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July 26, 2019

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

VIA HAND DELIVERY

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 for filing with the Pennsylvania Public Utility Commission ("PUC" or "Commission") are the original and three (3) copies of the Petition for Clarification and Reconsideration of Broadband Cable Association of Pennsylvania, Inc., in the above-referenced proceeding.

As indicated on the attached Certificate of Service, all parties to this proceeding are being duly served. Please date stamp the extra copy of this transmittal letter and Petition, and kindly return them for our filing purposes.

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Very truly yours,

McNEES WALLACE & NURICK LLC

By
Pamela C. Polacek

Counsel to Broadband Cable Association of Pennsylvania, Inc.

PCP:ajf
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Certificate of Service

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In the Matter of	)	
	)	
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

PETITION FOR RECONSIDERATION OF BROADBAND CABLE ASSOCIATION OF PENNSYLVANIA, INC.

Pursuant to 66 Pa. C.S. § 703 and 52 Pa. Code § 5.572, the Broadband Cable Association of Pennsylvania, Inc. ("BCAP") submits this Petition for Reconsideration of the Final Policy Statement Order issued on July 11, 2019 in the above-referenced proceeding.[1]

INTRODUCTION AND EXECUTIVE SUMMARY

For decades, providers of jurisdictionally mixed private line services in Pennsylvania have paid federal and state regulatory fees based on the application of the Federal Communications Commission's ("FCC's") Ten Percent Rule. Under this rule, where over ten percent of the traffic carried by a private line is interstate, all the revenues and costs generated by the entire line are classified as interstate for regulatory purposes—and where ten percent or less of the traffic is interstate, all the revenues and costs for the line are classified as intrastate. This rule, adopted by the FCC in 1989 and reaffirmed several times since, provides a reasonable and predictable framework for allocating revenues between state and federal jurisdictions, and

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[1] *See* 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, Docket No. M-2018-3004578, Final Policy Statement Order (rel. July 11, 2019) ("Final Policy Statement Order" or "Order").

service providers have developed their sales, billing, and provisions systems around this structure. Among its various benefits, the Ten Percent Rule avoids double assessment of the same revenues for state and federal regulatory fees. And in applying the rule, the FCC allows providers to rely on customer certifications regarding the jurisdictional nature of the traffic.

The Commission's Final Policy Statement Order,[2] which abandons the Ten Percent Rule in favor of an entirely new regime requiring the reporting and assessment of so-called "*de facto* gross intrastate operating revenues," is impracticable and unprecedented. It was adopted in the face of near-unanimous opposition. While starting from the understandable premise that providers should pay a "reasonable share" of fees, the Final Policy Statement Order veers off into adopting unlawful requirements that will impose significant and unwarranted burdens on competitive providers of jurisdictionally mixed services and their customers.

As explained herein, the Final Policy Statement Order warrants reconsideration under the Commission's precedents. The Order suffers from multiple deficiencies that the Commission either has overlooked or has failed to adequately address:

- The Commission's adoption of a new and binding assessment regime for state regulatory fees—without undergoing a formal rulemaking proceeding or subjecting its proposal to review by the Independent Regulatory Review Commission ("IRRC") and other oversight bodies—violated the Commission's procedural obligations under state law.

- The new regime adopted in the Order stands as a clear obstacle to the purposes and objectives underlying the FCC's Ten Percent Rule, and thus is preempted under established "conflict preemption" principles. The Order does not seriously grapple with this flaw in its chosen approach and contains no discussion of the relevant federal objectives—instead focusing its preemption discussion on strawman arguments that no party raised.

- The new regime also is preempted under Section 253 of the Communications Act, both by assessing fees that have no relationship to the agency's actual costs, and by imposing

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2 The Final Policy Statement Order was adopted on a closely divided 3-2 vote. *See id.*

discriminatory burdens on providers' ability to offer interstate services—issues that the Order's cursory treatment of Section 253 either ignored or did not adequately address.

- Additionally, the Order appears to expose IP-enabled services to new state regulatory fees—despite prohibitions on such regulation—and the Order's treatment of the issue in a two-sentence footnote does not reflect adequate consideration.

- And finally, the Commission overlooked alternative solutions that would avoid or minimize many of the legal deficiencies of the Final Policy Statement Order—including the adoption of an alternative minimum regulatory fee that would ensure that all certificated providers of covered telecommunications services in Pennsylvania contribute to the Commission's cost-recovery mechanism.

Each of these issues would warrant reconsideration on its own. Together, they demonstrate the significant procedural and substantive shortcomings with the Order's unprecedented ruling, and compel a fresh reexamination by the Commission. The Commission should promptly grant this Petition to allow for a full and deliberate consideration of these issues and, at a minimum, state clearly that it will not apply its new regime for reporting and assessing *de facto* gross intrastate operating revenues pending reconsideration of the Order.

BACKGROUND

The Commission's Final Policy Statement Order was adopted against—and is in significant tension with—a substantial preexisting regulatory backdrop at both the federal and state levels.

A. Regulatory Background

The FCC's Ten Percent Rule. One of the core principles underlying the Communications Act is the sharp division of responsibility between the FCC and state agencies.[3] While states have regulatory oversight over certain intrastate communications, the FCC has

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[3] *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 (1986) (observing that the Communications Act "facilitates the creation or recognition of distinct spheres of regulation").

exclusive jurisdiction over "all interstate and foreign communication" and "all persons engaged . . . in such communication."[4] The point of creating a jurisdictional separations process between interstate and intrastate activities was to avoid the possibility of inconsistent or duplicative regulatory control,[5] and the process is "essential to the appropriate recognition of the competent governmental authority in each field of regulation."[6] Critically, for intrastate communications, the Communications Act preserves state jurisdiction only to the extent that state regulations do not conflict with any applicable FCC rules.[7]

In a series of orders and other actions spanning three decades, the FCC has established a comprehensive regime for determining the jurisdictional classification of special access and similar jurisdictionally mixed services. Most relevant to this proceeding is the FCC's Ten Percent Rule, which provides that, "where over ten percent of the traffic carried by a private or WATS line is interstate, the revenues and costs generated by the entire line should be classified as interstate" for regulatory purposes.[8]

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4 47 U.S.C. § 152(a); *see also Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1501 n.6 (D.C. Cir. 1984) (observing that interstate communications "are placed explicitly within the sphere of federal jurisdiction by the plain language of the Communications Act").

5 *See La. Pub. Serv. Comm'n*, 476 U.S. at 375.

6 *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 404 (1999) (quoting *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148 (1930)).

