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VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265

**Re: Cancellation of Certificates of Public Convenience for Telecommunications
Public Utilities; Reporting Zero Intrastate Operating Revenue**

**Application of PEG Bandwidth PA, LLC for approval to offer, render, furnish or
supply telecommunication services as a Competitive Access Provider to the
Public in the Commonwealth of Pennsylvania**

Docket Nos. M-2019-3010251 & A-2012-2301870

Dear Secretary Chiavetta:

Attached for electronic filing, please find PEG Bandwidth PA, LLC comments in opposition to the Commission's Tentative Order, in the above captioned matters. If you have any questions, please do not hesitate to contact us.

Respectfully submitted,

/s/ Christian E. Hoefly Jr.

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**Before the
Pennsylvania Public Utilities Commission
Harrisburg, PA 17120**

In the Matters of)	
Cancellation of Certificates of Public Convenience for Telecommunications Public Utilities; Reporting Zero Intrastate Operating Revenue)	M-2019-3010251
Application of PEG Bandwidth PA, LLC for approval to offer, render, furnish or supply telecommunication services as a Competitive Access Provider to the Public in the Commonwealth of Pennsylvania)	A-2012-2301870

**Opposition of PEG Bandwidth PA, LLC
to Cancellation of Certificates of Public Convenience
for Telecommunications Public Utilities**

PEG Bandwidth PA, LLC (“PEG”) respectfully submits this opposition to the Pennsylvania Public Utilities Commission’s (“Commission”) Tentative Order proposing to find public utilities reporting no intrastate revenue within the last three years as deemed to be no longer providing public utility service for compensation in Pennsylvania and, consequently, no longer entitled to hold a Commission-issued Certificate of Public Convenience and Necessity (“CPC”).¹ This Tentative Order follows a Policy Statement in which the Commission found: 1) the Federal Communications Commission’s (“FCC”) rules regarding mixed-use private line services² did not

¹ See Tentative Order Finding Cancellation of Certificates of Public Convenience for Telecommunications Public Utilities; Reporting Zero Intrastate Operating Revenue, Docket No. M-2019-3010251 (Order entered July 11, 2019) (“Tentative Order”).

² See *MTS and WATS Mkt. Structure, Amendment of Part 36 of the Commission’s Rules and Establishment of a Joint Bd.*, 4 FCC Rcd 5660, para. 1 (1989) (*Special Access 10% Order*); *Federal-State Joint Bd. On Universal Service*, 32 FCC Rcd 2140, para. 1 (WCB 2017) (*2017 10% Audit Order*).

preempt the Commission's regulations requiring reporting of *de facto* gross intrastate operating revenues; and, 2) an entity offering intrastate telecommunications public utility service in Pennsylvania is subject to an annual fiscal assessment based, in part, on its intrastate revenues in order to determine its reasonable share of the cost of the Commission's operations.³ The Tentative Order requested oppositions within 20 days of notice in the *Pennsylvania Bulletin*, which was issued on September 14, 2019 and the Commission established that comments are due October 4, 2019.⁴ PEG opposes the cancellation of its CPC and respectfully submits that the Commission's tentative conclusion is flawed because, as explained below, service revenues are distinct from service classification; private-line providers are prohibited from reclassifying interstate revenues as intrastate; cancellation of PEG's CPC would constitute an unlawful barrier to providing interstate telecommunications; and cancellation of PEG's CPC would impede PEG's ability to offer intrastate telecommunications services.

I. The Commission's Tentative Conclusion is Flawed as Revenues are Distinct from Service Classification

A. PEG Offers Intrastate Service to the Public and Submits to the Commission's Jurisdiction

On April 24, 2012, PEG filed for the CPC at issue to operate as a Competitive Access Provider (CAP) throughout the Commonwealth of Pennsylvania, which was granted on August 2,

³ 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 (Issued July 11, 2019) ("Policy Statement").

