

STATEMENTS OF POLICY

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

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[M-2018-3004578]

Reporting of Intrastate Operating Revenues for Section 510 Assessment Purposes by Jurisdictional Telecommunications Carriers Offering Special Access and Other Similar Jurisdictionally-Mixed Telecommunications Services

[49 Pa.B. 929]

[Saturday, March 2, 2019]

The Pennsylvania Public Utility Commission (Commission) on November 8, 2018, adopted a policy statement that is intended to provide guidance regarding the reporting of gross intrastate operating revenues for Section 510 assessment purposes by jurisdictional telecommunications public utilities in Pennsylvania that offer special access or other similar jurisdictionally-mixed telecommunications services but report zero gross intrastate revenues.

Public Meeting held
November 8, 2018

Commissioners Present: Gladys M. Brown, Chairperson; Andrew G. Place, Vice Chairperson, statement follows; Norman J. Kennard; David W. Sweet; John F. Coleman, Jr.

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; M-2018-3004578

Proposed Policy Statement

By the Commission:

Pursuant to the Public Utility Code (Code), 66 Pa.C.S. §§ 101—3316, the Commission has regulatory authority over all public utilities and certain licensed entities operating and providing service to the public in Pennsylvania. In particular, the Commission has full regulatory authority over all Commission-certificated telecommunications carriers offering intrastate telecommunications services, whether it is on a retail or wholesale basis.¹ Moreover, no person or corporation that is a public utility under Pennsylvania law may offer telecommunications service to the public in Pennsylvania without first obtaining, from the Commission, a Certificate of Public Convenience (CPC) based on a finding that the service is necessary or proper for the service, accommodation, convenience or safety of the public. 66 Pa.C.S. §§ 1102-1103. All telecommunications carriers holding a CPC in Pennsylvania are subject to the Commission's regulatory, investigative, enforcement, audit and information gathering authority, 66 Pa.C.S. §§ 501, 504—506, and 516, including the Commission's authority under Section 510 of the Code, 66 Pa.C.S. § 510 to impose assessments upon these carriers to cover their "reasonable share" of the costs of administering the Code.

Through the Section 510 assessment process, each telecommunications carrier holding a CPC is assessed and is obligated to pay for the reasonable costs attributable to the regulation of all Commission-certificated telecommunications carriers. For the Commission's 2017-18 fiscal year, the total costs of administering the Code was \$60.7 million for all utilities and licensed entities. Based on employee time records for direct costs and a revenue-based allocation of indirect costs, the sub-total attributable to the regulation of all Commission-certificated telecommunications carriers was \$5.9 million. By statute, the allocation of the Commission's indirect costs is based on each carrier's intrastate revenues. See 66 Pa.C.S. § 510(b)(2). Therefore, if some carriers fail to accurately report their intrastate revenues, the burden of their cost of regulation to be recovered through the assessment is improperly shifted to all other certificated telecommunication carriers.

The Commission is proposing this policy statement to provide guidance regarding the reporting of gross intrastate operating revenues for Section 510 assessment purposes by jurisdictional telecommunications public utilities in Pennsylvania that offer special access or other similar jurisdictionally-mixed telecommunications services but report zero gross intrastate revenues.² These services often are provided by Competitive Access Providers (CAP), but also, are provided by other telecommunications public utilities in Pennsylvania, including Incumbent Local Exchange Carriers (ILEC). As explained herein, these carriers are obligated file their de facto gross intrastate revenues³ with the Commission. The Commission is proposing this policy statement in order to assist these carriers in complying with their

statutory obligations to file their Section 510 revenues report on March 31 of each year and to pay a reasonable share of the Commission's costs of administering the Public Utility Code.

Specifically, we propose to amend 52 Pa. Code Chapter 69 to include Section 69.3701. This section will incorporate the policy determination that Commission-jurisdictional providers of special access or other similar jurisdictionally-mixed telecommunications services that report zero gross intrastate revenues are obligated to report their de facto gross intrastate operating revenues with the Commission on March 31 of each year, and are obligated to pay a reasonable share of the costs of administering the Public Utility Code. Further, it will be the Commission's position that the Federal Communications Commission's (FCC) ten percent contamination rule does not preempt or otherwise preclude these carriers' obligation to report their de facto gross intrastate operating revenues or the associated obligation, under Section 510, to pay a reasonable share of the costs of administering the Public Utility Code.

In addition, the Commission is proposing this policy statement to provide guidance to Commission-jurisdictional providers of special access or other similar jurisdictionally-mixed telecommunications services who report gross intrastate revenues to the Commission from other intrastate services but may not be reporting such revenues from special access or other similar jurisdictionally-mixed telecommunications services. It will be the Commission's position that the FCC's ten percent contamination rule does not preempt or otherwise preclude these carriers' obligation to report, as part of their gross intrastate operating revenues, their de facto gross intrastate operating revenues from providing special access or other similar jurisdictionally-mixed telecommunications services in Pennsylvania. The Commission further directs that the proposed policy statement be published in the *Pennsylvania Bulletin* for comment by interested parties.

