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September 26, 2019

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

**VIA HAND DELIVERY**

**RE: Cancellation of Certificates of Public Convenience for Telecommunications Public Utilities' Failure to Operate or Report Any Operating Revenue;  
Docket No. M-2019-3010251**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission ("Commission") are the Comments and a Petition for Rescission of the Tentative Order entered by the Commission on August 1, 2019, in the above-referenced docket, submitted by the United Fiber & Data, LLC ("UFD")<sup>1</sup> on behalf of United Federal Data of Pennsylvania, LLC ("UFD-PA").

As evidenced by the Certificate of Service, copies of this filing are being duly served on the appropriate parties.

If you have any questions regarding the enclosed documents, please contact the undersigned. In addition, please date stamp the enclosed extra copy of this transmittal letter, and kindly return it to our messenger for our filing purposes. Thank you.

Sincerely,

McNEES WALLACE & NURICK LLC

A handwritten signature in black ink that reads 'Kenneth R. Stark'.

By

Kenneth R. Stark

Enclosure

c: Certificate of Service

PA PUC  
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<sup>1</sup> UFD-PA is a wholly owned subsidiary of UFD.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Cancellation of Certificates of Public	:	
Convenience for Telecommunications	:	Docket No. M-2019-3010251
Public Utilities' Failure to Operate or	:	
Report Any Operating Revenue	:	

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**COMMENTS AND  
PETITION FOR RESCISSION OF TENTATIVE ORDER**

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*Counsel to United Fiber & Data, LLC on behalf of  
United Federal Data of Pennsylvania LLC*

Dated: September 26, 2019

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SECRETARY'S BUREAU



## **I. BACKGROUND**

### **A. The August 1, 2019 Tentative Order**

On August 1, 2019, the Commission in a 3-2 decision entered the Tentative Order tentatively revoking the certificates of public convenience (“CPCs”) of various telecommunications public utilities that had reported zero gross intrastate operating revenues for three years or more.<sup>4</sup> Those telecommunications companies, including UFD-PA, were listed in Appendix A of the Tentative Order. In Appendix B to the Tentative Order, the Commission included select annual revenue reports of the telecommunications companies, including UFD-PA, that recently reported zero gross intrastate revenues. The Commission ordered that telecommunications carriers desiring to challenge the Tentative Order revoking their certificates could file comments within 20 days after publication of the Tentative Order in the *Pennsylvania Bulletin*.<sup>5</sup> The Commission also provided those telecommunication companies listed in Appendix A an opportunity to file revised Section 510(b) revenue reports for calendar years 2016, 2017, and 2018.<sup>6</sup>

As its rationale for tentatively revoking the CPCs of the companies listed in Appendix A, the Commission noted the importance of gross intrastate operating revenue as a metric for the Commission’s assessment allocation formula as well as the requirement for all public utilities to operate continuously and without unreasonable interruptions of service.<sup>7</sup> The Commission concluded that, by failing to report revenues, the telecommunications public utilities listed in

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<sup>4</sup> Tentative Order at p. 6-7, Ordering Para. 1.

<sup>5</sup> Tentative Order, Ordering Para. 4.

<sup>6</sup> Tentative Order, Ordering Para. 5.

<sup>7</sup> See Tentative Order, at p. 1 (citing 66 Pa. C.S. §§ 510(b), 1501).

Appendix A “failed to pay for the reasonable costs attributable to their regulation by the Commission and have failed to establish that they are operating continuously in Pennsylvania.”<sup>8</sup>

The Commission in the Tentative Order recognized that, under the Public Utility Code, a CPC is required prior to beginning to “offer, render, furnish or supply” service in Pennsylvania.<sup>9</sup> The Commission observed that a *public utility* offers its service to the public for compensation.<sup>10</sup> Therefore, the Commission concluded that “it follows that all certificated public utilities must have intrastate revenues, demonstrating intrastate service to the public for compensation in Pennsylvania, in order to qualify for public utility status in Pennsylvania.”<sup>11</sup>

In a dissenting statement, Chairman Gladys Brown Dutrieuille asserted that Section 510(b) of the Public Utility Code does not contain any language authorizing the revocation of a CPC of a public utility for reporting no intrastate revenues.<sup>12</sup> Chairman Brown Dutrieuille also concluded that the Tentative Order violated Commission precedent due to, among other things, the Tentative Order’s “novel interpretation of Sections 1102 and 510(b) of the Public Utility Code” and selective enforcement of those provisions “using a legal theory not reflected in a final Regulation.”<sup>13</sup> In a separate dissenting statement, Commissioner Andrew G. Place pointed out that many of the carriers listed in Appendix A to the Tentative Order had responded to PUC Staff data requests

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<sup>8</sup> Tentative Order, at p. 2.