7 See 47 U.S.C. § 152(b) ("[C]harges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service" fall under state jurisdiction, "[e]xcept as otherwise provided" under provisions administered by the FCC); *Iowa Utils. Bd.*, 525 U.S. at 377-83 (holding that the FCC may prescribe rules governing intrastate communications when implementing provisions added by the Telecommunications Act of 1996).

8 *Federal-State Joint Board on Universal Service*, Order, 32 FCC Rcd 2140 ¶ 4 (WCB 2017) ("*FCC WCB Audit Order*"); *see* 47 C.F.R. § 36.154(a) ("Interstate private lines . . . shall include all private lines and WATS lines that carry exclusively interstate traffic as

The FCC originally adopted its Ten Percent Rule in 1989 as part of its seminal jurisdictional separations proceedings.[9] In doing so, it explained that such a rule "reasonably recognizes state and federal regulatory interests and fosters administrative simplicity and economic efficiency," while avoiding "the disadvantages in terms of administrative complexity, customer confusion, and economic inefficiency inherent in alternative methods."[10] One alternative method the FCC specifically rejected on these grounds was "a usage based allocation of mixed use lines,"[11] which would have required providers to ascertain precisely how much traffic on a particular circuit was interstate and how much was intrastate, and then to allocate costs for each circuit to the federal and state jurisdictions respectively. The FCC found that such an approach would "require additional traffic studies" and "necessitate changes in [providers'] billing systems," thereby "undermin[ing] efforts to simplify the separations process" and presenting "substantial administrative difficulties [and] undesirable effects on economic efficiency."[12]

Under the Ten Percent Rule established by the FCC, providers rely on "certification[s] by customers that each of their special access lines carries more than a *de minimis* amount of interstate traffic."[13] Moreover, "[t]o ensure that the benefits of direct assignment were not lost

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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.").

9 *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Decision and Order, 4 FCC Rcd 5660 ¶¶ 1, 2 (1989) ("*Ten Percent Rule Order*").

10 *Id.* ¶ 6.

11 *Id.* ¶ 4.

12 *Id.*

13 *Id.* ¶ 3.

through burdensome verification requirements," the FCC adopted "a carefully circumscribed, uniform system of verification" for use in connection with these separations procedures.[14] Here, too, the FCC rejected alternative approaches to measuring the relative amounts of interstate and intrastate traffic on a line, noting that "traffic on many special access lines cannot be measured at present without significant additional administrative efforts," and that a requirement to "perform additional traffic studies for this purpose" would "seriously undermine the administrative benefits of the separations procedures."[15]

Since then, the FCC has expanded the application of the Ten Percent Rule to all assessments of a private line provider's costs or revenues for regulatory purposes, including in the context of regulatory fees. In its 1997 *USF First Report and Order* establishing the rules governing the federal universal service program, the FCC made clear that the Ten Percent Rule applies to *revenue* allocation just as it does to cost allocation, and specifically instructed providers to use the Ten Percent Rule for purposes of calculating federal universal service contributions.[16] The 2017 *FCC WCB Audit Order* then reaffirmed the broad application of the Ten Percent Rule in calculating regulatory assessments. There, the FCC rejected arguments espousing a narrow view of the Ten Percent Rule as applying only to "cost allocation," and found that USAC had appropriately applied the rule to "determine whether private line *revenues*

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14 *Id.*; *see also id.* ¶ 6 (adopting "the Joint Board's reasoning" in proposing such an approach).

15 *Id.* ¶ 6 n.7.

16 *See Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 ¶ 778 (1997) ("*USF First Report and Order*") (explaining that, "under the [FCC'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" (emphasis added)).

should be assigned to the interstate jurisdiction."[17] The FCC went on to explain that "prior decisions have clearly incorporated the [Ten Percent Rule] into the Commission's framework" for revenue allocation, and that the time for challenging that well-established determination had "long since passed."[18]

Accordingly, since 1997, the FCC's Form 499-A has required telecommunications providers to allocate revenues in accordance with the Ten Percent Rule, and has made clear that the Ten Percent Rule applies to *all* types of revenue allocations for regulatory purposes.[19] Importantly, as Form 499-A explains, the FCC uses the revenue data reported by providers pursuant to the Ten Percent Rule not only in determining proper assessments for "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)," but also in "*calculat[ing] and assess[ing] Interstate Telecommunications Service Provider (ITSP) regulatory fees*."[20] Moreover, just last year, the FCC specifically acknowledged that its jurisdictional separations procedures, including the Ten Percent Rule, govern revenue allocations in the context of state regulatory fees. In a notice of proposed rulemaking on reforms to its jurisdictional separations approach, the FCC explained

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[17] *FCC WCB Audit Order* ¶ 8 (emphasis added).

[18] *Id.* ¶¶ 9, 10.

[19] *See Federal-State Joint Board on Universal Service*, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400, 18512, App'x. C (1997) (adopting first set of Form 499-A instructions and incorporating ten percent rule for revenue allocation); *see also* FCC, Instructions to FCC Form 499-A, at 27 (2019), *available at* https://docs.fcc.gov/public/attachments/DA-19-84A3.pdf ("2019 FCC Form 499-A") (preserving the Ten Percent Rule for revenue allocation in current instructions).

[20] 2019 FCC Form 499-A at 1-2 (emphasis added).

that states "use separations results to determine the amount of intrastate universal service support *and to calculate regulatory fees.*"[21]

Thus, providers of jurisdictionally mixed private line services and other special access services, including BCAP's members, apply the Ten Percent Rule when determining their regulatory contribution obligations at the federal and state levels, including in the payment of federal and state regulatory fees. In compliance with the FCC's orders, BCAP members and other providers rely on customer certifications to determine whether a particular special access, transport, or similar line is intrastate or interstate based on the Ten Percent Rule. As discussed further below, BCAP members do not currently monitor usage on these facilities—and even if they did, technical impediments would prevent them from ascertaining the endpoints of any particular transmission passing over these lines. Unlike providers of traditional voice services, which play an active role in routing the traffic and know the originating and terminating numbers on individual calls, providers of special access services may not play a significant role in routing the traffic, or the link may be serving as only one leg on a longer route between two unknown endpoints. Overhauling these networks and provisioning and billing systems to enable active tracking of transmissions for purposes of determining their endpoints and apply such factors to invoices would be extremely costly, present significant practical hurdles, and may implicate privacy considerations as well.

