

# STATEMENTS OF POLICY

## Title 52—PUBLIC UTILITIES

### PENNSYLVANIA PUBLIC UTILITY COMMISSION

[ 52 PA. CODE CH. 69 ]

[ 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

The Pennsylvania Public Utility Commission (Commission) on July 11, 2019, 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  
July 11, 2019

*Commissioners Present:* Gladys Brown Dutrieuille, Chairperson, statement follows, dissenting; David W. Sweet, Vice Chairperson; Norman J. Kennard; Andrew G. Place, statement follows, dissenting; 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*

#### Final Policy Statement Order

*By the Commission:*

On November 8, 2018, the Commission issued an Order<sup>1</sup> proposing to amend 52 Pa. Code Chapter 69 of its regulations by adding a Proposed Policy Statement codified at Section 69.3701 to provide guidance to jurisdictional telecommunications public utilities in Pennsylvania that they must report all gross intrastate operating revenues, including on all special access or other similar jurisdictionally-mixed telecommunications services, for Section 510 assessment purposes. Specifically, the Commission proposed that jurisdictional telecommunications carriers that offer special access or other similar jurisdictionally-mixed telecommunications services but report zero gross intrastate revenues on those services due to the Federal Communications Commission's (FCC) ten percent contamination rule (ten percent rule) are obligated, for assessment purposes, to report their de facto gross intrastate operating revenues on such telecommunications services with the Commission on March 31st of each year, as a part of their overall statutory obligation to pay a reasonable share of the costs of administering the Public Utility Code (Code), 66 Pa.C.S. §§ 101—3316.

The Commission requested interested parties to file comments and replies to the Order and the attached Annex A that set forth the Proposed Policy Statement at Section 69.3701. The Order and Annex A were published

<sup>1</sup> See Reporting of Intrastate Operating Revenues for Section 510 Assessment Purposes by Jurisdictional Telecommunications Carriers Offering Special Access and Other Similar Jurisdictionally-Mixed Telecommunications Services, Docket No. M-2018-3004578, Proposed Policy Statement (Order entered November 8, 2018) (Order).

in the *Pennsylvania Bulletin* on March 2, 2019.<sup>2</sup> Comments and replies were submitted by interested parties.

After reviewing the filed comments and replies thereto, this Order establishes a Final Policy Statement set forth in attached Annex A that amends Chapter 69 of our regulations. The Final Policy Statement provides guidance to all jurisdictional telecommunications services providers that they are legally obligated to report, for assessment purposes, their de facto gross intrastate operating revenues for special access services and other similar jurisdictionally-mixed telecommunications services with the Commission on March 31st of each year in order to recover the reasonable share of the costs of administering the Code.

#### *Background*

Pursuant to the Code, the Commission has regulatory authority over all public utilities and certain licensed entities operating and providing service to the public in Pennsylvania. This plenary regulatory authority grants the Commission the authority to impose annual fiscal assessments upon jurisdictional telecommunications carriers in order for the Commission to recover these carriers' "reasonable share" of the costs of administering the Code. See 66 Pa.C.S. § 510. However, over time, the Commission's Fiscal Office and the Bureaus of Technical Utility Services, Investigation & Enforcement, Audits, and Law (Staff) identified some telecommunications carriers certificated as Competitive Access Providers (CAPs) who have reported revenues inconsistently or repeatedly reported zero intrastate revenues. 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 a Secretarial Letter to all carriers who reported zero intrastate revenues 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.

The Commission issued an Order to establish a Proposed Policy Statement on the reporting of gross intrastate operating revenues for purposes of calculating assessments under 66 Pa.C.S. § 510 by regulated telecommunications carriers in Pennsylvania that offer special access or other services the Commission terms "jurisdictionally-mixed." Specifically, the Order set forth the Commission's determination that pursuant to Section 510 of the Code, 66 Pa.C.S. § 510, jurisdictional providers of special access services or other similar jurisdictionally-mixed telecommunications services have an obligation to report their de facto gross intrastate operating revenues on these telecommunications services, as part of their gross intrastate operating revenues, in order to pay their reasonable share of the costs of administering the Code. Further, in the Order, the Commission determined that the FCC's ten percent contamination rule does not preempt or otherwise preclude jurisdictional carriers from reporting gross intrastate operating revenues on all tele-

<sup>2</sup> 49 Pa.B. 929 (March 2, 2019).

communications services, including special access or other similar jurisdictionally-mixed telecommunications services.

Attached to the Order in Annex A was a Proposed Policy Statement that amended Chapter 69 of its regulations by adding Section 69.3701. The goal of the proposal was to provide guidance to those jurisdictional carriers who may not be reporting such revenues from special access or other similar jurisdictionally-mixed telecommunications services due to their reliance on the ten percent rule.

The Commission requested interested parties to file comments and replies to the Order and Annex A. Comments were filed by the Broadband Cable Association of Pennsylvania, Inc. (BCAP), the Pennsylvania Telephone Association (PTA), Verizon Companies<sup>3</sup> (Verizon), Crown Castle Fiber LLC (Crown Castle), Frontier Communications<sup>4</sup> (Frontier) and the Pennsylvania Office of Consumer Advocate (OCA). The OCA also filed Reply Comments. The Commission provides a summary of the filed Comments and OCA's Reply Comments.

#### Comments

##### a. BCAP

In its Comments, BCAP urges the Commission to withdraw its Proposed Policy Statement for various reasons. In summary fashion, BCAP states that the Commission's policy determination that jurisdictional telecommunications carriers that offer and provide special access or other similar jurisdictionally-mixed telecommunications services are obligated to ascertain and report their de facto gross intrastate revenues from providing these telecommunications services in Pennsylvania and to pay additional intrastate regulatory fees based on such reported revenues would be inconsistent with federal and state law and would pose significant practical hurdles. BCAP Comments at 1-2.

Specifically, BCAP asserts that the Commission's core premise, that the FCC's ten percent contamination rule does not preempt or otherwise preclude carriers' obligations to report their de facto gross intrastate operating revenues from special access or similar services, is based on an incomplete and ultimately inaccurate understanding of federal precedent. Id. at 2. Further, BCAP asserts that the Proposed Policy Statement's central claim that the ten percent rule is "designed to allocate costs only and regulatory authority over ratemaking," and thus does not extend to revenue allocations for purposes of assessing state regulatory fees, does not hold up to scrutiny. Id. (Emphasis in original). BCAP states that the Commission overlooks subsequent FCC precedent extending the ten percent rule to revenue allocation and acknowledging its impact on regulatory fee assessments. Id. at 3.

BCAP states that in its 1997 order establishing the rules governing the federal universal service program, the FCC made clear that the ten percent rule applies to revenue allocation just as it does to cost allocation.<sup>5</sup> Id. BCAP states that since its determination in 1997, the

<sup>3</sup> Verizon Pennsylvania LLC, Verizon North LLC, MCImetro Access Transmissions Corp. and XO Communications Services, LLC.

<sup>4</sup> Frontier Communications of Breezewood (Utility Code: 310400) Frontier Communications of Pennsylvania (Utility Code: 311250) Frontier Communications of Canton (Utility Code: 310550) Frontier Communications of Lakewood (Utility Code: 311750) Frontier Communications of Oswayo River (Utility Code: 312600) Frontier Communications Commonwealth Telephone Company (Utility Code: 310800) Citizens Telecommunications Company of NY (Utility Code: 310174) Frontier Communications of America (Utility Code: 310376) Frontier Communications CTSI Company (Utility Code: 311095) CTE Telecom d/b/a Commonwealth Long Distance (Utility Code: 311225). Frontier simply filed a letter in support of the comments of PTA.

<sup>5</sup> See Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776 ¶ 778 (1997 Universal Service Report and Order).

FCC's Form 499-A has required telecommunications providers to allocate these revenues in accordance with the ten percent rule. Id.

Furthermore, BCAP states that the FCC reaffirmed the application of the ten percent rule to revenue allocation in a 2017 order, responding to a series of requests to review determinations made by the Universal Service Administrative Company (USAC) on whether revenues associated with mixed-use special access lines qualify as interstate when assessing contributions to the federal Universal Service Fund (FUSF).<sup>6</sup> Id. BCAP states that the FCC had rejected the position of certain petitioners who argued that the ten percent rule "does not apply to revenues" but rather only to "cost allocation," which it believes to be the same view espoused by the Commission in its Proposed Policy Statement. Id. at 3-4. BCAP states that the FCC went on to explain that "prior decisions have clearly incorporated the [ten percent rule] into the Commission's framework" for revenue allocation, and that the time for challenging that well-established determination "has long since passed." Id. at 4. Thus, USAC had appropriately applied the ten percent rule to "determine whether private line revenues should be assigned to the interstate jurisdiction."<sup>7</sup> Id.

BCAP states that last year, the FCC specifically acknowledged that its jurisdictional separations procedures, including the ten percent rule, govern revenue allocations in the regulatory fee context. Id. BCAP states that in a notice of proposed rulemaking on reforms to its jurisdictional separations approach, the FCC explained that states "use separations results to determine the amount of intrastate universal service support and to calculate regulatory fees."<sup>8</sup> Id. BCAP asserts that by overlooking this explicit and recent acknowledgment by the FCC, as well as the FCC's repeated rulings applying the ten percent rule to revenue allocations, the proposal arrives at an overly narrow understanding of the scope and preemptive effect of the ten percent rule. Id.

Additionally, BCAP states that the Eighth Circuit's decision in *Scott*<sup>9</sup> does not compel a different conclusion. Id. BCAP asserts that the *Scott* court concluded that the FCC's ten percent rule did not "preclude all state regulation" of special access services, and that performance reporting was entirely distinct from the types of allocation questions addressed by the ten percent rule.<sup>10</sup> Id. at 5. BCAP argues that, by contrast, the Commission's Proposed Policy Statement directly implicates the allocation questions addressed by the ten percent rule. Id. BCAP argues that the *Scott* court specifically recognizes that the ten percent rule applies to the allocation not only of "costs" but also of "revenues, expenses, taxes and reserves between state and interstate jurisdictions."<sup>11</sup> Id. BCAP states that this undermines rather than supports the Commission's expressed view of the ten percent rule. Id.

Additionally, BCAP states that the Commission's Proposed Policy Statement also overlooks impediments to its suggested approach under state law. Id. BCAP notes that many special access services and other jurisdictionally-mixed services offered by its members are provided using

<sup>6</sup> See Federal-State Joint Board on Universal Service, Order, 32 FCC Rcd 2140 (WCB 2017) (2017 Ten Percent Order).

<sup>7</sup> See 2017 Ten Percent Order ¶ 8 (emphasis added).

<sup>8</sup> See Jurisdictional Separations and Referral to the Federal-State Joint Board, Further Notice of Proposed Rulemaking, 33 FCC Rcd 7261 ¶ 11 (2018).

<sup>9</sup> *Qwest Corporation v. Scott*, 380 F.3d 367 (8th Cir. 2004) (*Scott*).

<sup>10</sup> *Scott*, 380 F.3d at 374 (noting that, "when the 10% Order is read as a whole, the Commission's expressed intent to preempt state regulation does not extend to performance measurements and standards").

<sup>11</sup> *Scott*, 380 F.3d at 371 (quoting 47 CFR § 36.1(b)).

Internet Protocol (IP) technology.<sup>12</sup> Id. BCAP states that Pennsylvania law prevents the Commission from “enact[ing] or enforc[ing], either directly or indirectly, any law, rule, regulation, standard, order or other provision having the force or effect of law that regulates, or has the effect of regulating, the rates, terms and conditions of VoIP service or IP-enabled service.”<sup>13</sup> Id. BCAP asserts that this statute makes clear that this prohibition should be construed broadly and contains no such specific carve-out that would justify this expansion of state regulatory fees.<sup>14</sup> Id. at 6.