⁴ See Pennsylvania Public Utility Commission, *Case Summary Docket No. M-2019-3010251*, <http://www.puc.state.pa.us/pcdocs/1636950.pdf> (Daily Action on 9/14/2019 setting comments of 10/4/2019).

2012.⁵ In applying for CAP authority, PEG submitted to the jurisdiction of the Commission for the purpose of providing “interLATA and intraLATA dedicated private line high capacity intrastate transmission services to wireless carriers and other carriers requiring large amounts of bandwidth.”⁶ Further, this service offering is captured in PEG’s tariff.⁷ Specifically, PEG’s tariff provides, in relevant part:

The Company undertakes to furnish dedicated point to point services in accordance with the terms and conditions set forth in this Tariff. Service is offered via the Company's facilities or in combination with transmission facilities of other companies. The dedicated high-speed digital service provided includes the furnishing of intrastate interLATA and intraLATA Dedicated Telecommunications services in connection with one-way and/or two-way information transmission originating from non-residential user points within the Commonwealth of Pennsylvania.⁸

Pursuant to the applicable provisions of the Pennsylvania Statute and Code PEG is obligated to offer intrastate services in accordance with its tariff. Specifically, PEG customers can order intrastate private line services at any point from PEG, subject to availability of facilities to deliver such service.⁹ So long as PEG publicly offers intrastate private line service to the public for a fee, the company is making use of its CAP authorizations.

By offering these CAP services, PEG became subject to the jurisdiction of the Commission and must comply with the Commission’s regulatory, investigative, enforcement, audit and

⁵ See Order Regarding Application of PEG Bandwidth PA, LLC for approval to offer, render, furnish or supply telecommunication services as a Competitive Access Provider to the Public in the Commonwealth of Pennsylvania, Docket No. A-2012-2301870 (Issued August 2, 2012).

⁶ *Id.* at 3.

⁷ See Uniti, *Legal & Regulatory | Tariffs | PEG Bandwidth PA Tariff No. 1*, <https://uniti.com/uploads/documents/tariffs/PEG-Bandwidth-PA-Pennsylvania-Tariff-No.-1.pdf> (Sept. 19, 2012).

⁸ *Id.* at Original Sheet 9, § 2.2.

⁹ See *id.* at Original Sheet 39, § 3.1.

information gathering authority, 66 Pa.C.S. §§ 501, 504, 505, 506, and 516. In fact, PEG has so submitted itself to the Commission’s jurisdiction, and has paid filing fees to the Commission in order to obtain approval for various transactions it has undertaken over the past several years. Specifically, the company recently paid \$350 for a Securities Certificate filing, and has also paid \$350 for each transfer of control application filed over the past several years. In total, the company has submitted filing fees to the Commission of well over \$1,000 in recent years alone. These fees far exceed the fees paid to most other state public utility commissions with respect to these transactions, many of which collect no fees for such filings.

The jurisdiction of the Commission is dependent on *service classification*, not simply service revenues. The statute empowers the Commission to “regulate all public utilities doing business within” Pennsylvania.¹⁰ Moreover, the definition of a “public utility” under Pennsylvania law is: “A person, partnership, association or corporation, now or hereafter owning or operating in this Commonwealth, equipment or facilities for conveying or transmitting messages or communications by telephone or telegraph to the public for compensation.”¹¹ There is no reference to reporting intrastate revenue in the definition of a “public utility.” Chairperson Brown Dutrieuille agrees, supporting the jurisdiction of the Commission to promote competition and protect consumers through carriers submitting to the jurisdiction of the Commission by obtaining a CPC.¹²

¹⁰ 66 Pa.C.S. § 501(a)-(b).

¹¹ 66 Pa.C.S. § 2901.

