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April 16, 2019

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

Re: Policy Statement Regarding the Reporting of Intrastate Operating Revenues for Section 510 Assessment Purposes by Jurisdictional Telecommunications Carriers Offering Special Access and Other Similar Jurisdictionally-Mixed Telecommunication Service
Docket No. M-2018-3004578

Dear Secretary Chiavetta:

Attached for electronic filing are the Comments of the Office of Consumer Advocate in the above-referenced proceeding.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

Barrett Sheridan

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Certificate of Service
*270515

CERTIFICATE OF SERVICE

Re: Policy Statement Regarding the Reporting of Intrastate Operating Revenues for Section 510 Assessment Purposes by Jurisdictional Telecommunications Carriers Offering Special Access and Other Similar Jurisdictionally-Mixed Telecommunication Services	:	Docket No. M-2018-3004578

I hereby certify that I have this day served a true copy of the following documents, the Office of Consumer Advocate's Comments, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 16th day of April 2019.

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Policy Statement Regarding the Reporting of Intrastate Operating Revenues for Section 510 Assessment Purposes by Jurisdictional Telecommunications Carriers Offering Special Access and Other Similar Jurisdictionally- Mixed Telecommunications Service	: : : : : :	Docket No. M-2018-3004578

THE OFFICE OF CONSUMER ADVOCATE
COMMENTS

I. INTRODUCTION

Section 510 of the Public Utility Code, 66 Pa.C.S. § 510, provides the legal framework for the Public Utility Commission (PUC or Commission) to assess the gross intrastate operating revenues of public utilities under the Commission's jurisdiction to provide funds for the Commission's annual operating budget. On November 8, 2018, the Commission issued for public comment a Proposed Policy Statement (Order) to guide telecommunications public utilities in the determination of intrastate operating revenues which are subject to the Commission's Section 510 assessment process. Through a separate Statement, then Vice Chairman Andrew G. Place posed several questions for additional comment.

The Office of Consumer Advocate (OCA) supports the Commission's plan to provide guidance to Pennsylvania certificated telecommunications public utilities as to their obligation to report intrastate revenues from the provision of public utility service and so "pay a reasonable share of the Commission's costs of administering the Public Utility Code." (Order at 2-3). The Commission's Proposed Policy Statement is directed at better matching the gross intrastate operating revenues reported by Pennsylvania's telecommunications public utilities for Section 510 assessment purposes with the actual provision of intrastate service. The Commission's Proposed Policy Statement would have a similar impact on the assessment on public utilities for the OCA's and the Office of Small Business Advocate's (OSBA) respective administrative costs. See, 71 P.S. § 309-4.1; 73 P.S. § 399.46.

Office of Consumer Advocate (OCA) offers these Comments in response to the Commission's Proposed Policy Statement Order and then Vice Chairman Place's Statement.

II. COMMENTS

A. The Commission Has Properly Identified A Problem Of Inequitable Allocation Of Commission Costs Among Jurisdictional Telecommunications Public Utilities.

The OCA supports the general premise of the Commission's Proposed Policy Statement. Among the Commission's powers and duties set forth in the Public Utility Code, Section 510 addresses how the Commission's administrative agency functions shall be funded. 66 Pa.C.S. § 510. Section 510 describes the process for the Commission to allocate its operational costs among utility groups and then to each public utility within a group for assessment purposes. Id., § 510(a), (b). Section 510(f) declares, "[i]t is the intent and purpose of this section that each public utility subject to this part shall advance to the commission its reasonable share of the cost of administering this part." In this context, it is necessary for the Commission to monitor and respond to circumstances which give rise to an unbalanced and so unreasonable allocation of the Commission's administration costs.

In September 2018, the Commission issued Secretarial Letters and data requests to a number of certificated telephone public utilities that had reported zero gross intrastate revenues for assessment purposes in 2017 and earlier. See, Zero Revenue Assessment Reporters, Docket No. M-2018-3004503.[1] Some carriers replied that they had no reportable gross intrastate operating revenues because they provide special access or services for resale including to wireless carriers.[2] Based upon the Federal Communications Commission's "10% rule," the carrier classified all of the revenues as interstate. See, e.g. Reply of PEG Bandwidth-PA LLC (Sept. 18, 2018); Joint Reply of Crown Castle NG East and PA-CLEC LLC (collectively, Crown Castle) (Oct. 19, 2018).

