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April 16, 2019

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

VIA ELECTRONIC FILING

RE: Reporting of Intrastate Operating Revenues for Section 510 Assessment Purposes by Jurisdictional Telecommunications Carriers Offering Special Access and Other Similar Jurisdictionally-Mixed Telecommunications Services; Docket No. M-2018-3004578

Dear Secretary Chiavetta:

Please find enclosed for filing with the Pennsylvania Public Utility Commission the Comments of Broadband Cable Association of Pennsylvania, Inc. in the above-referenced proceeding. Thank you.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By Pamela C. Polacek
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Counsel to Broadband Cable Association of Pennsylvania, Inc.

Enclosure
cc: David E. Screven, Assistant Counsel, Law Bureau (via email dscreven@pa.gov)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In the Matter of	)	M-2018-3004578
	)	
Reporting of Intrastate Operating Revenues for Section 510 Assessment Purposes by Jurisdictional Telecommunications Carriers Offering Special Access and Other Similar Jurisdictionally-Mixed Telecommunications Services	)))))	

COMMENTS ON BEHALF OF BROADBAND CABLE ASSOCIATION OF PENNSYLVANIA, INC.

The Broadband Cable Association of Pennsylvania, Inc. ("BCAP")[1] submits these comments on behalf of its members in response to the Commission's Proposed Policy Statement issued in the above-captioned proceeding (the "Proposal"),[2] concerning the reporting of certain intrastate operating revenues for purposes of assessing intrastate regulatory fees under Section 510. BCAP and its members understand and appreciate the Commission's goal of ensuring a fair and proportional assessment of such fees. However, the Commission's Proposal in this proceeding—which would obligate certificated providers to ascertain and report their "*de facto* gross intrastate revenues from providing special access or other similar jurisdictionally-mixed telecommunications services in Pennsylvania,"[3] and to pay additional intrastate regulatory fees

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[1] BCAP is an association representing more than a dozen cable providers offering broadband, video, and voice services to consumers and businesses in Pennsylvania. Our members serve over 3 million customers utilizing more than 85,000 miles of fiber and coaxial cable throughout the Commonwealth.

[2] *See Reporting of Intrastate Operating Revenues for Section 510 Assessment Purposes by Jurisdictional Telecommunications Carriers Offering Special Access and Other Similar Jurisdictionally-Mixed Telecommunications Services*, Pa. Pub. Util. Comm'n, No. M-2018-3004578, Proposed Policy Statement, 49 Pa. Bull. 929 (Mar. 2, 2019) ("Proposal").

[3] *Id.* at 929.

based on such reported revenues[4]—would be inconsistent with federal and state law and would pose significant practical hurdles.

DISCUSSION

I. THE PROPOSAL WOULD CONTRAVENE FEDERAL AND STATE LAW

The core premise of the Proposal—the notion that "the Federal Communications Commission's (FCC) ten percent contamination rule does not preempt or otherwise preclude . . . carriers' obligation to report their *de facto* gross intrastate operating revenues" from special access or similar services[5]—is based on an incomplete and ultimately inaccurate understanding of federal precedent. To be sure, the Proposal's characterization of federal law is correct in some respects. For instance, the Proposal rightly notes that the FCC initially adopted the ten percent rule in 1989 as a tool for determining whether a special access line or similar mixed-use line is treated as interstate or intrastate for regulatory purposes.[6] The Proposal also recognizes that "[t]he federal government may preempt state law" in various contexts, including where "the state action would actually conflict with the federal law or its purposes."[7] But the Proposal's conclusion that the FCC's ten percent rule does not apply to the reporting and assessment framework under consideration—and therefore does not preempt it—is misguided.

More specifically, the Proposal's central claim that the ten percent rule is "designed to allocate *costs only and regulatory authority over ratemaking*," and thus does not extend to *revenue* allocations for purposes of assessing state regulatory fees,[8] does not hold up to scrutiny. While

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[4] *See id.*

[5] *Id.*

[6] *See id.* at 930-931 (citing *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Decision and Order, 4 FCC Rcd 5660 ¶¶ 1, 2 (1989) ("*Ten Percent Rule Order*")).

