

RULES AND REGULATIONS

Title 52— PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 63]

[L-00000148]

Universal Service Fund

The Pennsylvania Public Utility Commission (Commission) on March 22, 2001, adopted a revised final rulemaking order establishing a universal service funding mechanism, implementing revenue-neutral rate reform and resolving interconnection issues in the telecommunications industry. The contact persons are Gary Wagner, Bureau of Fixed Utility Services, (717) 783-6175, and Elizabeth Barnes, Law Bureau, (717) 772-5408.

Executive Summary

For several years, the Commission has been examining the need for an Intrastate Universal Service Fund (USF or Fund) in an effort to both reduce and restructure access charges and establish the appropriate level playing field for the development of local competition in this Commonwealth. The USF is a means to reduce access and toll rates for the ultimate benefit of end-users and to encourage greater toll competition while enabling carriers to preserve the affordability of local service rates.

The State USF, as currently constituted within the parameters of the instant rulemaking, can best be described as a "revenue-neutrality" fund designed to neutralize local exchange carrier (LEC) revenue short-falls resulting as a consequence of anticipated access charge and intraState toll revenue reductions. Although it is referred to as a fund, it is actually a pass-through mechanism to facilitate the transition from a monopoly environment to a competitive environment—an exchange of revenue between telephone companies which attempts to equalize the revenue deficits occasioned by mandated decreases in toll and access charges receipts.

Prior rulemaking attempts at establishing USF regulations, *Rulemaking to Establish a Universal Service Funding Mechanism*, Docket No. L-00950105 (June 21, 1996), were ultimately addressed in the Commission's Order on September 30, 1999 (P-00991648 and P-00991649). The September 30 Order directed that regulations be promulgated to establish and administer a State USF.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Commission submitted a copy of the final rulemaking, which was published as proposed at 30 Pa.B. 1549 (March 18, 2000) and served on March 7, 2000 to IRRC and the Chairpersons of the House Committee on Consumer Affairs and the Senate Committee on Consumer Protection and Professional Licensure for review and comment. Under section 5(c), the Commission also provided the Independent Regulatory Review Commission (IRRC) and the Committees with copies of the comments received, as well as other documentation. In preparing these final-form regulations, the Commission has considered all comments received from IRRC, the Committees and the public.

These final-form regulations were deemed approved by the House Committee on Consumer Affairs and Senate

Committee on Consumer Protection and Professional Licensure on February 20, 2001. The final-form regulations were approved by IRRC on May 17, 2001, in accordance with section 5.1(e) of the Regulatory Review Act.

Public Meeting held
March 22, 2001

Commissioners Present: John M. Quain, Chairperson; Robert K. Bloom, Vice-Chairperson; Nora Mead Brownell; Aaron Wilson, Jr.; Terrance J. Fitzpatrick

Revised Final Rulemaking Order

By the Commission:

Introduction

For several years, the Commission has been examining the need for a USF or Fund in an effort to both reduce and restructure access charges and establish the appropriate level playing field for the development of local competition. The USF is a means to reduce access and toll rates for the ultimate benefit of end-users and to encourage greater toll competition while enabling carriers to continue to preserve the affordability of local service rates. The State USF, as currently constituted within the parameters of the instant rulemaking, can best be described as a revenue-neutrality fund designed to neutralize LEC revenue short-falls resulting as a consequence of ordered access charge and intraState toll revenue reductions. Although it is referred to as a fund, it is actually a pass-through mechanism to facilitate the transition from a monopoly environment to a competitive environment—the USF provides for an exchange of revenue between telephone companies which attempts to equalize the revenue deficits occasioned by mandated decreases in toll and access charges receipts.

With the enactment of 66 Pa.C.S. Chapter 30 (relating to alternate form of regulation of telecommunications services), this Commission has statutory authority to establish a USF. *Rulemaking to Establish a Universal Service Funding Mechanism*, L-00950105 (June 21, 1996); *Bell Atlantic-Pennsylvania v. PaPUC*, 2790 C.D. 1999, October 25, 2000. Under Chapter 30, the Commission has explicit regulatory authority to take appropriate actions to maintain universal service at affordable rates. In particular, we note the legislative objective of "maintaining universal service at affordable rates statewide," the requirement that telecommunications customers pay only "reasonable charges" for local service, and that the Commission may "establish such additional requirements and regulations as it determines to be necessary and proper to ensure the protection of consumers." See 66 Pa.C.S. §§ 3001(1), 3001(2) and 3009(b)(3) (relating to declaration of policy; and additional powers and duties), respectively. Section 254(f) of the Telecommunications Act of 1996 (TA-96) (47 U.S.C.A. § 254) also contains explicit state authority for a USF, providing that "[e]very telecommunication carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to preserve and advance universal service in that State."

With the initiation of the Global Settlement Conference in September 1998, the issues relating to a USF, including the size and structure of the fund, and its interplay with access and toll rate reduction, rate caps and rate rebalancing, were bundled with the myriad of other complex telecommunications issues the parties were seeking to resolve. Both of the subsequent petitions to resolve

these complex telecommunications issues (P-00991648 and P-00991649) contained proposals to establish a USF. These petitions formed the basis for the Global Order later entered on September 30, 1999.