¹² See Tentative Order at 5; *citing 2 Ill. Pub. Telcoms. Ass’n v. FCC*, 410 U.S. App. D.C. 69, 752 F.3d 1918 (2014), cert denied 135 S. Ct. 1583 (2015). 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-20092093336 (March 16, 2010) (CPC provider of interstate services required to compensate an intrastate carrier); *RTCC v. Pa.*

Additionally, the Commission, when interpreting *Qwest Corporation v. Scott*,¹³ found that it retains jurisdiction over intrastate services regardless of the classification of revenues for jurisdictional separation purposes.¹⁴ The Commission specifically noted: “Like the *Scott* court determined, the FCC’s expressed intent to preempt state regulation on jurisdictionally-mixed services does not extend to performance measurements and standards.”¹⁵ Thus, it would be inconsistent to declare a CAP provider, like PEG, is not utilizing its CPC due to the lack of reported revenues associated with intrastate services when the Commission correctly determined that it retains jurisdiction, for certain purposes, over jurisdictionally-mixed service offerings.

B. The Commission Can Recover Reasonable Regulation Costs Through Assessments Other Than Gross Intrastate Operating Revenues

The Commission’s principal concern is recovering regulatory costs attributable to public utilities.¹⁶ The Commission recognizes it has the power to assess public utilities to recoup these costs.¹⁷ However, the Commission fails to consider alternatives to recoup these costs other than assessing “*de facto* gross intrastate operating revenues.”¹⁸ Given the inherent conflict between the FCC jurisdictional treatment of private line revenues and the Commission’s goal of recouping

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).

¹³ 380 F. 3d 367 (8th Cir. 2004) (*Scott*).

¹⁴ See Policy Statement at 25-26.

¹⁵ *Id.* at 25.

¹⁶ See Tentative Order at 1; Policy Statement at 2-3.

¹⁷ See Tentative Order at 1-2; Policy Statement at 20-22.

¹⁸ Tentative Order at 1; See generally Policy Statement (considering only gross intrastate operating revenues as a method to recoup regulatory costs).

regulatory costs, alternative methods to determine regulatory fees should be explored prior to the Commission adopting a radical interpretation of its rules with the deleterious impact of cancelling CPCs. For example, the Commission could adopt a minimum regulatory fee for public utilities reporting zero dollars of intrastate revenues. This type of predetermined fee is currently being utilized in Pennsylvania for 911 fees.¹⁹ Further, minimum fees or flat assessments have been employed by other state public utilities commissions, including in Delaware, where telecommunications providers pay the state commission regulatory recovery charges for specific investigations or proceedings involving the provider.²⁰ Finally, as noted *supra*,²¹ PEG has paid in excess of \$1,000 in fees to the Commission in support of various applications and filings it has made in recent years. Given that the Commission's most direct costs associated with regulating PEG stem from the processing of such applications, the Commission could increase filing or processing fees associated with such applications as a means to cover its regulatory costs, especially those costs most directly attributable to companies like PEG that do not otherwise require significant Commission resources outside of such filings.

II. FCC Rules Prohibit Private-Line Providers from Reclassifying Revenues as Intrastate under applicable Federal Laws and Regulations

A. The FCC Requires PEG to Classify Revenues from Mixed-Use Lines as Interstate

As the Commission recognizes, the FCC requires providers of private line services to report revenues associated with jurisdictional-mixed or mixed-use lines between interstate and intrastate jurisdictions in order to calculate assessments of various federal fees for the federal universal

¹⁹ See 53 Pa.C.S.A §5306.2 (establishing a surcharge in the amount of \$1.65 without regard to revenue or fee associated with the applicable service).

²⁰ See 26 Del. C. §§ 114, 710.