Background

The Commission's Fiscal Office, the Bureaus of Technical Utility Services, Investigation & Enforcement, and Audits, and the Law Bureau (Staff) identified some telecommunications carriers certificated as CAPs who reported revenues inconsistently or repeatedly reported zero intrastate revenues. Accordingly, the Commission requested Staff to undertake an inquiry to examine the carriers' claims of zero intrastate revenues. As part of this inquiry, on September 7, 2018, Staff issued to all carriers who reported zero intrastate revenues a Secretarial Letter setting forth a comprehensive set of inquiries examining the basis for some carriers' claims of zero intrastate revenues.

Specifically, Staff sought information necessary to examine the factual bases and analyze the legal theories underlying the carriers' claims of zero reportable intrastate revenue. As their legal basis, a majority of the zero reporters referred to the FCC's ten percent contamination rule (discussed in more detail below) as their rationale and justification for reporting zero intrastate revenues to the Commission.

Regulation of Telecommunications Carriers

Telecommunications services are regulated by a combination of rules from the United States Congress, the FCC, state legislatures and state public utility commissions (PUC). The state legislatures define the activities or services that state PUCs have the authority to regulate and the manner in which entities that provide such services are certificated. See generally *Bethlehem Steel Corp. v. Pa. Public Utility Commission*, 713 A.2d 1110 (Pa. Super. 1998). While the federal Communications Act of 1934 (the 1934 Act), as amended, codified at 47 U.S.C. §§ 151 et seq., established "a system of dual state and federal regulation over telephone service," it also preserved state authority to regulate intrastate telecommunications and specifically denied the FCC jurisdiction to regulate wholly "intrastate" telecommunication services. 47 U.S.C. § 152(b); see *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986) (*Louisiana PSC*); cf. *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148-51 (1930).

The General Assembly, via enactment of the Code, has granted the Commission the authority to supervise and regulate all public utilities doing business within this Commonwealth. 66 Pa.C.S. § 501(b). Moreover, the Commission has the authority to regulate those public utilities that are offering intrastate telecommunications, whether on a retail or wholesale basis. See *Application of Sprint Communications Company L.P. for Approval of the Right to Offer, Render, Furnish or Supply Telecommunications Services as a Competitive Local Exchange Carrier to the Public in the Service Territories of Alltel Pennsylvania, Inc., Commonwealth Telephone Company and Palmerton Telephone Company*, Docket Nos. A-310183F0002AMA et al. (Order entered December 1, 2006); see also 66 Pa.C.S. § 3012 (intrastate telecommunications service consists of *local exchange* telecommunications, intrastate, interexchange services or [intrastate] toll services, and [intrastate] access telephone service [switched or special] to the public for compensation) (emphasis added).

In particular, pursuant to Chapter 30, the Commission has the authority to regulate telecommunications public utilities that offer special access services that provide point-to-point telecommunications service to customers via dedicated lines, many but not all of which are certificated as CAPs in Pennsylvania. 66 Pa.C.S. § 3012. The Commission acknowledges that the network facilities and equipment used by CAP and other carriers to provide intrastate telecommunications services to customers are

often used to provide interstate telecommunications services as well. Hence, a special access circuit, which may carry both interstate and intrastate communications, implicates regulation at both the federal and state levels.

Facilities that are capable of providing communications between interstate end points as well as intrastate end points are deemed to be "mixed-use" or "jurisdictionally-mixed" facilities and, conceivably, are within the jurisdiction of both state and federal authorities. See, e.g., MTS and WATS Market Structure Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72, 80-286, Memorandum Opinion and Order on Reconsideration and Order Inviting Comments, 1 FCC Rcd 1287 (1987); Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation, 7 FCC Rcd 1619, 1620, ¶ 7 (1992) (BellSouth MemoryCall); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998).

Treatment of Mixed-Use Services

Mixed-use or jurisdictionally-mixed services are generally subject to dual federal/state jurisdiction, except where it is impossible or impractical to separate the service's intrastate components from its interstate components, and the state regulation of the intrastate component interferes with valid federal rules or policies. See, e.g., See *Louisiana PSC*, 476 U.S. at 368 (1986) (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963)); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1114-15 (D.C. Cir. 1984); *Computer & Communications Industry Association v. FCC*, 693 F.2d 198, 214-18 (D.C. Cir. 1982) (*CCIA*), cert. denied, 461 U.S. 938 (1983); *Qwest Corp. v. Minnesota Pub. Utils. Comm'n*, 380 F.3d 367, 374 (8th Cir. 2004); *BellSouth MemoryCall*, 7 FCC Rcd at 1622-23, ¶¶ 18-19.