Treatment of IP-Enabled Services. Many special access services and other jurisdictionally mixed services are provided using Internet Protocol ("IP") technology—and thus are subject to additional limitations on state regulation. Most notably, Pennsylvania law prevents

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21 *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Further Notice of Proposed Rulemaking, 33 FCC Rcd 7261 ¶ 11 (2018) ("*Separations FNPRM*") (emphasis added).

the Commission from "enact[ing] or enforc[ing], either directly or indirectly, any law, rule, regulation, standard, order or other provision having the force or effect of law that regulates, or has the effect of regulating, the rates, terms and conditions of VoIP service or IP-enabled service."[22] And while the statute preserves authority for the Commission to "enforce applicable Federal or State statutes or regulations" relating to certain enumerated matters, such as "[t]elecommunications relay service fees," the statute contains no specific carve-out for regulatory fees.[23]

B. Procedural Background

Against this backdrop, the Commission issued a Proposed Policy Statement in November 2018 (published in the Pennsylvania Bulletin in March 2019) that included a radical and unprecedented proposal for assessing regulatory fees in the Commonwealth.[24] Under the approach set forth therein, all certificated providers in Pennsylvania, including legacy carriers and IP-enabled service providers alike, would be required to ascertain and report their "*de facto* gross intrastate revenues from providing special access or other similar jurisdictionally-mixed

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22 73 Pa. C. S. § 2251.4; *see also id.* § 2251.3 (defining "IP-enabled service" as any "service, capability, functionality or application provided using Internet protocol or any successor protocol that enables an end user to send or receive a communication in Internet protocol format or any successor format, regardless of whether the communication is voice, data or video").

23 *Id.* § 2251.6.

24 *See Reporting of Intrastate Operating Revenues for Section 510 Assessment Purposes by Jurisdictional Telecommunications Carriers Offering Special Access and Other Similar Jurisdictionally-Mixed Telecommunications Services*, Pa. Pub. Util. Comm'n, No. M-2018-3004578, Proposed Policy Statement, 49 Pa. Bull. 929 (Mar. 2, 2019).

telecommunications services in Pennsylvania,"[25] and to pay additional intrastate regulatory fees based on such reported revenues.[26]

This proposal proceeded from an erroneous understanding of the established principles set forth above. Among other things, the Proposed Policy Statement claimed that the Ten Percent Rule is "designed to allocate *costs only and regulatory authority over ratemaking*," and thus does not extend to *revenue* allocations for purposes of assessing state regulatory fees.[27] The Proposed Policy Statement based this misconception on an incomplete review of FCC precedent—making no mention of the FCC's express application of the Ten Percent Rule to revenue allocations, including in the regulatory fee context. The Proposed Policy Statement also did not acknowledge or grapple with the Commission's lack of authority over IP-enabled services.

The Proposed Policy Statement was met with near-unanimous opposition. BCAP, the Verizon Companies, the Pennsylvania Telephone Association (joined by Frontier), and Crown Castle all filed comments opposing the Commission's proposal. These parties explained, among other things, that the proposed measures would be preempted by federal law and would constitute impermissible regulation of IP-enabled services.[28] These parties also highlighted significant technical impediments and new cost burdens that providers would face under the

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[25] *Id.* at 929.

[26] *See id.*

[27] *Id.* at 932 (emphasis in original).

[28] *See, e.g.*, Comments of BCAP, Docket No. M-2018-3004578, at 2-6 (filed Apr. 16, 2019) ("BCAP Comments"); Comments of the Verizon Companies, Docket No. M-2018-3004578, at 8-9 (filed Apr. 16, 2019) ("Verizon Comments").

proposal.[29] Even the Office of Consumer Advocate acknowledged that the comments filed by service providers "raise some concerns which support more review by the Commission of the scope and language of the Proposed Policy Statement," and urged the Commission to undertake a "technical conference or collaborative process" to consider alternative paths forward instead of reflexively adopting the Proposed Policy Statement.[30]

Rather than heed any of this cautionary feedback from commenters, the Commission adopted its proposed approach in the Final Policy Statement Order issued earlier this month. The Final Policy Statement Order acknowledged that, contrary to the view espoused in the Proposed Policy Statement, the Ten Percent Rule applies to both cost and revenue allocations, including in the regulatory fee context.[31] But the Order nevertheless proceeded to deny that the Ten Percent Rule preempts the assessment of state regulatory fees based on "*de facto* gross intrastate revenues," through an incomplete analysis that overlooked or failed to adequately grapple with substantial legal deficiencies and real-world implementation concerns identified in the record. Making matters worse, although the Final Policy Statement Order plainly was intended to establish a new, binding obligation for service providers, the Commission failed to undergo a formal rulemaking process, including submitting the proposal to the IRRC for careful evaluation of costs and benefits, before adopting this new mandate.

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29 *See, e.g.*, BCAP Comments at 6-7; Verizon Comments at 9-10.

30 Reply Comments of the Office of Consumer Advocate, Docket No. M-2018-3004578, at 6-7 (filed May 1, 2019).

31 *See* Final Policy Statement Order at 23-24, 28.

DISCUSSION

The Final Policy Statement Order suffers from various defects that warrant reconsideration by the Commission. As the Commission has explained, a Petition for Reconsideration "may properly raise any matters designed to convince the Commission that it should exercise its discretion . . . to rescind or amend a prior order in whole or in part."[32] A Petition typically should raise either "new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission."[33] Additionally, "a Petition for Reconsideration is properly before the Commission where it . . . alleges errors of law."[34] As discussed below, the Final Policy Statement Order proceeds from multiple clear errors of law, both procedural and substantive, and it either overlooks or fails to adequately address several legal deficiencies and real-world implementation concerns.[35]

I. THE COMMISSION'S ADOPTION OF THE FINAL POLICY STATEMENT ORDER WAS PROCEDURALLY IMPROPER

As an initial matter, the manner in which the Commission adopted the Order violated Pennsylvania law governing rulemaking proceedings. Although styled as a "policy statement,"

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32 *Duick v. Pennsylvania Gas and Water Company,* 56 Pa. PUC 553, 559 (1982) ("*Duick*").

