

July 26, 2019

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; Petition for Reconsideration of Crown Castle

Dear Secretary Chiavetta:

Enclosed for filing is the Petition for Reconsideration of Crown Castle Fiber LLC in the above-referenced proceeding.

Please do not hesitate to contact me if you need any further information.

Regards,



T. Scott Thompson
Davis Wright Tremaine LLP

Counsel for Crown Castle

Encl.

Cc: Chairman Gladys Brown Dutrieuille
Vice Chairman David W. Sweet
Commissioner Andrew W. Place
Commissioner Norman J. Kennard
Commissioner John F. Coleman
Kathryn G. Sophy, Director, OSA

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PA 17105**

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

PETITION FOR RECONSIDERATION

Pursuant to Section 703(g) of the Pennsylvania Public Utility Code (the “Code”), 66 Pa. C.S. § 703(g), and Section 5.572 of the Pennsylvania Public Utility Commission’s (“Commission’s”) regulations, 52 Pa. Code § 5.572, Crown Castle Fiber LLC (“Crown Castle”)¹ hereby files this petition for reconsideration of the Commission’s Final Policy Statement Order entered on July 11, 2019 (the “Order”)² in the above-captioned proceeding.

¹ As the result of several mergers, Crown Castle Fiber LLC, Crown Castle NG East LLC, Fiber Technologies Networks, L.L.C., PA – CLEC LLC d/b/a Pennsylvania – CLEC LLC, and Sunesys, LLC are all wholly-owned subsidiaries of a common parent. On Sept. 19, 2018, the aforementioned companies submitted a Joint Application before the Commission to consolidate the multiple affiliates with common ownership. *See Amended Joint Application for Approval of a General Rule Transaction and Abandonment of Competitive Access Services by Crown Castle NG East LLC, Fiber Technologies Networks, L.L.C., PA – CLEC LLC, and Sunesys, LLC*, Dkt. Nos. A-2018-3004131, A-2018-3004133, A-2018-3004135, A-2018-3004136, A-2018-3004771 (Sept. 19, 2018). On December 11, 2018, the Commission approved the application via a Secretarial Letter. On January 24, 2019, the Commission approved the abandonment of competitive access services for Crown Castle NG East LLC, Fiber Technologies Networks, L.L.C., PA – CLEC LLC d/b/a Pennsylvania – CLEC LLC, and Sunesys, LLC.

² *Policy Statement Regarding Intrastate Operating Revenues for Section 510 Assessment Purposes by Jurisdictional Telecommunications Carriers Offering Special access and Other Similar Jurisdictionally-Mixed Telecommunications Services*, Order, Docket No. M-2018-3004578 (Order entered July 11, 2019) (“Order”).

I. INTRODUCTION

As demonstrated below and in the concurrently filed Petition for Reconsideration submitted by the Broadband Cable Association of Pennsylvania, Inc. (“BCAP”), the Commission’s July 11, 2019 Final Policy Statement Order should be reconsidered because it is based on several clear errors of law and considerations which appear to have been overlooked. There are also procedural defects in the process by which the Commission has proposed to First, the Order demonstrates a flawed understanding of the FCC’s well-established Ten Percent Rule in that it ignores the practical effect of the FCC’s express application of the Ten Percent Rule to revenue allocation in the context of regulatory fees and denies that the Ten Percent Rule preempts the assessment and collection of regulatory fees by the Commission based on “*de facto* gross intrastate revenues.” Second, the Commission’s determination that a company must report some level of intrastate revenues in order to retain its status as a public utility is not supported by the Public Utility Code and constitutes an error of law. Revocation of a carrier’s certificate of public convenience (“CPC”) because it reports no intrastate revenues also conflicts with federal communications law. Third, the Commission took a procedural shortcut in issuing the Order, by failing to go through the formal rulemaking process. While the Commission has styled the Order as a “policy statement,” application of relevant Pennsylvania law demonstrates that it is an unpromulgated regulation. Because of this procedural deficiency, the Order should be void.