Lastly, BCAP asserts that as a practical matter BCAP’s members would face significant hurdles in complying with an obligation to ascertain and report “de facto” intrastate revenues attributable to special access, transport, or similar jurisdictionally mixed-use services. Id. BCAP states that the FCC has acknowledged that the best method to verify and ascertain the jurisdictional status of the traffic that traverses a special access private line for purposes of complying with regulatory obligations is through customer certifications.<sup>15</sup> Id. BCAP states that its member companies rely on customer certifications to determine whether a particular special access, transport, or similar line is carrying intrastate or interstate traffic that is above or below the ten percent rule. Id. BCAP asserts that if the Proposed Policy Statement is adopted, its member companies would not be able to ascertain the endpoints of any particular transmission passing over these lines since they do not currently monitor usage on these facilities. Id. at 7. In short, BCAP asserts that its members lack a reliable mechanism to ascertain the “de facto” intrastate revenues attributable to special access or similar services. Id.

#### b. *Pennsylvania Telephone Association*

In its Comments, the PTA recommends that the Commission wait to implement the Proposed Policy Statement until it has conducted a collaborative process with interested stakeholders to examine the complex issues underlying and implicated by its policy determinations regarding the FCC’s ten percent rule. PTA Comments at 2. The PTA asserts that the convergence of technologies and prevalence of data-based traffic has significantly complicated issues with attempting to determine whether services are intrastate or interstate for jurisdictional purposes. Id. The PTA notes that when a special access circuit is purchased, the customer, not the carrier, makes the inter/intra distinction at the time of sale. Id. Further, the PTA states that carriers do not inspect each data packet to determine jurisdiction. Id. The PTA asserts that to require a carrier to somehow apportion the intrastate pieces of traffic traversing a special access circuit would cause security and privacy issues and this action would violate federal policies and the underlying reason for the ten percent rule. Id.

The PTA states that special access services and other similarly mixed jurisdictional services are overwhelmingly interstate in nature as the FCC has concluded that

<sup>12</sup> 73 Pa.C.S. § 2251.3 (defining “IP-enabled service” as any “service, capability, functionality or application provided using Internet protocol or any successor protocol that enables an end user to send or receive a communication in Internet protocol format or any successor format, regardless of whether the communication is voice, data or video”).

<sup>13</sup> 73 P.S. § 2251.4. We note that BCAP points out that the prohibition of regulation in Section 2251.4 is expressly limited to the regulation of “rates” and “terms and conditions of VoIP service.” Section 510 assessments do not address end-user rates or terms and conditions of service.

<sup>14</sup> 73 P.S. § 2251.6.

<sup>15</sup> 2017 Ten Percent Order ¶ 3 (citing MTS and WATS Market Structure, Amendment of Part 36 of the Commission’s Rules and Establishment of a Joint Board, Recommended Decision and Order, 4 FCC Rcd 1352 ¶ 32 (1989) (Ten Percent Rule Recommended Decision)).

broadband Internet access service (BIAS) is considered interstate for regulatory purposes.<sup>16</sup> Id. at 3.

Lastly, the PTA expresses concern that adoption of the Proposed Policy Statement would impose new reporting and record-keeping burdens on its rural local exchange carrier (RLEC) members. Id. at 4. Therefore, the PTA supports a collaborative approach that can facilitate the exchange of information regarding the challenges and potential benefits of the Proposed Policy Statement, such as how to determine which revenues’ services would fall within the ambit of the concept of “de facto gross intrastate operating revenues” and what specific services fall within the ambit of the phrase “or other similar jurisdictionally-mixed telecommunications services.” Id. at 3-4.

#### c. *Verizon*

In its Comments, Verizon suggests that the Commission should not issue the Proposed Policy Statement and decline to attempt to assess any portion of the revenue from services that are classified as interstate under the ten percent rule. Verizon Comments at 11. Verizon recommends that the Commission should rather explore other alternatives to recover the costs from providers that it determines are expending excessive administrative resources without paying an assessment. Id.

Verizon asserts that the Proposed Policy Statement would result in administrative burden and infeasibility regarding the identification of the portion of the “intrastate” traffic traversing over a private line. Id. at 9-10. In particular, Verizon states in enforcing the ten percent rule,<sup>17</sup> the FCC adopted a process relying on customer certifications and specifically rejected proposals to base the interstate/intrastate classification of mixed-use special access lines on traffic studies or usage-based allocation factors.<sup>18</sup> Id. at 4, 9-10.

Additionally, Verizon asserts that the Proposed Policy Statement would result in double taxation. Id. at 8. Verizon states that the FCC repurposed the jurisdictional separations ten percent rule in its 1997 Universal Service Report and Order<sup>19</sup> so that not only the costs are classified as interstate, but also the revenues generated by the entire line are classified as interstate.<sup>20</sup> Id. at 5. Verizon states that since that time, if the special access line carries more than ten percent interstate traffic, providers have been required to report all of the revenue and costs from that line as interstate on FCC Form 499-A and then have been assessed for various federal fees based on that revenue. Id. at 5-6.

Verizon also states that in 2017, the FCC again discussed this issue extensively in an order addressing several requests for review of audit findings related to whether certain revenues associated with specific mixed-use special access lines should be considered interstate for the purpose of assessing contributions to the FUSF.<sup>21</sup> Id. at 6. Verizon asserts that in the 2017 Ten Percent Audit Order, the FCC stated that “there was sufficient notice for all carriers that the ten percent rule would provide the basis for determining whether a mixed-use special access line would be considered interstate or intrastate in nature for contributions purposes,” and “given that the [FCC] incorporated the ten percent rule

<sup>16</sup> See Restoring Internet Freedom Order, WC Docket No. 17-108, Declaratory Ruling, Order, Report and Order, 33 FCC Rcd 311 (2018) (Restoring Internet Freedom Order); *Mozilla Corp. v. FCC*, No. 18-1051 (D.C. Cir. Feb. 22, 2018).

<sup>17</sup> 47 CFR § 36.154.

<sup>18</sup> MTS and WATS Market Structure, Amendment of Part 36 of the Communications Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, Decision and Order, 4 FCC Rcd 5660, ¶ 4 (1989) (Ten Percent Rule Order).

<sup>19</sup> See 1997 Universal Service First Report and Order.

<sup>20</sup> Id. at ¶s 777-78.

<sup>21</sup> See 2017 Ten Percent Order.

into its contributions requirements in the Universal Service First Report and Order, we conclude that the Commission intended to extend the ten percent rule to contributions without modification.”<sup>22</sup> *Id.* at 6-7.

Verizon asserts that attempting to reclassify as intrastate the same revenue that the FCC considers interstate under the ten percent rule would frustrate the FCC’s purpose in funding its own assessment. *Id.* at 9. Therefore, Verizon asserts that the Commission’s policy determination conflicts with federal law and thus it is pre-empted from attempting to assess revenue from special access services that are interstate, since the FCC already assesses those revenues to support its own funds and operations and has ruled that they are interstate revenues for contribution purposes. *Id.* at 9.

Lastly, Verizon suggests that the best solution for the Commission to recover actual costs from telecommunications providers that report zero or de minimis intrastate gross operating revenues is to seek a statutory change to account for time and resources expended by the Commission on issues related to jurisdictional carriers that do not report intrastate revenue. *Id.* at 10. As an example, Verizon notes that in Delaware, telecommunications providers no longer pay an assessment based on a percentage of intrastate revenue, but the state commission has authority to charge providers to recover its costs of specific investigations or proceedings involving that provider. *Id.*

#### d. *Crown Castle*

In its Comments, Crown Castle asserts that the Commission is seeking to assess as “de facto intrastate operating revenue” the same revenues that are considered interstate revenue by the FCC and could subject it and other similarly situated entities to double assessments of regulatory expenses. Crown Castle Comments at 2. Crown Castle urges the Commission to decline to adopt the Proposed Policy Statement entirely, or, in the alternative, to modify the language in Section 69.3701 so as to clarify that only those entities who currently report zero intrastate operating revenues for jurisdictionally-mixed services and that report no other intrastate operating revenues are subject to report their “de facto intrastate operating revenues” as defined in proposed Section 69.3701. *Id.* at 2-3. Crown Castle also states that, at a minimum, the Commission should initiate a formal collaborative process with Staff and interested parties to clarify the Proposed Policy Statement and address issues associated with the proposed change in reporting requirements for the purpose of establishing assessments. *Id.* at 3. Such a collaborative will avoid uncertainties and unintended consequences. *Id.*

Crown Castle gives the following reasons for these suggestions: 1) the Commission’s Proposed Policy Statement is ambiguous; 2) the Proposed Policy Statement is inconsistent with the plain language of Section 510 of the Public Utility Code; 3) the Proposed Policy Statement is potentially discriminatory because it does not apply to local exchange carriers and unfairly impacts deregulated entities; 4) the Proposed Policy Statement has the potential to violate Section 253 of the Communications Act by effectively prohibiting the provision of wireless services; and 5) the Proposed Policy Statement incorrectly disregards the import of jurisdictional separations principles. *Id.* at 4-5.

In particular, Crown Castle argues that the Order is ambiguous because the requirement of reporting “de facto gross intrastate operating revenues” applies only to tele-

communications entities that otherwise “report zero gross intrastate revenues.”<sup>23</sup> *Id.* at 6. However, Crown Castle states the language in proposed Section 69.3701 is different. *Id.*

Crown Castle asserts that unlike the Order, the language of the Proposed Policy Statement at Section 69.3701 does not appear to limit the reporting of “de facto gross intrastate operating revenues” only to those entities that currently report zero gross intrastate revenues for jurisdictionally-mixed services. *Id.* Instead, it appears to apply this new requirement to all telecommunications public utilities in the Commonwealth that hold a certificate of public convenience (CPC) and provide jurisdictionally mixed-use services. *Id.* at 6-7.

Crown Castle states it is unclear how entities that are reporting intrastate gross operating revenues separate from services other than those jurisdictionally-mixed services that qualify as interstate under the ten percent rule would be treated under Section 510(b)(3)-(4) in light of the broad applicability of proposed Section 69.3701. *Id.* at 7. Crown Castle asserts that the proposed Section 69.3701 appears to potentially discriminate in favor of certain telecommunications entities depending on whether they provide services whose revenues are treated as jurisdictionally-mixed. *Id.* Accordingly, Crown Castle states that the Commission should modify the language of proposed Section 69.3701 to be consistent with the Order and make clear that the section only applies to entities that otherwise report zero gross intrastate operating revenues. *Id.*

Crown Castle further asserts that the language in Section 69.3701 requiring the submission of “traffic studies, tax returns, jurisdictional allocations formulas and factors, books of account, [and] reports” appears to conflict with the definition of “de facto gross intrastate operating revenues” provided in the Section and, therefore, presents further ambiguity and uncertainty. *Id.* Crown Castle notes that proposed Section 69.3701 defines this revenue as “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.”<sup>24</sup> *Id.* at 7-8. Crown Castle states that this language makes it appear that the “de facto” intrastate revenue includes any revenue derived from any services with endpoints within the Commonwealth, without regard for jurisdictional allocation, traffic studies, or similar methods traditionally used in jurisdictional separations analysis.<sup>25</sup> *Id.* at 8. Accordingly, Crown Castle states that the reference to matters such as jurisdictional allocation formulas and traffic studies creates uncertainty regarding what is intended. *Id.*

Crown Castle also asserts that the term “de facto gross operating revenues” as defined is also ambiguous and “potentially radically overbroad.” *Id.* Crown Castle notes that proposed Section 69.3701 purports to include “revenues that are billed, charged or otherwise due.”<sup>26</sup> *Id.* Crown Castle asserts that this definition is “so broad as to essentially encompass all of its accounts receivable for intrastate services, regardless of whether the revenue is ever actually realized by Crown Castle.” *Id.* Crown Castle notes that neither the Pennsylvania Administrative Code nor the Public Utility Code define the term revenue in related sections, and that Black’s Law Dictionary defines revenue as “income from any and all sources.”<sup>27</sup> *Id.* Crown Castle states that it also further defines “income”

<sup>23</sup> Order at 2.

