PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105-3265

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

PUBLIC MEETING: July 11, 2019
3004578-LAW

Docket No. M-2018-3004578

STATEMENT OF COMMISSIONER ANDREW G. PLACE

Before us is a final recommendation regarding the adoption of a previously proposed Policy Statement.[1] Under this Policy Statement, telecommunications carriers that are certified by this Commission and operate in Pennsylvania offering jurisdictionally mixed telecommunications services (e.g., mainly private line and special access services), but report zero gross intrastate revenues on those services due to the Federal Communications Commission's (FCC's) ten percent contamination rule, would be obligated, for fiscal assessment purposes, to report their *de facto* gross intrastate operating revenues and pay an assessed amount of this Commission's costs for administering the Public Utility Code.

The majority of the commenting parties, including such entities as the Pennsylvania Telephone Association (PTA), the Verizon Companies (Verizon), and the Broadband Cable Association of Pennsylvania (BCAPA), have actively opposed the adoption of this Policy Statement. These comments have raised several serious legal and technical concerns and have strongly recommended against its adoption. I share many of the concerns that these commenting parties have expressed. Assuming that there is a genuine and concrete fiscal assessments issue for both incumbent and competitive telecommunications carriers that do not report operating revenues from special access and private line circuits that have been classified as interstate under the FCC's ten percent contamination rule (or report zero intrastate revenues from such services) — and I am not convinced that there is such an issue — this matter should be further studied and addressed through a collaborative process[2] or through a legislative solution.[3] Furthermore, for the reasons that I explain in detail below, any future Commission action in this matter should proceed on the basis of a rulemaking and not a Policy Statement.

A. The Recommended Policy Statement Suffers from Serious Legal and Technical Flaws

The recommended Policy Statement suffers from serious legal and technical flaws. The potential adoption of the Policy Statement will inevitably lead to a conflict with the FCC's applicable jurisdictional separation rules.[4] This conflict most likely will result in appellate litigation before courts and/or administrative agencies of competent jurisdiction. Most of the comments plainly demonstrate that the FCC's ten percent contamination rule, that affects the interstate classification of special access

[1] Docket No. M-2018-3004578, Order entered November 8, 2018, 49 Pa.B. 929 (March 2, 2019).
[2] PTA Comments at 2-3, 6; Crown Castle Comments at 3, 5.
[3] Verizon Comments at 10.
[4] 47 C.F.R. § 36.154(a). The FCC originally established its ten percent contamination rule in 1989. BCAPA Comments at 2-3 and n. 6 citing *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, 5660-61, ¶¶ 1, 2 (1989).

and private line circuits and services, also affects the corresponding jurisdictional classification, separation and allocation of capital investment, associated fixed investment costs, operational costs, and associated revenues.[5] The relevant interstate classification and jurisdictional allocation of the network facilities, costs, and revenues affected by the ten percent contamination rule are utilized for a variety of purposes. They are not solely utilized for the jurisdictional allocation of revenues for the purpose of ascertaining contribution assessments to the federal and state universal service fund (USF) mechanisms. They are also utilized for the assessment and payment of regulatory fees to appropriate agencies including the FCC and this Commission.

BCAPA explained the evolution of the FCC's ten percent contamination rule and also pointed out that "the FCC specifically acknowledged that its jurisdictional separations procedures, including the ten percent rule, govern revenue allocations in the regulatory fee context."[6] BCAPA points to the FCC's explanation in a notice of proposed rulemaking that "states 'use separations results to determine the amount of intrastate universal service support *and to calculate regulatory fees*.'"[7] Verizon also states that since the FCC adopted the ten percent contamination rule for special access and private line services, "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."[8] Verizon's extensive quote from the FCC Form 499-A plainly indicates that these reported interstate revenues are utilized not only for the calculation of federal USF mechanism contribution assessments, but also for funding such programs as the interstate telecommunications relay services (TRS), the shared costs of local number portability administration (LNPA), and the FCC's own Interstate Telecommunications Service Provider (ITSP) regulatory fees.[9] The Verizon comments further explains that "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 [federal USF] and a number of other federal fees."[10] Verizon reinforces and explains its position by referencing the FCC Wireline Competition Bureau's Order of March 10, 2017 regarding the applicability of the ten percent contamination rule for private and special access lines, and the resulting contribution assessments to the federal USF mechanism.[11] The same *FCC WCB Audit Order* also includes the following language that is relevant to the *"de facto"* intrastate revenues fundamental premise that has been advanced in the Policy Statement under consideration:

> Mixed-use special access lines are assignable to the interstate jurisdiction if the interstate traffic constitutes more than ten percent of the total traffic and to the intrastate jurisdiction if it constitutes ten percent or less. We find no basis for allowing carriers *to simply presume*, without any evidence or good-faith inquiry,

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[5] BCAPA Comments at 3; Verizon Comments at 5. This classification does not obviate this Commission's regulatory oversight and responsibilities that telecommunications network facilities and services within Pennsylvania comply with applicable statutory and regulatory standards involving reliability, adequacy, safety, efficiency, privacy, and reasonableness. *See, e.g.,* 66 Pa.C.S. § 1501.