²¹ See *supra* Section I.A.

service fund, interstate telecommunications relay services, the administration of the North American Numbering Plan, and the shared costs of local number portability administration.²² Under the FCC’s “ten percent rule,” the revenue of a mixed-use line is directly assigned to the interstate jurisdiction when the line carries interstate traffic in a proportion greater than ten percent.²³ The FCC adopted the ten percent rule to “foster[] administrative simplicity and economic efficiency,” and to avoid “disadvantages in terms of administrative complexity, customer confusion, and economic inefficiency inherent in alternative methods.”²⁴ In adopting the ten percent rule, the FCC explicitly declined to adopt usage based allocation for private lines, and instead choose to require providers of private lines on which at least ten percent of usage is interstate to allocate *all* revenues from these lines as interstate.²⁵ The FCC did not want carriers to engage in the substantial administrative efforts required by traffic studies and instead chose the simplicity of customer certifications to satisfy the ten percent rule.²⁶ As a result, private line providers are required at both the federal and state level to allocate private line revenues as interstate when customers certify to the application of the ten percent rule.²⁷ Therefore, private line providers, like PEG, must report revenues from lines satisfying the ten percent rule as interstate.

The Commission’s direction to report *de facto* intrastate operating revenues from lines that meet the ten percent threshold directly conflicts with the FCC’s guidance where such revenues are

²² See Tentative Order at 2, fn. 2.

²³ See 47 CFR § 36.154(a)-(b); *Special Access 10% Order*, at 556061, paras. 2, 6-7; *2017 10% Audit Order*, at 2140, para.1.

²⁴ *Special Access 10% Order*, at 5560-61, para. 6.

²⁵ See *id.* at 5560, para. 4.

²⁶ See *id.*

²⁷ See FCC, Form 499-A and Instructions, [link](#), at 40 (January 2019) (*FCC Form 499-A*) (applying the ten percent rule to mixed-use private line revenues); *Jurisdictional Separations and Referral*

reported as 100% allocable to the provision of interstate services. PEG and similarly situated CAPs are required by the FCC to report private line revenues as interstate. PEG cannot, as the Commission suggests, reclassify these revenues to reflect *de facto* intrastate operating revenues in Pennsylvania. As detailed above, the lack of revenue attributable to intrastate services is a function of the FCC's revenue reporting rules and accompanying FCC guidance. PEG reports no intrastate revenues in Pennsylvania not due to any inability or unwillingness to offer intrastate services within the Commonwealth, but due to the FCC's reporting rules applicable to mixed-use private line offerings.

B. PEG must apply a consistent, national revenue reporting approach

The FCC's revenue reporting guidance does not permit PEG to use different cost allocation methods in different states, nor does it allow PEG's affiliated companies to use differing methods for cost allocation methods. If PEG were to use traffic studies or other methods to attribute mixed-use private line revenues to interstate and intrastate as the Commission requests, PEG (and its affiliated companies) would have to conduct and report revenues based on traffic studies nationally.²⁸ This would be administratively burdensome and expensive as well as inconsistent with federal law, which allows PEG to use customer certifications for purposes of jurisdictionally separating revenues between interstate and intrastate services. Further, if the traffic studies revealed that more than ten percent of the traffic was interstate, the entirety of the revenues would

to the Federal-State Joint Board, Report and Order and Waiver, 33 FCC Rcd 12743, 12745, para. 6, fn. 11 (noting that only "wholly intrastate" private line costs and revenues are subject to intrastate jurisdiction under the separations rules).

²⁸ See *FCC Form 499-A* at 40-41 (discussing the use of safe harbors versus reporting actual revenues through the use of corporate records or traffic studies and stating that a single election must be made for all affiliated entities, each quarter whether to use a safe harbor and, further, filers are required to use a consistent methodology for determining interstate revenues); *Federal-State Joint Board on Universal Service et al.*, CC Docket No. 96-45 *et al.*, Order and Order on Reconsideration, 18 FCC Rcd 1421, 1424-25, para. 6 (2003).

have to be reported as interstate. This result is guaranteed as customer certifications form the basis of PEG's current revenue reporting where customers attest to the traffic of such lines as more than ten percent interstate. Accordingly, PEG cannot file revised revenues for private line services that reflect *de facto* intrastate operating revenues in Pennsylvania as the FCC's rules do not permit this approach. FCC rules also prohibit PEG from using an approach in Pennsylvania that conflicts with its approach in other states, and it would be an exercise in futility as PEG's customers in Pennsylvania certify that such lines carry interstate traffic in a proportion greater than ten percent resulting in requiring PEG to report the revenue as 100% interstate pursuant to relevant federal law.

