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

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:

Enclosed please find Verizon's Comments Regarding the November 8, 2018 Policy Statement, in the above captioned matter.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

Suzan D. Paiva /crh

Suzan D. Paiva

SDP/sau

Enclosure

cc: David E. Screven, Law Bureau

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 Services	:	M-2018-3004578

COMMENTS OF THE VERIZON COMPANIES

By order entered November 8, 2018, published in the Pennsylvania Bulletin on March 2, 2019, the Commission proposed a policy statement on the reporting of gross intrastate operating revenues for purposes of calculating assessments under 66 Pa. C.S. § 510 by regulated telecommunications carriers in Pennsylvania that offer special access or other services the Commission terms "jurisdictionally-mixed." The Commission's proposed policy statement directs providers to report as "de facto intrastate operating revenue" (and therefore subject to assessment) some portion of the revenue earned from special access services that are classified by the Federal Communications Commission ("FCC") as interstate services because more than ten percent of the traffic they carry is jurisdictionally interstate. Verizon[1] responds to the Commission's request for comment on this proposal. For the reasons stated below, Verizon respectfully urges the Commission not to adopt the proposed policy statement.

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[1] These Comments are filed on behalf of Verizon Pennsylvania LLC, Verizon North LLC, MCImetro Access Transmission Services Corp. and XO Communications Services, LLC (together, "Verizon").

I. BACKGROUND

The Commission's Assessment. Under 66 Pa. C.S. § 510, the Commission's operations are funded by assessments made upon the public utilities that it regulates. According to the Commission, its total recoverable costs for the 2017-18 fiscal year were $60.7 million for all utilities and licensed entities, and the portion attributable to the regulation of all Commission-certificated telecommunications carriers was $5.9 million. By statute, the Commission is to allocate that $5.9 million among certificated telecommunications carriers based on the proportion that an individual carrier's gross intrastate operating revenues bears to the total gross intrastate operating revenues of the group. 66 Pa. C.S. §510(b)(4). The statute does not define "gross intrastate operating revenues."

The Commission's proposed policy statement responds to the discovery that certain companies that are certificated by the Commission as "competitive access providers" or "CAPs" have reported zero gross intrastate operating revenue for assessment purposes (and therefore pay no share in the Commission's costs) because they classify all of their revenue as interstate, indicating that all of these services are special access services that carry more than ten percent interstate traffic and therefore are classified as jurisdictionally interstate under FCC rules. The Commission's proposed policy statement would assess revenue earned from this type of mixed-use special access service by requiring not only these zero-revenue reporting CAPs, but also any regulated provider offering services that are classified as interstate under the FCC's ten percent rule, to report some portion of the revenue from those interstate services as "de facto gross intrastate operating revenue" to be used in the assessment calculation. The Commission does not specify exactly how a provider is to determine what portion of the revenue from these mixed-use services is de facto intrastate revenue.

Special Access and Private Line Services. Special access services – sometimes referred to as private lines – are dedicated, non-switched point-to-point wireline circuits that carry large volumes of telecommunications traffic from one location to another.[2] These lines might be used to serve other providers, such as interexchange carriers or wireless companies moving traffic to their networks. They might also be used by large volume retail customers to exchange data among company offices, backup storage facilities and other locations.

Special access and private lines can be offered as an intrastate service (subject to this Commission's jurisdiction) or as an interstate service (subject to the FCC's jurisdiction). A private line that begins in one state and ends in another is interstate. But for lines that physically begin and end within the same state, it is the nature of the traffic carried over the circuit that determines its jurisdiction. Under the FCC's "ten percent rule," if more than ten percent of the traffic carried over the line is interstate, then the line is considered interstate, but if ten percent or less of the traffic is interstate then the line is jurisdictionally intrastate. Interstate traffic carried over these facilities would include long distance traffic originating from or terminating to another state and/or internet traffic.

The ten percent rule originated in the 1980s as part of the FCC's jurisdictional separations process, to allocate costs to be recovered either in the intrastate or interstate jurisdiction.[3] The FCC noted that, at that time, the costs of special access lines carrying both intrastate and interstate traffic (mixed-use lines) were generally assigned to the interstate jurisdiction, and concluded "state interests are better served by permitting states to regulate

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2 *See, e.g.*, 66 Pa. C.S. § 3012 (Chapter 30 definitions). For ease of reference in these comments Verizon refers to all mixed-use dedicated circuits as "special access."