Recognizing that conflicts may emerge when dealing with "mixed-use" facilities, the 1934 Act "established a process designed to resolve what is known as 'jurisdictional separations' matters, by which process it may be determined what portion of an asset is employed to produce or deliver interstate as opposed to intrastate service." *Louisiana PSC*, 476 U.S. at 375 (citing 47 U.S.C. §§ 221(c), 410(c)). The United States Supreme Court explained that "[b]ecause the separations process literally separates costs such as taxes and operating expenses between interstate and intrastate service, it facilitates the creation or recognition of distinct spheres of regulation." *Id.* Pursuant to Section 221(c) of the 1934 Act, the FCC promulgated regulations entitled "Jurisdictional Separations Procedures" to delineate the appropriate jurisdictions for itself and state regulators of mixed-used facilities. 47 U.S.C. § 221(c). According to the FCC, the procedures "are designed primarily for the allocation of property costs, revenues, expenses, taxes and reserves between state and interstate jurisdictions." 47 CFR § 36.1(b).

In 1989, the FCC revised the jurisdictional separations procedures for "mixed-use special access lines," which carry both interstate and intrastate traffic. See In the Matter of MTS and WATS Mkt. Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Bd., 4 FCC Rcd 5660, ¶ 1 (1989) (Special Access 10% Order). The FCC explained that prior to this revision, "the cost of special access lines carrying both state and interstate traffic [was] generally assigned to the interstate jurisdiction." *Id.* at ¶ 2. This allocation was known as the "contamination doctrine"; where any interstate traffic was deemed to "contaminate" the service, even when the facilities involved were physically located intrastate. See In the Matter of MTS and WATS Mkt. Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Bd., 4 FCC Rcd 1352, ¶ 5, n.14 (1989) (10% Recommendation).

The contamination doctrine was initially criticized because it deprived state regulators of authority over largely intrastate private line systems that carried only small amounts of interstate traffic. Special Access 10% Order, 4 FCC Rcd 5660, paragraphs 5-6. Therefore, the FCC adopted a bright-line administrative rule known as the "ten percent rule, under which interstate traffic is deemed de minimis when it amounts to ten percent or less of the total traffic on a special access line. Under the ten percent contamination rule, the cost of a mixed-use line is directly assigned to the interstate jurisdiction only if the line carries interstate traffic in a proportion greater than ten percent." *Id.* at ¶¶ 2, 6-7; see also 47 CFR §§ 36.154(a)-(b). Accordingly, if ten percent or more of the traffic on a mixed-use special access line is interstate, then all of the traffic for that line is considered interstate; in other words, the 90% of a carrier's traffic that is in fact geographically intrastate is deemed to be interstate for jurisdictional separations purposes. Under this scenario, however, a carrier's traffic also may be considered to be 90% de facto intrastate.

The FCC concluded that the new rule would "resolve existing concerns in a manner that reasonably recognizes state and federal regulatory interests and fosters administrative simplicity and economic efficiency." Special Access 10% Order, 4 FCC Rcd 5660, ¶ 6 (footnote omitted). Accordingly, if the interstate traffic is greater than the ten percent threshold the carrier has to file a tariff with the FCC for such service. See 47 CFR § 36.154(a).

Preemption and Jurisdictionally-Mixed Services

Based upon their responses to our Secretarial letter, it appears that those jurisdictional telecommunications public utilities in Pennsylvania offering special access or other similar jurisdictionally-mixed telecommunications services⁴ report zero gross intrastate revenues to the Commission because it is their belief that the FCC has exclusive jurisdiction over special access lines implicated by the ten percent

contamination rule. Nevertheless, given the differing purposes of the FCC's ten percent contamination rule and the Section 510 assessment process, the Commission believes that the ten percent contamination rule does not preempt the Commission from requiring jurisdictional telecommunications carriers to file their de facto gross intrastate operating revenues with the Commission for their mixed-use access lines in order to pay their reasonable share of the costs of administering the Code pursuant to Section 510.

The federal government may preempt state law in one of three ways. First, Congress may explicitly state its intent to preempt state action. See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, courts may imply congressional intent to preempt state action where federal legislation completely occupies a given field. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Finally, preemption may be implied where the state action would actually conflict with the federal law or its purposes. See, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The U.S. Supreme Court, in *New York Blue Cross v. Travelers Ins.*, 514 U.S. 645 (1995) (*NY Blue Cross*), summarized the scope of federal preemption analysis as follows:

[T]he Supremacy Clause, U.S. Const., Art. VI, may entail preemption of state law either by express provision, by implication, or by a conflict between federal and state law. . . . And yet, despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law. . . . Indeed, in cases like this one, . . . we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

NY Blue Cross, 514 U.S. at 654-55 (citations omitted). Upon review, we do not believe that the Commission is preempted from directing telecommunications public utilities to report their de facto gross intrastate revenues with the Commission for mixed-use access lines and from imposing a fiscal assessment based in part on those reports so that these carriers pay for the reasonable costs of administering the Public Utility Code.