<sup>24</sup> See Proposed Annex A, § 69.3701(8); see Final Annex A, § 69.3701(j).

<sup>25</sup> See 47 CFR § 36.1, et seq.

<sup>26</sup> See Proposed Annex A, § 69.3701(8); see Final Annex A, § 69.3701(j).

<sup>27</sup> Revenue, Black’s Law Dictionary (10th ed. 2014).

<sup>22</sup> *Id.*

as “money or other form of payment that one receives.”<sup>28</sup> Id. Crown Castle asserts that, in the interest of fairness and all other issues aside, the definition of “de facto gross operating revenues” should be revised to only apply to revenues actually received, rather than amounts “charged” or “otherwise due.” Id.

Next, Crown Castle asserts that the Proposed Policy Statement is inconsistent with the Code and the Commission lacks the power to modify Section 510 of the Code. Id. at 9. Crown Castle asserts that proposed Section 69.3701 essentially sua sponte modifies Section 510 of the Code by creating the new category of “de facto” gross operating revenues. Id. Crown Castle asserts that adopting proposed Section 69.3701 constitutes legislative action and would modify the legislative policy and rules contained in Section 510 of the Code. Id. Accordingly, Crown Castle asserts that by implementing the proposed Section 69.3701, the Commission is acting beyond its statutory authority by attempting to unilaterally modify Section 510 of the Code. Id. at 10.

Crown Castle states that it is also concerned that the Proposed Policy Statement is potentially discriminatory to the extent it seeks to impose additional burdens only on certain ill-defined telecommunications entities to the exclusion of others. Id. Crown Castle states that proposed Section 69.3701 attempts to modify Section 510 of the Code’s requirements only as to CAPs and “other telecommunication public utilities holding Commission-issued” Certificates of Public Convenience.<sup>29</sup> Id. Crown Castle states that neither the Order nor proposed Section 69.3701 define the term “other telecommunications public utilities” as used therein. Id. Crown Castle asserts that if proposed Section 69.3701 does not include local exchange carriers (LECs)—specifically incumbent local exchange carriers (ILECs)—it is discriminatory because it would allow LECs to report their intrastate revenues as defined by the federal jurisdictional separations process, while avoiding these new reporting requirements. Id. Crown Castle argues that the Commission cannot allow the LECs to continue defining their intrastate revenues under the widely-accepted ten percent rule while explicitly disallowing CAPs from doing the same. Id.

Crown Castle further asserts that the Proposed Policy Statement unfairly impacts deregulated entities like itself in conflict with Section 510(f) of the Code.<sup>30</sup> Id. at 11. Crown Castle notes that, unlike the ILECs, deregulated CAPs are subject to “alternative forms of regulation” as defined in the Code.<sup>31</sup> Id. Crown Castle asserts CAPs, as largely deregulated entities, impose little or in some cases no year-over-year regulatory burdens or costs on the Commission, particularly when compared with regulatory oversight required of ILECs. Id. Crown Castle argues that imposing on deregulated CAPs the same regulatory assessment percentage imposed on highly-regulated ILECs, which by their very nature inflict much higher regulatory costs on the Commission, does not lead to each party paying its reasonable share of the cost of administering this part. Id. Accordingly, Crown Castle asserts that it would be “manifestly unjust—and directly contra to Section 510’s explicitly stated intent—to impose this extra burden on telecommunications entities like Crown Castle whose services are largely deregulated.” Id.

Crown Castle next asserts that the Proposed Policy Statement has the potential to effectively prohibit the

provision of service in violation of 47 U.S.C. § 253. Id. Crown Castle states that the FCC in its Declaratory Ruling<sup>32</sup> sought to clarify “the types of fees that run afoul of Congress’s limits in Section 253” of the Communications Act.<sup>33</sup> Id. at 11-12. Crown Castle states that the FCC specifically stated that “fees are only permitted to the extent that they represent a reasonable approximation of the local government’s objectively reasonable costs and are non-discriminatory.”<sup>34</sup> Id. Crown Castle further states that in the Declaratory Ruling, the FCC noted that while Section 253(c) only expressly governed fees for use of rights-of-way, the same analysis applies to all fees that affect the deployment of small cell technology because they all “drain limited capital resources that otherwise could be used for deployment.”<sup>35</sup> Id.

Crown Castle argues that while the FCC was speaking in the context of Section 253 and its impact on the ability of states and localities to only recoup costs of entry from permissible government fees specific to “deployment,” the Declaratory Ruling endorses the same policy outlined in Section 510(f) of the Code that the government’s fees must reflect the costs caused by the particular entity subject to the fee. Id. at 13.

Lastly, Crown Castle asserts that the Proposed Policy Statement disregards the importance of jurisdictional separations principles and misreads and takes too narrow a view of the federal cases, *Illinois Bell*<sup>36</sup> and *Scott*. Id. at 14. Crown Castle argues that the Commission’s reliance on *Illinois Bell* and *Scott* is misplaced as each of those cases involved regulation of services, whereas the present issue involves the appropriate treatment of revenues, an action that falls squarely within the rubric that the jurisdictional separations doctrine is designed to address. Id.

#### e. Office of Consumer Advocate

In its Comments, the OCA states that it supports the general premise of the Commission’s Proposed Policy Statement. OCA Comments at 2. The OCA agrees that the Commission’s authority to assess intrastate operating revenues for Section 510 assessment purposes has not been preempted by federal law. Id. at 4. Section 510 of the Code provides the legal framework for the Commission to assess the gross intrastate operating revenues of public utilities under the Commission’s jurisdiction to provide funds for the Commission’s annual operating budget.<sup>37</sup> Id. at 1.

The OCA cited to *Regency*<sup>38</sup> for the proposition that Congress does know how to preempt explicitly or constrain the Commission’s authority to assess the operating revenues of public utilities which provide both interstate and intrastate services. OCA Comments at 5. In *Regency*, the Court was asked to consider whether the Commission’s assessment of a public transportation carrier that claimed its operations were interstate and not subject to Section 510 assessment. Id. It was noted that the federal Unified Carrier Registration Act, 49 U.S.C. § 14504a(a)(3), (c), prohibited state imposition of fees, including assessments, on certain interstate motor carriers as an undue burden on interstate commerce. Id. However, the Court acknowledged that a 2008 amend-

<sup>28</sup> In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment by Removing Barriers to Infrastructure Investment, WT Docket 17-70 and In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket 17-84, Declaratory Ruling and Third Report and Order, 83 FR 51867, 51868 (2018) (Declaratory Ruling).

<sup>29</sup> Id. at ¶ 3.

<sup>30</sup> Id. (emphasis in original).

<sup>31</sup> Id. at ¶ 54.

<sup>32</sup> *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989) (*Illinois Bell*).

<sup>33</sup> 66 Pa.C.S. § 510 et seq.

<sup>34</sup> *Regency Transp. Group, Ltd. v. Pa. P.U.C.*, 44 A.3d 107 (Pa. Cmwlth. 2012) (*Regency*).

<sup>28</sup> Income, Id.

<sup>29</sup> See Proposed Annex A, § 69.3701(3); see Final Annex A, § 69.3701(d).

<sup>30</sup> 66 Pa.C.S. § 510(f) provides in relevant part “it is the intent and purpose of this section that each public utility subject to this part shall advance to the commission its reasonable share of the cost of administering this part.”

<sup>31</sup> 66 Pa.C.S. § 3015.

ment to the statute permitted states to assess the intrastate operations of interstate carriers, equivalent to assessment of purely intrastate carriers.<sup>39</sup> *Id.* Consequently, the OCA agrees with the Commission that the FCC's jurisdictional separations rules do not preempt the Commission or limit the Commission's assessment of gross operating intrastate revenues to those revenues which remain after application of the "10 percent contamination rule." *Id.*

The OCA also proposes some slight modifications to the phrasing and content of proposed Section 69.3701. First, the OCA states that a declaration of the Commission's intent to provide guidance, so that going forward each certificated telecommunications public utility will know to report for assessment purposes its de facto gross intrastate operating revenues, is absent from the proposed Section 69.3701. *Id.* The OCA notes that the Order explains that the proposed Section 69.3701 is designed "to assist these carriers in complying with their statutory obligations to file their Section 510 revenues report and to pay a reasonable share of the Commission's costs of administering the Public Utility Code."<sup>40</sup> OCA Comments at 5-6.

Next, the OCA states that the proposed Section 69.3701 refers twice to Distributed Antenna Systems (DAS) operators.<sup>41</sup> *Id.* at 6. The OCA recommends that the Commission consider whether these references are necessary and will be informative in many years to come as today's "DAS" may be replaced in the future by some other equipment or technology. *Id.* Also, in several places, the proposed Section 69.3701 refers one or more times to the reporting of "gross intrastate revenues."<sup>42</sup> *Id.* The OCA recommends that to be consistent with the wording of Section 510 of the Code, the word "operating" be included to read "gross intrastate operating revenues." *Id.*

The OCA notes that proposed Section 69.3701 refers to the FCC's "ten percent contamination rule" in Subparts (5) and (9) but does not provide a citation to either a case or the FCC's Section 36.154 regulation. *Id.* Additionally, Subparts (5) and (9) repeatedly describe the ten percent rule as an "administrative jurisdictional cost allocation rule." *Id.* The OCA recommends that one short summary description of the FCC's ten percent rule and its purpose as a federal cost allocation rule for ratemaking and other purposes, with a citation, would improve the proposed Section 69.3701. *Id.* at 7. Lastly, the OCA suggests a rephrasing of Subpart (9) regarding the lack of preemption to make it more of an affirmative statement, appropriate to a policy statement adopted after public comment and close review of the legal underpinnings of the Commission's Proposed Policy Statement. *Id.*

#### Reply Comments

The OCA filed Reply Comments in response to the initial comments filed by BCAP, Crown Castle, the PTA (joined by the Frontier Companies), and Verizon. The OCA states that these parties have not shown that the Commission is preempted or legally barred by federal or state law from clarifying that the "gross intrastate operating revenues" concept embodied in Section 510 refers to "de facto gross intrastate operating revenues" for assessment purposes. OCA Reply Comments at 2.

