PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17120

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 held July 11, 2019
3004578-LAW
Docket No. M-2018-3004578

STATEMENT OF CHAIRMAN GLADYS BROWN DUTRIEUILLE

This case involves a proposed Policy Statement that we issued on November 8, 2018, which provides guidance to telecommunications public utilities with a Certificate of Public Convenience (CPC) on how they are to report revenues for Section 510 assessment purposes. The issue arises because some telecommunications carriers with interstate operations and a CPC report no intrastate revenues and pay no assessments while others may be doing the same thing but report revenues from other operations and pay assessments. Both telecommunications public utilities compete to provide interstate services subject to the Federal Communications Commission (FCC) 10% contamination rule.

The parties disagree on whether the Commission can require telecommunications carriers with interstate operations but no reportable intrastate revenues to pay an intrastate assessment based on their interstate revenues in light of the 10% contamination rule. FCC rules classify as interstate all revenues from those services where a customer certifies that 10% or more of the services are interstate i.e., private line special access. A service in which potentially 90% of the revenues comes from intrastate services becomes interstate and no assessment is paid because no intrastate revenues are reported. This "10 percent contamination rule" arises from federal jurisdictional separations rules governing the allocation of network costs and revenues between the states and the FCC.

Except for the Office of Consumer Advocate, the comments oppose adoption of a "de facto" gross operating revenues solution in which parties will pay an intrastate assessment on up to 90% of the interstate revenues deemed to be intrastate revenues. Two of the parties, PTA and Verizon respectively, urge the Commission to convene a collaborative and to explore ways to recover the costs

from providers that utilize administrative resources but pay no assessments. Crown Castle, a Distributed Antenna System (DAS) network provider who is challenging our decision that it is not a jurisdictional public utility in the Supreme Court of Pennsylvania, is concerned about discrimination given the focus on Competitive Access Providers (CAPs) compared to Incumbent Local Exchange Carriers (ILECs), possibly violating Section 253 of federal law, 253 U.S.C. § 253.[1]

The legal and factual claims in the majority of comments demonstrate that the scope and operation of this 10% rule is complex. Some claim this precludes any state assessment whatsoever because caselaw prohibits state assessments on interstate revenues for state universal service.[2]

While I support assessments on carriers with a CPC to support Commission operations, I am concerned that we are not considering other approaches and have not chosen to pursue a rulemaking. I am also concerned that the Commission has not taken the PTA's suggestion to convene a collaborative to explore other options and to address the concerns with reliance on the 10% rule.

These are important because federal law permits non-discriminatory and reasonable burdens on interstate commerce. Precedent requires the states to enforce federal law.[3] A CPC not only ensures compliance with that obligation but also provides Commission processes to resolve disputes, promote competition, and protect Pennsylvania consumers and companies.[4] Other federal precedent states that assessments for state universal service and dispute resolution do not violate a federal prohibition on rate regulation or market entry of interstate services.[5] In the case of mixed jurisdictional services and traffic, the FCC permits use of a "safe harbor" approach allowing the states to assess a fixed portion of revenues for state

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[1] That concern is particularly troublesome should the Commission's first action under this Policy Statement pursue revocation limited to only competitive carriers who report no intrastate revenues under the 10% contamination rule while others who do the same thing retain theirs because they pay an assessment on revenues from other operations unrelated to the 10% contamination rule. *Compare 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*, Docket No. M-2018-3004578 (Comments of Verizon Communications, Inc. and BCAP) with Appendix A. It is now well-settled that the TA-96 authorized federal regulations of intrastate telecommunications while prohibiting states from erecting barriers to competitive entry. *AT&T v. Iowa Utilities Board*, 525 U.S. 368, 371-373 (1999). Such a selective action would suggest otherwise.

[2] *Texas Office of Public Utilty Counsel, Pennsylvania Public Utility Commission et. al* v. FCC, 183 F.3d 393 (5th Cir. 1999)

[3] *Ill. Pub. Telecoms. Ass'n v. FCC*, 410 U.S. App. D.C. 69, 752 F.3d 1018 (2014), cert denied 135 S. Ct. 1583 (2015).

[4] *See e.g., AT&T Corporation v. Core Communications, Inc. and the Pennsylvania Public Utility Commission*, Docket Nos. 14-1499 & 14-1664 (November 25, 2015)(Commission enforcement of federal intercarrier compensation rule upheld); *Palmerton Telephone Company v. Pa. PUC*, Docket C-2009-2093336 (March 16, 2010)(CPC provider of interstate services required to compensate an intrastate carrier); *RTCC v. Pa. PUC*, 941 A.2d 751 (Pa. Cmwlth 2005)(Commission promotion of competition under state and federal law upheld); *Palmerton Telephone Company v. Global NAPS South, Inc.*, Docket No. C-2009-2093336 (March 16, 2010), Letter of Palmerton Telephone (December 23, 2010)(Commission enforcement apprised of interstate carrier with CPC refusal to comply with the Commission's March 2010 Order).

[5] *Mountain Solutions, Inc. v. State Corporation Commission of Kansas*, 996 F.Supp. 1043 (D. Kan. 1997), aff'd 149 F.3d 1058; *Telesaurus, VPC, LLC v. Power*, 623 F.3d 998 (9th Cir. 2010), cert denied 132 S.Ct. 95.

universal service purposes so long as there is no double counting.[6] There is no caselaw holding that the ban on assessing interstate revenues for state universal service extends to assessments for government operations.

For these reasons, I am voting no.

DATE: July 11, 2019

Gladys Brown Dutrieuille

Gladys Brown Dutrieuille, Chairman

[6] *In Re: Universal Service Contribution*, Docket No. 06-122 *Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling* (November 10, 2010), para 11. The FCC permits traffic studies for regulatory purposes but those are usually explored in Pennsylvania by a regulation and not by policy statements. *See e.g.*, 52 Pa. Code § 63.71.