33 *Id.*

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

35 *See, e.g., Mid-Atlantic Interstate Transmission, LLC*, Pa. P.U.C. Docket No. A-2018-3001386, 2018 Pa. PUC LEXIS 439, at *16 (2018) (granting reconsideration where petitioner "present[ed] additional information and elaborate[d] on its justification" for its position); *Pennsylvania American Water Company*, Pa. P.U.C. Docket No. R-2018-3000725, 2018 Pa. PUC LEXIS 216, at *8 (2018) (granting reconsideration where petitioner "raise[d] an issue overlooked by the Commission" and where, "as to substance," the Commission agreed that the prior order "should be revised"); *Peoples Gas Company LLC*, Pa. P.U.C. Docket No. R-2018-3000502, 2018 Pa. PUC LEXIS 212, at *7 (2018) (granting reconsideration where petitioner "convince[d] the Commission to amend its prior order" on the merits and "raise[d] issues not previously considered by the Commission").

the Order plainly establishes a binding norm intended to compel providers to report "*de facto* intrastate gross operating revenues" and to pay state regulatory fees based on such reporting—rather than merely making a non-binding announcement as to how the Commission might approach the issue in individual cases. As a result, the Commission was required to undergo a more thorough deliberative process that should have included review and input by the IRRC, among other procedures. The Commission's failure to follow these procedural obligations renders the Order unlawful.

Pennsylvania courts have articulated clear standards for "differentiating a regulation from a statement of policy," and in particular for determining "whether a particular statement of policy" is, in reality, tantamount to "an unpromulgated regulation."[36] Under these precedents, courts look to whether the policy statement is intended to establish a "binding norm," which in turn involves consideration of "(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."[37] Critically, the agency's own characterization of its action as a policy statement or a regulation is not dispositive; as courts have explained, "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."[38]

Applying these factors, the Order plainly aims to put in place a new "binding norm" that is tantamount to regulation. To begin with, the "plain language" of the Order and the

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36 *Eastwood Nursing & Rehab. Ctr. v. Dep't of Pub. Welfare*, 910 A.2d 134, 141 (Pa. Cmwlth. 2006).

37 *Id.* at 144 (citations omitted).

38 *Pennsylvania Human Relations Commission v. Norristown Area School*, 473 Pa. 334, 374 A.2d 671 (1977); *see also Physicians Insurance Co. v. Callahan*, 648 A.2d 608, 614 (Pa. Cmwlth. 1994).

amendments to the Pennsylvania Administrative Code appearing in Annex A makes clear that the Commission set out to establish a new regulatory mandate. The Order states unambiguously that providers are now "legally obligated to report, for assessment purposes, their *de facto* gross intrastate operating revenues for special access services and other similar jurisdictionally-mixed telecommunications services with the Commission."[39] The amendments in Annex A are similarly unequivocal—announcing a new "obligation of jurisdictional telecommunications public utilities to report to the Commission's fiscal office their *de facto* gross intrastate operating revenues related to providing jurisdictionally mixed-use telecommunications services."[40] In doing so, the Order sets forth concrete directives providing specific instructions to providers on how they are to report gross intrastate operating revenues for regulatory fee purposes.[41] Moreover, in adopting these new reporting and payment requirements, the Commission expressly relies on Section 501(b) of Pennsylvania Public Utility Code, which authorizes the Commission to "make such *regulations*, not inconsistent with law, as may be necessary or proper in the exercise of its powers or for the performance of its duties."[42] The Commission's intent to establish a new, binding regulation thus is evident on the Order's face.

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39 Final Policy Statement 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").

40 *Id.*, Annex A, at 44.

41 *See, e.g.*, *id.* (adopting new definition of "*de facto* gross intrastate operating revenues" under this regime as "those gross intrastate reporting revenues that are actually received for all telecommunications services and traffic between points that are both located within this Commonwealth, including the traffic traversing a special access circuit that is deemed interstate by the Ten Percent Rule set forth in 47 CFR 36.154"); *id.* (specifying the types of "supporting information" that providers may submit).

42 *Id.* at 32 (quoting 66 Pa. C.S. § 501(b)) (emphasis added).

The "manner in which the agency has implemented the provision" likewise reveals the Commission's regulatory intent in this proceeding.[43] The Order does not merely "announce[] the agency's tentative intentions for the future," as a policy statement would.[44] The Order, by its own terms, is "effective upon publication."[45] In other words, it "announces that *now, in the present time*," providers must begin collecting information that would enable them to ascertain and report the *de facto* gross intrastate operating revenues for special access and other jurisdictionally mixed services.[46] Because the Order "is not an announcement of future intent but, instead, of current rules, it appears less like a statement of policy and more like a binding norm."[47]

Finally, the Order plainly "restricts the agency's discretionary power."[48] Nowhere in the Order is there any indication that, in individual cases, the Commission might depart from its view that providers must report *de facto* gross intrastate operating revenues without regard to the Ten Percent Rule. While the Order suggests an alternative method for calculating revenues,[49] and states that a provider may challenge any specific assessment before an Administrative Law Judge,[50] the Order leaves no doubt as to the baseline requirement to report and pay fees based on the Order's new concept of "*de facto* gross intrastate operating revenues." And nothing in the

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43 *Eastwood*, 910 A.2d at 144.

44 *Id.* at 143 (quoting *Pennsylvania Human Relations Commission v. Norristown Area School District*, 473 Pa. 334, 349-50 (1977)).

45 Final Policy Statement Order at 40.

46 *Eastwood*, 910 A.2d at 147 (emphasis in original).

47 *Id.*

48 *Id.* at 148.

49 Final Policy Statement Order at 34.

50 *Id.* at 38.

Order suggests that the Commission's employees have discretion to accept future reports of such revenues based on an application of the FCC's Ten Percent Rule. Quite the contrary: the Order expressly contemplates that the Commission's Fiscal Office will assess regulatory fees based on providers' reports of their *de facto* gross intrastate operating revenues, which by definition must be calculated without applying the Ten Percent Rule.[51]

Because the Order thus sets out to establish a binding norm, the Commission was required to undergo a formal rulemaking proceeding before adopting it. Among other things, the Commission was obligated to follow the procedures set forth in the Regulatory Review Act, which requires the Commission to submit any regulations under consideration to the IRRC and to a designated legislative standing committee.[52] The Commission also must submit a "regulatory analysis form," which includes a "statement of the need for the regulation"; a statement regarding "additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements"; an "identification of the financial, economic and social impact of the regulation on individuals, small businesses, business and labor communities and other public and private organizations"; and an "economic impact statement" evaluating the effect on small businesses in particular.[53] This additional layer of consideration and review is designed to "curtail excessive regulation and to require the executive

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51 *See id.*, Annex A, at 44.

52 71 P.S. § 745.5(a).

53 *Id.*

branch to justify its exercise of the authority to regulate before imposing hidden costs upon the economy of Pennsylvania."[54]

But the Commission failed to follow these and other core rulemaking procedures,[55] and as a result, its Order is unlawful. Indeed, the Regulatory Review Act specifically states that an agency may not adopt a new regulation "until completion of the review provided for in this [A]ct."[56] Thus, even apart from the Order's substantive flaws discussed below, these obvious procedural defects compel the Commission to grant reconsideration.