Procedural History

In *Formal Investigation to Examine and Establish Updated Universal Service Principles and Policies for Telecommunications in the Commonwealth*, Docket No. I-00940035 (November 10, 1997) and *Generic Investigation in Intrastate Access Charge Reform*, Docket No. I-00960066 (November 10, 1997), Bell Atlantic-Pennsylvania, Inc., now known as Verizon Pennsylvania (Verizon), and the small incumbent LECs filed a proposed joint settlement of the universal service issues, embodied in their Small Company Universal Service Plan (Small Company Plan), originally filed on November 10, 1997, at Docket Nos. I-00940035, L-00950105, I-00940034 and I-00960066. The Small Company Plan was proposed as an interim measure to be in place until such time as the Commission and the Federal Communications Commission resolved outstanding policy issues and permanently established rules concerning universal service and access charge reform. Subsequently, Verizon and the Rural Telephone Company Coalition (RTCC) filed an Amended Plan which was attached to their petition at P-00991649 (1649 Petition) as Appendix II, Small Company Universal Service Fund Settlement.¹

In the Global Order, the Commission directed that a USF be established and sized in accordance with the Amended Plan attached to the 1649 Petition as Appendix II, Section A, as altered by Sprint Communications Company L.P. and the United Telephone Company of Pennsylvania's (Sprint/United) inclusion in the plan. The Commission adopted the Amended Plan's proposal that the Fund be sized at \$20.5 million based upon the schedules attached to the Amended Plan.

At a subsequent Technical Conference on November 2, 1999, the RTCC requested additional time to submit updated schedules which would more accurately reflect September 1998 to September 1999 data, and it was further generally agreed among the parties represented at the Technical Conference that the originally estimated sizing of \$20.5 million did not anticipate Sprint/United's participation in the Fund at a level of \$9.0 million. Therefore, since new incumbent local exchange carrier (ILEC) schedules and Sprint/United's original schedule were forthcoming and would affect the eventual tariff filings and the sizing of the Fund, it was recognized and accepted that the sizing figure of \$20.5 million, as well as Verizon's initial payment of \$12.0 million, would increase.

The USF Proposed Regulations were published at 30 Pa.B. 1549 (March 18, 2000). On April 17, 2000, the Commission received written comments from AT&T Communications of Pennsylvania, Inc. (AT&T); Verizon; RTCC; the Attorney General's Office; Office of Consumer Affairs; and Sprint/United. On May 18, 2000, the Commission received comments from IRRC.

On December 5, 2000, a Final Rulemaking Order was entered at the Commission. However, upon review of continued concerns from IRRC, the Commission sua sponte withdrew its Final Rulemaking Order by letter dated February 23, 2001. This Revised Final Rulemaking Order replaces the earlier Final Rulemaking Order, except that Annex B no longer follows. This is because

¹ Since the modified Small Company Plan in the 1649 Petition essentially replaced the November 10, 1997, filing, this Commission viewed the November 10, 1997, filing as being superseded by the Amended Plan. Global Order, P-00991648 and P-00991649 (September 30, 1999).

Annex B consisted of a draft request for proposals (RFP) inviting bids for the administrator of the Fund. The RFP was officially published at 31 Pa.B. 56 (January 6, 2001).

Discussion of Comments

IRRC commented generally that the Commission Order and Regulatory Analysis Form did not contain sufficient information to evaluate the economic and fiscal impact of this regulation or the regulation's reasonableness. Specifically, IRRC was concerned about the dollar amount of the Fund.

In our Proposed Order adopted on January 27, 2000, and entered on February 4, 2000, the Commission ordered that the Fund be sized at \$20.5 million plus an additional \$9.0 million to reflect Sprint/United's participation, or approximately \$29.5 million. In fact, since then, the size of the Fund for the year 2000 has been established by Commission Order entered April 18, 2000, at \$31,220,606.² The size of the Fund will increase each year at the rate at which the number of access lines owned by the 31 recipient carriers increases.³ Although the regulations do not specify a minimum or maximum limit on the dollar amount of the Fund, the size of the Fund is tied directly to changes in the number of access lines each recipient company owns. The contribution rate to the Fund is directly tied to the specific local telecommunication provider's revenues. Those participating carriers which report intrastate end-user retail telecommunication revenues will contribute to the Fund in their pro-rata share.

In its Comments, IRRC also notes that proposed § 63.161(3) (relating to statement of purpose and policy) sets forth the current intent of the Fund, but that proposed § 63.164(1) (relating to Commission oversight) states that the Commission may establish new programs eligible for universal service funding. IRRC objects that the regulation does not specify any limit on the scope of services that could be supported by the Fund. We have amended § 63.164(1) so as to delete this language.

Verizon argues that Pa.R.A.P. 1707 bars the Commission from establishing the USF because the Commission's ability to create and fund a different USF is currently before the Commonwealth Court in a prior appeal.⁴ However, while the merits of that particular fund adopted in 1997 (but never implemented) may be on appeal, nothing in Pa.R.A.P. 1701 bars this Commission from establishing a wholly different fund.

Pa.R.A.P. 1701 generally provides that after an appeal is taken or review of a quasi-judicial order is sought, the trial court or government unit may no longer proceed further in the matter. See Pa.R.A.P. 1701(a). Essentially, the effect of an appeal stays the government unit's ability to act further on the particular matter or issues appealed to the reviewing court. The Pa.R.A.P. 1701 stay, however, is not applicable to the USF established by the Commission in the instant order.

The January 28, 1997, order established a Basic Universal Service (BUS) rate and a different universal service costing methodology. Verizon's appeal is limited to

² *Establishment of a Pennsylvania Universal Service Fund*, M-00001337, Tentative Order, entered April 18, 2000, p.14.

³ *Establishment of a Pennsylvania Universal Service Fund*, M-00001337, Order, entered April 18, 2000, p. 3.