II. ARGUMENT

A. Reconsideration of the Commission’s Order Is Appropriate.

1. The Commission has authority to grant reconsideration of its orders pursuant to Section 703(g) of the Code, 66 Pa. C.S. § 703(g), and Section 5.572 of the Commission’s regulations, 52 Pa. Code § 5.572.

2. The standards for granting reconsideration following final orders are largely set forth in *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553 (1982), in which the Commission stated:

A petition for reconsideration, under the provisions of 66 Pa CS § 703(g), may properly raise any matters designed to convince the commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the court in the Pennsylvania Railroad Company case, wherein it was said that '[p]arties . . . cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them.' What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the commission.³

In addition, the Commission has also explained that "a petition for reconsideration is properly before the Commission where it pleads newly discovered evidence, alleges errors of law, or a change in circumstances."⁴

3. This Petition for Reconsideration meets the standards articulated by the Commission because it raises arguments based on several valid grounds for consideration under Commission precedent. In addition, this Petition advances arguments on the basis of considerations that appear to have been overlooked or not addressed by the Commission, as well as on the basis of several apparent errors of law.

B. Crown Castle Formally Adopts the Positions Put Forth by the Broadband Cable Association of Pennsylvania, Inc. in its Petition for Reconsideration.

4. Crown Castle has reviewed the arguments put forth by BCAP in its concurrently filed Petition for Reconsideration. Crown Castle hereby formally indicates that it generally

³ *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553, 559 (1982) (quoting *Pa. R.R. Co. v. Pa. Pub. Serv. Comm'n*, 118 Pa. Super. 380, 179 A. 850 (1935)).

⁴ *PPL Elec. Utils. Corp. Proposed Transmission Serv. Charge (TSC) Reconciliation for the 12 Months Ended Nov. 30, 2010*, Order, Docket Nos. M-2010-2213754, M-2011-2239805, 2013 WL 6116354 (Nov. 14, 2013).

supports the Petition filed by BCAP and incorporates by reference BCAPs Petition. Crown Castle notes that BCAP’s argument in its Petition for Reconsideration regarding IP-enabled services is primarily relevant to BCAP members.

In addition to the arguments advanced by BCAP, Crown Castle further notes as follows:

C. The Final Policy Statement Order is an Unpromulgated Regulation and the Commission did not Enact it Via the Proper Rulemaking Process.

5. The fact that the Commission elected to enact the substance of the Order via recommended policy statement does not change the fact that the Order plainly establishes a “binding norm” that compels telecommunications providers subject to its jurisdiction to report “*de facto* intrastate gross operating revenues” and to pay the state regulatory fees on that reporting. While the Commission has attempted to get around this issue by stating that the Order merely “provides guidance to all jurisdictional telecommunications service providers,”⁵ the Order in fact “establish[es] a binding norm and does not merely serve as an announcement to the public of a policy which the [Commission] hopes to implement in future rulemaking.”⁶

6. The Order’s binding effect is unambiguous. It states that providers are “legally obligated to report, for assessment purposes, their *de facto* intrastate gross operating revenues for special access services and other similar jurisdictionally-mixed telecommunications services with the Commission.”⁷ This plain language evidences the Commission’s intent to create a new,

⁵ Order, at 2.

⁶ *Eastwood Nursing & Rehab. Ctr. v. Dep’t of Pub. Welfare*, 910 A.2d 134, 148 (Pa. Commw. Ct. 2006).

⁷ Order at 2; *see also id.* at 38 (stating that the Order “provides the manner in which the total gross intrastate operating revenues on all jurisdictional telecommunications services, including jurisdictionally-mixed telecommunications services[,] are to be reported in Section 510 assessment reports”).

binding regulation. It is more than a mere policy statement. In *Pennsylvania Human Relations Comm'n v. Norristown Area School*, the Pennsylvania Supreme Court stated that

the critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings. . . . A properly adopted substantive rule establishes a standard of conduct which has the force of law. . . . The underlying policy embodied in the rule is not generally subject to challenge before the agency.