In particular, the OCA states that it disagrees with Crown Castle's contention that the Proposed Policy Statement is unfair and discriminatory. *Id.* The OCA notes

that the Section 510 assessment process, based upon the gross intrastate operating revenues of each public utility, is a fair and reasonable approach. *Id.*

Further, the OCA pushes back on Verizon's and Crown Castle's contention that clarifying that assessable revenues from jurisdictional telecommunications carriers encompasses de facto operating revenues from all telecommunications services without a statutory amendment of Section 510 of the Code exceeds the Commission's legislatively granted powers. *Id.* at 4. The OCA states that the Commission has the authority to clarify what constitutes gross intrastate operating revenues under Section 510(f) of the Code. *Id.*

The OCA notes the PTA's concern that adoption of the Proposed Policy Statement would impose new reporting and record-keeping burdens on its rural local exchange carrier (RLEC) members. *Id.* at 5. However, the OCA states that the Commission has the authority to require ILECs and other jurisdictional telecommunications carriers to provide information in support of their reported gross intrastate operating revenues. *Id.* Nevertheless, the OCA states that even ILECs operating under an amended network modernization plan or Chapter 30 Plan are still subject to certain Commission "filing and audit requirements."<sup>43</sup> *Id.*

#### Discussion

As indicated above, some of the commentators have expressed opposition to the Commission's determinations underpinning the Order and attached Proposed Policy Statement. These commentators suggest that the Commission may not assess the intrastate revenues derived from the provision of special access services and other jurisdictionally mixed-use telecommunications services in order to recover the administrative expenses incurred by the Commission in its administration of the Public Utility Code and, in particular, the expenses incurred by the Commission with respect to telecommunications public utilities. However, we disagree with their positions.

The Public Utility Code demonstrates without question that the General Assembly of the Commonwealth of Pennsylvania has therein expressed its policy to commit the regulation of jurisdictional public utilities to the Commission.<sup>44</sup> The Code's definition of jurisdictional "public utility" includes those entities that "convey or transmit messages or communications. . . by telephone or telegraph. . . for the public for compensation." See 66 Pa.C.S. § 102(1)(vi). Thus, the Commission has exclusive authority to regulate jurisdictional telecommunications carriers offering intrastate telecommunications services, whether it is on a retail or wholesale basis.<sup>45</sup>

Section 501 of the Code, 66 Pa.C.S. § 501, sets forth the Commission's general police powers to, inter alia, supervise and regulate all jurisdictional public utilities in the Commonwealth. With this plenary authority, the General Assembly granted the Commission the authority to impose annual fiscal assessments upon jurisdictional public utilities in order to cover their "reasonable share" of the costs of administering the Code. See 66 Pa.C.S. § 510. According to Section 510 of the Code, the Commission calculates the amount owed by each public utility based on the utility's yearly gross intrastate operating revenues and the Commission's yearly expenses. *Id.* To

<sup>39</sup> 49 U.S.C. § 14504a(c)(2).

<sup>40</sup> See Proposed Policy Statement Order at 3.

<sup>41</sup> See Proposed Annex A, § 69.3701(4), (5); see Final Annex A, § 69.3701(e), (f).

<sup>42</sup> See Proposed Annex A, § 69.3701(3), (5), (6), (7); see Final Annex A, § 69.3701(d), (f), (g), (j), (k).

<sup>43</sup> 66 Pa.C.S. § 3015(e)(7).

<sup>44</sup> See generally, *Duquesne Light Company v. Upper St. Clair Township*, 105 A.2d 287 (Pa. 1954).

<sup>45</sup> The Commission acknowledges that its regulatory reach over Voice-over-Internet Protocol carriers is more circumscribed, including those that may have sought or acceded to Commission certification. However, as even BCAP conceded, that circumscription pertains to regulating rates, terms and conditions of such service. See 66 Pa.C.S. § 102(2)(iv) and 73 P.S. § 2251.1.

that end, the Commission has determined that it has the authority and discretion to apply the requirements of Section 510 of the Code to all jurisdictional telecommunications carriers, including those that offer jurisdictionally mixed-use telecommunications services.

In the Proposed Policy Statement, the Commission provides guidance to all jurisdictional telecommunications providers holding Commission-issued CPCs that may have reported zero gross intrastate revenues in the past in regards to their jurisdictionally mixed-use private lines. For Section 510 assessment purposes, these providers have an obligation to report their “de facto intrastate operating revenue” earned from their jurisdictionally-mixed services, even if traffic traversing the carrier’s access lines would be classified by the FCC as interstate services for other purposes because more than ten percent of the traffic over the access lines is deemed to be interstate.

BCAP, Verizon and Crown Castle all assert that the Commission is misguided in its determination that the FCC’s ten percent rule does not preempt or apply to its annual fiscal assessment framework under Section 510. These commenters claim that all of the revenue the Commission proposes to reclassify as “de facto intrastate operating revenue” is expressly classified as interstate by the FCC and is required to be reported as such for purposes of federal assessments, based on the 1997 Universal Service First Report and Order, the instructions to FCC Form 499-A, and the 2017 Ten Percent Rule Audit Order.

Many telecommunications carriers use their networks and other resources to provide both interstate and intrastate services. Over thirty years ago, in the Ten Percent Rule Order, the FCC established “jurisdictional separations” rules in order to help telecommunications carriers apportion the costs of their regulated services between the interstate or intrastate jurisdictions in a manner that reflects the relative use of their networks to provide interstate or intrastate services.<sup>46</sup> The Commission acknowledges that under the FCC’s ten percent rule, for federal purposes, if the interstate traffic over a mixed-use access line is claimed to exceed ten percent, the costs of that private line are apportioned to interstate jurisdiction.<sup>47</sup>

The Commission also acknowledges that subsequently the FCC repurposed the ten percent rule in its 1997 Universal Service First Report and Order, so that not only are costs identifiable as interstate in those instances where over ten percent of the traffic carried by a private or WATS line is interstate but also the revenues generated by the entire line are also classified as interstate if the ten percent rule is implicated.<sup>48</sup> The FCC was under a statutory mandate to establish support mechanisms to ensure the delivery of affordable telecommunications service to all Americans, including low-income consumers, eligible schools and libraries, and rural health care providers.<sup>49</sup> Since this new universal service mechanism was to be paid for by contributions from telecommunications carriers based on an assessment on their interstate end-user revenues,<sup>50</sup> the FCC decided to utilize the ten percent rule in order to help telecommunications carriers identify their interstate revenues in order to assist them in calculating their appropriate contributions under the

new universal service framework.<sup>51</sup> Accordingly, the ten percent rule is a jurisdictional separations rule that assists telecommunication carriers to accurately apportion the costs that shall be recovered from all subscribers of the jurisdictionally mixed-use private lines and also to identify the appropriate interstate revenue on that same jurisdictionally mixed-use private line in order to help them calculate their FUSF contributions.

Since then, it should be noted that the ten percent rule has been specifically utilized to assist telecommunications carriers to also identify their interstate revenues from jurisdictionally mixed-use private lines so that they can calculate their contributions, which are a percentage of that interstate end-user revenue, to additional specific federal programs such as the federal Telecommunications Relay Services Fund (TRS) 47 CFR § 64.604(c)(5)(i)—(iii); the administration of the North American Numbering Plan (NANPA) 47 CFR § 52.17; the shared costs of local number portability administration (LNPA) 47 CFR § 52.32; and assessments of Interstate Telecommunications Service Provider (ITSP) regulatory fees 47 U.S.C. § 159(b)(1)(B).

However, the federal jurisdictional separations rule does not create an exemption to 66 Pa.C.S. § 510 for the reporting of intrastate revenue associated with a jurisdictionally mixed-use private line where interstate traffic exceeds ten percent. Even when interstate traffic is claimed to exceed ten percent on a private access line and the ten percent rule is implicated, a jurisdictional telecommunications carrier cannot rely on the federal jurisdictional separations rules as a means to refuse to report its de facto or actual intrastate revenue associated with a jurisdictionally mixed-use access line. Some percentage of the total revenue associated with that particular private line must be de facto intrastate revenue that should be reported as a part of the overall gross intrastate operating revenues set forth in the Section 510 assessment report filed with the Commission’s Fiscal Office if the carrier holds a state CPC.

Moreover, the ten percent contamination rule does not preempt or otherwise preclude the Commission from imposing annual fiscal assessments to cover its costs related to the regulation of state certificated telecommunications public utilities in Pennsylvania. The preemptive effects of the Supremacy Clause<sup>52</sup> and the restraint of the Commerce Clause<sup>53</sup> do not prevent a state regulatory agency from applying a uniform methodology to develop an annual fiscal assessment to recover regulatory costs caused by telecommunications carriers who invoke this Commission’s jurisdiction by applying for, receiving, and subsequently operating under a state-issued CPC.

It is generally accepted that the Supremacy Clause invalidates all state laws that conflict or interfere with an act of Congress. *Rose v. Arkansas State Police*, 479 U.S. 1, 3 (1986). Administrative regulations promulgated pursuant to Congressional authorization have the same preemptive effect as federal statutes. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984). The FCC’s jurisdictional separations rules do not preempt the Commission or limit the Commission’s authority to provide guidance so that the de facto gross operating intrastate revenues from special access revenues deemed interstate after application of the ten percent rule are reported to the Commission’s Fiscal Office for assessment purposes.

Under the Supremacy Clause, federal law may preempt state law in any of three ways. When enacting federal

<sup>46</sup> Ten Percent Rule Order, 4 FCC Red 5660.

<sup>47</sup> 47 CFR § 36.154(a).

<sup>48</sup> See 47 CFR § 36.154(a); see also 1997 Universal Service First Report and Order, 12 FCC Red at 9173, ¶ 778.

<sup>49</sup> 47 U.S.C. § 254(b)(3).

<sup>50</sup> 47 U.S.C. § 254(d).

<sup>51</sup> 1997 Universal Service First Report and Order, 12 FCC Red at 9173, ¶ 778.

<sup>52</sup> See Article VI, Paragraph 2 of the U.S. Constitution.

<sup>53</sup> See Article 1, Section 8, Clause 3 of the U.S. Constitution.

law, Congress can explicitly define the extent to which it intends to preempt state law. Or, in the absence of express preemptive language, Congress can indicate an intent to occupy an entire field of regulation and by leaving no room for states to supplement the federal law. Also, federal law can preempt state law when compliance with both state and federal law is impossible or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Michigan Cannery and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469 (1984); *Crisp*, 467 U.S. at 699.

The FCC's jurisdictional separations rules do not expressly preempt the Commission's annual assessment and do not comprehensively govern the field of utility regulation, including state annual fiscal assessments. Indeed, the federal interest in this area cannot be classified as dominant, given the historical right of the states to exercise police power over utilities. Pursuant to the Code, the Commission is an independent administrative agency responsible for regulating jurisdictional telecommunications utilities, including imposing fiscal assessments under Section 510 of the Code to recover the costs of administering the Code. Like the *Scott* court determined, the FCC's expressed intent to preempt state regulation on jurisdictionally-mixed services does not extend to performance measurements and standards. As previously discussed, the ten percent rule has been specifically utilized to assist telecommunications carriers to identify their interstate revenues from jurisdictionally mixed-use private lines so that they can calculate their contributions to various federal programs. Any intent to preempt state regulation is limited to these specific areas and has not extended to the Commission's annual fiscal assessment. Section 510 operates only in an area which Congress has not preempted but, to the contrary, has expressly reserved to state control. Thus, we disagree with BCAP's and other parties' characterizations that our Proposed Policy Statement directly implicates the allocation questions addressed by the ten percent rule.

Similarly, the Commission's Section 510 annual assessment process does not make compliance with the ten percent contamination rule impossible and does not frustrate the purpose and objective of the rule. Proposed Section 69.3701 makes it clear that all jurisdictional telecommunications carriers have an obligation to report this de facto gross revenue to the Commission so that the annual fiscal assessment under Section 510 of the Code can be calculated to capture the costs of administering the Code. The claim by BCAP, Verizon and Crown Castle that the Proposed Policy Statement results in double taxation of the same revenues is erroneous and conflates federal annual regulatory assessments and state fiscal assessments related to recovering the actual costs of administering the Code from all jurisdictional telecommunications carriers providing jurisdictionally mixed-use services.