⁴ See *Formal Investigation to Examine and Establish Updated Universal Service Principles and Policies for Telecommunications in the Commonwealth*, PaPUC Docket No. I-00940035, Opinion and Order entered January 28, 1997, *Bell Atlantic-Pennsylvania v. PaPUC* at No. 2420 C.D. 1997, Commonwealth Court of Pennsylvania.

the creation of the prior fund. Verizon's appeal does not create an open-ended stay or bar the Commission's ability to create any fund, only the one at issue in the appealed order. The Commission has not attempted to pursue implementation of the January 28, 1997, BUS fund. Moreover, in the recently issued decision at *Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Commission*, 2790 C.D. 1999, October 25, 2000, the Commonwealth Court has expressly ruled that "the PUC's action on the current USF issue, now before this Court, is not barred by Pa.R.A.P. 1701." *Slip Opinion* at 99.

Verizon also argues that in *Process Gas Consumers Group v. Pa.P.U.C.*, 511 Pa. 88, 511 A.2d 1315 (1986) (*Process Gas*), the Pennsylvania Supreme Court prohibited the Commission from creating a fund similar to the USF because the creation of that particular kind of fund was not within the Commission's delegated authority. The Commission rejects this argument as the fund created in *Process Gas* is distinguishable from the USF established in the Global Order.

In *Process Gas*, the Commission, in response to a Federal program established to reduce the rates of eligible consumers throughout the states, imposed a State-specific Boiler Fuel Rider (BFR) surcharge on certain industrial consumers. The Commission ordered the resulting revenue from the State BFR surcharge to be placed into an escrow account. Subsequently, the Commission ordered that the funds from the escrow account be used to create a conservation program, finding that the General Assembly had conferred in 66 Pa.C.S. § 308 (relating to bureaus and offices) a duty upon the Commission to promote energy conservation. The Pennsylvania Supreme Court concluded that 66 Pa.C.S. § 308 only empowers the Commission to direct an internal bureau to conduct research in the area of conservation, and does not empower the Commission to create a fund or to mandate programs to utilize those funds.

The creation of the USF in the Global Order, however, is within the Commission's delegated authority. One of the primary purposes set forth in 66 Pa.C.S. Chapter 30 is to "[m]aintain universal telecommunications service at affordable rates. . . ." See 66 Pa.C.S. § 3001(1). Another prevailing purpose of the Commission under 66 Pa.C.S. Chapter 30 is to "[e]nsure that customers pay only reasonable charges for local exchange telecommunications services. . . ." See 66 Pa.C.S. § 3001(2). Moreover, 66 Pa.C.S. § 3009(b)(3) provides statutory authority for the Commission to "establish such additional requirements and regulations as it determines to be necessary to ensure the protection of consumers."

Section 254(f) of TA-96 provides that a state may adopt regulations to determine the manner in which intrastate telecommunications providers shall on an equitable and nondiscriminatory basis contribute to the preservation and advancement of universal service. Verizon argues that because section 254(f) of TA-96 refers to "states" instead of "state commissions," the General Assembly, not the Commission, is the only entity authorized to establish a USF in this Commonwealth. Nonetheless, as was previously explained, the General Assembly has delegated authority to the Commission under 66 Pa.C.S. § 501 (relating to general powers) to administer and supervise public utilities doing business within this Commonwealth, and therefore, the Commission may promulgate and enforce regulations to carry out its duties. Under these circumstances, the Commission submits, and the Com-

monwealth Court has now affirmed, that State and Federal statutes confer upon the Commission the power to establish a USF.⁵

IRRC further comments that the Commission did not provide an estimate of the operating cost of the Fund. These costs include those determined by competitive bid (the administrator and auditor), the reserve in § 63.165(b) (relating to calculation of contributions), and the cost to telecommunications providers to report monthly to the administrator.

The Commission did not provide an estimate of the operating cost of the Fund because we are interested in obtaining a low bid from prospective administrators and/or auditors. Publicly estimating how much the administrative and auditor fees should be would jeopardize the competitive bid process. Nevertheless, the administrative and auditing costs of the Fund should be minimal compared to the overall size of the Fund and should not be dependent on the size of the Fund. Rather, the fees should be reflective of the cost of providing the administrative and auditing services.

Regarding the cost to telecommunications providers to provide monthly reports to the administrator, monthly calculations are eliminated in the final-form regulations. Also, the companies can save on mailing expenses by electronically submitting their worksheets to the administrator and by electronically wiring their payments into the Fund.

AT&T commented that although the Commission's establishing a USF is "on the mark," the methodology imposes a disproportionate financial burden of the Fund on competitive local exchange carriers (CLECs), interexchange carriers (IXC), and other telecommunications providers that must pay access and other wholesale charges to LECs because the contribution calculation is based on each provider's end-user retail revenue and thus excludes all revenues received from the sale of wholesale services such as access, resale (toll or local) and unbundled network elements (UNEs). CLECs buy UNEs from ILECs. The revenues the ILEC receives for the sale of wholesale services are not assessed for purposes of calculating the ILEC's contribution to the USF. Contrarily, the CLEC, which does not sell its services at wholesale rates, has entirely assessable revenues. AT&T operates as an IXC and a CLEC within this Commonwealth and it advocates changing the Fund contribution calculation so as to base contributions on each carrier's gross intrastate revenues, less payments made to other carriers for wholesale services.

The Commission developed the formula for determining each company's USF contribution so as to avoid a double counting of revenues for the same services. Whether the Commission allows the ILECs to exclude wholesale revenues from their calculation of assessable revenues, or allows the carriers buying wholesale services to subtract what they pay, the service which ultimately reaches the end-user customer is assessed only once. The Commission believes, for the purposes of this USF, that it is more appropriate to allow the ILECs to subtract those revenues received from the sale of wholesale services because the ILEC is not delivering the service to an end-user customer. The Commission is persuaded by the RTCC and Verizon that this calculation is more revenue-neutral for the eligible recipient carriers. We also note that, unlike the assessments for Commission regulatory expenses under 66 Pa.C.S. § 510 (relating to assessment for regu-

⁵ *Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Commission*, 2790 C.D. 1999, October 25, 2000, *Slip opinion* at p. 104.

latory expenses upon public utilities), there is no set statutory formula that limits our discretion in developing an appropriate USF contribution methodology.