<sup>9</sup> Tentative Order, at p. 2 (citing 66 Pa. C.S. § 1102).

<sup>10</sup> Tentative Order, at p. 2 (citing 66 Pa. C.S. § 102).

<sup>11</sup> Tentative Order, at p. 2.

<sup>12</sup> *Dissenting Statement of Chairman Gladys Brown Dutrieuille* at p. 2, Docket No. M-2019-3010251 (July 11, 2019).

<sup>13</sup> *Dissenting Statement of Chairman Brown Dutrieuille* at p. 3.

seeking clarification from those carriers as to why they reported zero intrastate revenues.<sup>14</sup> UFD-PA is one of the carriers that responded to Staff data requests over the past three years.<sup>15</sup>

On August 31, 2019, the Tentative Order was published in the Pennsylvania Bulletin, thereby setting a comment deadline of September 20, 2019.

**B. UFD-PA's Business Model and Offering of Service in Pennsylvania**

UFD has diligently and continuously pursued the construction of its fiber network despite several hurdles and is now offering intrastate service. UFD has reported zero intrastate revenues because of the construction delays. Going forward in 2019 and beyond, UFD will be able to report intrastate revenues when it contracts with customers for intrastate service. UFD intends to continue offering this service into the future. However, UFD cannot state with certainty that a customer will accept UFD's offering because the customer ultimately decides whether to accept the offer and thus enable UFD to receive intrastate revenues.

Founded in 2012, UFD has been constructing a fiber network connecting New York City to Ashburn, Virginia, and traversing parts of New York, New Jersey, Pennsylvania, Maryland, and Virginia. Since 2012, UFD has been planning and constructing the 340+ mile fiber route.<sup>16</sup> The fiber route was completed in the spring of 2019. UFD currently offers dark fiber solutions and plans to offer lit services in 2020. Importantly, UFD is currently and actively offering intrastate services in Pennsylvania. While UFD-PA has not yet received any Pennsylvania-specific intrastate

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<sup>14</sup> Dissenting Statement of Commissioner Andrew G. Place at p. 1, Docket No. M-2019-3010251 (July 11, 2019). In his dissenting statement, Commissioner Place also raised due process concerns regarding the Commission's tentative revocation of the CPCs listed in Appendix A of the Tentative Order. *See id.* at p. 1-2.

<sup>15</sup> *See* Exhibit A (UFD Responses to PUC Data Requests and Staff Requests for Additional Information).

<sup>16</sup> *See generally* <https://www.ufd.com/>; *see also* <https://www.lightwaveonline.com/network-design/high-speed-networks/article/14033527/united-fiber-data-runs-dark-fiber-network-from-new-york-city-to-ashburn> (explaining that UFD's fiber network will help serve more rural areas along its route).

revenues, UFD-PA expects to receive Pennsylvania-specific interstate revenues later this year or in early 2020.

Effective April 4, 2013, UFD-PA holds a CPC to “offer, render, furnish or supply telecommunications services” as a Competitive Access Provider.<sup>17</sup> In its Application for the CPC, UFD-PA explained that it intended to offer Large Enterprise, Government, Wholesale, and Carrier customers with interLATA, intraLATA, interstate dark fiber, wavelength, ethernet, and internet access services.<sup>18</sup> UFD-PA also explained that its service would include multipoint private line and backhaul services to major points of presence for access to other carrier networks and the greater Internet.<sup>19</sup> UFD's services can be tailored to match the needs of its customers, including both dedicated intrastate transport and interstate transport. The customers' requests will dictate the extent to which UFD provides intrastate services; however, transport between points within Pennsylvania will be an ever-present option that UFD will offer. Strategically located, more than 97,000 businesses and 3,000 cell towers are within five miles of UFD's route.<sup>20</sup> UFD is in the design phase of developing a 43,000 square foot datacenter facility in York, PA. UFD's network will be utilized to provide access to the datacenter for its customers in Pennsylvania, as well as those in other locations along the UFD route.

Constructing the network route took several years due to financing issues and pole occupancy difficulties. In 2013, UFD experienced funding issues pertaining to the construction of

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<sup>17</sup> See Docket No. A-2012-2340487 (Apr. 4, 2013).

<sup>18</sup> *Application of United Federal Data of Pennsylvania, LLC for approval to offer, render, furnish or supply telecommunication services as a Competitive Access Provider to the Public in the Commonwealth of Pennsylvania*, Docket No. A-2012-2340487, at p .3 (Order entered Feb. 28, 2013).