II. THE COMMISSION OVERLOOKED OR FAILED TO ADEQUATELY CONSIDER CLEAR CONFLICTS WITH FEDERAL AND STATE LAW

A. The Final Policy Statement Order Is Preempted Under the Federal Ten Percent Rule, and the Commission Overlooked Critical Issues and Misapplied Legal Standards in Concluding Otherwise

The Order purports to respond to concerns raised by BCAP and other commenters that the new requirement to report *de facto* gross intrastate operating revenues and to pay state regulatory fees based on such revenues is preempted under the FCC's Ten Percent Rule. However, upon close inspection, the Order carefully overlooks or sidesteps the most substantial preemption problems posed by its new requirements, and instead spends several pages "rebutting" arguments that parties have not made. Thus, on the topic of preemption under the Ten Percent Rule, there are various "considerations which appear to have been overlooked or not addressed by the Commission,"[57] as well as multiple "errors of law" underlying the

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54 *Id.* § 745.2(a).

55 *See also, e.g.*, 71 P.S. §§ 732-204, 732-402 (requiring that the Commission's Chief Counsel must "review and approve" any new regulations, after which the Attorney General "reviews" the regulation and has the opportunity to object).

56 71 P.S. § 745.5a(l).

57 *Duick*, 56 Pa. PUC at 559.

Commission's conclusion[58]—all of which warrant reconsideration under the Commission's precedents.

To begin with, most of the Order's discussion of preemption under the Ten Percent Rule relies on assertions that the FCC did not "expressly" preempt the requirements at issue[59] and did not occupy the "field" of utility regulation.[60] But no party has argued "express" or "field" preemption. Instead, BCAP and Verizon contended that the requirements are invalid under "conflict" preemption principles.[61] The Order contains only limited discussion of conflict preemption, and there, too, the Order fixates on arguments that no party has made. Most notably, the Order states on multiple occasions that conflict preemption does not apply because it is not "impossible" to comply with both the Commission's new requirements and the FCC's Ten Percent Rule[62]—even though no one has argued that compliance with both standards is physically impossible. Nearly all of the Order's contentions regarding preemption address arguments the parties did not make.

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58 *Verizon Pennsylvania,* 2009 Pa. PUC LEXIS 2241, at *7.

59 *See, e.g.*, Final Policy Statement Order at 25 ("The FCC's jurisdictional separations rules do not expressly preempt the Commission's annual assessment[.]"); *id.* at 27 (arguing that the FCC's rules and Section 510 of the Public Utility Code "do[] not expressly conflict"); *id.* at 29-30 ("[T]he commentators [*sic*] opposing the Proposed Policy Statement have failed to present any FCC decision that expressly sets forth that states are precluded from exercising regulatory authority and imposing annual fiscal assessments on the revenue of mixed-use telecommunications services for Section 510 assessment-type purposes as the method to recover the Commission's regulatory costs related to telecommunications public utilities operating in Pennsylvania."); *id.* at 30 ("[T]he FCC has not expressly preempted state regulation for jurisdictionally mixed-use services[.]").

60 *See, e.g.*, *id.* at 25 (asserting that the FCC's rule "do not comprehensively govern the field of utility regulation, including state annual fiscal assessments").

61 *See* BCAP Comments at 2, 5; Verizon Comments at 8-9.

62 Final Policy Statement Order at 26; *see also, e.g.*, *id.* at 27 (asserting that "there is no physical impossibility . . . in complying with both the federal and state regulations").

The appropriate framework for analyzing preemption in this context is the concept of "obstacle" preemption, under which a state measure impermissibly conflicts with federal law where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law[63] or otherwise "frustrates the full effectiveness of federal law."[64] On this score, the Order has very little to say. The Order contains just two conclusory assertions—one stating that its new regime "does not frustrate the purpose and objective" of the FCC's Ten Percent Rule,[65] and another claiming that "the state action does not frustrate any important federal interest."[66] In neither case does the Order make any effort to identify the "purpose," "objective," or "interest" underlying the Ten Percent Rule—much less engage in any analysis of whether the Commission's new approach frustrates or stands as an obstacle to such interests.

If the Commission had undertaken this analysis in earnest, it would have been compelled to conclude that its new requirements for assessing state regulatory fees *do* frustrate and stand as an obstacle to the federal objectives behind the Ten Percent Rule. As explained above, the FCC adopted the Ten Percent Rule to "foster[] administrative simplicity and economic efficiency," and to avoid "the disadvantages in terms of administrative complexity, customer confusion, and economic inefficiency inherent in alternative methods."[67] Notably, the FCC relied on these

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63 *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Farina v. Nokia, Inc.*, 625 F.3d 97 (3d Cir. 2010) ("Conflict preemption nullifies state law inasmuch as it conflicts with federal law, . . . [including] where state law erects an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (internal quotation marks and citations omitted)).

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

65 Final Proposed Policy Statement at 26.

66 *Id.* at 30.

67 *Ten Percent Rule Order* ¶ 6.

federal objectives in *rejecting* the very alternative the Order seeks to implement in Pennsylvania—a "usage based allocation of mixed use lines" that would have required providers to ascertain precisely how much traffic on a particular circuit was interstate and how much was intrastate.[68] According to the FCC, such an approach would "undermine efforts to simplify the separations process" and pose "substantial administrative difficulties [and] undesirable effects on economic efficiency,"[69] because it would "require additional traffic studies" and "necessitate changes in [providers'] billing systems."[70] The FCC also enabled providers to rely on customer certifications to satisfy the Ten Percent Rule because "traffic on many special access lines cannot be measured at present without significant additional administrative efforts," and a requirement to "perform additional traffic studies for this purpose" would "seriously undermine the administrative benefits of the separations procedures."[71] Moreover, the FCC has clarified that the Ten Percent Rule applies to the assessment of revenues for regulatory fee purposes at both the federal[72] and state[73] levels.

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[68] *Id.* ¶ 4.

[69] *Id.* ¶ 4.

[70] *Id.* ¶ 4.

[71] *Id.* ¶ 6 n.7.

[72] *See* 2019 FCC Form 499-A at 1-2 (applying FCC separations rules, including the Ten Percent Rule, in "calculat[ing] and assess[ing] Interstate Telecommunications Service Provider (ITSP) regulatory fees").

[73] *See Separations FNPRM* ¶ 11 (noting the use of "separations results" under the Ten Percent Rule "to determine the amount of intrastate universal service support and to calculate regulatory fees").