[6] BCAPA Comments at 4.

[7] BCAPA Comments at 4 and n. 18, citing *In re Jurisdictional Separations and Referral to the Federal-State Joint Board,* CC Docket No. 80-286, (FCC, Rel. July 18, 2018), Further Notice of Proposed Rulemaking, 33 FCC Rcd 7261 ¶ 11 (2018); *slip op.* FCC 18-99 at 5 (emphasis added by BCAP).

[8] Verizon Comments at 5.

[9] Verizon Comments at 6.

[10] Verizon Comments at 7.

[11] Verizon Comments at 6-7 and n. 12 citing *In re Federal-State Joint Board on Universal Service et al.*, CC Docket No. 96-45 *et al.*, (FCC, Acting Chief, Wireline Competition Bureau, Rel. March 30, 2017), Order, 32 FCC Rcd 2140, *slip op.* DA 17-309, 2017 FCC LEXIS 954 (*FCC WCB Audit Order*), *application for review pending. See also* BCAPA Comments at 3-4 and n. 13.

> that ten percent or less of the traffic on a mixed-use line is interstate. Stated differently, carriers and their customers must make good faith effort to assign a mixed-use private line because no default presumption of interstate or intrastate jurisdiction exists.
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> In summary, we find no basis in our rules to conclude that a carrier *may simply presume* that a mixed-use private line is properly *assignable to the intrastate jurisdiction.* The carrier must engage in some kind of good faith query into the jurisdictional nature of the traffic carried on the line. Allowing such a presumption would permit carriers to regularly assign to the state jurisdiction authority, costs *and revenues* associated with private lines carrying more than ten percent interstate traffic, in violation of the plain language of section 36.154 of the Commission's rules [47 C.F.R. § 36.154] and the Commission's [FCC's] longstanding USF rules and policies.

FCC WCB Audit Order, slip op. ¶¶ 11, 21 at 6, 9 (emphasis added, citations omitted).

Thus, in accordance with the *FCC WCB Audit Order*, the application of the FCC's ten percent contamination rule on private line and special access circuits and services that are classified as interstate under the rule does not create a presumption that *any* of the revenues associated with such circuits and services can be treated as intrastate under the *"de facto"* theory and premise.

Both the BCAPA and Verizon comments explain the inherent conflict between the theory of utilizing and somehow deriving the *"de facto"* intrastate revenues that are *per se* subject to interstate jurisdictional classification because of the FCC's ten percent contamination rule, and the resulting risks of federal preemption.[12] The lack of a presumption that any private line and special access revenues that are classified as interstate under the FCC's ten percent contamination rule can be deemed as intrastate further complicates the actual application of the recommended Policy Statement. I believe that certain comments addressing the practical implementation of the recommended Policy Statement hold merit. The *FCC WCB Audit Order* directives notwithstanding, the recommended Policy Statement does not contain a practically applicable and *adequately defined* methodology through which the *"de facto"* intrastate gross revenues subject to the fiscal assessments by this Commission can be readily identified and quantified. Rather, the recommended Policy Statement provides vague guidance that jurisdictional telecommunications carriers need to make available "supporting information (such as traffic studies, tax returns, jurisdictional allocation formulas and factors, books of account, reports, etc.) on which the carrier bases its revenue determination, so that the [Commission's] Fiscal Office can ascertain the carrier's *de facto* gross intrastate operating revenues and compute an accurate assessment in accordance with the metrics and requirements of Section 510 of the [Public Utility] Code."

The lack of appropriate definitions — an essential parameter with a recommended Policy Statement that also implicates federal law and jurisdiction — complicates the task of properly identifying and quantifying the targeted *"de facto"* gross intrastate operating revenues. For example, since several incumbent and competitive telecommunications carriers have already been applying the FCC's ten percent contamination rule for private lines and special access circuits and services,[13] the relevant and reportable jurisdictional allocation factors would be "100% interstate." The recommended Policy Statement does not outline a procedure whereby a private line or special access circuit

[12] Verizon Comments at 8-9; BCAPA Comments at 2-3.
[13] Verizon Comments at 7.