C. Reporting Intrastate Revenues Specific to Pennsylvania Would Result in Duplicative Collections and Increase Customer Costs

The Commission's proposed assessment on *de facto* intrastate operating revenues further frustrates the Commission's goals of ensuring proper use of CPCs to further the public interest in providing timely access to competitive services. For the reasons stated above, PEG's intrastate operations result in revenues that must be reported to the FCC as interstate. In turn, the FCC assesses these revenues to fund the federal universal service fund, interstate telecommunications relay services, the administration of the North American Numbering Plan, and the shared costs of local number portability administration. The FCC permits these regulatory assessments to be recovered through fees charges to the customer.

If the Commission proceeds with recouping its regulatory costs by assessing *de facto* intrastate operating revenues from mixed-use private lines, it is unavoidable that these revenues would be subject to duplicative assessments. The FCC's treatment of these revenues allocates 100% of the revenues to interstate treatment and assesses the total. With no ability to separate interstate and intrastate revenues for federal assessment purposes, the Commission's assessment

based on the *de facto* intrastate portion of the revenues would represent a duplicative assessment. This would result in increased customer cost for the services. Again, the Commission's stated purpose for this review is to ensure proper use of CPCs in Pennsylvania and serve the public convenience.²⁹ Increasing customers' costs for private line services offered in Pennsylvania due to unavoidable, duplicative assessment calculation does not further this purpose.

III. Cancellation Would Unlawfully Increase Barriers to Providing Interstate Service in Pennsylvania

The Commission's legal analysis fails to recognize that cancellation of CPCs would create impermissible barriers to interstate service prohibited by Section 253 of the Communications Act.³⁰ States are not permitted to enact any "statute or regulation, or other State or local legal requirement, [which] may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."³¹ Courts have found that Section 253 represents a "broad preemption of laws that inhibit competition."³² By canceling the CPCs of PEG and similar CAPs, the Commission is preventing PEG from offering wholly intrastate services to future or current customers. For example, and as detailed *supra*,³³ PEG has filed tariffs offering intrastate services. A future customer could request such a service as early as tomorrow. Likewise, a current customer tomorrow could shift the usage of PEG's service from one that is jurisdictionally mixed to one that is wholly (or more than 90%) intrastate. If PEG were required to obtain a new CPC in order to offer such a service (or to continue providing an existing service),

²⁹ See Tentative Order at 1-2.

³⁰ See 47 U.S.C. § 253.

³¹ 47 U.S.C. § 253(a).

³² See, e.g., *Puerto Rico Tel. Co. v. Telecomm. Reg. Bd. of Puerto Rico*, 189 F.3d 1, 11 n.7 (1st Cir. 1999).

³³ See *supra* Section I.A.

such a situation would result in a significant barrier to entry. Obtaining a new CPC in Pennsylvania often takes a minimum of three to six months, which would put PEG at a competitive disadvantage to other providers that would not be subject to the same delay. Finally, PEG provides private line services in support of wireless and small cell deployments. Revoking PEG's CPC on the basis of no reported intrastate revenues would prohibit the company from accessing the rights-of-way that, for the reasons detailed herein, would violate Section 332 of the Communications Act and the FCC's *Infrastructure Declaratory Ruling*.³⁴

Likewise, revocation of PEG's CPC would result in the inability to undertake interconnection with carriers within Pennsylvania. Under Section 252 of the Act, ILECs require requesting carriers to provide evidence of telecommunications licensure before entering interconnection agreements with them.³⁵ Revocation of PEG's CPC would result in the loss of interconnection rights under Section 252 of the Act, and may put PEG's existing interconnection arrangements in Pennsylvania at risk, which would likewise have the effect of significantly disrupting *existing* customer services within the state, not to mention the future deployment of services and facilities.