A general statement of policy, on the other hand, does not establish a 'binding norm'. A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.⁸

Thus, under well-established Pennsylvania law, the Order is a binding norm and acts as an unpromulgated regulation.

7. Finally, the Order also restricts the Commission's "discretionary power."⁹ It contains no language indicating that the Commission might depart from its stated view, and contains no language indicating that Commission employees have discretion in enacting the Order. Because the Order establishes a binding norm, it is an unpromulgated regulation. The Order failed to go through the proper formal rulemaking process. The Order is a nullity absent a formal rulemaking process. Accordingly, reconsideration is necessary and appropriate to remedy this fundamental defect.

D. The Ten Percent Rule Preempts the Final Policy Statement Order

8. While the Order paid lip service to the Ten Percent Rule, it ignored the most important arguments involving preemption. Therefore, reconsideration is proper because of both

⁸ *Pennsylvania Human Relations Comm'n v. Norristown Area School*, 374 A.2d 671, 679 (1977) (quoting *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)).

⁹ *Eastwood*, 910 A.2d at 148.

“considerations which appear to have been overlooked or not addressed by the Commission”¹⁰ and various “errors of law.”¹¹

9. In their comments, both BCAP and Verizon demonstrated that the Order’s requirements are preempted under “conflict” preemption principles.¹² The Order ignores the proper framework for analyzing this issue, which courts have described as “obstacle” preemption. This Constitutional analysis shows that a state enactment conflicts with its federal counterpart where it stands as an obstacle to the accomplishment and execution of the full purposes and objectives” of federal law¹³ or otherwise “frustrates the full effectiveness of federal law.”¹⁴ A cursory reading of the Order shows that it the Commission’s requirements involving the reporting of “*de facto* intrastate operating revenues” frustrates and stands as an obstacle to the FCC’s Ten Percent Rule. Crown Castle directs the Commission to BCAP’s Petition for Reconsideration for a fuller discussion of these obstacles.

E. The Commission Erroneously Added the Requirement of Reporting Intrastate Revenues to the Definition of Public Utility.

10. At several places in its Order, the Commission holds that the failure to report intrastate revenues will result in a carrier having to relinquish its CPC.¹⁵ Yet, public utilities are

¹⁰ *Duick*, 56 Pa. PUC at 559.

¹¹ *Verizon Pennsylvania, Inc.*, Pa. P.U.C. Docket No. R-2008-2074972, 2009 Pa. PUC LEXIS 2241, at *7 (2009) (“*Verizon Pennsylvania*”).

¹² See BCAP Comments at 2, 5; Verizon Comments at 8-9. While the Commission discussed in detail “express” or “field” preemption, no commenter advanced that argument.

¹³ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹⁴ *Perez v. Campbell*, 402 U.S. 637, 652 (1971).

¹⁵ “If no intrastate services are provided and the carrier reports zero intrastate revenues, its right to a CPC is not clear and, after requisite due process, the carrier may be required to relinquish its CPC.” Order, at 37.

defined in the Public Utility Code (“Code”) without reference to intrastate revenues.¹⁶ Carriers utilizing the FCC’s 10% rule can provide service as defined in the Code, yet not have intrastate revenues to report for mixed-use services. The Policy Statement erroneously holds otherwise.

11. These statements equating the reporting of intrastate revenues to public utility status contradict the Commission’s argument that it is not preempted by the FCC in demanding that all carriers report the intrastate portion of mixed-use revenues for the reason that this metric only reflects the requirements of Code assessment Section 510 and “controls neither the nature and scope of regulation associated with services that give rise to such revenues....”¹⁷ Revocation of a carrier’s CPC goes to the heart of the nature and scope of the Commission’s regulation. This squarely conflicts with Section 253(a) of the Communications Act that prohibits state regulation that prohibits the ability of an entity to provide any interstate or intrastate service.¹⁸ The Policy Statement thus further puts the Commission in conflict with federal communications law.