[7] *See id.* at 931 (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

[8] *Id.* at 932 (emphasis in original).

the Proposal repeatedly notes that the FCC's 1989 *Ten Percent Rule Order* refers to the rule in the context of cost allocation and ratemaking,[9] the Proposal overlooks subsequent FCC precedent extending the ten percent rule to revenue allocation and acknowledging its impact on regulatory fee assessments.[10]

For example, in its 1997 order establishing the rules governing the federal universal service program, the FCC made clear that the ten percent rule applies to *revenue* allocation just as it does to cost allocation. As that order explains, "under the [FCC's] rules, if over ten percent of the traffic carried over a private or WATS line is interstate, then the *revenues and costs* generated by the entire line are classified as interstate."[11] In keeping with that determination, since 1997, the FCC's Form 499-A has required telecommunications providers to allocate these revenues in accordance with the ten percent rule.[12]

The FCC reaffirmed the application of the ten percent rule to revenue allocation in a 2017 order, responding to a series of requests to review determinations made by the Universal Service Administrative Company ("USAC") on whether revenues associated with mixed-use special access lines qualify as interstate when assessing contributions to the federal universal service fund.[13] In the requests, the petitioners argued that the ten percent rule "does not apply to revenues"

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[9] *See, e.g.*, *id.* at 932 & n.6 (citing *Ten Percent Rule Order* ¶¶ 2, 8).

[10] Indeed, the Proposal even quotes the FCC rule stating that jurisdictional separations procedures like the ten percent rule "are designed primarily for the allocation of property costs, revenues, expenses, taxes and reserves between state and interstate jurisdictions," Proposal at 930 (quoting 47 C.F.R. § 36.1(b))—and yet makes no effort to reconcile this broad rule with the narrow cost-only reading of the ten percent rule set forth in the Proposal.

[11] *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 ¶ 778 (1997).

[12] *See Federal-State Joint Board on Universal Service*, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400, 18512, App'x. C (1997) (adopting first set of Form 499-A instructions and incorporating ten percent rule for revenue allocation); *see also* FCC, Instructions to FCC Form 499-A, at 27 (2019), *available at* https://docs.fcc.gov/public/attachments/DA-19-84A3.pdf (preserving the ten percent rule for revenue allocation in current instructions).

[13] *See Federal-State Joint Board on Universal Service*, Order, 32 FCC Rcd 2140 (WCB 2017) ("*2017 Order*").

but rather only to "cost allocation"[14]—the same view espoused in the Commission's Proposal.[15] But the FCC rejected those arguments, finding that USAC had appropriately applied the ten percent rule to "determine whether private line *revenues* should be assigned to the interstate jurisdiction."[16] The FCC went on to explain that "prior decisions have clearly incorporated the [ten percent rule] into the Commission's framework" for revenue allocation, and that the time for challenging that well-established determination "has long since passed."[17]

Moreover, just last year, the FCC specifically acknowledged that its jurisdictional separations procedures, including the ten percent rule, govern revenue allocations in the regulatory fee context. In a notice of proposed rulemaking on reforms to its jurisdictional separations approach, the FCC explained that states "use separations results to determine the amount of intrastate universal service support *and to calculate regulatory fees*."[18] By overlooking this explicit and recent acknowledgment by the FCC, as well as the FCC's repeated rulings applying the ten percent rule to revenue allocations, the Proposal arrives at an overly narrow understanding of the scope and preemptive effect of the ten percent rule.

The Eighth Circuit's decision in *Qwest Corporation v. Scott*,[19] cited frequently in the Commission's Proposal, does not compel a different conclusion. The issue in that case was whether the ten percent rule preempted the Minnesota Public Utilities Commission from requiring Qwest to report performance data regarding its special access services.[20] The *Scott* court found

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[14] *Id.* ¶ 8.

[15] *See* Proposal at 932.

[16] *2017 Order* ¶ 8 (emphasis added).

[17] *Id.* ¶¶ 9, 10.

[18] *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Further Notice of Proposed Rulemaking, 33 FCC Rcd 7261 ¶ 11 (2018) (emphasis added).

[19] 380 F.3d 367 (8th Cir. 2004).

[20] *Id.* at 372.

that the performance reporting requirement was not preempted—concluding that the FCC's ten percent rule did not "preclude all state regulation" of special access services,[21] and that performance reporting was entirely distinct from the types of allocation questions addressed by the ten percent rule.[22] Here, by contrast, the Proposal *directly* implicates the allocation questions addressed by the ten percent rule—by forcing providers in Pennsylvania to allocate revenues for intrastate regulatory fees using a state-specific methodology that directly conflicts with the FCC's approach. In fact, the *Scott* court specifically recognizes that the ten percent rule applies to the allocation not only of "costs" but also of "revenues, expenses, taxes and reserves between state and interstate jurisdictions"[23]—and thus undermines rather than supports the Proposal's stated view of the rule.