<sup>19</sup> *Id.*

<sup>20</sup> See <https://www.ufd.com/>.

its New York City network, thereby delaying construction in Pennsylvania. In 2016, UFD obtained full financing of its multi-state network.

In 2016, UFD experienced further construction delays and needed to re-engineer many parts of the planned construction. Pole attachment applications for portions of the network in Pennsylvania took over a year to complete. In 2017, construction of the dark fiber network commenced in Pennsylvania. Both First Energy and Windstream failed to complete their make-ready in a timely manner, which resulted in significant delays in construction of the Pennsylvania segment of UFD's network. Construction was completed in the spring of 2019. Earlier this year, UFD began offering intrastate services in Pennsylvania, including customized dark fiber solutions to businesses/customers doing business in Pennsylvania. UFD has quoted for intrastate services to potential customers who look to utilize UFD's dark fiber to connect certain network assets located solely in Pennsylvania, including replacement of aging infrastructure, or adding capacity to their existing networks.

## **II. COMMENTS AND PETITION FOR RESCISSION OF THE TENTATIVE ORDER**

Because UFD-PA is active and is currently offering intrastate services in the Commonwealth of Pennsylvania, UFD-PA requests rescission of the Tentative Order tentatively revoking UFD-PA's CPC.

### **A. The Tentative Order Errs in Finding that Intrastate Revenues Are Required to Qualify for Public Utility Status in Pennsylvania.**

In the Tentative Order, the Commission stated that obtaining a CPC is required prior to beginning to "offer, render, furnish or supply" service in Pennsylvania.<sup>21</sup> The Commission observed that a *public utility* offers its service to the public for compensation.<sup>22</sup> However, the

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<sup>21</sup> Tentative Order, at p. 2 (citing 66 Pa. C.S. § 1102).

<sup>22</sup> *Id.* (citing 66 Pa. C.S. § 102).

Commission then erred in concluding that “it follows that all certificated public utilities must have intrastate revenues, demonstrating intrastate service to the public for compensation in Pennsylvania, in order to qualify for public utility status in Pennsylvania.”<sup>23</sup> Critically, the Commission does not cite to the Public Utility Code, its regulations, or any other precedent establishing a requirement that a telecommunications carrier must have intrastate revenues, especially when that carrier is offering intrastate services to the public for compensation. As noted in Chairman Brown Dutrieuille’s dissent to the Tentative Order, Section 510(b) of the Public Utility Code does not contain any language authorizing the revocation of a CPC of a public utility for reporting no intrastate revenues.<sup>24</sup>

The Public Utility Code requires that a CPC be obtained prior to beginning to “offer, render, furnish or supply” public utility service in Pennsylvania.<sup>25</sup> Thus, a CPC will be obtained prior to the receipt of any intrastate operating revenues received as a result of offering public utility services. UFD-PA’s CPC grants UFD-PA the authority to “offer, render, furnish or supply telecommunications services.”<sup>26</sup> In granting UFD the authority to offer telecommunications services as a Competitive Access Provider, the Commission did not condition such authority on a requirement that annual intrastate revenues are necessary year after year in order to maintain the CPC.<sup>27</sup> The Commission also did not condition such authority on the offering of service at a particular time or the receipt of gross intrastate operating revenues by a particular time.<sup>28</sup>

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<sup>23</sup> Tentative Order, at p. 2.

<sup>24</sup> See Dissenting Statement of Chairman Brown Dutrieuille at p. 2, Docket No. M-2019-3010251 (July 11, 2019).

<sup>25</sup> 66 Pa. C.S. § 1102 (emphasis added).

<sup>26</sup> See Docket No. A-2013-2340487 (Apr. 4, 2013).

<sup>27</sup> See *Application of United Federal Data of Pennsylvania, LLC for approval to offer, render, furnish or supply telecommunication services as a Competitive Access Provider to the Public in the Commonwealth of Pennsylvania*, Docket No. A-2012-2340487 (Order entered Feb. 28, 2013).

<sup>28</sup> See *id.*

Importantly, a customer's decision to accept an offer of intrastate service is beyond the control of the carrier offering that service.

Yet, the Commission concluded in the Tentative Order that after a utility reports zero gross intrastate operating revenues for three years or more, such a utility is "no longer entitled to hold a Commission-issued CPC."<sup>29</sup> Such a conclusion is arbitrary and capricious as it is unsupported by the Public Utility Code and the Commission's regulations. Such a conclusion ignores the business model of an entity like UFD, which is now offering intrastate services but has not yet had a customer contract for that intrastate service option. UFD has quoted several offers to potential customers and hopes that it will successfully onboard an intrastate customer (with intrastate revenues to report to the PUC) later this year or in early 2020.