While the federal government may preempt state law, the courts have indicated that they will reject preemption of state regulation where the FCC has declined to preempt state regulation in jurisdictionally-mixed areas and where there is no federal rule on point and the state action does not frustrate any important federal interest. See *Louisiana PSC*, 476 U.S. at 375; *Diamond Int'l Corp. v. FCC*, 627 F.2d 489, 493 (D.C. Cir. 1980) (permitting state regulation of mixed-use service within FCC's

authority); In the Matter of Filing and Review of Open Network Architecture Plans, 4 F.C.C.R. 1 ¶¶ 276, 277 (1988) (deciding to allow continuation of state tariffing of Complementary Network Services) (Open Network Order). Indeed, no court has ever determined that a state commission is preempted from imposing filing fees, annual maintenance fees, annual assessments or other administrative fees on a telecommunications public utility to cover the reasonable and allocated operating costs of the state commission and as a condition for maintaining its CPC or license granted by that state commission.

There is an illustrative federal appellate court case that addressed the issue of whether states are preempted from regulating "special access lines" deemed interstate pursuant to the ten percent contamination rule. In *Qwest Corporation v. Scott*, 380 F.3d 367 (2004) (*Scott*), the Minnesota Public Utilities Commission (Minnesota Commission) had issued an order requiring Qwest Corporation (Qwest) to provide reports regarding special access performance data to AT&T Communications of the Midwest (AT&T) and WorldCom, Inc. and Time Warner Telecom of Minnesota, LLC (collectively "WorldCom"), in accordance with WorldCom's suggested requirements. In this case, the Eighth Circuit Court faced the issue of whether the Special Access 10% Order allocated between federal and state jurisdictions all regulatory authority over special access lines based on the ten percent traffic threshold or whether the FCC's intent with the Order was more limited.

The Eighth Circuit Court determined that the ten percent rule set forth in the Special Access 10% Order did not preempt the Minnesota Commission's reporting requirements for special access lines. First, the Court determined that the jurisdictional separations process is one part of a larger regulatory process for rate regulation and therefore, neither the jurisdictional separations process, nor the larger regulatory framework in which it exists, is generally designed to confer exclusive regulatory power. The Court noted that the District of Columbia Circuit Court (DC Circuit Court) in *Illinois Bell* recognized that the regulatory accounting treatment of a telecommunications service as interstate or intrastate does not necessarily negate the mixed-use character of the service for purposes of regulating other aspects of that service.⁵ The Eighth Circuit Court found the *Illinois Bell* case instructive and agreed with the DC Circuit Court's analysis.

Additionally, the Eighth Circuit Court focused on the Special Access 10% Order itself and determined that it was plainly concerned with cost allocation.⁶ The Court also noted that the codification of the Special Access 10% Order likewise referred only to costs, without any mention of other regulatory authority. See 47 CFR §§ 36.154(a)-(b). Furthermore, the Eighth Circuit Court noted that the U.S. Supreme Court also has spoken of "distinct spheres of regulation" that are recognized by the jurisdictional separations process, but it has done so in connection with questions of

cost allocation and rate regulation. *Louisiana PSC*, 476 U.S. at 375 (citing *Smith*, 282 U.S. 133, 51 S. Ct. 65, 75 L. Ed. 255). Moreover, the Eighth Circuit further noted that the Joint Board explained in recommending the ten percent rule, "[t]he fundamental principles of separations were described by the Supreme Court in [*Smith*], which holds that the separation of telephone company plant is necessary to proper rate regulation." *10% Recommendation*, 4 F.C.C.R. 1352 at ¶ 33 (citation omitted) (emphasis added). Accordingly, the Eighth Circuit Court concluded that when the Special Access 10% Order is read as a whole, the Commission's expressed intent to preempt state regulation does not extend to performance measurements and standards.

Thus, in *Scott*, the Eighth Circuit Court determined that the FCC's orders concerning the ten percent contamination rule were consistent with the Court's view that jurisdictional separations procedures generally are designed to allocate costs only and regulatory authority over ratemaking, rather than plenary regulatory authority over a telecommunications service. The Eighth Circuit Court concluded that when the *Special Access 10% Order* is read as a whole, the FCC's expressed intent to preempt state regulation does not extend to performance measurements and standards. Therefore, the Eighth Circuit Court reversed the district court's grant of a permanent injunction as to applicability of the Minnesota Commission's performance standards to the interstate special access lines.