Additionally, we note that carriers are required to calculate the amount of their contributions to the FUSF based on retail end-user interstate revenue. However, certain carriers only offer interstate telecommunications services on a wholesale basis. As such, we do not find any merit in the argument that seeking to assess de facto intrastate operating revenue would result in double assessments of regulatory expenses of these carriers' interstate revenues.<sup>54</sup>

Section 510 of the Code does not expressly conflict with the FCC's jurisdictional separations rules because the Commission is not seeking to impose an annual assessment on interstate revenue for any purposes for which the FCC assesses interstate revenue. The Commission is not seeking to impose an annual fiscal assessment on interstate revenue or seeking to assess interstate revenues from jurisdictionally mixed-use private lines for the purposes of its state universal service fund or for any of the other purposes the FCC assesses jurisdictionally-mixed revenues implicated by the ten percent rule. There is no conflict between the workings of the FCC's ten percent contamination rule and the authority granted to the Commission under Section 510 to impose annual fiscal assessments to capture the proper costs of administering the Code from jurisdictional telecommunications utilities providing mixed-use telecommunications services. Thus, there is no physical impossibility, and no double taxation, in complying with both the federal and the state regulations.

The Commission concludes that its Section 510 assessment process is not preempted by federal law and that its determination in the Proposed Policy Statement is proper. Crown Castle's assertion that the Proposed Policy Statement disregards the importance of jurisdictional separations principles misreads and takes too narrow a view of the federal cases *Illinois Bell* and *Scott*. These cases stand for the proposition that where it is not possible to separate the interstate and the intrastate components of the FCC regulation involved, the Communications Act sanctions federal regulation of the entire subject matter, which may include preemption of inconsistent state regulation, if necessary, to fulfill a valid federal regulatory objective. Thus, the Communications Act permits FCC preemption of a state's authority over intrastate telephone service when the states' exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communications.

Notwithstanding, we see no authority for the remarkable proposition that telecommunications carriers who operate under Commission-issued CPCs to provide intrastate service are exempt from the uniform application of reasonable state administrative fees related to their Pennsylvania operations. Carriers who report zero intrastate revenues for mixed-used telecommunications services based on the ten percent contamination rule at 47 CFR § 36.154 cannot have it both ways; a carrier cannot claim state jurisdictional rights and simultaneously disclaim all state jurisdictional responsibilities where such broad preemption claims are not supported. Nor have the comments in opposition to the Proposed Policy Statement justified the position that, of all the various accounting metrics by which the Commission's cost of operations related to telecommunications public utilities can be reasonably allocated (equal shares, relative assets, net income, number of employees, direct hours, annual fees, etc.), the use of gross intrastate operating revenues as the metric is unlawful and unconstitutional.

The commentators opposing the Proposed Policy Statement have not proven or shown that a state commission is violating the Supremacy Clause or the Commerce Clause by imposing a fiscal assessment only on the de facto intrastate revenues associated with a jurisdictionally mixed-use that has interstate traffic that exceeds ten percent and which is deemed interstate revenue for the purposes of the FCC's allocation rules. The ten percent rule is nothing more than a jurisdictional separations procedure designed primarily to identify the appropriate costs and revenues to be allocated between state and interstate jurisdictions. 47 CFR § 36.154(a) and (b). The

<sup>54</sup> 1997 Universal Service Report and Order, 12 FCC Red at 9171, 9206-07 ¶s 772, 843-845.



ten percent rule exists to assist telecommunication carriers the interstate revenue from a jurisdictionally mixed-use private line so that the carrier can calculate the amount of their contributions based on that interstate revenue that it is required to submit to the FUSF, the interstate telecommunications relay services (TRS), the administration of the NANP, the shared costs of local number portability administration and to the FCC in the form of regulatory fees under 47 U.S.C. § 159(b)(1)(B).<sup>55</sup> The FCC did not establish the ten percent contamination rule to, by implication, enact a wholesale preemption of state fees associated with licenses to provide intrastate service whether based on flat annual fees, in-state assets, in-state employees or, as with Section 510, based on in-state revenues.

The Commission concludes that preemption cannot be inferred from this overall jurisdictional separations scheme. The FCC's regulations establishing the ten percent rule and the related federal assessments do not limit or impede the state's police power or the Commission's authority under Section 510 to require the reporting of de facto intrastate operating revenue for the purpose of allocating and assessing, on a fair and reasonable basis, the costs incurred by the Commission with respect to telecommunications carriers holding Commission-issued CPCs. Moreover, under Section 510, gross intrastate operating revenue is merely the metric by which the Commission's costs are allocated among telecommunications carriers holding Commission-issued CPCs. It controls neither the nature and scope of regulation associated with services that give rise to such revenues nor the overall amount of the Commission's operating costs.

Accordingly, the Commission issued the Proposed Policy Statement specifically to provide guidance to telecommunications carriers holding Commission-issued CPCs so that, going forward, they would understand the state law obligation to report de facto intrastate revenue associated with jurisdictionally-mixed services for fiscal assessment purposes under Section 510 of the Code. Alternatively, telecommunications carriers that report no revenue from intrastate services for several years may be viewed as no longer providing service to the public for compensation in Pennsylvania and, accordingly, no longer qualified to hold a Commission-issued CPC. In other words, if there are no intrastate transactions from which revenues are derived, these telecommunications carriers should not invoke intrastate jurisdiction or continue to hold intrastate certification that comes with obtaining a Pennsylvania CPC.

Moreover, the commentators opposing the Proposed Policy Statement have failed to present any FCC decision that expressly sets forth that states are precluded from exercising regulatory authority and imposing annual fiscal assessments on the revenue of mixed-use telecommunications services for Section 510 assessment-type purposes as the method to recover the Commission's regulatory costs related to telecommunications public utilities operating in Pennsylvania.

As we previously determined in the Order and now reaffirm after review of the filed comments, the FCC has not expressly preempted state regulation for jurisdictionally mixed-use services 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). Accordingly, a state commission is no more preempted from imposing an annual fiscal assessment or other form of state fee on a jurisdictional telecommunications public utility to cover the reasonable and allocated operating costs of the state commission than it is from granting a CPC or license to provide jurisdictionally-mixed service with the Commonwealth.

Even in the absence of preemptive legislation, the Commerce Clause bars state regulation that unduly burdens interstate commerce. The Commerce Clause acts as an implied restraint on state regulatory powers, which must give way to the superior authority of Congress to legislate on, or leave unregulated, matters involving interstate commerce. *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208, 220 (1984). However, the Commission also determines that imposing fiscal assessments on revenues subject to the ten percent rule is not in violation of the Commerce Clause because the effect the Commission's uniform methodology under 66 Pa.C.S. § 510 is incidental. A fiscal assessment will not detrimentally impact the flow of interstate commerce in light of the legitimate state interest that all jurisdictional telecommunications carriers report gross intrastate operating revenues so as to provide the requisite funds for the Commission's annual operating budget.

Next, Verizon questions whether the Commission may clarify that assessable revenues from telecommunications service are "de facto gross operating revenues" without statutory amendment of Section 510. We disagree with this position and also note that the argument acknowledges state authority to assess revenues as de facto gross intrastate operating revenues.

The Commission has the authority to clarify what constitutes "gross intrastate operating revenues" so that telecommunications public utilities are responsible for covering their reasonable share of costs related to the Commission's administration of the Code. Section 510(f) declares, "[i]t is the intent and purpose of this section that each public utility subject to this part shall advance to the commission its reasonable share of the cost of administering this part." 66 Pa.C.S. § 510(f).

Under Section 501 of the Code, the Commission has the full power and authority to carry out by regulations, orders, or otherwise, the provisions of the Public Utility Code, including Section 510. Section 501 of the Code provides in pertinent part:

(a) *Enforcement of provisions of part.*—In addition to any powers expressly enumerated in this part, the commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part, and the full intent thereof; and shall have the power to rescind or modify any such regulations or orders. The express enumeration of the powers of the commission in this part shall not exclude any power which the commission would otherwise have under any of the provisions of this part.

(b) *Administrative authority and regulations.*—The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. The commission may make such regulations, not inconsistent with law, as may be necessary or proper in the exercise of its powers or for the performance of its duties.

<sup>55</sup> See also 47 U.S.C. § 159(a)(2).

(c) *Compliance*.—Every public utility, its officers, agents, and employees, and every other person or corporation subject to the provisions of this part, affected by or subject to any regulations or orders of the commission or of any court, made, issued, or entered under the provisions of this part, shall observe, obey, and comply with such regulations or orders, and the terms and conditions thereof.

66 Pa.C.S. §§ 501(a), (b) and (c).

Clarifying that “de facto gross operating revenues” from jurisdictionally mixed-use services should be reported to the Commission by jurisdictional telecommunications carriers for annual fiscal assessments is squarely within the Commission’s Section 501 general powers “to enforce, execute and carry out” the purpose under Section 510 of the Code. 66 Pa.C.S. § 501(a) and (b).

Furthermore, Section 502 of the Code gives the Commission the authority to initiate appropriate legal proceedings to enforce the statutory provisions of the Code. 66 Pa.C.S. § 502. The plain language of the Code gives the Commission the authority to assess jurisdictional telecommunications carriers providing telecommunications services and the duty to enforce this statutory provision. Thus, the Commission may issue a policy statement that provides guidance to jurisdictional telecommunications that they should report the de facto gross intrastate operating revenue on all revenue from jurisdictionally mixed-use services implicated by the ten percent rule.

The PTA expresses concern that adoption of the Proposed Policy Statement would impose new reporting and record-keeping burdens on its RLEC members. All LECs are subject to Section 510 and to adequately fulfill the purposes of this statutory provision, telecommunications carriers are required to submit all pertinent information and reports necessary for purposes of calculating their annual fiscal assessment. This filing requirement has not been repealed or eliminated. Additionally, Sections 309, 504, and 505 of the Code provide the Commission with the plenary authority to compel the production of information and to require public utilities to furnish such records, documents, and information as may be necessary.

While the Commission acknowledges the streamlined reporting obligations for ILECs, similar to the OCA, we note that pursuant to Section 3015(e)(7), ILECs operating under a Chapter 30 Plan are required to file an annual statement of gross intrastate operating revenues for purposes of calculating assessments for regulatory expense. 66 Pa.C.S. § 3015(e)(7). Also, pursuant to 66 Pa.C.S. § 3017(f)(2), streamlined reporting does not impede the ability of the Commission to request explanation of the report mandated by Section 3015(e)(7). Proposed Section 69.3701(7) only clarifies that supporting information “such as traffic studies, tax returns, jurisdictional allocation formulas and factors, books of accounts, reports, etc.” may be considered when reporting proper gross intrastate revenue for fiscal assessment purposes.<sup>56</sup> Thus, the Proposed Policy Statement does not subject any jurisdictional telecommunications carriers, including Chapter 30 Plan ILECs, to any new audit and filing requirements. It only describes the possible scope of information which may be necessary to be filed and considered as support for calculating the proper fiscal assessment.

<sup>56</sup> See Final Annex A, § 69.3701(k).

BCAP, PTA and Verizon all assert that it would be technically infeasible to comply with the obligation to ascertain and report “de facto” intrastate revenues attributable to special access, transport, or similar jurisdictionally mixed-use services. These commenters all state that the FCC has acknowledged that the best method to verify and ascertain the jurisdictional status of the traffic that traverses a special access private line for purposes of complying with regulatory obligations is through customer certifications. This begs the question of how carriers have been able to accurately report what special access revenues in past assessment forms fall under the ten percent rule since they simply rely on customer certifications to determine whether a particular special access, transport, or similar line is carrying intrastate or interstate traffic that is above or below the ten percent rule. Nevertheless, in order to ensure full compliance with the requirements of Section 510 of the Code, the Commission believes it is appropriate and the statutory responsibility of all jurisdictional carriers holding Commission-issued CPCs to file the requisite evidence to ascertain the “de facto” intrastate revenues attributable to jurisdictionally-mixed services.