The Proposal also overlooks impediments to its suggested approach under state law. Many special access services and other jurisdictionally mixed services offered by BCAP members are provided using Internet Protocol ("IP") technology. Yet Pennsylvania law prevents the Commission from "enact[ing] or enforc[ing], either directly or indirectly, any law, rule, regulation, standard, order or other provision having the force or effect of law that regulates, or has the effect of regulating, the rates, terms and conditions of VoIP service or IP-enabled service."[24] The statute makes clear that this prohibition should be construed broadly—declaring that "[t]he proliferation of new technologies and applications and a growing number of providers developing and offering

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[21] *Id.* at 374.

[22] *See id.* (noting that, "when the 10% Order is read as a whole, the Commission's expressed intent to preempt state regulation does not extend to performance measurements and standards").

[23] *See id.* at 371 (quoting 47 C.F.R. § 36.1(b)).

[24] 73 Pa. C. S. § 2251.4; *see also id.* § 2251.3 (defining "IP-enabled service" as any "service, capability, functionality or application provided using Internet protocol or any successor protocol that enables an end user to send or receive a communication in Internet protocol format or any successor format, regardless of whether the communication is voice, data or video").

innovative services using Internet protocol is due in large part to little regulation, including freedom from regulations governing traditional telephone service, that these new technologies and the companies that offer them have enjoyed in this Commonwealth."[25] And while the statute preserves authority for the Commission to "enforce applicable Federal or State statutes or regulations" relating to certain enumerated matters, such as "[t]elecommunications relay service fees," the statute contains no such specific carve-out that would justify this expansion of state regulatory fees.[26]

II. THE PROPOSAL ALSO PRESENTS SIGNIFICANT PRACTICAL CONCERNS

Additionally, as a practical matter, BCAP's members would face significant hurdles in complying with an obligation to ascertain and report "*de facto*" intrastate revenues attributable to special access, transport, or similar jurisdictionally-mixed services. As the FCC has recognized, when ascertaining the jurisdictional status of a special access line for purposes of complying with regulatory obligations, "the best method for verifying private line traffic [i]s through customer certifications."[27] The FCC endorsed this method due to its "concern[] with the administrative practicality of the ten percent rule," and found that "'the benefits of [the rule] can best be achieved through customer certification that each special access line carries more than a *de minimis* amount of interstate traffic.'"[28] BCAP members accordingly rely on customer certifications to determine

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[25] *Id.* § 2251.2(2).

[26] *Id.* § 2251.6. Notably, the Supreme Court of Pennsylvania has struck down analogous efforts by the Commission to impose regulatory fee assessments on entities that are exempt from regulation as "public utilities" under state law. *See, e.g.*, *Delmarva Power & Light Co. v. Commonwealth of Pennsylvania*, 582 Pa. 338, 355-56 (2005) (striking down Commission effort to apply Section 510 assessments on entities that the General Assembly did not intend to treat as "public utilities").

[27] *2017 Order* ¶ 3 (citing *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Recommended Decision and Order, 4 FCC Rcd 1352 ¶ 32 (1989) ("*Ten Percent Rule Recommended Decision*")).

[28] *Id.* ¶ 18 (quoting *Ten Percent Rule Recommended Decision* ¶ 32).

whether a particular special access, transport, or similar line is intrastate or interstate based on the ten percent rule.

The Proposal, if adopted, would turn this well-functioning system on its head. BCAP members do not currently monitor usage on these facilities—and even if they did, they may not be able to ascertain the endpoints of any particular transmission passing over these lines. These services are fundamentally different from traditional voice services, where providers play an active role in routing the traffic and know the originating and terminating numbers on individual calls. In providing special access and similar services, by contrast, a provider may not play a significant role in routing the traffic, or the link may be serving as only one leg on a longer route between two unknown endpoints. In short, BCAP members lack a reliable mechanism to ascertain the "*de facto*" intrastate revenues attributable to special access or similar services.

CONCLUSION

Accordingly, BCAP respectfully urges the Commission to withdraw its Proposal to require providers to ascertain and report their *de facto* intrastate revenues attributable to special access or similar services for purposes of assessing intrastate regulatory fees. BCAP stands ready to work with the Commission to identify alternative avenues for recovering the Commission's administrative costs in a fair and lawful manner.

Respectfully submitted,

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Dated: April 16, 2019