As the Commission observes, "if some carriers fail to accurately report their intrastate revenues, the burden of their cost of regulation ... is improperly shifted to all other certificated telecommunications carriers." Order at 2. The Commission expects that other telephone public utilities may report some gross operating intrastrate revenues,

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[1] Other carriers replied, stating that they had not commenced the provision of service or had no customers in Pennsylvania and so had no gross intrastate operating revenues to report. See, e.g., Reply of Charter Fiberlink-Pennsylvania, LLC (Dec. 11, 2018). Inactive certificated carriers may impose administrative costs on the Commission, without the production of assessable intrastate operating revenues. See, Final Order Regarding the Commission's Plan to Implement a One-Year Timeframe for Inactive Telecommunication Carriers to Provide Service on an Annual Basis within the Commonwealth of Pennsylvania, Docket No. M-2011-2273119, Order at 5-6 (July 19, 2012).

[2] As referenced in the Proposed Policy Statement Order, the Commission has also examined whether the provision of wholesale service to wireless carriers through distributed antenna systems (DAS) is within the scope of the Section 102 definition of a telephone public utility. See, Order at 2-3, fn. 2.

but "may not be reporting such revenues from special access or other similarly jurisdictionally-mixed telecommunications services." Id. at 3-4. The Commission attributes this to the practice of carriers providing jurisdictionally-mixed telecommunications services reporting gross intrastate revenues derived from application of the Federal Communications Commission's (FCC) cost allocation rules.

The OCA supports the Commission's decision to delve deeper into the question of the impact of this practice on the reasonableness of the Commission's allocation of its costs of administration among telephone public utilities.

B. The OCA Concurs that Federal Law Does Not Preempt the Commission's Proposed Policy Statement.

In the Order, the Commission examines whether federal law or regulation has preempted the Commission's ability to identify *de facto* gross operating intrastate revenues from intrastate telecommunications services in the context of Section 510 assessments as an amount different than intrastate operating revenues under federal cost allocation or jurisdictional separation rules. The Commission starts with a review of the origin and purpose of the FCC's cost allocation rules which apply to jurisdictionally-mixed telecommunications services. Id. at 6-8. The FCC's "10 percent contamination rule," set forth at 47 C.F.R. §36.154(a)-(b), effectively provides that "if ten percent more of the traffic on a mixed-use special access line is interstate, then all of the traffic for that line is considered interstate..." Id. at 8. Thus, traffic over a mixed-use special access line which is up to 90% wholly intrastate is classified, for the purposes of the FCC's cost allocation rules, as interstate. Id.

The OCA agrees that the Commission's authority to assess intrastate operating revenues for Section 510 assessment purposes is not preempted by federal law. The

Order offers a careful analysis of the possibility of express preemption, preemption by implication, or conflict preemption. See, Order at 8-13. Congress does know how to preempt or constrain the Commission's authority to assess the operating revenues of public utilities which provide both interstate and intrastate services. See, Regency Transp. Group, Ltd. v. Pa. P.U.C., 44 A.3d 107 (Pa. Cmwlth. 2012)(Regency). Regency concerned the Commission's assessment of a public transportation carrier that claimed its operations were interstate and not subject to Section 510 assessment. The federal Unified Carrier Registration Act prohibits state imposition of fees, including assessments, on certain interstate motor carriers as an undue burden on interstate commerce. See, 49 U.S.C.S. § 14504a(a)(3), (c). A 2008 amendment permitted states to assess the intrastate operations of interstate carriers, equivalent to assessment of purely intrastate carriers. Id., § 14504a(c)(2). The OCA agrees with the Commission that the FCC's jurisdictional separations rules do not preempt the Commission or limit the Commission's assessment of gross operating intrastate revenues to those revenues which remain after application of the "10 percent contamination rule." See, Order at 16-17.

C. The Proposed Policy Statement and Other Commission Regulations and Policy Statements May Be Improved Upon.

The OCA recommends that the Commission consider modest changes to the Proposed Policy Statement's phrasing and content.