Likewise, the FCC has not preempted the Commission's authority to direct telecommunications public utilities to report their de facto gross intrastate revenues with the Commission for mixed-use special access lines and to impose a fiscal assessment so that these carriers pay for the reasonable costs attributable to the Commission's administration of the Public Utility Code, which includes various degrees of regulation of telecommunications carriers. While preemption may be implied where the state action actually conflicts with the federal law or frustrates its purposes, there is no such conflict or frustration of purpose with directing telecommunications public utilities to report their de facto gross intrastate revenues with the Commission for mixed-use access lines for regulatory assessment purposes. The FCC's orders concerning the ten percent contamination rule are consistent with the Commission's view that jurisdictional separations procedures generally are designed to allocate costs only and regulatory authority over ratemaking, rather than plenary regulatory authority over a telecommunications service. Thus, when the Special Access 10% Order is read as a whole and within the context of other substantive orders in which the FCC has addressed preemption, the FCC's intent to preempt state regulation is limited to cost allocation and ratemaking and has not extended to a state's assessment of certificated carriers in order to recover from those carriers the Commission's cost of administering the Public Utility Code.

Based on these cases, the Commission concludes that the ten percent contamination rule is an administrative rule for certain jurisdictional cost allocations that deems all services to be interstate if a ten percent threshold is met. While any attempted regulation of the rates, terms and conditions of service for telecommunications services that are deemed to be interstate is likely to be preempted, the FCC has not gone so far as to preempt a state's authority to impose annual fiscal assessments or any other administrative fees to cover the cost of a state commission's operations as they pertain to telecommunications public utilities and, in particular, the use of de facto intrastate revenues as the metric to allocate those costs among the telecommunications carriers certificated by that state commission.

Section 510 Assessment Process

In Pennsylvania, the General Assembly established an annual fiscal assessment process, based on both records of direct employee hours and an allocation of indirect costs based on the relative size of each public utility, as the primary means to cover the costs of operation of the Commission. Hence, the Code directs the Commission to impose annual fiscal assessments upon public utilities and a concomitant statutory obligation on public utilities holding a CPC to pay, via such assessments, their reasonable share of the Commission's cost of administering the Public Utility Code. 66 Pa.C.S. § 510.

In order to compute the annual fiscal assessment, in addition to Commission employee direct hours data for each industry group, the Commission receives necessary data relating to each public utility's gross intrastate operating revenue in Pennsylvania from the utilities from the assessment report. In particular, each public utility is required to file, on or before March 31 of each year, a statement under oath reporting the utility's "gross intrastate operating revenues for the preceding calendar year." 66 Pa.C.S. § 510(b). Per Section 309 of the Public Utility Code, 66 Pa.C.S. § 309, the Commission's plenary investigative authority over entities and matters within its jurisdiction includes the power to compel the production of information as deemed necessary or proper in any investigation. In addition, pursuant to Sections 504 and 505 of the Public Utility Code, 66 Pa.C.S. §§ 504-505, the Commission may require any public utility to file such reports and to furnish such records, documents and information as may be necessary in aid of any inspection, examination, inquiry, investigation or hearing.⁷

In order to compute the precise assessment for each public utility, Section 510(b) provides for a four-step calculation process based on employee time records for direct costs and a revenue-based allocation of indirect costs.⁸ For any public utility that fails to file a timely actual revenue statement, the Commission is required to estimate the revenue, and the estimated gross operating revenue is used to calculate that utility's

assessment, along with the allocation of the total assessment among all public utilities operating in the Commonwealth.

Accordingly, the plain intent of the General Assembly is that each public utility lawfully doing business in Pennsylvania with a Commission-issued CPC "shall advance to the commission its reasonable share of the costs incurred in connection with the administration and enforcement of [the Public Utility Code] and any other statute." 66 Pa.C.S. § 510(f). In this statutory scheme, the General Assembly has chosen intrastate revenues as the metric by which a public utility's "reasonable share" of the costs incurred for the telecommunications industry is allocated.

In Pennsylvania, the General Assembly could have chosen a number of different mechanisms and metrics to allocate the costs of regulation, such as filing fees for applications and other pleadings, annual license or certificate maintenance fees, annual assessments based on the relative size of each public utility or other types regulatory fees designed to cover the costs of administering and regulating a utility's services. The General Assembly chose to adopt a system of annual fiscal assessments that is based on both direct hours of staff time devoted to each industry group and the intrastate revenues of each industry group to develop a per public utility assessment fee (supplemented by modest filing fees) as its allocation metrics to recover the cost of administering the Code from all certificated telecommunications carriers operating in the Commonwealth.