F. The Commission Failed To Consider The Plain Language Of Section 510 of the Public Utility Code

12. In its Comments, Crown Castle demonstrated that with the Proposed Policy Statement, the Commission was altering the plain language of Section 510 of the Public Utility Code.¹⁹ Crown Castle demonstrated that the Commission was altering the statute by adding a new category of “de facto” gross operating revenues, which exceeds the Commission’s

¹⁶ 66 Pa.C.S. § 102.

¹⁷ Order, at 29.

¹⁸ 47 U.S.C. § 253(a).

¹⁹ Crown Castle Comments at 8-9.

authority.²⁰ The Final Policy Statement failed to fully consider and misapprehended Crown Castle’s argument. The Commission argues that it has authority to change the statutory language because Section 501(a) and (b) authorize it to “enforce, execute and carry out” Section 510. However, fundamentally altering the language and meaning of Section 510 is not enforcing, executing, or carrying out. It is engaging in legislative amendment of the meaning and scope of the statute, which is beyond the Commission’s authority.

G. The Commission Failed to Consider the Adoption of an Alternative Minimum Regulatory Fee.

13. As discussed in footnote 1, Crown Castle has gone through recent significant corporate restructuring. Crown Castle anticipates that it will report non-zero intrastate revenues, even though some of the prior entities reported zero revenues for jurisdictionally-mixed services. Regardless, Crown Castle anticipates that its reporting of intrastate revenues will be *de minimis*. Therefore, Crown Castle suggests, along with BCAP, that the Commission subject analogous providers to an alternative minimum regulatory fee set at a reasonable level.

CONCLUSION

WHEREFORE, Crown Castle respectfully requests that the Commission reconsider its decision in the July 11, 2019 Final Policy Statement Order requiring regulated telecommunications entities to report “*de facto* gross intrastate operating revenues” for assessment purposes, and grant Crown Castle and BCAP’s Petitions for Reconsideration.

DATED: July 26, 2019.

Respectfully submitted,

/s/ Robert Ritter
Robert Ritter
Senior Gov’t Relations Counsel
Robert Millar
Associate General Counsel

²⁰ *Id.*

Rebecca Hussey
Utility Relations Counsel
Crown Castle
2000 Corporate Drive
Canonsburg, PA 15317
(510) 290-3086
Attorneys for Crown Castle

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PA 17105**

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

VERIFICATION

I, Robert L. Ritter, Senior Government Relations Counsel of Crown Castle, hereby state that the facts set forth in Crown Castle's Petition for Reconsideration in the above-captioned proceeding are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).



Robert L. Ritter
Senior Government Relations Counsel
Crown Castle

July 26, 2019.

CERTIFICATE OF SERVICE

I hereby certify that on this day of July 26, 2019, I served a true and correct copy of the foregoing upon the participants listed below pursuant to 52 Pa. Code Section 1.54.

VIA EMAIL AND FIRST-CLASS MAIL

Barrett Sheridan, Esq.
Office of Consumer Advocate
555 Walnut Street Forum Place – 5th Floor
Harrisburg, PA 17101-1921
bsheridan@paoca.org

Steven J. Samara, President
Pennsylvania Telephone Association
30 N. 3rd Street, Suite 300
Harrisburg, PA 17101
steve.samara@patel.org

Suzan D. Paiva, Esq.
Verizon
600 Race Street, 6th Floor
Philadelphia, PA 19107
Suzan.D.Paiva@verizon.com

Pamela C. Polacek, Esq.
McNees Wallace & Nurick LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108
ppolacek@mcneeslaw.com

Daniel R. Tunnell, President
Broadband Cable Association
of Pennsylvania, Inc.
127 State Street
Harrisburg, PA 17101
dtunnell@bcapa.com

VIA FIRST-CLASS MAIL

Michael Cicchetti, Vice President
Frontier Communications
125 South Main Street
West Hartford, CT 06107

/s/ T. Scott Thompson _____
T. Scott Thompson
Davis Wright Tremaine, LLP