In the Tentative Order, the Commission finds that public utilities that report zero gross operating revenues "have failed to pay for the reasonable costs attributable to their regulation by the Commission and have failed to establish that they are operating continuously in Pennsylvania."<sup>30</sup> First, the Commission does not cite to any legal precedent or any facts to support its conclusion that reporting zero intrastate state revenues axiomatically equates to a lack of continuous service. Importantly, the Commission has not demonstrated that UFD-PA has been inactive or has not been continuously undertaking activities over the past three to five years in order to complete construction of its network and to offer intrastate service. Section 1501 of the Public Utility Code requires "reasonably continuous service" that is "without unreasonable interruptions or delay." 66 Pa. C.S. § 1501. After offering service in early 2019, UFD-PA has not stopped offering intrastate services or otherwise subjected any of its customers to any unreasonable

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<sup>29</sup> Tentative Order at p. 4.

<sup>30</sup> *Id.* at p. 2.

interruptions or delays. The Tentative Order did not specifically find that UFD-PA stopped offering service or that any of its customers were subject to unreasonable interruptions or delays. Second, the Commission does not quantify or further explain the costs incurred to regulate a competitive access carrier whose regulatory activities are limited to filing a one-page annual report indicating it has no intrastate revenues at this time.

Accordingly, the Tentative Order errs in finding that intrastate revenues are required to qualify for public utility status in Pennsylvania.

**B. The Tentative Order's Revocation of UFD-PA's CPC Is Not Supported by Substantial Evidence.**

To avoid the risk of reversal on appeal, a PUC Order must be supported by substantial evidence.<sup>31</sup> Aside from the tenuous legal footing and rationale in the Tentative Order regarding the sweeping tentative revocation of numerous CPCs of certificated carriers, the Commission has not supported the specific revocation of UFD-PA's CPC by any specific details or specific facts, let alone substantial evidence.

Critically, the Commission has overlooked or omitted UFD-PA's factual circumstances, as provided to the Commission over the past few years. From 2016-2019, UFD-PA consistently and timely filed annual reports with the Commission. In 2017 and 2018, UFD-PA timely responded to Commission and Staff inquiries and data requests seeking clarification on UFD's business and plans to offer intrastate service in Pennsylvania.<sup>32</sup> UFD-PA provided written responses and explained the delayed construction of its network.

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<sup>31</sup> See *PECO Energy Co. v. Pa. PUC*, 791 A.2d 1155, 1160 (Pa. 2002) (directing that the necessary findings of fact in a PUC Order must be supported by substantial evidence).

<sup>32</sup> See Exhibit A (UFD Responses to PUC Data Requests and Staff Requests for Additional Information).

On May 1, 2017, UFD-PA provided Commission staff in the Telco Section with a copy of Construction Services Agreement/Contract and an explanation of the construction timeline and the scope of work.<sup>33</sup> Therein, the scope of work made it clear that UFD-PA planned to construct and install a fiber optic cable network system from New Hope Boro, Bucks County, PA to Germany Township, Adams County, PA.<sup>34</sup> Aerial and underground construction would be necessary and the installation of the conduit system would require trenching or boring.<sup>35</sup> Construction activities could also include handhole/manhole installations, bridge and tunnel attachments, the installation of fiber optic cable into newly placed conduit and into existing innerduct systems, and the repair and restoration of all disturbed services.<sup>36</sup>

On September 21, 2018, UFD-PA provided detailed responses and supporting documentation in response to the Commission's data requests issued to UFD-PA and other utilities.<sup>37</sup> Therein, UFD-PA explained that it currently had no income because it has not yet completed construction of its fiber line in the Commonwealth.<sup>38</sup> UFD-PA also explained that it anticipated receiving revenues in 2019.<sup>39</sup> UFD-PA provided the Commission with copies of UFD's FCC Form 499-A for the requested calendar years.<sup>40</sup>

Despite providing the Commission and Commission staff with detailed, verified information<sup>41</sup> regarding UFD-PA's factual circumstances, including the fact that intrastate

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<sup>33</sup> See Exhibit A.

<sup>34</sup> Exhibit A (May 1, 2019 responses, Exhibit A: Scope of Work).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See Exhibit A; see also PUC Docket No. M-2018-3004503 (UFD Sep. 21, 2018 responses).

<sup>38</sup> Exhibit A (Sep. 21, 2018 UFD data responses).