AT&T further asserts that the definition of a USF Recipient in § 63.162 (relating to definitions) should be modified so as to provide that a CLEC operating in the service territory of an ILEC other than Verizon-Pennsylvania or Verizon-North, and certified by the Commission as an eligible telecommunications carrier under 47 U.S.C.A. § 214(e), qualifies as a USF Recipient. We disagree. The Small Company Plan restricted the eligible carriers to a list of approximately 30 rural telephone companies and, by the Global Order, this Commission adopted that theory and added Sprint/United to the limited listing of eligible Fund recipients. The Federal universal fund referenced by AT&T as justification for its position was established for various programs which are not a part of the reasons for establishing the Commonwealth USF. Therefore, 47 U.S.C.A. § 214(e) does not govern our definition.

We further disagree with AT&T regarding its assertion that the costs associated with administering the Fund should be borne only by those receiving disbursements from the Fund. The Fund was designed to be revenue neutral. The 31 companies that are recipients should not have to bear the entire administrative cost.

AT&T also avers that the Commission's proposed supervision and oversight of the Fund administrator should be expanded to provide contributors with an ongoing consultative role in the administration of the Fund and that the regulations should provide for an oversight committee comprising contributors, recipients and Commission employees. While we agree with AT&T that all telecommunications providers' input is helpful and wanted, we do not believe this needs to be expressly incorporated into the regulation. By regulation, all participants will receive annual reports regarding the Fund administration and will have opportunity to comment regarding the administration of the Fund. Any intermittent problems may be addressed to the Commission.

Comments relating to specific sections of the proposed regulations are addressed as follows.

§ 63.161. Statement of purpose and policy.

As noted previously, we agree with IRRC that the last sentence in § 63.161 should be stricken as it appears that future Commission orders could have the effect of changing the regulations. We have further deleted the word "currently" from the regulation. We decline to specify dollar amounts on what the access charges, intraLATA toll rates, and cap on residential local services are to be because these dollar amounts might change in the future. In its September 30, 1999, Global Order, the Commission ordered reductions to \$.009 per minute for access charges, \$.11 per minute for intraLATA toll rates and \$16.00 caps on residential local service charges to consumers.

§ 63.162. Definitions.

We accept IRRC's suggested modifications to the definitions for the terms assessment rate, contributing telecommunications providers, end-user revenue, fund recipient and local service provider, and modify our definitions accordingly. IRRC suggested we delete the term "basic universal service" because it was not used elsewhere in the regulation. Instead, in the definition of "local service provider" we have changed the phrase "basic local exchange services" to "basic universal service" and have kept the definition of BUS. We note that we have defined BUS as "an evolving set of telephone services, as defined

by the Commission, which represents the set of services essential for a resident of this Commonwealth to participate in modern society at any point in time." By order entered April 10, 1995, the Commission has specifically defined BUS to consist of the following service components: 1) single party, voice grade, incoming and outgoing access to the public switched network and usage within a local calling area; 2) touch tone capability; 3) annual local directory; 4) access to operator services; 5) access to directory assistance; 6) access to telecommunications relay service and other services designed for persons with disabilities; and 7) access to emergency services.⁶

§ 63.163. Universal service fund administration.

IRRC is concerned that § 63.163 describes a competitive bidding process, but does not state the term of the contract. IRRC states that the Commission should amend § 63.163(a) to provide the length of the contract awarded. Although we decline to add a temporal constraint to the regulation, we included a sentence in our RFP attached to our original Final Rulemaking Order entered on December 5, 2000, which provided that the initial contract for the administrator shall terminate on December 31, 2003, subject to possible renewals.

§ 63.164. Commission oversight.

IRRC commented that § 63.164(a)(1)–(4) goes beyond the intent of the Fund expressed in the Global Order and should be deleted. The Commission agrees and deletes § 63.164(a)(1)–(4). IRRC also commented regarding the Commission's need to include "the size of the Fund" in the Order required by this subsection. We agree and have added such language to § 63.164(a) of the final-form regulation.

§ 63.165. Calculation of contributions.

RTCC requested additional language in § 63.165 to require that the Fund amount never fall below the initial amount established by the Commission. The Commission declines to add this provision as it is not necessary. We note that the Fund size will never fall below the initial amount established by the Commission because even if recipient carriers have a decrease in access lines, they will not receive less than they initially received because that is how the Small Company Plan was designed and adopted by the Commission in the September 30, 1999, Global Order.

The Commission further rejects RTCC's suggestion that the submission of year-end intrastate end-user retail revenue by March 31 of each year be changed to an earlier date. March 31 is the deadline for the submission of utility gross intrastate operating revenue reports under 66 Pa.C.S. § 510 annual assessment calculations; therefore, it is a good deadline for the submission of year-end intrastate end-user retail revenue reports.

The Commission does agree with RTCC that all calculations and assumptions should be done on an annual basis rather than monthly. The Commission is persuaded by RTCC, Sprint/United and Verizon that the administrative expense of having to recalculate monthly contributions to the Fund outweighs the benefit of having the monthly contributions more accurately reflect monthly revenue fluctuations. The Commission further agrees with RTCC that the calculation should include a factor which increases the Fund in accordance with growth in access lines of eligible recipient carriers.

⁶ In Re: Formal Investigation to Examine and Establish Updated Universal Service Principles and Policies for Telecommunications Services in the Commonwealth; Declaratory Order, Advance Notice of Proposed Rulemaking, Scheduling of Public Forum, Order entered April 10, 1995, Docket Nos. 1-00940035 and L-00950102.