The reporting and assessment regime adopted in the Commission's Order flies in the face of these federal objectives and findings and is therefore preempted.[74] The Order's "usage based allocation" for determining the revenues assessable for state regulatory fees directly conflicts with the FCC's decision not to require such an allocation. The Order's requirement that providers collect and submit "evidence to ascertain the '*de facto*' intrastate revenues attributable to jurisdictionally-mixed services"[75]—including "traffic stud[ies]," "jurisdictional allocation formulas," and the like[76]—is precisely what the FCC found would "seriously undermine the administrative benefits of the separations procedures."[77] The Order even appears to suggest that "simply rely[ing] on customer certifications" is insufficient[78]—despite the FCC's determination that such an approach best "fosters administrative simplicity and economic efficiency."[79] The Order entirely overlooks and ultimately undermines these clearly articulated federal interests, and those failings amply support reconsideration.[80]

Moreover, the FCC's findings in this regard have been borne out by three decades of experience. BCAP members do not monitor usage on the private line facilities that are the subject of the Commission's Order—and attempting to do so would present significant technical

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[74] *Cf. Farina*, 625 F.3d at 123 (explaining that "regulatory situations in which an agency is required to strike a balance between competing statutory objectives lend themselves to a finding of conflict preemption," as a "state-law standard that is more protective of one objective may result in a standard that is less protective of others").

[75] Final Policy Statement Order at 34.

[76] *Id.* at 34, 44.

[77] *Ten Percent Rule Order* ¶ 6 n.7.

[78] Final Policy Statement Order at 34.

[79] *Ten Percent Rule Order* ¶ 6.

[80] *See Duick*, 56 Pa. PUC at 559 (explaining that reconsideration is appropriate where a Petition identifies "considerations which appear to have been overlooked or not addressed by the Commission").

challenges, impose substantial costs on providers, and raise other policy concerns. As noted above, unlike providers of traditional voice services, which play an active role in routing the traffic and know the originating and terminating numbers on individual calls, providers of special access services typically do not play a significant role in routing the traffic, or the link may be serving as only one leg on a longer route between two unknown endpoints. Any effort to actively monitor a customer's usage of private lines in an effort to ascertain the endpoints of individual transmissions is technically uncertain and would, at a minimum, require a costly reengineering of the underlying networks. These networks would need to be equipped with new functionalities in an attempt to determine the paths of specific packets—which not only would pose additional technical difficulties but also could raise substantial privacy concerns. The Order attempts to sweep these difficulties under the rug by suggesting that a provider could look to "the point of origination and termination on the carrier's network, rather than the point of origination and termination of the underlying communication."[81] But such an approach would turn the FCC's well-established, "end-to-end" method for determining the jurisdictional nature of communications traffic on its head.[82] And the Order acknowledges that this approach likewise would entail new "traffic stud[ies],"[83] which, again, would frustrate the federal objectives noted above, including the FCC's express desire to avoid such costly measures in this context.[84]

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[81] Final Policy Statement Order at 34.

[82] *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, Memorandum Opinion and Order, 19 FCC Rcd 22404 ¶ 17 (2007) ("*Vonage Preemption Order*"), *aff'd sub nom.*, *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007); *see also AT&T Corp. v. Core Communs., Inc.*, 806 F.3d 715, 725 (3d Cir. 2015) ("[T]he FCC employs end-to-end jurisdictional analysis to determine whether communications are intrastate or interstate.").

[83] Final Policy Statement Order at 34.

[84] *See Ten Percent Rule Order* ¶¶ 4, 6 n.7.

B. The Order Overlooks Various Ways in Which Section 253 of the Communications Act Independently Preempts the Commission's New Assessment Methodology

The Order also glides over concerns that the Commission's new assessment methodology is preempted by Section 253 of the Communications Act. Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[85] Section 253(c), in turn, provides that states or localities may "require fair and reasonable compensation from telecommunications providers," but only "on a competitively neutral and nondiscriminatory basis."[86] The FCC has indicated on multiple occasions that Section 253(a), when read in conjunction with Section 253(c), preempts conduct by a state or locality "that materially inhibits or limits the ability of a provider 'to compete in a fair and balanced legal and regulatory environment.'"[87] Courts have not hesitated to declare state statutes and regulations unlawful under Section 253 if they impose inequitable or discriminatory fees that have no relationship to an agency's actual costs,[88] or unreasonably burden a provider's ability to provide interstate telecommunications services.[89] The Order's new assessment methodology fails on both counts.

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85 47 U.S.C. § 253(a).

86 *Id.* § 253(c).

87 *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd. 3266 ¶ 108 (2017) (quoting *California Payphone*, Memorandum Opinion and Order, 12 FCC Rcd. 14191 ¶ 31 (1997)).

88 *See, e.g.*, *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 22 (1st Cir. 2006).

89 *See, e.g.*, *AT&T Corp. v. Pub. Util. Comm'n of Texas*, 373 F.3d 641, 647 (5th Cir. 2004).

First, the Commission's Order fails to demonstrate any reasonable relationship between the state regulatory fees it seeks to impose on jurisdictionally mixed special access services and its actual expenses in regulating providers of such services. In *Puerto Rico Tel. Co.*, the First Circuit held that a municipality's gross revenue fee on a carrier was invalid under Section 253 because the fee significantly increased the carrier's operating costs and was not reasonably related to the municipality's actual costs of carrying out its statutorily prescribed functions.[90] The same rationale applies here. A special access circuit for which the traffic is more than ten percent interstate is subject to FCC jurisdiction by operation of the Ten Percent Rule, so there are simply no relevant state-level regulatory costs associated with that circuit that the Commission could have any reasonable interest in recovering. While the Order vaguely asserts at various points that the Commission has an interest in "recovering the actual costs of administering the Code from all jurisdictional telecommunications carriers providing jurisdictionally mixed-use services,"[91] it never makes any effort to explain how mixed-use lines that are deemed interstate under the Ten Percent Rule and thus are subject to FCC jurisdiction impose *any* "actual costs" on the Commission.[92] For the same reasons, under Section 510 of the Public Utility Code, such jurisdictionally interstate lines cannot form the basis for assessing a provider's "reasonable share" of the costs of administering the Code.[93] As the court explained in *XO Missouri v. City of Maryland Heights*, "plainly a fee that does more than make a municipality whole is not

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90 *Puerto Rico Tel. Co.*, 450 F.3d at 22.

91 Final Policy Statement Order at 26.

92 Indeed, interstate services are outside the Commission's jurisdiction under 66 Pa. C.S. § 104.

93 66 Pa. C.S. § 501; *cf.* Final Policy Statement Order at 21.

compensatory in the literal sense, and instead risks becoming an economic barrier to entry"[94]—one that the Commission has not adequately considered and addressed in this proceeding.