3 *MTS and WATS Market Structure, Amendment of Part 36 of the Communications Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72 and 80-286, Decision and Order, 4 FCC Rcd 5660 (FCC, July 20, 1989) ("*Ten Percent Rule Order*").

charges for intrastate private line systems carrying small amounts of interstate traffic."[4] It determined that ten percent or less interstate traffic is a "de minimis" amount, so that the line should be classified as intrastate and subject to state-regulated charges, despite the presence of a small portion of interstate traffic. This rule was codified at 47 CFR § 36.154.[5]

To determine whether a line carries more than ten percent interstate traffic, the FCC adopted a process relying on customer certifications. It specifically rejected proposals to base the interstate/intrastate classification of mixed-use special access lines on traffic studies or usage-based allocation factors, explaining that "any benefits generated by these methods would be greatly outweighed by their disadvantages" because it would "undermine efforts to simplify the separations process, necessitate changes in the LECs' billing systems, and complicate the tariffing and billing for special access lines," and that "a usage-based allocation would also tend to undermine economic efficiency."[6] The FCC "emphasize[d] the importance of . . . carefully circumscribed verification procedures," noting that "traffic on many special access lines cannot be measured . . . without significant additional administrative efforts. . . . While we expect customers to act in good faith when certifying the nature of their traffic based on existing information, we do not expect special access customers to perform additional traffic studies for this purpose. To mandate a more rigorous approach would seriously undermine the administrative benefits of the separations procedures recommended by the Joint Board."[7]

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4 *Id.* ¶ 2.

5 47 CFR § 36.154 ("Interstate private lines and interstate WATS line ...shall include all private lines and WATS lines that carry exclusively interstate traffic as well as private lines and WATS lines carrying both state and interstate traffic if the interstate traffic on the line involved constitutes more than ten percent of the total traffic on the line.")

6 *Ten Percent Rule Order*, ¶ 4.

7 *Id.* ¶ 6, n. 7.

While this Commission's Order suggests that the FCC only adopted the ten percent rule for jurisdictional separations purposes, in fact there is subsequent activity at the FCC on this issue that is relevant. In its 1997 *Universal Service First Report and Order*, the FCC repurposed the jurisdictional separations ten percent rule to define interstate telecommunications under the new federal universal service contributions framework.[8] The FCC "agree[d] with the Joint Board's recommendation that all telecommunications carriers that provide interstate telecommunications services must contribute to the support mechanisms" and explained that for purposes of FCC assessments "[t]elecommunications are 'interstate' when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession, or the District of Columbia. In addition, under the Commission'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."[9]

Since that time, providers have been required to report as interstate revenue on the FCC Form 499-A their revenue from special access services carrying more than ten percent interstate traffic, and they have been assessed for various federal fees based on that revenue. The instructions to FCC Form 499-A state that: "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."[10] FCC Form 499-A is used by the FCC to calculate the following federal assessments:

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8 *Universal Service First Report and Order*, 12 FCC Rcd 8776, 9173, 1997 FCC LEXIS 5786, *235-237 (FCC May 7, 1997).

9 *Id.* ¶'s 777-778.

10 2019 Telecommunications Reporting Worksheet Instructions (FCC Form 499-A), at 40, available at https://docs.fcc.gov/public/attachments/DA-19-84A3.pdf.

> The Communications Act of 1934, as amended, requires that the Commission establish mechanisms to fund universal service (USF), interstate telecommunications relay services (TRS), the administration of the North American Numbering Plan (NANPA), and the shared costs of local number portability administration (LNPA). To accomplish these congressionally directed objectives, the Commission requires telecommunications carriers and certain other providers of telecommunications (including Voiceover-Internet-Protocol (VoIP) service providers) to report each year on the Telecommunications Reporting Worksheet the revenues they receive from offering service. The administrators of each of these programs use the revenues reported on this Worksheet to calculate and assess any necessary contributions. The Commission also uses the revenue data reported on this Worksheet to calculate and assess Interstate Telecommunications Service Provider (ITSP) regulatory fees. Although some Telecommunications Reporting Worksheet filers may not need to contribute to each of the support and cost recovery mechanisms, all telecommunications carriers and certain additional telecommunications providers must file. These instructions explain which filers must contribute to particular mechanisms, but filers should consult the specific rules that govern contributions for each of the mechanisms. In general, contributions are calculated based on each filer's end-user telecommunications revenue information, as filed in this Worksheet.[11]