Accordingly, the imposition of an annual fiscal assessment to recover each telecommunications carrier's reasonable share of the costs of administering the Code is in no sense an actual or attempted regulation of the rates, terms or conditions of service for the services whose intrastate revenues are deemed to be interstate pursuant to the FCC's ten percent contamination rule. Thus, if an entity is offering intrastate telecommunications public utility service in Pennsylvania, it 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, and payment of that assessment as a condition of maintaining its CPC or license in Pennsylvania.

Conclusion

Section 510 requires that each telecommunications carrier holding a CPC is obligated to report its gross intrastate operating revenues on March 31st of each year and to pay an appropriate assessment, based on those revenues, to cover the reasonable costs attributable to the regulation of telecommunications carriers. Based upon the Commission's analysis to date, neither the FCC nor the courts have determined or held that the states lack the authority to impose annual fiscal assessments, annual licensing fees, filing fees or other charges to cover the costs

incurred by state commissions for the regulation of state-certificated telecommunications carriers. As such, the FCC's ten percent contamination rule does not preempt or otherwise bar the Commission from imposing an annual fiscal assessment based on a telecommunications carriers' de facto intrastate revenues to cover the costs of administering the Public Utility Code.

Based on the foregoing, the Commission is not precluded from imposing impose filing fees, license maintenance fees, annual fiscal assessments or any other administrative fees, separately or in combination, to recover the costs incurred to cover the cost of the Commission's operations. Accordingly, the FCC's ten percent contamination rule does not exempt telecommunications carriers holding CPCs issued by the Commission from their obligation under Section 510 to report their total gross intrastate operating revenues,⁹ under oath, in order to accurately compute the assessment; does not nullify the Commission's authority to impose and telecommunication carriers' concomitant obligation to pay the annual fiscal assessment pursuant to Section 510; and does not preclude the obligation of telecommunication carriers to report their gross intrastate operating revenues, under oath, in order to accurately compute the assessment.

Lastly, we note here that while this a policy statement provides guidance regarding the reporting of gross intrastate operating revenues by telecommunication carriers for assessment purposes, any final decision on the precise amount of an assessment to be imposed on an individual telecommunications carrier, if challenged, will be made only after a formal adjudication that follows the notice, objection and hearing procedures provided for in Section 510(c). 66 Pa.C.S. § 510(c). This is a statement of general policy reserving our discretion to act in future individual cases, based on the facts and arguments presented in those cases, and is not a final, binding rule on the Commission; *Therefore,*

It Is Ordered That:

1. The Commission adopt the proposed policy statement as set forth in Annex A.
2. The Law Bureau shall deposit this order and Annex A with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.
3. Comments to the Order and Annex A shall be filed within 45 days of the date of publication in the *Pennsylvania Bulletin*. Reply comments are due within 60 days of the date of publication in the *Pennsylvania Bulletin*.
4. This Order and Annex A shall also be posted on the Commission's web site.

5. The contact person is David E. Screven, Assistant Counsel, Law Bureau, (717) 787-2126, dscreven@pa.gov.

ROSEMARY CHIAVETTA,
Secretary

Fiscal Note: 57-324. No fiscal impact; (8) recommends adoption.

Statement of Vice Chairperson Andrew G. Place

Before us for disposition is the Staff recommendation for the issuance of a Proposed Policy Statement (Policy Statement) regarding the potential fiscal assessment under Section 510 of the Public Utility Code of special access service revenues where relevant special access circuits are classified as interstate under currently applicable Federal Communications Commission (FCC) regulations. This Policy Statement would also apply to other similar jurisdictionally mixed telecommunications services and their respective providers that operate under this Commission's jurisdiction.

The Policy Statement introduces the concept of the de facto gross intrastate operating revenues for such jurisdictionally mixed services that can be subject to this Commission's fiscal assessments under Section 510, to include revenues derived from special access circuits and services that have been classified as interstate under the FCC's "10% contamination rule." This would affect the gross intrastate revenue reporting for fiscal assessment purposes of various providers of jurisdictionally mixed special access services or other similar services including competitive access providers (CAPs), competitive local exchange carriers (CLECs), and incumbent local exchange carriers (ILECs). These providers do or may classify special access circuits and corresponding services as totally interstate under the FCC's "10% contamination rule." Consequently, although these providers furnish jurisdictionally mixed services within this Commonwealth under the regulatory oversight of this Commission, their relevant federally classified special access service revenues are not currently reported for intrastate fiscal assessment purposes under Section 510.