The Commission agrees with Verizon and AT&T in reducing the surcharge for uncollectables from 5% to 1% of the size of the Fund per annum, and in eliminating estimated surplus at the end of each calendar year. Our final-form regulation has been amended accordingly.

IRRC commented that the calculation includes the "Commission approved" administrative and auditing expenses. Section 63.163(a) states the administrator and auditor will be selected by competitive bid. Therefore, it is unclear why the phrase "Commission approved" is needed. The phrase "Commission approved" is needed because in a contract, there may be per diem charges for things not covered in the flat-rate charge for administering the Fund. Extra expenses, which may include traveling expenses, auditing expenses and legal expenses, are those expenses above that which were contemplated and bargained for in the flat rate charge and these expenses may be recovered, but only with Commission approval.

IRRC further commented that the language describing the illustrated calculation was confusing and IRRC suggested that the formula could stand alone in the regulation without the description. We deleted the language describing the formula for calculating contributions. Additionally, IRRC noted that the definition for "W" could be better. We added language describing how to calculate "W." IRRC questioned whether we should amend the calculation of "Y" such that $Y = 1\% \text{ times } (X+W)$ instead of what had been written, $Y = 1\% \text{ times } X$. We agree with IRRC that the 1% for uncollectables should be multiplied by the prior year's size of the Fund plus any increase in the Fund due to growth in access lines of the recipient carriers. We amend the calculation of "Y" accordingly. Finally, we changed the definition of X such that the prior year's size of the Fund is adjusted for any surplus or shortfall experienced the prior year.

§ 63.166. Administrator criteria.

We accept IRRC's comments that the administrator be expressly neutral, impartial and independent from telecommunications services providers operating in this Commonwealth. We have modified our regulation accordingly.

IRRC commented that the term "affiliate" should be defined in § 63.166(3). We define "affiliate" as in the *Webster's Collegiate Dictionary 10th Edition* as "a person or organization closely associated with another typically in a dependent or subordinate position." IRRC commented that we should explain whether this provision, which excludes all affiliates, including telecommunications providers outside of this Commonwealth, was our intent. Yes, it was. We have added additional language to the regulation to further clarify our position.

Additionally, in response to IRRC's comment that the phrase "common carrier" is undefined and should be clarified, we remove the term "common carrier" and substitute the word "telecommunications," which needs no definition.

In response to IRRC's comments regarding the Administrator's requirement to report to the Commission any changes in its Board composition, we agree, and have added such language to the regulation.

§ 63.167. Administrator's duties.

We accept IRRC's comments regarding administrator duties in this section and modify § 63.167 accordingly. We have changed references to "companies" or "entities" to read "contributing telecommunications providers" in the interest of using consistent language. We have changed the deadline for the administrator's annual report from July 1 to September 1.

Regarding § 63.167(2), IRRC commented the Commission should explain the need to report contributions on a monthly basis. While the assessment calculations are annual, billings and payments are monthly. The form is mailed with payment due on a monthly basis because the form identifies the carrier, the carrier's current address, phone numbers, utility code and the monthly amount due. The form acts as an invoice and a way of tracking incoming payments. We have amended the text of the regulation to clarify our intent.

Regarding § 63.167(7), IRRC commented that if the administrator believes a contributing telecommunications provider is guilty of submitting false information or another irregularity, and the Commission agrees, the type of action taken against a contributing telecommunications provider should be specified. IRRC suggests that the regulation should reference either a citation to corrective action or other penalty that will be assessed to the contributing telecommunications provider. Accordingly, we will cross reference this subsection to the section of these rules dealing with enforcement, § 63.171.

Regarding § 63.167(8), IRRC wants to know where the return on investment will be placed. Will profits be reinvested in selected instruments, or will the moneys be placed into the Fund? The interest earned on the Fund monies will be reinvested into the Fund. This is specified in the final-form regulation.

Regarding § 63.167(9), any potential Fund shortfall should be reported as soon as possible because it would involve the Commission having to recalculate assessment rates and this would take time before Funds flowing in would exceed Funds flowing out. Also, we have removed the term "data analysis" from the regulation to remove any uncertainty caused by this term.

Regarding § 63.167(10), we believe it is important that the forms be mailed annually to contributing telecommunications providers as opposed to sending the forms electronically or by facsimile. Currently, electronic mail and fax machines are not viewed as reliable as regular mail.

Regarding § 63.167(12), IRRC wants to know what is meant by "promptly." Depending upon the type of data request, the Commission will determine what is an acceptably prompt response. This discretion is necessary to effective oversight of the Fund administration. For example, if the Commission requires a recalculation of contributions, the Commission might expect a prompt response to be within 2 weeks. However, if the Commission asks whether a particular contributor is delinquent and by how much, the Commission might expect a prompt response to be one within a couple of days.

Regarding § 63.167(23), IRRC commented the phrase "on a timely basis" is unacceptably vague. IRRC suggested the Commission should consider adding a specific minimum time period that an administrator must follow to alert the Commission if short-term borrowing is needed. We agree and remove the phrase "on a timely basis" and substitute the phrase "at least 60 days before short-term borrowing is necessary."

Regarding § 63.167(24), we agree with IRRC and omit compliance requirements with "procedures and guidelines" as there are none currently other than an investment guideline attached as an appendix to the current sole source contract with the National Exchange of Carriers Association (NECA) as an interim administrator. To clarify, we have substituted in the revised final-form regulations the phrase, "the contract and Commission Orders" for "procedures and guidelines."

§ 63.168. Auditor's duties.