Notably absent from the Proposed Policy Statement is a declaration of the Commission's intent to provide guidance, so that going forward each certificated telecommunications public utilities will know to report for assessment purposes its *de facto* gross intrastate operating revenues. The Order explains the Proposed Policy Statement as designed "to assist these carriers in complying with their statutory obligations to file their Section 510 revenues report and to pay a reasonable share of the Commission's costs of administering the Public Utility Code." Order at 3.

The Commission's Proposed Policy Statement largely tracks the legal and factual framework set forth in the Order. Among the passages, the Proposed Policy Statement refers twice to Distributed Antenna Systems operators. See, Proposed § 69.3701(4), (5). The first reference in Subpart (4) implies some impermanence or uncertainty: "Under current Pennsylvania law, these jurisdictionally-mixed services include services provided by operators of Distributed Antenna Systems (DAS)." The second reference, in Subpart (5) singles out "some DAS operators" as in the group of certain telecommunications public utilities that "repeatedly have reported zero gross intrastate revenues." The OCA recommends that the Commission consider whether these references are necessary and will be informative in many years to come. Today's "DAS" may be replaced in the future by some other equipment or technology. Additionally, as the Order notes, the Commission's jurisdiction over DAS providers and their services to wireless carriers is the subject of an appeal before the Pennsylvania Supreme Court. Order at 3, fn. 2.

In several places, the Proposed Policy Statement refers one or more times to the reporting of "gross intrastate revenues." See, Proposed § 69.3701(3), (5), (6), (7). To be consistent with the wording of Section 510, the OCA recommends that the word "operating" be included, to read "gross intrastate operating revenues."

The Proposed Policy Statement refers to the FCC's "ten percent contamination rule" in Subparts (5) and (9) but does not provide a citation to either a case or the FCC's Section 36.154 regulation. Additionally, Subpart (5) and (9) repeatedly describe the ten percent rule, "which is an administrative jurisdictional cost allocation rule" and "which is an administrative rule for certain jurisdictional cost allocations…." One short summary description of the FCC's ten percent rule and its purpose as a federal cost allocation rule for ratemaking and other purposes,[3] with a citation, would improve the Proposed Policy Statement. The other part of Subpart (9) regarding the lack of preemption might be rephrased in a more affirmative manner, appropriate to a Policy Statement adopted after public comment and close review of the legal underpinnings of the Commission's Proposed Policy Statement Order. See, e.g. Order at 3-4.

D. Then Vice Chairman Place's Questions 1, 2, and 3

In his Statement, then Vice Chairman Place asked for comments on "[w]hether and in what fashion existing jurisdictional separations rules are implicated in implementing the Proposed Policy Statement." As discussed above, the OCA submits that the Commission has reasonably identified the FCC's Section 36.154(a) "10 percent rule" as contributing to the probable under-reporting for Section 510 assessment purposes of actual intrastate operating revenues resulting from the provision of services over facilities which transport both intrastate and interstate traffic.

In reply to then Vice Chairman Place's second question, the OCA agrees that the Commission's annual fiscal Assessment Report should be modified to provide certificated telephone public utilities with sufficient instructions to identify and report "de facto gross intrastate operating revenues," consistent with the Proposed Policy Statement.

Commissioner Place's third question concerns "[w]hether the Commission should initiate a formal collaborative process between its Staff and the interested parties and

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[3] The Commission has in the past accepted or relied upon the FCC's cost allocation rules and factors, for financial reporting and ratemaking for some telephone public utilities. See, e.g. 52 Pa. Code § 71.8(a), (c) (Intrastate Allocation Factors); § 69.501 (Average schedule telephone companies; Residual ratemaking – statement of policy).

entities in order to address this potential change of reportable revenues for Section 510 fiscal assessment purposes." The OCA agrees with the premise of Commissioner Place's question, that the Commission's final Policy Statement may benefit from some further exchange of ideas and information, apart from this written comment and reply comment process. However, it remains the Commission's obligation to determine what constitutes a public utility's "reasonable share of the cost of administering" the Public Utility Code, which the public utility must advance to the Commission through the assessment process. See, 66 Pa.C.S. § 510(f).

III. CONCLUSION

WHEREFORE, the Office of Consumer Advocate respectfully provides these Comments in response to the Public Utility Commission's Proposed Policy Statement Order entered November 8, 2018.

Respectfully Submitted,

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Dated: April 16, 2019
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