If a jurisdictional carrier believes that obtaining customer certifications is unduly burdensome, the Commission would be willing to entertain a determination of the point of origination and termination on the carrier’s network, rather than the point of origination and termination of the underlying communication. So that, for example, if a jurisdictional telecommunications carrier provides wireline transport of communications entirely within the state, then the call would be classified as intrastate, regardless of the jurisdiction of the underlying call. If one of those points were located outside of Pennsylvania, then the underlying revenue would be interstate. The routing on the jurisdictional carrier’s network cannot be circuitous or designed to avoid the assessment process set forth in this Policy Statement. If a jurisdictional carrier prefers to explore this type of traffic study, we would consider it upon a request, with underlying support, to do so.

Crown Castle asserts that the Proposed Policy Statement is discriminatory and unfair. This argument is misguided and has no basis whatsoever. Crown Castle refers to itself and other CAPs as “deregulated” as a means to infer that since they are subject, as they claim, to “alternative forms of regulation” as defined in the Public Utility Code the costs to administer the Code as related to them is low. That argument is based upon an erroneous legal interpretation of Chapter 30, however.

There is a difference between a competitive carrier which is certificated and regulated, and a deregulated carrier, which is neither certificated nor regulated. Under Chapter 30, neither Crown Castle individually nor CAPs as a class are deregulated. Consequently, we reject Crown Castle’s argument that the Commission’s policy determination detrimentally impacts them more because we are imposing a uniform regulatory assessment as we do on ILECs that Crown Castle avers without support inflict higher regulatory costs on the Commission.

Under Chapter 30, the “alternative form of regulation” Crown Castle invokes applies only to ILECs (defined as local exchange telecom companies under the act). Under Chapter 30, it is the ILECs, not competitive providers, who were provided statutory authority to convert to a less burdensome alternative form regulation, modifying their regulatory ratemaking construct from the traditionally more highly regulated rate base/rate of return base rate case methodology to a less burdensome alternative form

of ratemaking in exchange for a ubiquitous broadband deployment commitment. Section 3015 of the Code, 66 Pa.C.S. § 3015, relied on by Crown Castle, is not even applicable to Crown Castle. This statutory provision applies only to ILECs. Non-ILECs such as Competitive Local Exchange Carriers (CLECs), CAPs and interexchange carriers (IXCs) are classified as “alternative service providers” that are competitive under Chapter 30 and provide services in competition with ILECs. They certainly are not “deregulated” in any fashion.

Moreover, Crown Castle’s assertion that, as a competitive carrier, it is not a highly regulated entity is of no consequence under Section 510. Section 510 applies to all certificated jurisdictional public utilities and hence, all jurisdictional telecommunications carriers—competitive or otherwise. Section 510 of the Code makes no distinction or exemption for CAPs or any other certificated carriers. Section 510 does not authorize one assessment obligation for certificated jurisdictional carriers that are “highly-regulated” and a different assessment obligation for competitive carriers. All jurisdictional telecommunications carriers holding a Pennsylvania CPC are subject to Section 510.

Moreover, contrary to Crown Castle’s, the Proposed Policy Statement does not effectively prohibit the provision of service in violation of 47 U.S.C. § 253. Rather, it conforms to the criteria set forth in the FCC’s Declaratory Ruling Order regarding regulatory fees in that the fees will be permitted “to the extent that they represent a reasonable approximation of the local government’s objectively reasonable costs and are non-discriminatory.”<sup>57</sup> The statutory Section 510 assessment process is a reasonable and fair approach as it imposes a fiscal assessment on a jurisdictional telecommunications carrier that is based upon both the direct hours incurred by Commission staff in each utility sector and the particular gross intrastate operating revenues of that public utility. All jurisdictional telecommunications carriers, whether they be ILECs, CLECs, CAPs, or IXCs are classified as a common utility group and all are subject to Section 510’s use of gross intrastate operating revenues as the basis to calculate their individual annual fiscal assessment. This is a fair, equitable and nondiscriminatory to determine fiscal assessment under Section 510 of the Code.

The Commission receives necessary data relating to each public utility’s gross intrastate operating revenue in Pennsylvania from the utilities by way of the assessment report. Based on this submitted data, each certificated telecommunications carrier in the telephone public utility group is allocated and required to advance to the Commission its reasonable share of the cost of administering the Code. 66 Pa.C.S. §§ 510(b) and (f). Thus, Crown Castle’s position that the Proposed Policy Statement somehow disrupts this equitable approach is erroneous and without merit.

Also, Crown Castle argues that the Proposed Policy Statement is unfair because it does not apply to ILECs. This is an erroneous interpretation. The Proposed Policy Statement provides guidance to all jurisdictional telecommunications carriers that they have an obligation to report the de facto and actual intrastate revenue associated with jurisdictionally mixed-use private lines as a part of their total gross intrastate operating revenues reported to the Fiscal Office. If a telecommunications carrier seeks to invoke this Commission’s jurisdiction to provide intrastate services, then it is obliged to report gross revenues received from those services. If no intrastate services are provided and the carrier reports zero

intrastate revenues, its right to a CPC is not clear and, after requisite due process, the carrier may be required to relinquish its CPC. We note, however, that in order to make this abundantly clear, we have removed references to any specific class of certificated providers, such as CAPs, because the policy statement is intended to and will apply with equal force to all jurisdictional telecommunications public utilities.

Additionally, Crown Castle states that the Commission’s Proposed Policy Statement exceeds its legislatively granted powers. However, the Proposed Policy Statement simply provides guidance regarding how jurisdictional telecommunications carriers must report the de facto intrastate revenues on jurisdictionally-mixed telecommunications services as a part of the total gross intrastate operating revenues reported for Section 510 assessment purposes. Specifically, in reporting their total gross intrastate operating revenues in their Section 510 assessment report, jurisdictional telecommunications carriers may not rely on the FCC’s ten percent rule as their basis for not reporting the de facto intrastate revenue on all jurisdictionally-mixed telecommunications services.

It should be noted that the Proposed Policy Statement does not calculate any specific amount for fiscal assessments and takes no individual action against any individual carrier or group of carriers at this time. The Proposed Policy Statement only provides the manner in which the total gross intrastate operating revenues on all jurisdictional telecommunications services, including jurisdictionally-mixed telecommunications services are to be reported in Section 510 assessment reports. After submitting its Section 510 assessment report to the Commission, the fiscal assessment is calculated by the Fiscal Office and must be paid within 30 days of receipt of its notice of assessment. The statutory scheme provides for objections to and adjudication of any contested assessment amount. In particular, Section 510(c) provides that a public utility may file, within 15 days, an objection to the assessment “setting out in detail the grounds upon which the objector regards such assessment to be excessive, erroneous, unlawful or invalid.” 66 Pa.C.S. § 510(c). Any such objection will be assigned to the Office of Administrative Law Judge for hearing and decision. Thus, the Proposed Policy Statement does not prohibit a jurisdictional telecommunications carrier from challenging any calculated fiscal assessment that the carrier may deem unsupported or inappropriate. It simply provides guidance on the manner it should report its total intrastate operating revenues.

Lastly, the Commission will adopt certain editorial suggestions of the OCA and others to amend proposed Section 69.3701 to eliminate any ambiguity as to whether the “de facto gross intrastate operating revenues” standard would apply only to a telephone public utility which reported zero intrastate revenues in the prior year or to all telephone public utilities. The Commission will also incorporate a declaration into proposed Section 69.3701 that the policy statement exists to assist these carriers in complying with their statutory obligations to file their Section 510 revenues report and to pay a reasonable share of the Commission’s costs of administering the Public Utility Code. As we have with CAPs, the Commission will eliminate the explicit references to DAS network operators in proposed Section 69.3701(4) and (5). We agree with the OCA that these references are unnecessary because the intent of the policy statement is to

<sup>57</sup> See Declaratory Ruling.

provide guidance to jurisdictional local exchanges that provide jurisdictionally mixed-use telecommunications services.<sup>58</sup>

The OCA also noted that in several places, proposed Section 69.3701 refers one or more times to the reporting of “gross intrastate revenues.” We agree with the OCA that in order to be consistent with the wording of Section 510 of the Code, we should use the language of the statutory provision and use the word “operating” so the proposed Section 69.3701(3), (5), (6) and (7) will read as “gross intrastate operating revenues.”<sup>59</sup>

We also take the OCA’s editorial suggestion that Subparts (5) and (9) of proposed Section 69.3701 refer to the FCC’s “ten percent contamination rule” without the requisite citation to 47 CFR § 36.154. Additionally, the OCA states that Subparts (5) and (9) of proposed Section 69.3701 are redundant and repetitive in the description of the ten percent rule. The Commission agrees with the OCA that one short summary description of the FCC’s ten percent rule and its purpose as a federal cost allocation rule for ratemaking and other purposes, with a citation, is all that is necessary. Finally, the OCA also suggests that the other part of Subpart (9) regarding the lack of preemption should be rephrased in a more affirmative manner, appropriate to a policy statement adopted after public comment and close review of the legal underpinnings of the Commission’s Proposed Policy Statement.<sup>60</sup> We agree.

Crown Castle states that as defined in proposed Section 69.3701, the term “de facto gross operating revenues” is ambiguous and may potentially be overly broad. Crown Castle suggests that the definition of “de facto gross operating revenues” should be revised to only apply to revenues actually received, rather than amounts charged or otherwise due. We agree with this suggestion.

Lastly, many commentators requested that the Commission establish a collaborative process to examine the complex issues underlying and implicated by the Proposed Policy Statement. Given the clear and unambiguous mandate in the statute that public utilities holding Commission-issued CPC must report their gross intrastate operation revenues and the further guidance provided in this Final Policy Statement, the Commission does not believe that a technical conference or collaborative process is necessary. All telecommunications public utilities holding a Commission-issued CPC are obligated to report gross intrastate operating revenues in a manner which assures each of them pays their reasonable share of the Commission’s costs of administration. We expect each telecommunication public utility to comply with its obligations under state law; *Therefore,*

*It Is Ordered That:*

1. The Final Policy Statement as set forth in Annex A is adopted.
2. The Law Bureau shall submit this Order and Annex A to the Governor’s Budget Office for review of its fiscal impact.
3. The Law Bureau shall deposit this Order and Annex A with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.
4. The Final Policy Statement shall become effective upon publication in the *Pennsylvania Bulletin*.

<sup>58</sup> We acknowledge that the explicit use and reference to “DAS” network operators may be moot no matter the outcome of the current appeal before the Pennsylvania Supreme Court regarding their jurisdictional classification. See generally, *Crown Castle NG East LLC & PA-CLEC LLC, v. Pennsylvania Public Utility Commission*, 2 MAP 2019.

<sup>59</sup> See Final Annex A, § 69.3701(d), (f), (g), (j), (k).

<sup>60</sup> See Final Annex A, § 69.3701(i).

5. A copy of this Order, together with Annex A, be served on all jurisdictional telecommunications public utilities and all parties that filed comments under this docket. The Order and Annex A shall also be posted on the Commission’s website.