IRRC noted that in the original rulemaking the regulations stated that the Administrator's report and the Auditor's report were due on the same date, July 1 of each year. This was a typographical error. The Administrator's report should be due 60 days after the Auditor's report is due. Therefore, we changed the language in § 63.163 to reflect that the Administrator's report is due on September 1, and we did not change the auditor's deadline for a report in § 63.168.

IRRC further requested we amend or explain the meaning of the sentence: "Thereafter, the Fund shall be audited in the same manner annually." We accept IRRC's comments regarding these matters and modify § 63.168 so as to clarify that an audit of Fund collections and disbursements will be done annually.

§ 63.169. Collection of universal service fund contributions.

IRRC contends that it is unclear why each carrier must return the form within 30 days of issuance. Second, IRRC contends the phrase "end-user revenue" should replace the phrase "end-user telecommunications retail revenue." We have addressed IRRC's two concerns in our revised final-form regulations.

At the beginning of the calendar year, the administrator will provide monthly reporting forms to each contributing telecommunications provider. Each carrier will complete and remit the form to the administrator along with its monthly contribution in full. Failure to make timely payment will result in the levy of a late-payment charge of 1.5% per month pro rata per diem on the delinquent contribution. If a carrier's contribution to the USF in any given year is less than or equal to \$120, that carrier will not be required to submit a contribution. We have added this figure to the regulation. Also, we eliminated the phrase "end-user telecommunications retail revenue."

§ 63.170. End-user surcharge prohibited.

IRRC asked for clarity regarding whether a provider can recover USF contributions through any type of direct or indirect charge even though a surcharge on customer bills is expressly prohibited. To clarify as requested, no telecommunications service provider may implement a customer or end-user surcharge to recover its contribution to the USF. All telecommunications service providers are prohibited from recovering these contributions through any type of direct or indirect charge. Section 63.170 is expanded to include this clarification.

§ 63.171. Sunset provision.

IRRC commented that § 63.171 states the "Fund shall expire on December 31, 2003, unless the term of the Fund is extended by the Commission." The regulations would thus allow the term of the Fund to be extended by Commission order. The regulation does not specify under what authority or circumstances the Commission would extend the term of the Fund beyond December 31, 2003. Therefore, the term of the Fund is unclear. IRRC recommends that if the Commission wants to rescind this regulation at some point, it should do so by promulgating another regulation. IRRC recommends the provision be deleted from the final-form version. We agree and delete § 63.171.

In addition to the previously-noted modifications, the final-form USF regulations hereby adopted include a number of grammatical, nonsubstantive changes intended only for clarification.

Overall, we believe that the final-form regulations, as herein amended in consideration of comments received, and as follows in Annex A, are consistent with the public interest and shall be adopted at this time through final order. Accordingly, under authority in 66 Pa.C.S. § 501, the Commonwealth Documents Law (45 P.S. § 1201, et seq.) and regulations promulgated thereunder in 1 Pa. Code §§ 7.1—7.4, we add the regulations in §§ 63.161—63.171 as previously discussed and as set forth in Annex A.

Therefore,

It Is Ordered that:

1. The Commission's Final Rulemaking Order entered on December 5, 2000, is hereby rescinded and replaced with this Revised Final Rulemaking Order.

2. Chapter 63 of the regulations of the Commission is amended by adding §§ 63.161—63.171 to read as set forth in Annex A.

3. The Secretary shall submit this order and Annex A for review by the designated Standing Committees of both houses of the General Assembly, and for review and approval of IRRC.

4. The Secretary shall submit this order and Annex A to the Governor's Budget Office for review of fiscal impact.

5. The Secretary shall submit a copy of this order and Annex A to the Office of Attorney General for review as to legality.

6. The Secretary shall certify this order and Annex A and deposit them with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

7. A copy of this order and Annex A be filed in the Joint Petitions for Global Resolution proceeding at P-00991648 and P-00991649 as well as at Docket No. M-00001337, *Establishment of a Pennsylvania Universal Service Fund*.

8. A copy of this Order and Annex A shall be served upon the Pennsylvania Telephone Association, all jurisdictional telecommunications utilities, the Office of Trial Staff, Office of Consumer Advocate and the Office of Small Business Advocate.

9. The final-form regulations embodied in Annex A shall become effective upon publication in the *Pennsylvania Bulletin*.

10. NECA continues as the interim administrator to assist in administering the interim USF now in place until final regulations are approved and a permanent administrator is selected through a competitive bidding process.

JAMES J. MCNULTY,
Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 31 Pa.B. 2855 (June 2, 2001).

Fiscal Note: Fiscal Note 57-214 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 63. TELEPHONE SERVICE

Subchapter L. UNIVERSAL SERVICE

Sec.

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63.170.	End-user surcharge prohibited.
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§ 63.161. Statement of purpose and policy.

On July 8, 1993, the General Assembly enacted 66 Pa.C.S. Chapter 30 (relating to alternative form of regulation of telecommunications services) which provides for the regulatory reform of the telephone industry in this Commonwealth.

(1) The General Assembly's first declaration of policy in Chapter 30 is to "[m]aintain universal telecommunications services at affordable rates while encouraging the accelerated deployment of a universally available state-of-the-art, interactive, public switched broadband telecommunications network in rural, suburban and urban areas." See 66 Pa.C.S. § 3001(1) (relating to declaration of policy).

(2) The General Assembly assigned to the Commission and this Commonwealth's telecommunications providers responsibility for assuring and maintaining universal service in this Commonwealth. Given an increasingly competitive telecommunications marketplace, it is necessary to establish a competitively-neutral universal service funding mechanism to assure and maintain universal service and to promote the development of competition in telecommunications markets throughout this Commonwealth.

(3) The purpose of the Fund is to maintain the affordability of local service rates for end-user customers while allowing rural telephone companies to reduce access charges and intraLATA toll rates, on a revenue-neutral basis, thereby encouraging greater competition.