In 2017, the Acting Chief of the FCC's Wireline Competition Bureau discussed this issue extensively in an order addressing several requests for review of audit findings related to whether certain revenues associated with specific mixed-use special access lines should be considered interstate for the purpose of assessing contributions to the FUSF. This order reviewed the history of the ten percent rule before the FCC, including the 1997 *Universal Service First Report and Order* and the adoption of the ten percent rule in the instructions to FCC Form 499-A, and concluded that "there was sufficient notice for all carriers that the ten percent rule would provide the basis for determining whether a mixed use special access line would be considered interstate or intrastate in nature for contributions purposes," and "given that the [FCC] incorporated the ten percent rule into its contributions requirements in the *Universal Service First Report and Order*,

[11] *Id.* at 1-2 (footnotes omitted).

we conclude that the Commission intended to extend the ten percent rule to contributions without modification."[12]

Accordingly, the same revenue that the Commission is now seeking to assess as "de facto intrastate operating revenue" is considered interstate revenue for FCC assessment purposes and is subject to being assessed for the ITPS, FUSF and a number of other federal fees.

Verizon's Special Access Services. The Verizon local exchange companies offer special access and other mixed-use services both on an intrastate and interstate basis. Verizon (particularly through its incumbent local exchange companies) reports a substantial amount of intrastate revenue to this Commission from special access services that carry ten percent or less of interstate traffic and therefore are classified as intrastate special access. That revenue is included in the "gross intrastate operating revenue" reported for assessment purposes. Verizon's local exchange affiliates also offer special access that is classified as interstate because the facilities carry more than ten percent interstate traffic. Revenue from those services is reported to the FCC as interstate on Form 499-A, and therefore is not reported to this Commission for assessment.

II. VERIZON COMMENTS

Verizon understands the Commission's wish to ensure that, where the Commission is expending administrative resources to address issues and proceedings relating to "zero-revenue" CAPS, those parties should pay a fair share of the Commission's assessment that funds its regulation of the telecommunications industry. Unfortunately, the assessment statute at 66 Pa. C.S. § 510 is designed to fund the Commission from assessments based on intrastate revenue, so

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[12] *In re Federal-State Joint Bd. on Universal Serv.*, 32 FCC Rcd 2140, 2017 FCC LEXIS 954 (FCC, Acting Chief Wireline Competition Bureau, March 30, 2017) ("*Ten Percent Rule Audit Order*"). Verizon affiliate XO Communications Services, LLC has a pending Application for Review of this order relating to the auditors' reclassification of certain XO facilities from intrastate to interstate.

if a certificated provider does not earn intrastate revenue, it is not assessed. While Verizon appreciates the Commission's effort to ensure that these providers pay a fair share of the assessment, Verizon respectfully urges the Commission ***not*** to adopt the proposed policy statement, for the following reasons. Instead, as discussed below, if an inequity is perceived in the current funding system, then a change to the governing statute to more accurately assess costs upon the cost-causers would be the better approach.

Federal Preemption and Double Taxation. As outlined above, the Commission's proposal to reclassify as "de facto intrastate operating revenue" and to impose assessments upon revenue from special access services that the FCC classifies as interstate under the ten percent rule directly conflicts with the FCC's own holdings on federal assessments and would result in double taxation. Based on the 1997 *Universal Service First Report and Order*, the instructions to FCC Form 499-A, and the 2017 *Ten Percent Rule Audit Order*, all of the revenue that this Commission proposes to reclassify as "de facto intrastate operating revenue" is expressly classified as interstate by the FCC and is required to be reported for purposes of federal assessments. As this Commission itself points out, state action is preempted by federal law "where the state action would actually conflict with the federal law or its purposes." (11/8/18 Order at 9). The Commission may only act where "there is no federal rule on point and the state action does not frustrate any important federal interest." (11/8/18 Order at 10).