The concept of the de facto gross intrastate operating revenues includes "those operating revenues that are billed, charged or otherwise due for all telecommunications services and traffic between points that are both located within the Commonwealth of Pennsylvania." State fiscal assessments—such as those that are imposed and calculated under Section 510—are used for the funding of legitimate regulatory oversight operations of state utility regulatory agencies including this Commission. As such, they have a different purpose than revenue assessments that are designated via statute and/or regulation for the funding of the federal and state

universal service fund (USF) mechanisms. However, the federal and state USF mechanism assessments still follow certain jurisdictional separation guidelines that specifically categorize assessable interstate and intrastate revenues.¹⁰ Similarly, such jurisdictional separation and corresponding revenue classification is factored into the calculation of federal regulatory fees that are charged by the FCC for its own regulatory operations.

Consequently, I encourage the participating parties, the various categories of telecommunications carriers and communications providers as well as their respective associations, to provide comments that are supported by applicable legal rationales and appropriate technical explanations and address the following areas:

1. Whether and in what fashion existing jurisdictional separations rules are implicated in implementing the Proposed Policy Statement;
2. Whether the format and content of the Commission's annual fiscal Assessment Report should be modified so that it contains better information on the reportable de facto revenues (including information and data on special access revenues that are classified as interstate under the FCC's "10% contamination rule"); and
3. Whether the Commission should initiate a formal collaborative process between its Staff and the interested parties and entities in order to address this potential change of reportable revenues for Section 510 fiscal assessment purposes.

For the above-referenced reasons, I will be respectfully concurring in result only on the issuance of the Proposed Policy Statement.

ANDREW G. PLACE,
Vice Chairperson

ANNEX A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 69. GENERAL ORDERS, POLICY STATEMENTS AND GUIDELINES ON FIXED UTILITIES

§ 69.3701. Computation of Section 510 Assessments for Providers of Special Access or Other Similar Jurisdictionally-Mixed Telecommunications Services.

(1) Telecommunications carriers, including Competitive Access Providers (CAPs), holding Certificates of Public Convenience (CPC) issued pursuant to Sections 1102 and 1103 of the Public Utility Code (Code), 66 Pa.C.S. §§ 1102-1103, are public utilities subject to the Commission's regulatory, investigative, enforcement, audit and information gathering authority, 66 Pa.C.S. §§ 501, 504, 505, 506, and 516, as well as the Commission's authority under Section 510 of the Code, 66 Pa.C.S. § 510 to impose assessments upon these carriers to cover their "reasonable share" of the costs of administering the Public Utility Code.

(2) Section 510(b) of the Code requires every public utility holding a CPC from the Commission to file, on March 31 of each year, a statement, under oath, showing its gross intrastate operating revenues for the preceding calendar year and to pay to the Commission its proportionate share of the amount assessed to each utility group based on its total gross intrastate revenues.

(3) CAPs and other telecommunications public utilities holding Commission-issued CPCs are obligated by Section 510 of the Code to file assessment reports with the Commission showing their gross intrastate operating revenues and to pay to the Commission their proportionate share of the amount assessed to the telecommunications utility group based on each carrier's total gross intrastate revenues.

(4) CAPs and other telecommunications public utilities holding Commission-issued CPCs in Pennsylvania provide, among other things, special access or other similar jurisdictionally-mixed telecommunications services. Under current Pennsylvania law, these jurisdictionally-mixed services include services provided by operators of Distributed Antenna Systems (DAS).

(5) Certain telecommunications public utilities in Pennsylvania who are providing special access or other similar jurisdictionally-mixed telecommunications services, including some DAS operators, repeatedly have reported zero gross intrastate revenues to the Commission for regulatory assessment purposes. As their legal basis, a majority of the zero reporters refer to the ten percent contamination rule of the Federal Communications Commission (FCC) to justify reporting zero gross intrastate revenues to the Commission. Under this rule, which is an administrative jurisdictional cost allocation rule, the cost of a mixed-use line is directly assigned to the interstate jurisdiction only if the line carries interstate traffic in a proportion greater than ten percent.

(6) Other telecommunications public utilities in Pennsylvania who report gross intrastate revenues to the Commission may not be reporting gross intrastate revenues from providing special access or other similar jurisdictionally-mixed telecommunications services.

(7) Any CAP or other telecommunications public utility holding a Commission-issued CPC operating in Pennsylvania and providing special access or other similar jurisdictionally-mixed telecommunications services is obligated to submit its de facto gross intrastate revenues from providing these services to the Commission's Fiscal Office, along with all supporting information (such as traffic studies, tax returns, jurisdictional allocation formulas and factors, books of account, reports, etc.) on which the carrier bases its revenue determination, so that the Fiscal Office can ascertain the carrier's de facto gross intrastate operating revenues and compute an accurate assessment in accordance with the metrics and requirements of Section 510 of the Code.

(8) De facto gross intrastate operating revenues are those operating revenues that are billed, charged or otherwise due for all telecommunications services and traffic between points that are both located within the Commonwealth of Pennsylvania.