³⁴ See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, et al.*, Declaratory Ruling, Third Report and Order, 33 FCC Rcd 9088 (2018) (*Infrastructure Declaratory Ruling*).

³⁵ See Verizon, *Verizon Partner Solutions | Doing Business | Establish & Maintain Account for Local Services*, <https://www2.verizon.com/wholesale/business/local/establish/home/Establish-Maintain-Account-for-Local-Services.html> (last visited Sept. 19, 2019) (Verizon stating state certifications are required prior to doing business with Verizon, which includes interconnection agreements); CenturyLink, *Interconnection Negotiation Process - V17.0*, <https://www.centurylink.com/wholesale/clecs/negotiationsprocess.html> (last visited Sept. 19, 2019) (Stating "prior to this initial contact, you must obtain certification as a telecommunications provider with the State Public Utility Commission or agency in the state(s) in which you want to interconnect with CenturyLink").

A. The Lack of a CPC Would Prevent PEG from Providing Intrastate Services to Customers, Putting PEG at a Competitive Disadvantage

Assuming, *arguendo*, that the Commission correctly found that providers need to have *de facto* intrastate operating revenues to maintain a CPC – a finding that is incorrect for the reasons detailed in this filing – this would prevent PEG from providing service to customers seeking purely intrastate service. Likewise, it could prevent PEG from continuing to provide service to existing customers that change their current service to one that is wholly (or substantially) intrastate in nature. This places PEG at a competitive disadvantage to other public utilities that continue to hold CPCs due to having other intrastate revenues who can continue to offer intrastate private line services based solely on the fact that they *report* intrastate revenues. Distinguishing on the basis of reported revenue, particularly when federal law compels providers to report revenue in a particular manner, is arbitrary, capricious, and conflicts both with federal and state law for reasons already explained above. Commissioner Andrew G. Place rightfully raises this discrimination between classes of carriers based solely on reported revenues.³⁶

Adopting such an interpretation of relevant law would also competitively disadvantage certain providers and violate competitive neutrality. Specifically, and as applied to PEG, PEG's CPC would be cancelled due to its lack of *reported* intrastate revenues as a result of PEG complying with federal law. In order to provide intrastate services, PEG would need to obtain a new CPC, a process that takes a minimum of three to six months. For instance, PEG's initial CPC took from April 24, 2012, until August 2, 2012.³⁷ Other providers seeking similar authority have

³⁶ See Tentative Order at 6-7.

³⁷ See *Application of PEG Bandwidth PA, LLC for approval to offer, render, furnish or supply telecommunication services as a Competitive Access Provider to the Public in the Commonwealth of Pennsylvania*, Docket No. A-2012-2301870 (Issued August 2, 2012).

encountered the same or longer timeframes to obtain the requisite approval..³⁸ This places PEG at a competitive disadvantage to providers retaining CPCs who could more quickly offer service to customers seeking wholly intrastate services.

PEG cannot reclassify its private line revenues as intrastate due to applicable federal law — it cannot certify the same services to be both intrastate to one agency and interstate to another. This conflicting revenue treatment serves as a barrier to providing intrastate services in contravention of Section 253 of the Communications Act. The FCC has explained that a state legal requirement can function as an effective prohibition due to the competitive disparity the requirement causes between carriers.³⁹ The FCC reasoned that the barrier need not be insurmountable to be an effective prohibition under Section 253 of the Act.⁴⁰ As Commission Andrew G. Place explains, there is “no doubt” cancelling PEG’s certification due to its revenues being subject to the ten percent rule while not subjecting carriers providing the same services who also have independent intrastate revenues to the same treatment creates competitive disparity.⁴¹ Accordingly, the Commission should not cancel the CPC of PEG. PEG continues to offer intrastate services to the public for a fee and doing so would place PEG at a competitive disadvantage to