subject to the FCC's contamination rule — and the relevant revenues — can somehow be "separated" into "X%" *"de facto"* intrastate while the "Y%" will still retain its interstate classification. Similarly, the definitions and potential methodological use of "tax returns, ... books of accounts, reports, etc.," are also lacking. There can be reliance on traffic studies involving specific private lines and special access circuits or groups thereof — and the *FCC WCB Audit Order* appears to emphasize "the nature of the traffic" and not simple customer certifications that address the jurisdictional classification of such traffic.[14] However, as the comments have made clear, telecommunications carriers extensively rely on their respective customer certifications for the jurisdictional classification of private lines and special access circuits and associated revenues that are affected by the FCC's ten percent contamination rule.[15] However, the recommended Policy Statement does not address the interplay between such customer certifications and the use of actual traffic studies in ascertaining the desired *"de facto"* intrastate revenues "X%" allocation factor. Verizon also cautions in its comments that "if the Commission expects providers to assume that ninety percent of the traffic 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."[16]

The recommended Policy Statement also does not contain any preferred reporting form where the requested information can be included and readily discerned by the Commission's Fiscal Office. This can easily lead to reporting dissimilarities between individual and/or whole categories of telecommunications carriers and the non-uniform application of the recommended Policy Statement. Such reporting dissimilarities can and will lead to disparate regulatory treatment between telecommunications carriers that immediately come under the rubric of the recommended Policy Statement or will attempt to comply in the future. This will also increase the administrative burden on the Commission and its Staff because there will not be an easy and standardized way to cross-check and validate the submitted information and data, i.e., the existing annual financial report formats for telecommunications public utilities do not readily accommodate the data elicited through the recommended Policy Statement in an appropriately disaggregated form.

It is beyond doubt that private lines and special access circuits and services and their revenues that are classified as interstate under the ten percent contamination rule are assessed for FCC regulatory fee purposes.[17] Thus, this interstate classification and the corresponding application of jurisdictional separations involves both services and revenues. Under these circumstances and where the boundaries of jurisdictional separations have been prescribed and enforced, violations of such boundaries are not condoned under appropriate judicial review.[18] Because the legal and technical premises of the *"de facto"* intrastate revenues theory violate such boundaries, the recommended Policy Statement is unsustainable.

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[14] "Subsequent discussion of the ten percent rule by the Commission [FCC] also emphasized accurately determining the nature of the traffic, without any reference to a presumption based on certification and, in most cases, without discussion of the certification process at all." *FCC WCB Audit Order, slip op.* ¶ 20 at 8. The FCC's Wireline Competition Bureau further cautioned: "To ensure that customers make *informed certifications*, carriers should provide basic guidance to their customers regarding what constitutes intrastate or interstate traffic. Carriers should specifically make customers aware that *it is the nature of the traffic over the private line that determines its jurisdictional assignment*, not merely the physical endpoints of the facility over which service is delivered." *Id.* ¶ 25 at 9 (emphasis added, citation omitted).

[15] BCAPA Comments at 6; Verizon Comments at 9-10.

[16] Verizon Comments at 10.

[17] Verizon Comments at 8-9.

[18] *See, e.g., Texas Office of Public Utility Counsel, et al. v. F.C.C.*, 183 F.3d 393 (5th Cir. 1999) (the FCC "exceeded its jurisdictional authority when it assessed contributions for § 254(h) 'schools and libraries' programs based on the combined intrastate and interstate revenues of interstate telecommunications providers and when it asserted its jurisdictional authority to do the same on behalf of high-cost support").

B. The Recommended Policy Statement Cannot Be Promulgated in Its Present Form

The recommended Policy Statement on the *"de facto"* intrastate revenues cannot be promulgated in its present form from a procedural viewpoint. Although the underlying premise and policy of the *"de facto"* intrastate revenues have been incorporated in the recommended Policy Statement, the immediate and anticipated implementation effects will be akin to those of a substantive, final form rulemaking. However, this agency has not engaged in a substantive rulemaking for the purpose of adopting the *"de facto"* intrastate revenues premise and policy as a rule. For example, although the proposed Policy Statement was the subject of notice and comment, it was not reviewed by the Independent Regulatory Review Commission (IRRC) since Commission policy statements are not subject to such review. Thus, before proceeding any further there is a need to determine whether the expressed *"de facto"* intrastate revenues premise constitutes a proper Policy Statement or amounts to an unpromulgated regulation.[19] In order to reach this determination, Pennsylvania appellate courts apply the "binding norm" test. Pennsylvania Commonwealth Court decisions generally hold that: "In ascertaining whether an agency has established a binding norm, the reviewing court must consider: (1) the plain language of the provision; (2) the manner in which the agency has implemented the provision; and (3) whether the agency's discretion is restricted by the provision."[20]