(9) The ten percent contamination rule established by the FCC, which is an administrative rule for certain jurisdictional cost allocations, does not preempt or otherwise nullify the Commission's authority to impose and a telecommunications public utility's concomitant obligation to pay the annual fiscal assessment required by Section 510 of the Code. Nor does the rule preempt or otherwise preclude the obligation of CAPs and other telecommunications public utilities to report their de facto gross intrastate operating revenues from providing special access or other similar jurisdictionally-mixed telecommunications services, without regard to any intrastate revenues deemed to be interstate pursuant to the ten percent contamination rule.

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¹ The Commission's regulatory reach over wireless carriers and Voice-over-Internet Protocol carriers is more circumscribed. See 66 Pa.C.S. § 102(2)(iv) and 73 P.S. § 2251.1.

² Pending the final appellate disposition of our jurisdiction over Distributed Antenna Systems or DAS providers, this would include the services provided by those DAS operators who have been certificated by the Commission. See *Crown Castle NG East LLC, et al. v. Pa. Public Utility Commission*, 188 A.3d 617 (Pa. Cmwlth. 2018), 2018 Pa. Commw. LEXIS 217, allocatur pending, *Crown Castle NG East LLC, et al v. Pa. Public Utility Commission* 447 MAL 2018.

³ De facto gross intrastate operating revenues are those operating revenues that are billed, charged or otherwise due for all telecommunications services and traffic between points that are both located within the Commonwealth of Pennsylvania.

⁴ This includes the services provided by operators of Distributed Antenna Systems or DAS who have been certificated by the Commission.

⁵ See *Illinois Bell*, 883 F.2d at 114. In that particular case, which involved the marketing of a mixed-use service, the DC Circuit Court rejected an argument that assignment to the intrastate jurisdiction of certain costs associated with marketing controlled whether the FCC could preempt state regulatory authority over the *manner* in which the services were marketed. *Id.* at 113-14. Instead, that court viewed the allocation of costs through a jurisdictional separation proceeding and the regulation of marketing practices by the FCC as independent matters.

⁶ The Court stated that the Special Access 10% Order begins by noting that "[a]t present, the cost of special access lines carrying both state and interstate traffic is generally assigned to the interstate jurisdiction," Special Access 10% Order, 4 F.C.C.R. 5660 at ¶ 2 (emphasis added), and ultimately "adopt[s] the Joint Board's recommendations *for the separation of investment* in mixed use special access lines." *Id.* at ¶ 8 (emphasis added). The Joint Board, whose reasoning was adopted by the FCC, likewise framed its recommendation as a matter of cost allocation. It began its discussion by noting that a "variety of options might be used *to separate special access costs*," *10% Recommendation*, 4 F.C.C.R. 1352 at ¶ 22 (emphasis added), and then expressed its final view in similar terms: "Based on a careful review of the record in this proceeding, we conclude that *direct assignment of special access costs* is superior to an allocation-based approach in terms of administrative simplicity and economic efficiency." *Id.* at ¶ 25 (emphasis added).

⁷ For illustration purposes only, such records and information may include, but is not limited to, the traffic studies, tax returns, jurisdictional allocation formulas and factors, books of account, reports or other information used to determine and verify interstate vs. Pennsylvania-intrastate revenues.

⁸ In order to compute the precise assessment for each public utility, Section 510(b) provides for a four-step calculation in which the Commission: (1) determines and assigns expenditures dedicated to the group of utilities to which the specific public utility belongs based on Commission employee direct hours for each industry group; (2) determines the balance of total expenditures, after direct costs are assigned, and assigns portions of the balance among groups of utilities in accordance with the proportion of their revenue to the total revenue sum for all utilities; (3) allocates a share of the total assessment to each utility group, in proportion to the expenditures assigned to the group; and (4) allocates a share of the assessment of the group to each utility, in proportion to the revenue of the utility to the total revenue sum of the public utilities in its group. 66 Pa.C.S. § 510(b)(1)–(4). The resulting assessment rate is subject to an appeal and review process in the form of a utility's filing objections on the grounds that the assessment is "excessive, erroneous, unlawful, or invalid." 66 Pa.C.S. § 510(c).

⁹ For example, if a telecommunications carrier has total operating revenues of \$1,000,000 for the 2018 calendar year, and 12% of the revenues was from traffic that was interstate and the other 88% was from traffic that was PA intrastate, that carrier must report, on the Section 510 assessment report due on March 31, 2019, the sum of \$880,000 as its de facto gross intrastate operating revenues.

¹⁰ See, e.g., *Texas Office of Public Utility Counsel, et al v. F.C.C.*, 183 F.3d 393 (5 Cir. 1999), at 409, 447. See also *AT&T v. Eachus*, 174 F.Supp.2d 1119 (D. Or. 2001).

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