³⁸ See, e.g., *Application of WANRack, LLC for Approval to Offer, Render, Furnish or Supply Telecommunications Services to the Public in the Commonwealth of Pennsylvania as a Competitive Access Provider*, Docket No. A-2019-3008735 (Issued May 23, 2019) (three months from March until May); *Application of Sherpa Fiber, LLC for Approval to Offer, Render, Furnish or Supply Telecommunications Services to the Public in the Commonwealth of Pennsylvania as a Competitive Access Provider*, Docket No. A-2019-3008482 (Issued May 23, 2019) (three months from March to May).

³⁹ See *Infrastructure Declaratory Ruling*, 33 FCC Rcd at 9106, para. 39.

⁴⁰ *Id.* at 9108-09, para. 41.

⁴¹ Tentative Order at 6.

other providers who retain CPCs due to reporting intrastate revenues from non-private line services in violation of Section 253 of the Communications Act.

B. Lack of Access to Public Rights-of-Way Would Violate the FCC's Small-Cell Rules

PEG provides private line services, among other things, for wireless small cell deployments. Section 332(c)(7) of the Communications Act provides, in relevant part: “[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof— . . . (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”⁴² Revoking PEG’s CPC would prevent it from engaging with municipalities to obtain access to public rights of way in order to offer such services in support of wireless and small cell offerings. As other providers have noted and consistent with PEG’s experience, having a CPC is a necessary pre-condition to access the rights-of-way and some customers require producing evidence of such prior to working with companies offering telecommunications services.⁴³ Further, Pennsylvania law grants public utilities the right to deploy their facilities in the public rights-of-way without being subject to local government zoning requirements, but instead the less restrictive municipal rights-of-way permitting process.⁴⁴ Prohibiting or otherwise impairing PEG’s ability to access the rights-of-way to install facilities or to offer services in support of “personal wireless facilities” violates Section 332 of the Communications Act. As such, revoking PEG’s CPC would prevent it from engaging

⁴² 47 U.S.C. § 332(c)(7)(B)(i).

⁴³ See, e.g., *Crown Castle NG East LLC v. Pennsylvania Pub. Util. Comms’n*, 188 A.3d 617, 622 (2018).

⁴⁴ See 15 Pa.C.S. § 1511(e); see, e.g., *Duquesne Light Co. v. Upper St. Clair Twp.*, 105 A.2d 287 (Pa. 1954); *South Coventry Twp. v. Philadelphia Elec. Co.*, 504 A.2d 368 (Pa. Cmwlth. 1986); *Heintzel v. Zoning Hearing Bd. of Millcreek Twp.*, 533 A.2d 832, 833 (Pa. Cmwlth. 1987).

with municipalities to obtain access to public rights-of-way and would also impair PEG’s ability to solicit certain customers that require evidence of such prior to engaging services providers like PEG in violation of Section 332 of the Communications Act. For example, at least one municipality in Pennsylvania cited the Commission’s 2017 determination that DAS network operators are not “public utilities” as grounds for denying Crown Castle permission to install facilities in the public rights of way.⁴⁵ In the case of PEG, it could also jeopardize facilities it has already installed in Pennsylvania public rights-of-way pursuant to authority based on its CPC. Revocation of its CPC could result in PEG having to remove such facilities negatively impacting its substantial investment in these facilities and disrupting services to customers served through such facilities.

