tax agreement within the period allowed subsequent to the date of sale, the seller may, within one hundred twenty days, or a longer period as may be provided by rule by the department, subsequent to a request for substantiation by the department, either prove that the transaction was not subject to tax by other means or obtain a fully completed exemption certificate from the purchaser, taken in good faith.

(c) Sellers are relieved from personal liability for the amount of tax if they obtain a blanket exemption certificate for a purchaser with which the seller has a recurring business relationship. The

epartment ma not request fr m a eller renewal f blanket exemption certificates r updates of exemption certificate information or data elements if there is a recurring business relationship between the buyer and seller. For purposes of this subsection (7)(c), a "recurring business relationship" means at least one sale transaction within a period of twelve consecutive months.

(d) Sellers are relieved from personal liability for the amount of tax if they obtain a copy of a direct pay permit issued under RCW 82.32.087.

(8) The amount of tax, until paid by the buyer to the seller or to the department, constitutes a debt from the buyer to the seller. Any seller who fails or refuses to collect the tax as required with intent to violate the provisions of this chapter or to gain some advantage or benefit, either direct or indirect, and any buyer who refuses to pay any tax due under this chapter is guilty of a misdemeanor.

(9) Except as otherwise provided in this subsection, the tax required by this chapter to be collected by the seller must be stated separately from the selling price in any sales invoice or other instrument of sale. On all retail sales through vending machines, the tax need not be stated separately from the selling price or collected separately from the buyer. Except as otherwise provided in this subsection, for purposes of determining the tax due from the buyer to the seller and from the seller to the department it must be conclusively presumed that the selling price quoted in any price list, sales document, contract or other agreement between the parties does not include the tax imposed by this chapter. But if the seller advertises the price as including the tax or that the seller is paying the tax, the advertised price may not be considered the selling price.

(10) Where a buyer has failed to pay to the seller the tax imposed by this chapter and the seller has not paid the amount of the tax to the department, the department may, in its discretion, proceed directly against the buyer for collection of the tax. If the department proceeds directly against the buyer for collection of the tax as authorized in this subsection, the department may add a penalty of ten percent of the unpaid tax to the amount of the tax due for failure of the buyer to pay the tax to the seller, regardless of when the tax may be collected by the department. In addition to the penalty authorized in this subsection, all of the provisions of chapter 82.32 RCW, including those relative to interest and penalties, apply. For the sole purpose of applying the various provisions of chapter 82.32 RCW, the twenty-fifth day of the month following the tax period in which the purchase was made will be considered as the due date of the tax.

(11) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) "Exemption certificate" means documentation furnished by a buyer to a seller to claim an exemption from sales tax. An exemption certificate includes a reseller permit or other documentation authorized in RCW 82.04.470 furnished by a buyer to a seller to substantiate a wholesale sale.

(b) "Seller" includes a certified service provider, as defined in RCW 82.32.020, acting as agent for the seller. [2017 3rd sp.s. c 28 § 211; 2010 c 112 § 8; 2010 c 106 § 217. Prior: 2009 c 563 § 206; 2009 c 289 § 2; 2007 c 6 § 1202; prior: 2003 c 168 § 203; 2003 c 76 § 3; 2003 c 53 § 400; 2001 c 188 § 4; 1993 sp.s. c 25 § 704; 1992 c 206 § 2; 1986 c 36 § 1; 1985 c 38 § 1; 1971 ex.s. c 299 § 7; 1965 ex.s. c 173 §

5; 196 c 15 § 08 050; p io : 95 c 44 § ; 949 c § 6; 94 c 71 § 3; 1939 c 225 § 11; 1937 c 227 § 7; 1935 c 180 § ; Rem. Supp. 1949 § 8370-21.]

Findings—Intent—2017 3rd sp.s. c 28 §§ 201-214: See note following RCW 82.08.0531.

Existing rights and liability—Severability—Application—Effective dates—2017 3rd sp.s. c 28: See notes following RCW 82.08.0531.

Retroactive application—2010 c 112: See note following RCW 82.32.780.

Effective date—2010 c 106: See note following RCW 35.102.145.

Finding—Intent—Construction—Effective date—Reports and recommendations—2009 c 563: See notes following RCW 82.32.780.

Part headings not law—Savings—Effective date—Severability—2007 c 6: See notes following RCW 82.32.020.

Findings—Intent—2007 c 6: See note following RCW 82.14.390.

Effective dates—Part headings not law—2003 c 168: See notes following RCW 82.08.010.

Intent—2003 c 76: "It is the intent of the legislature to exempt from business and occupation tax and to relieve from the obligation to collect sales and use tax from certain sellers with very limited connections to Washington. These sellers are currently relieved from the obligation to collect sales and use tax because of the provisions of the federal internet tax freedom act. The legislature intends to continue to relieve these particular sellers from that obligation in the event that the federal internet tax freedom act is not extended. The legislature further intends that any relief from tax obligations provided by this act expire at such time as the United States congress grants individual states the authority to impose sales and use tax collection duties on remote sellers, or a court of competent jurisdiction, in a judgment not subject to review, determines that a state can impose sales and use tax collection duties on remote sellers." [2003 c 76 § 1.]

Intent—Effective date—2003 c 53: See notes following RCW 2.48.180.

Finding—Intent—Effective date—2001 c 188: See notes following RCW 82.32.087.

Severability—Effective dates—Part headings, captions not law—1993 sp.s. c 25: See notes following RCW 82.04.230.

Effective date—1992 c 206: See note following RCW 82.04.170.

ffective d te —Seve bility—1971 ex. . c 299: See notes fo owing RCW 82.04.050.

Project on exemption reporting requirements: RCW 82.32.440.

LANE POWELL PC

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