Second, to the extent the Commission seeks to recoup its general operational expenses, it must do so in an equitable and nondiscriminatory manner and may not impermissibly burden providers' ability to offer interstate services. In *AT&T Communications, Inc. v. Eachus*, a state commission assessed a surcharge on both intrastate and interstate telecommunications services sold within the state.[95] AT&T challenged the regulatory action on the ground that it violated Section 253(a), impermissibly burdened the federal universal service mechanism, and ran afoul of the Commerce Clause.[96] While the court ultimately struck down the regulatory action on the ground that it burdened the universal service mechanism, its analysis applies equally to Section 253(a). The court explained that "allowing a state to assess services already assessed by the federal government" increases the burden on carriers providing interstate services, which may well "have an impact on a carrier's decision to provide interstate telecommunications" in the state.[97]

The Commission's assessment regime impermissibly forces providers of jurisdictionally mixed services to bear a disproportionate share of regulatory costs, putting such providers at a competitive disadvantage relative to carriers that provide only intrastate services, in direct violation of Section 253.[98] While the Order purports to consider the concern that its assessment

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94 256 F. Supp. 2d 987, 994 (E.D. Mo. 2003).

95 174 F. Supp. 2d 1119, 1121 (D. Or. 2001).

96 *Id.*

97 *Id.* at 1125.

98 *See, e.g.*, *AT&T Corp. v. Pub. Util. Comm'n of Texas*, 373 F.3d 641, 647 (5th Cir. 2004) (holding that state assessment of revenues derived from both intrastate and interstate calls

methodology discriminates among "ILECs, CLECs, CAPs, [and] IXCs,"[99] the Order never considers the discriminatory effect of this assessment methodology on providers of jurisdictionally mixed services vis-à-vis providers of purely or predominately intrastate services. This discriminatory treatment stems from the fact that the Commission's assessment would result in duplicative levies based on the very same revenues for providers of jurisdictionally mixed services, while providers of purely or predominately intrastate services would not face duplicative fees.

The Order asserts in cursory fashion that its chosen approach would not result in "double assessments" of the same revenues.[100] Even a simple illustration defeats this claim. Consider, for instance, a scenario in which a certificated provider in Pennsylvania operates a private line circuit on which 89 percent of the traffic is intrastate. Under federal law, the application of the Ten Percent Rule would require treating the relevant circuit as 100 percent interstate, and the provider would accordingly pay regulatory fees to the FCC based on 100 percent of the revenues of that circuit. Ordinarily, the application of the Ten Percent Rule also would result in the payment of no state regulatory fees for revenues from that circuit—but under the Commission's Order, a provider in Pennsylvania would be required to report 89 percent of the revenues as "*de facto*" intrastate and pay state regulatory fees based on that amount. Thus, the provider would pay federal and state regulatory fees assessed at *189 percent* of the gross revenues for that line—plainly a double assessment.

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was inequitable and discriminatory, and therefore preempted by Section 253(a), because it "burden[ed] multijurisdictional carriers more severely than pure interstate or intrastate carriers"); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 80 (2d Cir. 2002) (striking down regulatory fee provisions that were not "competitively neutral" or "nondiscriminatory").

99 Final Policy Statement Order at 36.

100 *Id.* at 26.

Apart from clear legal problems presented by this double assessment, the Commission's Order ignores the harmful policy implications that such a regime would present. The Order's new requirement to pay regulatory fees based on a reporting of *de facto* gross intrastate operating revenues would impose significant additional costs on providers of communications services in the Commonwealth. Such providers not only would face substantially higher regulatory fee assessments, but also, as noted above, would be forced to expend significant resources to develop and implement the tools necessary to evaluate the jurisdictional nature of each transmission over mixed-use special access lines, track such information in their systems, and apply the percent on a customer-specific and circuit-specific basis. And where federal and state regulatory assessments are passed on to special access customers, those customers—many of which are small businesses—would ultimately bear a significantly increased burden associated with the new state regulatory fee assessments under the Order. If the Commission had undergone the kind of formal rulemaking proceeding required under the Regulatory Review Act and submitted its proposal for review and approval by the IRRC and other bodies, it likely would have been alerted to these detrimental effects on providers and their customers. But the Commission overlooked these harmful impacts in adopting its Order—thus clearly warranting reconsideration.

C. The Final Policy Statement Order Regulates IP-Enabled Services in a Manner That Contravenes Federal and State Law, and the Commission Overlooked or Failed to Adequately Grapple with These Issues

The Order warrants reconsideration for the independent reason that it purports to impose new state-level obligations on IP-enabled services without adequately considering clear limits on the Commission's ability to do so under state law. The record indicates that many special access services and other jurisdictionally mixed services offered by providers in Pennsylvania are

provided using IP technology.[101] But the Final Policy Statement Order proceeds to impose its new assessment methodology broadly in connection with all "jurisdictionally mixed-use telecommunications services" provided by Commission-certificated "jurisdictional telecommunications public utilities," without specifically carving out IP-enabled services.[102] The Order's failure to adopt such a carve-out was plainly in error and should be reconsidered.

More specifically, the Order fails to adequately address or account for the express limitations on the Commission's authority over IP-enabled services under Pennsylvania's VoIP Freedom Act. As noted above, that law prevents the Commission from "enact[ing] or enforc[ing], either directly or indirectly, any law, rule, regulation, standard, order or other provision having the force or effect of law that regulates, or has the effect of regulating, the rates, terms and conditions of VoIP service or IP-enabled service."[103] The statute makes clear that this prohibition should be construed broadly—declaring that "[t]he proliferation of new technologies

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101 *See* BCAP Comments at 5-6.

102 Final Policy Statement Order, Annex A, and 44. Importantly, BCAP notes that the Commission is limiting the new requirements to common carrier "telecommunications services," and that the Commission is therefore not seeking to impose new requirements in connection with services that do not fall within that classification—including special access services offered by BCAP members that have been classified as private carriage offerings rather than as common carrier telecommunications services. *See Business Data Services in an Internet Protocol Environment*, Report and Order, 32 FCC Rcd 3459 ¶¶ 267-285 (2017) (specifically finding that certain special access services offered by BCAP's members are "private carriage offerings" and thus are not subject to common carrier offerings subject to regulation as telecommunications services). If the Commission were to depart from this limitation, BCAP reserves all rights and remedies to challenge such action.