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

ROSEMARY CHIAVETTA,  
*Secretary*

**Fiscal Note:** Fiscal Note 57-324 remains valid for the final adoption of the subject regulation.

**Statement of Chairperson Gladys Brown Dutrieuille**

This case involves a proposed Policy Statement that we issued on November 8, 2018, which provides guidance to telecommunications public utilities with a Certificate of Public Convenience (CPC) on how they are to report revenues for Section 510 assessment purposes. The issue arises because some telecommunications carriers with interstate operations and a CPC report no intrastate revenues and pay no assessments while others may be doing the same thing but report revenues from other operations and pay assessments. Both telecommunications public utilities compete to provide interstate services subject to the Federal Communications Commission (FCC) 10% contamination rule.

The parties disagree on whether the Commission can require telecommunications carriers with interstate operations but no reportable intrastate revenues to pay an intrastate assessment based on their interstate revenues in light of the 10% contamination rule. FCC rules classify as interstate all revenues from those services where a customer certifies that 10% or more of the services are interstate i.e., private line special access. A service in which potentially 90% of the revenues comes from intrastate services becomes interstate and no assessment is paid because no intrastate revenues are reported. This “10 percent contamination rule” arises from federal jurisdictional separations rules governing the allocation of network costs and revenues between the states and the FCC.

Except for the Office of Consumer Advocate, the comments oppose adoption of a “de facto” gross operating revenues solution in which parties will pay an intrastate assessment on up to 90% of the interstate revenues deemed to be intrastate revenues. Two of the parties, PTA and Verizon respectively, urge the Commission to convene a collaborative and to explore ways to recover the costs from providers that utilize administrative resources but pay no assessments. Crown Castle, a Distributed Antenna System (DAS) network provider who is challenging our decision that it is not a jurisdictional public utility in the Supreme Court of Pennsylvania, is concerned about discrimination given the focus on Competitive Access Providers (CAPs) compared to Incumbent Local Exchange Carriers (ILECs), possibly violating Section 253 of federal law, 253 U.S.C. § 253.<sup>61</sup>

The legal and factual claims in the majority of comments demonstrate that the scope and operation of this

<sup>61</sup> That concern is particularly troublesome should the Commission’s first action under this Policy Statement pursue revocation limited to only competitive carriers who report no intrastate revenues under the 10% contamination rule while others who do the same thing retain theirs because they pay an assessment on revenues from other operations unrelated to the 10% contamination rule. Compare *Regarding the Reporting of Intrastate Operating Revenues for Section 510 Assessment Purposes by Jurisdictional Telecommunications Carriers Offering Special Access and Other Similar Jurisdictionally-Mixed Telecommunications Services*, Docket No. M-2018-3004578 (Comments of Verizon Communications, Inc. and BCAP) with Appendix A. It is now well-settled that the TA-96 authorized federal regulations of intrastate telecommunications while prohibiting states from erecting barriers to competitive entry. *AT&T v. Iowa Utilities Board*, 525 U.S. 368, 371–373 (1999). Such a selective action would suggest otherwise.

10% rule is complex. Some claim this precludes any state assessment whatsoever because caselaw prohibits state assessments on interstate revenues for state universal service.<sup>62</sup>

While I support assessments on carriers with a CPC to support Commission operations, I am concerned that we are not considering other approaches and have not chosen to pursue a rulemaking. I am also concerned that the Commission has not taken the PTA's suggestion to convene a collaborative to explore other options and to address the concerns with reliance on the 10% rule.

These are important because federal law permits non-discriminatory and reasonable burdens on interstate commerce. Precedent requires the states to enforce federal law.<sup>63</sup> A CPC not only ensures compliance with that obligation but also provides Commission processes to resolve disputes, promote competition, and protect Pennsylvania consumers and companies.<sup>64</sup> Other federal precedent states that assessments for state universal service and dispute resolution do not violate a federal prohibition on rate regulation or market entry of interstate services.<sup>65</sup> In the case of mixed jurisdictional services and traffic, the FCC permits use of a "safe harbor" approach allowing the states to assess a fixed portion of revenues for state universal service purposes so long as there is no double counting.<sup>66</sup> There is no caselaw holding that the ban on assessing interstate revenues for state universal service extends to assessments for government operations.

For these reasons, I am voting no.

GLADYS BROWN DUTRIEUILLE,  
Chairperson

#### Statement of Commissioner Andrew G. Place

Before us is a final recommendation regarding the adoption of a previously proposed Policy Statement.<sup>67</sup> Under this Policy Statement, telecommunications carriers that are certified by this Commission and operate in Pennsylvania offering jurisdictionally mixed telecommunications services (e.g., mainly private line and special access services), but report zero gross intrastate revenues on those services due to the Federal Communications Commission's (FCC's) ten percent contamination rule, would be obligated, for fiscal assessment purposes, to report their de facto gross intrastate operating revenues and pay an assessed amount of this Commission's costs for administering the Public Utility Code.

The majority of the commenting parties, including such entities as the Pennsylvania Telephone Association (PTA), the Verizon Companies (Verizon), and the Broadband Cable Association of Pennsylvania (BCAPA), have actively opposed the adoption of this Policy Statement. These

comments have raised several serious legal and technical concerns and have strongly recommended against its adoption. I share many of the concerns that these commenting parties have expressed. Assuming that there is a genuine and concrete fiscal assessments issue for both incumbent and competitive telecommunications carriers that do not report operating revenues from special access and private line circuits that have been classified as interstate under the FCC's ten percent contamination rule (or report zero intrastate revenues from such services)—and I am not convinced that there is such an issue—this matter should be further studied and addressed through a collaborative process<sup>68</sup> or through a legislative solution.<sup>69</sup> Furthermore, for the reasons that I explain in detail below, any future Commission action in this matter should proceed on the basis of a rulemaking and not a Policy Statement.

#### A. The Recommended Policy Statement Suffers from Serious Legal and Technical Flaws

The recommended Policy Statement suffers from serious legal and technical flaws. The potential adoption of the Policy Statement will inevitably lead to a conflict with the FCC's applicable jurisdictional separation rules.<sup>70</sup> This conflict most likely will result in appellate litigation before courts and/or administrative agencies of competent jurisdiction. Most of the comments plainly demonstrate that the FCC's ten percent contamination rule, that affects the interstate classification of special access and private line circuits and services, also affects the corresponding jurisdictional classification, separation and allocation of capital investment, associated fixed investment costs, operational costs, and associated revenues.<sup>71</sup> The relevant interstate classification and jurisdictional allocation of the network facilities, costs, and revenues affected by the ten percent contamination rule are utilized for a variety of purposes. They are not solely utilized for the jurisdictional allocation of revenues for the purpose of ascertaining contribution assessments to the federal and state universal service fund (USF) mechanisms. They are also utilized for the assessment and payment of regulatory fees to appropriate agencies including the FCC and this Commission.

BCAPA explained the evolution of the FCC's ten percent contamination rule and also pointed out that "the FCC specifically acknowledged that its jurisdictional separations procedures, including the ten percent rule, govern revenue allocations in the regulatory fee context."<sup>72</sup> BCAPA points to the FCC's explanation in a notice of proposed rulemaking that "states 'use separations results to determine the amount of intrastate universal service support and to calculate regulatory fees.'"<sup>73</sup> Verizon also states that since the FCC adopted the ten percent contamination rule for special access and private line services, "providers have been required to report as interstate revenue on the FCC Form 499-A their revenue from special access services carrying more than ten percent interstate traffic, and they have been as-

<sup>62</sup> *Texas Office of Public Utility Counsel, Pennsylvania Public Utility Commission et al. v. FCC*, 183 F.3d 393 (5th Cir. 1999).

<sup>63</sup> *Ill. Pub. Telcoms. Ass'n v. FCC*, 410 U.S. App. D.C. 69, 752 F.3d 1018 (2014), cert. denied 135 S. Ct. 1583 (2015).

<sup>64</sup> See e.g., *AT&T Corporation v. Core Communications, Inc. and the Pennsylvania Public Utility Commission*, Docket Nos. 14-1499 & 14-1664 (November 25, 2015)(Commission enforcement of federal intercarrier compensation rule upheld); *Palmerton Telephone Company v. Pa. PUC*, Docket C-2009-2093336 (March 16, 2010)(CPC provider of interstate services required to compensate an intrastate carrier); *RTCC v. Pa. PUC*, 941 A.2d 751 (Pa. Cmwlth. 2005)(Commission promotion of competition under state and federal law upheld); *Palmerton Telephone Company v. Global NAPS South, Inc.*, Docket No. C-2009-2093336 (March 16, 2010), Letter of Palmerton Telephone (December 23, 2010)(Commission enforcement apprised of interstate carrier with CPC refusal to comply with the Commission's March 2010 Order).

<sup>65</sup> *Mountain Solutions, Inc. v. State Corporation Commission of Kansas*, 996 F.Supp. 1043 (D. Kan. 1997), aff'd 149 F.3d 1058; *Telesaurus VPC, LLC v. Power*, 623 F.3d 998 (9th Cir. 2010), cert. denied 132 S.Ct. 95.

<sup>66</sup> In Re: Universal Service Contribution. Docket No. 06-122 Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling (November 10, 2010), para 11. The FCC permits traffic studies for regulatory purposes but those are usually explored in Pennsylvania by a regulation and not by policy statements. See e.g., 52 Pa. Code § 63.71.

<sup>67</sup> Docket No. M-2018-3004578, Order entered November 8, 2018, 49 Pa.B. 929 (March 2, 2019).

<sup>68</sup> PTA Comments at 2-3, 6; Crown Castle Comments at 3, 5.

<sup>69</sup> Verizon Comments at 10.

<sup>70</sup> 47 CFR § 36.154(a). The FCC originally established its ten percent contamination rule in 1989. BCAPA Comments at 2-3 and n. 6 citing MTS and WATS Market Structure, Amendment of Part 36 of the Communications Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, Decision and Order, 4 FCC Red 5660, 5660-61, ¶¶ 1, 2 (1989).

<sup>71</sup> BCAPA Comments at 3; Verizon Comments at 5. This classification does not obviate this Commission's regulatory oversight and responsibilities that telecommunications network facilities and services within Pennsylvania comply with applicable statutory and regulatory standards involving reliability, adequacy, safety, efficiency, privacy, and reasonableness. See, e.g., 66 Pa.C.S. § 1501.

<sup>72</sup> BCAPA Comments at 4.

<sup>73</sup> BCAPA Comments at 4 and n. 18, citing In re Jurisdictional Separations and Referral to the Federal-State Joint Board, CC Docket No. 80-286, (FCC, Rel. July 18, 2018), Further Notice of Proposed Rulemaking, 33 FCC Red 7261 ¶ 11 (2018); slip op. FCC 18-99 at 5 (emphasis added by BCAPA).

sessed for various federal fees based on that revenue.”<sup>74</sup> Verizon’s extensive quote from the FCC Form 499-A plainly indicates that these reported interstate revenues are utilized not only for the calculation of federal USF mechanism contribution assessments, but also for funding such programs as the interstate telecommunications relay services (TRS), the shared costs of local number portability administration (LNPA), and the FCC’s own Interstate Telecommunications Service Provider (ITSP) regulatory fees.<sup>75</sup> The Verizon comments further explains that “the same revenue that the Commission is now seeking to assess as ‘de facto intrastate operating revenue’ is considered interstate revenue for FCC assessment purposes and is subject to being assessed for the ITPS, FUSF [federal USF] and a number of other federal fees.”<sup>76</sup> Verizon reinforces and explains its position by referencing the FCC Wireline Competition Bureau’s Order of March 10, 2017 regarding the applicability of the ten percent contamination rule for private and special access lines, and the resulting contribution assessments to the federal USF mechanism.<sup>77</sup> The same FCC WCB Audit Order also includes the following language that is relevant to the “de facto” intrastate revenues fundamental premise that has been advanced in the Policy Statement under consideration:

Mixed-use special access lines are assignable to the interstate jurisdiction if the interstate traffic constitutes more than ten percent of the total traffic and to the intrastate jurisdiction if it constitutes ten percent or less. We find no basis for allowing carriers to *simply presume*, without any evidence or good-faith inquiry, that ten percent or less of the traffic on a mixed-use line is interstate. Stated differently, carriers and their customers must make good faith effort to assign a mixed-use private line because no default presumption of interstate or intrastate jurisdiction exists.