§ 63.162. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

Assessment rate—The percentage rate which when multiplied by each contributing telecommunications provider's total intraState end-user telecommunications retail revenue for the prior month will determine that provider's monthly contribution to the annual Fund budget. The assessment rate is computed annually under § 63.165 (relating to calculation of contributions).

Basic universal service—An evolving set of telephone services, as defined by the Commission, which represents the set of services essential for a resident of this Commonwealth to participate in modern society at any point in time.

Contributing telecommunications providers—Telecommunications carriers that provide intraState telecommunications services. Whether a provider or class of provid-

ers is a telecommunications carrier will be determined based upon whether the provider or class of providers is considered a telecommunications carrier under Federal law as interpreted by the Federal Communications Commission except that wireless carriers are exempt from this subchapter under 66 Pa.C.S. § 102(2)(IV) (relating to definitions).

End-user revenue—Revenues received from telecommunications subscribers who consume the final service unadjusted for any expense or other purpose. Total intrastate end-user telecommunications retail revenue does not include those revenues received from access, resale (toll or local), or the sale of unbundled network elements or other services which are essentially wholesale in nature.

Fund—The Universal Service Fund.

Fund recipient—An entity which receives funds from the Fund. Incumbent local exchange carriers operating in this Commonwealth, with the exception of Verizon Pennsylvania and Verizon North, Inc. are eligible Fund recipients.

Local service provider—A telecommunications company to which retail customers subscribe for basic universal service.

§ 63.163. Universal service fund administration.

(a) The Commission will designate within the context of a competitive bidding process a third-party administrator and a fund auditor to maintain and audit the Fund consistent with this subchapter.

(b) The Fund shall be administered in a manner ensuring that the Fund is exempt from State, Federal, and local taxes. The Fund administrator shall seek tax exempt status from the Internal Revenue Service.

(c) The Fund shall be established and kept separate from any other Commonwealth general fund.

(d) The administrator shall be responsible for assessing contributing telecommunications providers for contributions to the Fund as provided for in § 63.165 (relating to calculation of contributions). The administrator shall also be responsible for receiving contributions, validating contributions and distributing payments to fund recipients.

(e) The administrator shall file with the Commission by September 1 of each year an annual report which shall include an income statement of the Fund's activity for the preceding calendar year, a list of recommendations pertaining to operations of the Fund, and a proposed budget and assessment rates for the upcoming year. A copy of the report will be served contemporaneously upon the Office of Consumer Advocate, Office of Small Business Advocate and all telecommunications carriers participating in the Fund.

(f) Interested parties shall be provided the opportunity to file comments to the administrator's report within 30 days of its submission to the Commission. Replies to comments shall be filed within 15 days thereafter. Comments should be addressed to the Pennsylvania Public Utility Commission's Secretary's Bureau, P. O. Box 3265, Harrisburg, PA 17105-3265. The comments should be filed at Docket No. M-00001337.

§ 63.164. Commission oversight.

The Commission will issue an order within 90 days of receipt of the administrator's annual report, which establishes the size of the Fund, a budget, assessment rate for contributing telecommunications providers, and administrative guidelines for the upcoming calendar year.

§ 63.165. Calculation of contributions.

(a) Contributing telecommunications providers shall submit an affidavit to the administrator by March 31 of each year, identifying the provider's total intrastate end-user telecommunications retail revenue for the previous calendar year. A copy shall be served upon the Commission.

(b) In determining the annual assessment rate, the administrator will utilize the following calculation:

$$\frac{W + X + Y + Z \times \frac{B}{12}}{A} = C$$

W = Increase in funding requirement due to growth in access lines of recipient carries. W equals the access line growth percentage for each recipient carrier multiplied by each recipient carrier's prior year net support (prior year funding minus prior year payment). The individual recipient carriers' required fund increases are totaled to yield W. $W = ALG \times (PYF-PYP)$.

X = Prior year's size of fund minus the estimated surplus from the prior year or plus any shortfall from the prior year.

Y = Surcharge for uncollectables is 1% times (X + W).

Z = Commission approved administrative and auditing expenses.

A = Aggregate Statewide end-user intraState retail revenue of all contributing telecommunications providers for the previous calendar year.

B = Individual contributing telecommunications provider's end-user intra-state retail revenue for the prior calendar year.

C = Individual contributing telecommunications provider's monthly contribution.

(c) To the extent the funding received from providers in any 1 year exceeds the disbursements required for the Fund plus the cost of administering the Fund (including 1% of the total size of the Fund to cover delinquent accounts and contingencies), the excess shall remain in the Fund, and the subsequent year's Fund size reduced by that surplus.

§ 63.166. Administrator criteria.

The administrator shall meet the following criteria:

(1) The administrator shall be neutral, impartial and independent from telecommunications service providers operating in this Commonwealth.

(2) The administrator may not advocate specific positions before the Commission in nonuniversal service administrative proceedings related to telecommunications issues.

(3) The administrator may not be an affiliate of any provider of telecommunications services. The administrator may not be closely associated with any provider of telecommunications services in a dependent or subordinate position.

(4) If the administrator has a board of directors that includes members with direct financial interests in entities that contribute to or receive support from the Fund, no more than a third of the board members may represent any one category (for example, local exchange carriers or interchange carriers) of contributing carriers or support recipients, and the Board's composition shall reflect the broad base of contributors to and recipients of

Fund assets. For purposes of this restriction, a direct financial interest exists when the administrator or Board member:

(i) Is an employee of a telecommunications carrier.

(ii) Owns any equity interests in bonds or equity instruments issued by any telecommunications carrier.

(iii) Owns mutual funds that invest more than 50% of its assets in telecommunications securities.