103 73 Pa. C. S. § 2251.4; *see also id.* § 2251.3 (defining "IP-enabled service" as any "service, capability, functionality or application provided using Internet protocol or any successor protocol that enables an end user to send or receive a communication in Internet protocol format or any successor format, regardless of whether the communication is voice, data or video").

and applications and a growing number of providers developing and offering innovative services using Internet protocol is due in large part to little regulation, including freedom from regulations governing traditional telephone service, that these new technologies and the companies that offer them have enjoyed in this Commonwealth."[104] And while the statute preserves authority for the Commission to enforce an enumerated set of "Federal or State statutes or regulations" that includes universal service fees and telecommunications relay service fees, the statute contains no exception for regulatory fees.[105]

This important statutory limitation barely garners a mention in the Commission's Order. The Order merely asserts, in a two-sentence footnote, that "[t]he Commission acknowledges that its regulatory reach over Voice-over-Internet Protocol carriers is more circumscribed, including those that may have sought or acceded to Commission certification," but that the statute's "circumscription pertains to regulating rates, terms and conditions of such service."[106] Nowhere does the Order grapple with the fact that its new assessment methodology, when applied to IP-enabled mixed-use services, *does* represent an impermissible form of regulation of the rates, terms, and conditions of service. Among other things, as noted above, state regulatory fees and other state and federal assessments often are passed on to customers and appear as line items on customer bills. Thus, any new or increased state regulatory fees for these IP-enabled services

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104 *Id.* § 2251.2(2).

105 *Id.* § 2251.6. The Supreme Court of Pennsylvania has struck down analogous efforts by the Commission to impose regulatory fee assessments on entities that are exempt from regulation as "public utilities" under state law. *See, e.g., Delmarva Power & Light Co. v. Commonwealth of Pennsylvania*, 582 Pa. 338, 355-56 (2005) (striking down Commission effort to apply Section 510 assessments on entities that the General Assembly did not intend to treat as "public utilities").

106 Final Policy Statement Order at 21 n.45.

would represent direct regulation of the rates, terms, and conditions of providing such services, and would contravene the plain language of the VoIP Freedom Act. In addition, the VoIP Freedom Act would not have required the exceptions for universal service fees and telecommunications relay service fees if the statute's prohibition regarding regulatory actions was intended to be as narrow as the Order asserts.[107] Also, the Order overlooks the fact that the Commission and its staff have construed the VoIP Freedom Act more broadly in analogous settings, finding that the statute categorically "prohibits the Commission from regulating VoIP or other internet protocol-enabled services" in any respect.[108] The Commission erred in declining to carve out IP-enabled services from its new regime.[109]

III. THE COMMISSION OVERLOOKED ALTERNATIVE SOLUTIONS THAT WOULD AVOID OR MINIMIZE MANY OF THESE CONCERNS

Finally, in adopting reporting and assessment requirements that violate state and federal law, the Commission failed to consider reasonable and more lawful alternatives to these requirements—yet another oversight that warrants reconsideration. Multiple parties offered to work collaboratively with the Commission to explore other options for reforming the state regulatory fee program in a manner that comports with governing law and avoids imposing unnecessary costs and other burdens on service providers in the Commonwealth. Moreover, the

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107 *See* 1 Pa.C.S § 1921(a) ("Every statute shall be construed, if possible, to give effect to all of its provisions.").

108 *Gray v. Comcast Phone of Pennsylvania, LLC*, Docket No. C-2012-2292826, Initial Decision Sustaining Preliminary Objection and Dismissing Complaint, 2012 Pa. PUC LEXIS 1367, *7 (rel. Aug. 15, 2012); *see also, e.g.*, *Silvestri v. Comcast Phone of Pennsylvania, LLC*, Docket No C-2011-2241959, Order (rel. Oct. 7, 2011).

109 *See also Vonage Preemption Order* ¶ 1 (ruling that the FCC, "not the state commissions, has the responsibility and obligation to decide whether certain regulations apply" to VoIP service "and other IP-enabled services").

Commission would have been obliged to devote more careful attention to alternative approaches if it had adhered to its obligations under the Regulatory Review Act, which requires the Commission to submit a report to the IRRC providing, among other things, a "description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected."[110] But the Commission declined to accept these offers from commenters or to undergo a more deliberative process, and accordingly overlooked other, more reasonable options.

One option that the Commission should have considered—and that it may now consider if it grants reconsideration—is the adoption of an alternative minimum regulatory fee. Under this approach, certificated providers of jurisdictionally mixed, non-IP-based telecommunications services in Pennsylvania would continue to report the costs and revenues for those services using the FCC's Ten Percent Rule, as federal law requires. In cases where such reporting reflects a material amount of properly attributed intrastate gross operating revenues, the provider would pay state regulatory fees based on an appropriate percentage of those revenues. But in cases where a provider reports zero or very little intrastate gross operating revenues, and thus would otherwise pay zero or *de minimis* state regulatory fees, the provider instead would be subject to a uniform alternative minimum regulatory fee set at a reasonable level.

This approach, if properly implemented, may well avert or mitigate several of the legal concerns discussed in this Petition. Among other things, it would preserve the ongoing application of the Ten Percent Rule and carve out IP-enabled services, while at the same time avoiding the imposition of unreasonable and discriminatory burdens on the provision of

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[110] 71 P.S. § 745.5(a)(12).

telecommunications services. BCAP stands ready to work with the Commission on exploring this approach and other potential alternatives if reconsideration is granted.

CONCLUSION

For the foregoing reasons, BCAP respectfully requests that the Commission grant reconsideration of the recently adopted Final Policy Statement Order concerning state regulatory fee assessments, and state clearly that it will not apply its new regime for reporting and assessing *de facto* gross intrastate operating revenues pending reconsideration of the Order.

Respectfully submitted,

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I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant).

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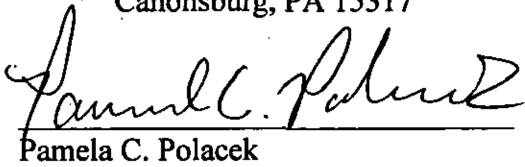

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Dated this 26th day of July, 2019 in Harrisburg, Pennsylvania

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In the Matter of	)	
	)	
Reporting of Intrastate Operating Revenues for	)	M-2018-3004578
Section 510 Assessment Purposes by Jurisdictional	)	
Telecommunications Carriers Offering	)	
Special Access and Other Similar Jurisdictionally-	)	
Mixed Telecommunications Services	)	

PETITION FOR RECONSIDERATION OF BROADBAND CABLE ASSOCIATION OF PENNSYLVANIA, INC.

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