The issue of federal preemption of regulation for mixed-use services was recently addressed by the United States Court of Appeals for the Third Circuit, which explained that:

> "[M]ixed-use" or "jurisdictionally-mixed" services are generally subject to dual federal/state jurisdiction, except where it is impossible or impractical to separate the service's intrastate from interstate components and the state regulation of the intrastate component interferes with valid federal rules or policies. That is to say, where—as here—the interstate and intrastate components are inseparable, state jurisdiction over mixed use services such as ISP-bound local traffic is tied to conflict preemption. This

> view recognizes the realities of technology and economics that belie such a clean parceling of responsibility between the state and federal governments. A state is therefore both preempted and lacking jurisdiction to regulate ISP-bound local traffic if and only if the state regulation conflicts with federal law.[13]

Here, an attempt by this Commission to assess revenue from special access services that are interstate under the ten percent rule would conflict with federal law because the FCC already assesses those revenues to support its own funds and operations and has ruled that they are interstate revenues for contribution purposes. Reclassifying as intrastate this same revenue that the FCC considers interstate would frustrate the FCC's purpose in funding its own assessment. The FCC has determined that this Commission's authority is limited to those special access services that carry ten percent or less of interstate traffic, and the Commission is free to include those revenues for its intrastate assessment. At least on Verizon's part, revenue from those intrastate special access services is already reported to this Commission for state assessment purposes. The other special access services that exceed ten percent interstate traffic are interstate in jurisdiction and subject to the FCC's assessments, not this Commission's.

Administrative Burden and Infeasibility. Not only would this new interpretation be subject to legal challenge due to the conflict with federal law, but also the Commission has provided no guidance on how providers are expected to identify the portion of "intrastate" use of these private lines. The FCC has already determined that requiring traffic or usage studies would be unduly burdensome, counterproductive, and likely infeasible given that the end-user generally controls that information.[14] Customers are only required to certify whether or not the facility carries more than ten percent interstate traffic. There is no requirement to perform traffic studies

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[13] *AT&T Corp. v. Core Communs., Inc.*, 806 F.3d 715, 727 (3rd Cir. 2015) (finding that ISP-bound traffic is interstate but states retain jurisdiction to regulate ISP-bound traffic where the state regulations do not conflict with federal law).

[14] *Ten Percent Rule Order*, ¶'s 4 and 6.

to determine exactly what percentage of intrastate traffic the facility carries. Not only would it be a new burden on providers and/or their customers to try to quantify the percentage of intrastate traffic, but it would also be very difficult if not impossible for the Commission to verify this information, leaving open the possibility of an unfair system where only some providers comply. Alternatively, if the Commission expects providers to assume that ninety percent of the traffic on these facilities is intrastate, that system is certainly subject to challenge as encroaching upon interstate traffic because in reality much less than ninety percent is likely to be intrastate. The ten percent rule originated precisely because it is impossible or impractical to separate intrastate from interstate components of this type of service, and it is simply the FCC's definition of *de minimis*, not a determination of how much interstate versus intrastate traffic is actually carried on these circuits.

Legislative Solutions. According to Section 510, "[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." 66 Pa. C.S. § 510(f). When this statute was enacted the Legislature determined that this purpose could be achieved by allocating the Commission's costs among members of a utility group based on gross intrastate operating revenue. If the market has changed so that this system is no longer achieving its intended purpose, then the best solution would be to seek a statutory change to account for time and resources expended by the Commission on issues related to jurisdictional carriers that do not report intrastate revenue. For example, in Delaware, telecommunications providers no longer pay an assessment based on a percentage of intrastate revenue, but the state commission has authority to charge providers to recover its costs of specific investigations or proceedings involving that provider.[15]

[15] *See* 26 Del. C. § 710; 26 Del. C. § 114.

Alternatively, the Commission could continue to assess providers with significant intrastate revenue under the present system, but a provision could be added to allow the Commission to recover actual costs from telecommunications providers that report zero or *de minimis* intrastate gross operating revenues.

III. CONCLUSION

For the foregoing reasons Verizon respectfully suggests that the Commission decline to issue the proposed policy statement and that it should not attempt to assess any portion of the revenue from services that are classified as interstate under the ten percent rule, while instead exploring other alternatives to recover costs from providers that the Commission might determine are expending excessive administrative resources without paying an assessment.

Respectfully submitted,

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