Further, the Commission recently asserted jurisdiction over *utility poles* in line with the FCC’s *Infrastructure Declaratory Ruling* reverse preemption framework.⁴⁶ The purpose of the Commission’s exercise of jurisdiction over utility poles was to preserve the “status quo” and “avoid regulatory uncertainty [to] promote broadband investment across Pennsylvania.”⁴⁷ Additionally, the Commission found that it was best positioned to “assist in spurring investment in, and access to, physical infrastructure used to deliver essential broadband access service to end-user customers by reducing the time and resources spent on disputes by resolving Pennsylvania-specific disputes in Pennsylvania.”⁴⁸ However, the Commission limited exercise of

⁴⁵ Definitive Brief of Petitioners at 58, *Crown Castle NG East LLC v. Pennsylvania Public Utility Commission*, 2017 WL 10373131 (Pa.Cmwlth. Nov. 27, 2017).

⁴⁶ *Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission*, Docket No. L-2018-3002672, (Issued August 29, 2019) (*PA PUC Poles Order*).

⁴⁷ *Id.* at 10.

⁴⁸ *Id.*

this jurisdiction to “to *utility* poles, ducts, conduits and rights-of-way *under this Commission’s jurisdiction...*”⁴⁹ The Commission explicitly declined to apply its pole attachment regime to utilities not subject to its jurisdiction and leaving federally regulated utilities subject to the FCC’s pole attachment regime. Thus, any carrier subject to federal regulation or otherwise not subject to the jurisdiction of the Commission must “obtain via private agreement or in in some other fashion beyond invoking the Commission’s authority” pole attachment agreements.⁵⁰

The Commission’s current action to find CAPs, like PEG, purely interstate carriers not subject to the Commission’s regulation places these providers’ poles outside of the Commission’s comprehensive pole attachment framework. This does not promote “status quo” regulation and creates a large amount of uncertainty for PEG as both an owner of poles and as an attacher. In lieu of a comprehensive and speedy pole attachment framework, the Commission upends this process by removing CAPs from Commission regulation and causing uncertainty as to which poles within Pennsylvania are subject to the Commission’s framework and which poles are subject to the FCC’s framework – the exact result the Commission was acting to prevent. If the Commission finds that CAP status is contingent upon reported intrastate revenues, poles could shift in and out of the Commission jurisdiction based on carriers’ customer base. Far from the speedy resolution the Commission wished to achieve in pole attachments, the Commission’s tentative conclusion in the instant proceeding causes great uncertainty for providers.

It is equally unclear whether subjecting PEG to wholly interstate regulation would allow for compliance with the FCC’s *Infrastructure Declaratory Ruling*. Specifically, the FCC requires municipalities to act within 60 days for review of an application for collocation of Small Wireless

⁴⁹ *Id.* at 12; 52 Pa. Code §77.2.

⁵⁰ *PA PUC Poles Order*, at 14.

Facilities using a preexisting structure and 90 days for review of an application for attachment of “small wireless facilities” using a new structure.⁵¹ PEG offers private line services in connection and in support of “small wireless facilities” for deployments in Pennsylvania. The FCC rested its jurisdiction on Section 332 of the Communications Act when examining the interplay of the Communications Act and states’ jurisdiction over zoning and other activities that occur at the state and local levels. Without a CPC, municipalities could require PEG to obtain a certificate prior to being able to access the public rights-of-way. This would take longer than the allowed 60 or 90 day period to review these siting applications. Moreover, the Commission may deny such applications based on the fact that PEG would find itself confronting the same conundrum described herein – offering intrastate services but reporting no intrastate revenue pursuant to relevant federal law. As such, revoking PEG’s CPC would violate both Section 332 of the Communications Act and the FCC’s *Infrastructure Declaratory Ruling*.

⁵¹ *Infrastructure Declaratory Ruling*, 33 FCC Rcd at 9142-43, para. 105; 47 CFR §1.6003(c).

IV. Conclusion

For the foregoing reasons, PEG Bandwidth respectfully opposes the Commissions tentative conclusion and requests the Commission find PEG Bandwidth provides public utility service for compensation within Pennsylvania and, consequently, is entitled to hold a Commission-issued Certificate of Public Convenience as a Competitive Access Provider throughout the Commonwealth of Pennsylvania.

Respectfully submitted,

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