(5) If the administrator's board composition changes during its contractual period, the administrator shall notify the Commission immediately.

§ 63.167. Administrator's duties.

The administrator shall have the following duties:

(1) Maintain a database to track contributing telecommunications providers.

(2) Develop Commission-approved forms which all telecommunications service providers will submit to the administrator on a monthly basis with their monthly contributions.

(3) Review the completed forms to ensure completeness and accuracy of reported revenue and Fund assessments and contact providers whose accounts contain unexplained variances in reported revenues or Fund assessments.

(4) Assess late-payment charges of 1.5% per month pro rata per diem on contributions that are 30 days or more past due.

(5) Send initial notices of delinquency to delinquent contributors when a payment is 30 days past due and follow up with at least one subsequent written notice, phone call, or both, to the contributor to pursue collection of Fund payments that are 60 days past due.

(6) Maintain logs of notices to delinquent contributors and refer to the Commission for further enforcement, on a monthly basis, all accounts more than 90-days past due.

(7) Immediately inform the Commission if the administrator has reason to believe that a contributing telecommunications provider has submitted false information to the administrator with the intent of obtaining fraudulent funding or underreported end-user revenue, or if any other irregularity occurs in the operation or administration of the Fund. Penalties that will be assessed to the contributing telecommunications provider are addressed in § 63.171 (relating to enforcement).

(8) Invest Fund moneys in interest-bearing instruments designed to minimize risk of loss while providing maximum liquidity. Return on investment shall be placed into the Fund. Permitted investments include:

(i) Marketable obligations directly and fully guaranteed by the United States government.

(ii) Federally-insured checking, money market accounts or certificates of deposit.

(iii) Other accounts expressly approved by the Commission.

(9) Promptly advise the Commission if the administrator projects any potential Fund shortfall or if Fund disbursements exceed receipts in a given month.

(10) In January of each year, mail reporting forms to each contributing telecommunications provider to acquire appropriate data to determine the following:

(i) Each contributing telecommunications provider's intraState end-user telecommunications retail revenue for the prior calendar year.

(ii) The Fund recipients' access line growth which translates into a dollar amount increase in the size of the next year's Fund.

(iii) Aggregate Statewide end-user intraState retail revenue of all contributing telecommunications providers for the previous calendar year.

(iv) Each contributing telecommunications provider's contribution for the following calendar year.

(11) Cooperate with the auditor selected by the Commission and provide data and information reasonably required to support audit activities.

(12) Promptly respond to Commission requests for information pertaining to Fund administration.

(13) Maintain adequate principal liability insurance coverage, criminal liability coverage, and a sufficient umbrella liability policy.

(14) Prepare reports of Fund activity for the Commission on a monthly basis detailing carrier assessments, delinquent payers, late-payment charges, fund disbursements, interest earned and cumulative results.

(15) Maintain records by contributor and by recipient.

(16) Provide additional reports as requested by the Commission.

(17) Maintain a statement of financial condition (balance sheet) and income statement for the total fund, and a sources and uses of funds statement, which will tie to the total Fund income statement.

(18) Deliver the balance sheet, income statement, and sources and uses of funds statement to the Fund auditor by May 1 of each year so that the auditor may prepare its report.

(19) Maintain a system of internal controls.

(20) Consider the auditor's report in preparing the annual report for submission to the Commission and include any undercollections or overcollections identified by the audit report in developing a proposed budget for the upcoming fiscal year.

(21) Submit the administrator's annual report by September 1 or 60 days following receipt of the audit report, whichever is later.

(22) With prior Commission approval, borrow monies to cover the short-term liabilities of the Fund caused by undercollections.

(23) At least 60 days before short-term borrowing is necessary, the administrator shall provide formal notice to the Commission which identifies the amount, the proposed lending source and the terms and conditions of the loan.

(24) Comply with the contract and Commission orders. Any dispute between the administrator and any contributing telecommunications provider shall be submitted to

the Commission for resolution.

(25) Have access to the books of account of all telecommunications service providers to the limited extent necessary to verify their intraState end-user telecommunications retail revenues and other information used by the administrator in determining assessments and disbursements for the Fund.

(26) Treat competitive and financial information received as confidential and proprietary and only release that information upon order of the Commission.

(27) Operate on a fiscal year which shall be the same as the calendar year.

§ 63.168. Auditor's duties.

(a) An independent external auditor chosen by the Commission will audit the Fund records covering both collections and disbursements for the fiscal year. The costs for conducting audits will be included in the computation of Fund requirements. Thereafter, an audit of the Fund collections and disbursements will be done annually.

(b) Following the audit, the Fund auditor will prepare and submit a report to the Commission and the administrator by July 1 of each year. The audit report should make recommendations regarding the finances of the Fund and should identify undercollections or overcollections experienced by the Fund in the previous year.

§ 63.169. Collection of universal service fund contributions.

(a) At the beginning of the calendar year, the administrator will provide monthly reporting forms to each contributing telecommunications provider. Each carrier will complete the form monthly using the calculation as described in § 63.165 (relating to calculation of contributions) and remit the form to the administrator along with its monthly contribution in full.

(b) Failure to make timely payment will result in the levy of a late payment charge of 1.5% per month pro rata per diem on the delinquent contribution.

(c) If a carrier's contribution to the Fund in a given year is less than \$120, that carrier will not be required to submit a contribution.

§ 63.170. End-user surcharge prohibited.

A telecommunications service provider may not implement a customer or end-user surcharge or any other direct or indirect charge to recover any contributions to the Fund.

§ 63.171. Enforcement.

A telecommunications service provider that fails to pay, in a timely manner, any contribution required under this subchapter may be prohibited from providing service in this Commonwealth and be subject to other penalty as authorized under law.

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