<sup>39</sup> *Id.*

<sup>40</sup> UFD-PA verified its responses subject to 18 Pa. C.S. § 4904. Exhibit A (Sep. 21, 2018 UFD data responses).

<sup>41</sup> Exhibit A (Sep. 21, 2018 UFD data responses).

operating revenues were anticipated, the Commission proceeded to tentatively revoke UFD-PA's CPC. Commissioner Place's dissent to the Tentative Order recognized that many of the carriers listed in Appendix A to the Tentative Order had responded to PUC Staff data requests seeking clarification from those carriers as to why they reported zero intrastate revenues.<sup>42</sup> Because the Tentative Order overlooked UFD-PA's factual circumstances and the data responses in the Commission's possession, the Tentative Order is not supported by substantial evidence and would be subject to reversal on appeal (if the Tentative Order were finalized). Critically, UFD holds *certificates or licenses to offer similar dark fiber services in New York, New Jersey, Maryland, and Virginia*; however, UFD has not experienced any regulatory issues in those states due to the failure to report intrastate operating revenues in certain years.

The Commission explains that tentatively "cancelling the relevant telecommunications public utilities' CPCs [is] in the public interest."<sup>43</sup> However, the Commission fails to specifically articulate how the revocation of those CPCs – including that of UFD-PA – is in the public interest and how the Commission considered any factors or criteria in reaching such a conclusion.

Accordingly, because the Commission omits the factual circumstances regarding UFD-PA's reporting of zero intrastate revenues over the past three years, the tentative revocation of UFD-PA's CPC is not supported by substantial evidence. Therefore, UFD asks the Commission to remove United Federal Data of Pennsylvania LLC from Appendix A in the Tentative Order prior to finalizing an order in this proceeding.

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<sup>42</sup> See Dissenting Statement of Commissioner at p. 1, Docket No. M-2019-3010251 (July 11, 2019).

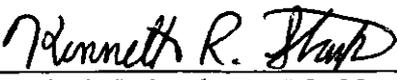
<sup>43</sup> Tentative Order at p. 4.

**III. CONCLUSION**

**WHEREFORE**, United Fiber & Data LLC respectfully requests that the Pennsylvania Public Utility Commission rescind the Tentative Order tentatively revoking the certificate of public convenience of United Federal Data of Pennsylvania LLC. United Fiber & Data LLC asks the Commission to remove United Federal Data of Pennsylvania LLC from Appendix A in the Tentative Order prior to finalizing an order in this proceeding.

Respectfully Submitted,

McNEES WALLACE & NURICK LLC

By   
Pamela C. Polacek (Pa. I.D. No. 78276)  
Kenneth R. Stark (Pa. I.D. 312945)  
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*Counsel to United Fiber & Data, LLC on behalf of  
United Federal Data of Pennsylvania LLC*

Dated: September 26, 2019



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PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

September 20, 2019

Kenneth R. Stark, Esq.  
McNees Wallace & Nurick LLC  
100 Pine Street  
Harrisburg, PA 17101

**Re: PA PUC Docket No. M-2019-3010251**

Dear Attorney Stark,

Per your request, enclosed please find the original executed Verification from Andrew Paxton concerning the above-referenced matter.

As always, please do not hesitate to contact me should you have any questions or require any additional information.

Best regards,

A handwritten signature in black ink, appearing to read "Ryan J. Sweitzer", with a horizontal line extending to the right.

Ryan J. Sweitzer  
Paralegal & Project Manager

Enclosure

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Cancellation of Certificates of Public** :  
**Convenience for Telecommunications** : **Docket No. M-2019-3010251**  
**Public Utilities' Failure to Operate or** :  
**Report Any Operating Revenue.** :

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**VERIFICATION**

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I, Andrew Paxton, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief, and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

SEPT 19, 2019  
Date

  
Signature

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PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**CERTIFICATE OF SERVICE**

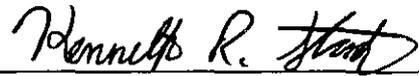
I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of Section 1.54 (relating to service by a participant).

**VIA FIRST-CLASS MAIL**

Office of Consumer Advocate  
555 Walnut Street  
Forum Place - 5th Floor  
Harrisburg, PA 17101-1921

Office of Small Business Advocate  
Suite 202, Commerce Building  
300 North Second Street  
Harrisburg, PA 17101

Bureau of Investigation and Enforcement  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120



Kenneth R. Stark

Counsel to United Fiber & Data, LLC on  
behalf of United Federal Data of  
Pennsylvania LLC

Dated this 26<sup>th</sup> day of September, 2019, in Harrisburg, Pennsylvania.

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