The plain language review of the recommended Policy Statement and the effects of the *"de facto"* intrastate revenues policy "taken as a whole, shows the" relevant provisions "to be restrictive, directive, substantive, and thus, more characteristic of a regulation."[21] The recommended Policy Statement applies concrete, substantive, and restrictive directives regarding the reporting of the *"de facto"* intrastate revenues of incumbent and competitive telecommunications carriers derived from private line and special access circuits and services that are classified as interstate under the FCC's ten percent contamination rule. These directives, in conjunction with other parallel Commission proceedings, are not mere declarations of future interpretative policy, but are and will be applied and *enforced* in a uniform fashion. Thus, the plain language of the recommended Policy Statement "establishes a standard of conduct with the force of law, and creates a binding norm."[22] Furthermore, although the recommended Policy Statement has been promulgated through public notice and comment, because of other concurrent proceedings, its application is almost immediate without proper and advance procedural effectuation. In other words, there are telecommunications carriers that will be immediately affected by the recommended Policy Statement standards of conduct without the Policy Statement being actually in effect (i.e., having undergone requisite review after its adoption and published in the *Pennsylvania Bulletin*). This does not provide sufficient and advance notice to affected telecommunications carriers, especially since this Commission has abided by the application of the FCC's ten percent contamination rule for a number of decades.

There is no doubt here that the recommended Policy Statement "restricts the agency's discretionary power and is, thus, more like a regulation than a statement of policy."[23] The Commission is concurrently proceeding with the enforcement of the standards of conduct contained in the recom-

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[19] *Eastwood Nursing and Rehabilitation Center v. Dept. of Public Welfare*, 910 A.2d 134, 141 (Pa. Cmwlth. 2006) (*Eastwood Nursing*). "In *Pennsylvania Human Relations Commission v. Norristown Area School*, 473 Pa. 334, 374 A.2d 671 (1977), our Supreme Court concluded that the General Assembly did not intend for the agency to have sole discretion in determining when a statement of policy would be settled enough to become a regulation." *Department of Environmental Resources v. Rushton Mining Co., et al.*, 591 A.2d 1168, 1173 (Pa. Cmwlth. 1991) (*Rushton Mining*).

[20] *Eastwood Nursing*, 910 A.2d at 144 (citations omitted).

[21] *Eastwood Nursing*, 910 A.2d at 146.

[22] *Eastwood Nursing*, 910 A.2d at 146.

[23] *Eastwood Nursing*, 910 A.2d at 148.

mended Policy Statement and will be doing so in the future in a uniform manner among jurisdictional telecommunications carriers. Furthermore, because the recommended Policy Statement will have cross-effects on the systems of accounts that are prescribed by the FCC and may be utilized by jurisdictional telecommunications carriers for network facilities, services and revenues that are classified as interstate under the FCC's ten percent contamination rule, the recommended Policy Statement may be modifying existing Commission regulations, e.g., 52 Pa. Code § 63.32. Since the recommended Policy Statement establishes a "binding norm," it is an unpromulgated regulation. Finally, as previously stated, this unpromulgated regulation is in conflict with applicable federal law and regulations.

C. Intrastate and Interstate Operations of Telecommunications Carriers in Pennsylvania

Certified competitive telecommunications carriers in Pennsylvania conduct *both* intrastate and interstate operations within Pennsylvania consistent with the directives in the Commission's *Implementation Orders* that facilitate the market entry of such entities in accordance with Pennsylvania law and the letter and the spirit of the federal Telecommunications Act of 1996 (TA-96).[24] To the extent that the recommended Policy Statement directly or indirectly does or will limit the activities of these carriers to operate in Pennsylvania and offer intrastate or interstate services, this will constitute a clear contravention and modification of the Commission's *Implementation Orders* when the proposed Policy Statement at issue did not notice nor did it solicit comments in that regard. Such an outcome also ignores the realities and the constantly shifting nature of telecommunications network operations and access services. A private line or special access circuit that currently may be subject to the FCC's ten percent contamination rule and classified as interstate, may have a different jurisdictional allocation in the future depending on the nature of the various types of traffic that it handles. This shift will also change the jurisdictional revenue classification and reporting for the specific telecommunications carrier in question.

For the above-referenced reasons I will be respectfully dissenting from the disposition of this matter.

Dated: July 11, 2019

Andrew G. Place
Commissioner

[24] *In re: Implementation of the Telecommunications Act of 1996*, Docket No. M-00960799, Order entered June 3, 1996, 1996 WL 482990; Order on Reconsideration entered September 9, 1996, 26 Pa. B. 4588 (1996), 1996 WL 482990 (collectively *Implementation Orders*); *Proposed Modifications to the Application Form for Approval of Authority to Offer, Render, Furnish, or Supply Telecommunications Services to the Public in the Commonwealth of Pennsylvania*, Docket No. M-00960799, Final Order entered May 22, 2014.