\* \* \* \* \*

In summary, we find no basis in our rules to conclude that a carrier *may simply presume* that a mixed-use private line is properly *assignable to the intrastate jurisdiction*. The carrier must engage in some kind of good faith query into the jurisdictional nature of the traffic carried on the line. Allowing such a presumption would permit carriers to regularly assign to the state jurisdiction authority, costs *and revenues* associated with private lines carrying more than ten percent interstate traffic, in violation of the plain language of section 36.154 of the Commission’s rules [47 CFR § 36.154] and the Commission’s [FCC’s] longstanding USF rules and policies.

FCC WCB Audit Order, slip op. ¶¶ 11, 21 at 6, 9 (emphasis added, citations omitted).

Thus, in accordance with the FCC WCB Audit Order, the application of the FCC’s ten percent contamination rule on private line and special access circuits and services that are classified as interstate under the rule does not create a presumption that any of the revenues associated with such circuits and services can be treated as intrastate under the “de facto” theory and premise.

Both the BCAPA and Verizon comments explain the inherent conflict between the theory of utilizing and

somehow deriving the “de facto” intrastate revenues that are per se subject to interstate jurisdictional classification because of the FCC’s ten percent contamination rule, and the resulting risks of federal preemption.<sup>78</sup> The lack of a presumption that any private line and special access revenues that are classified as interstate under the FCC’s ten percent contamination rule can be deemed as intrastate further complicates the actual application of the recommended Policy Statement. I believe that certain comments addressing the practical implementation of the recommended Policy Statement hold merit. The FCC WCB Audit Order directives notwithstanding, the recommended Policy Statement does not contain a practically applicable and adequately defined methodology through which the “de facto” intrastate gross revenues subject to the fiscal assessments by this Commission can be readily identified and quantified. Rather, the recommended Policy Statement provides vague guidance that jurisdictional telecommunications carriers need to make available “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 [Commission’s] 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 [Public Utility] Code.”

The lack of appropriate definitions—an essential parameter with a recommended Policy Statement that also implicates federal law and jurisdiction—complicates the task of properly identifying and quantifying the targeted “de facto” gross intrastate operating revenues. For example, since several incumbent and competitive telecommunications carriers have already been applying the FCC’s ten percent contamination rule for private lines and special access circuits and services,<sup>79</sup> the relevant and reportable jurisdictional allocation factors would be “100% interstate.” The recommended Policy Statement does not outline a procedure whereby a private line or special access circuit subject to the FCC’s contamination rule—and the relevant revenues—can somehow be “separated” into “X%” “de facto” intrastate while the “Y%” will still retain its interstate classification. Similarly, the definitions and potential methodological use of “tax returns, . . . books of accounts, reports, etc.,” are also lacking. There can be reliance on traffic studies involving specific private lines and special access circuits or groups thereof—and the FCC WCB Audit Order appears to emphasize “the nature of the traffic” and not simple customer certifications that address the jurisdictional classification of such traffic.<sup>80</sup> However, as the comments have made clear, telecommunications carriers extensively rely on their respective customer certifications for the jurisdictional classification of private lines and special access circuits and associated revenues that are affected by the FCC’s ten percent contamination rule.<sup>81</sup> However, the recommended Policy Statement does not address the interplay between such customer certifications and the use of actual traffic studies in ascertaining the desired

<sup>78</sup> Verizon Comments at 8-9; BCAPA Comments at 2-3.

<sup>79</sup> Verizon Comments at 7.

<sup>80</sup> “Subsequent discussion of the ten percent rule by the Commission [FCC] also emphasized accurately determining the nature of the traffic, without any reference to a presumption based on certification and, in most cases, without discussion of the certification process at all.” FCC WCB Audit Order, slip op. ¶ 20 at 8. The FCC’s Wireline Competition Bureau further cautioned: “To ensure that customers make *informed certifications*, carriers should provide basic guidance to their customers regarding what constitutes intrastate or interstate traffic. Carriers should specifically make customers aware that *it is the nature of the traffic over the private line that determines its jurisdictional assignment*, not merely the physical endpoints of the facility over which service is delivered.” Id. ¶ 25 at 9 (emphasis added, citation omitted).

<sup>81</sup> BCAPA Comments at 6; Verizon Comments at 9-10.

<sup>74</sup> Verizon Comments at 5.

<sup>75</sup> Verizon Comments at 6.

<sup>76</sup> Verizon Comments at 7.

<sup>77</sup> Verizon Comments at 6-7 and n. 12 citing In re Federal-State Joint Board on Universal Service et al., CC Docket No. 96-45 et al., (FCC, Acting Chief, Wireline Competition Bureau, Rel. March 30, 2017), Order, 32 FCC Rcd 2140, slip op. DA 17-309, 2017 FCC LEXIS 954 (FCC WCB Audit Order), application for review pending. See also BCAPA Comments at 3-4 and n. 13.

“de facto” intrastate revenues “X%” allocation factor. Verizon also cautions in its comments that “if the Commission expects providers to assume that ninety percent of the traffic is intrastate, that system is certainly subject to challenge as encroaching upon interstate traffic because in reality much less than ninety percent is likely to be intrastate.”<sup>82</sup>

The recommended Policy Statement also does not contain any preferred reporting form where the requested information can be included and readily discerned by the Commission’s Fiscal Office. This can easily lead to reporting dissimilarities between individual and/or whole categories of telecommunications carriers and the non-uniform application of the recommended Policy Statement. Such reporting dissimilarities can and will lead to disparate regulatory treatment between telecommunications carriers that immediately come under the rubric of the recommended Policy Statement or will attempt to comply in the future. This will also increase the administrative burden on the Commission and its Staff because there will not be an easy and standardized way to cross-check and validate the submitted information and data, i.e., the existing annual financial report formats for telecommunications public utilities do not readily accommodate the data elicited through the recommended Policy Statement in an appropriately disaggregated form.

It is beyond doubt that private lines and special access circuits and services and their revenues that are classified as interstate under the ten percent contamination rule are assessed for FCC regulatory fee purposes.<sup>83</sup> Thus, this interstate classification and the corresponding application of jurisdictional separations involves both services and revenues. Under these circumstances and where the boundaries of jurisdictional separations have been prescribed and enforced, violations of such boundaries are not condoned under appropriate judicial review.<sup>84</sup> Because the legal and technical premises of the “de facto” intrastate revenues theory violate such boundaries, the recommended Policy Statement is unsustainable.

#### B. *The Recommended Policy Statement Cannot Be Promulgated in Its Present Form*

The recommended Policy Statement on the “de facto” intrastate revenues cannot be promulgated in its present form from a procedural viewpoint. Although the underlying premise and policy of the “de facto” intrastate revenues have been incorporated in the recommended Policy Statement, the immediate and anticipated implementation effects will be akin to those of a substantive, final form rulemaking. However, this agency has not engaged in a substantive rulemaking for the purpose of adopting the “de facto” intrastate revenues premise and policy as a rule. For example, although the proposed Policy Statement was the subject of notice and comment, it was not reviewed by the Independent Regulatory Review Commission (IRRC) since Commission policy statements are not subject to such review. Thus, before proceeding any further there is a need to determine whether the expressed “de facto” intrastate revenues premise constitutes a proper Policy Statement or amounts to an

unpromulgated regulation.<sup>85</sup> In order to reach this determination, Pennsylvania appellate courts apply the “binding norm” test. Pennsylvania Commonwealth Court decisions generally hold that: “In ascertaining whether an agency has established a binding norm, the reviewing court must consider: (1) the plain language of the provision; (2) the manner in which the agency has implemented the provision; and (3) whether the agency’s discretion is restricted by the provision.”<sup>86</sup>

The plain language review of the recommended Policy Statement and the effects of the “de facto” intrastate revenues policy “taken as a whole, shows the” relevant provisions “to be restrictive, directive, substantive, and thus, more characteristic of a regulation.”<sup>87</sup> The recommended Policy Statement applies concrete, substantive, and restrictive directives regarding the reporting of the “de facto” intrastate revenues of incumbent and competitive telecommunications carriers derived from private line and special access circuits and services that are classified as interstate under the FCC’s ten percent contamination rule. These directives, in conjunction with other parallel Commission proceedings, are not mere declarations of future interpretative policy, but are and will be applied and enforced in a uniform fashion. Thus, the plain language of the recommended Policy Statement “establishes a standard of conduct with the force of law, and creates a binding norm.”<sup>88</sup> Furthermore, although the recommended Policy Statement has been promulgated through public notice and comment, because of other concurrent proceedings, its application is almost immediate without proper and advance procedural effectuation. In other words, there are telecommunications carriers that will be immediately affected by the recommended Policy Statement standards of conduct without the Policy Statement being actually in effect (i.e., having undergone requisite review after its adoption and published in the *Pennsylvania Bulletin*). This does not provide sufficient and advance notice to affected telecommunications carriers, especially since this Commission has abided by the application of the FCC’s ten percent contamination rule for a number of decades.

There is no doubt here that the recommended Policy Statement “restricts the agency’s discretionary power and is, thus, more like a regulation than a statement of policy.”<sup>89</sup> The Commission is concurrently proceeding with the enforcement of the standards of conduct contained in the recommended Policy Statement and will be doing so in the future in a uniform manner among jurisdictional telecommunications carriers. Furthermore, because the recommended Policy Statement will have cross-effects on the systems of accounts that are prescribed by the FCC and may be utilized by jurisdictional telecommunications carriers for network facilities, services and revenues that are classified as interstate under the FCC’s ten percent contamination rule, the recommended Policy Statement may be modifying existing Commission regulations, e.g., 52 Pa. Code § 63.32. Since the recommended Policy Statement establishes a “binding norm,” it is an unpromulgated regulation. Finally, as previously stated, this unpromulgated regulation is in conflict with applicable federal law and regulations.

<sup>85</sup> *Eastwood Nursing and Rehabilitation Center v. Dept. of Public Welfare*, 910 A.2d 134, 141 (Pa. Cmwlth. 2006) (*Eastwood Nursing*). “In *Pennsylvania Human Relations Commission v. Norristown Area School*, 473 Pa. 334, 374 A.2d 671 (1977), our Supreme Court concluded that the General Assembly did not intend for the agency to have sole discretion in determining when a statement of policy would be settled enough to become a regulation.” *Department of Environmental Resources v. Rushton Mining Co.*, et al., 591 A.2d 1168, 1173 (Pa. Cmwlth. 1991) (*Rushton Mining*).

<sup>86</sup> *Eastwood Nursing*, 910 A.2d at 144 (citations omitted).

<sup>87</sup> *Eastwood Nursing*, 910 A.2d at 146.

<sup>88</sup> *Eastwood Nursing*, 910 A.2d at 146.

<sup>89</sup> *Eastwood Nursing*, 910 A.2d at 148.

<sup>82</sup> Verizon Comments at 10.

<sup>83</sup> Verizon Comments at 8-9.

<sup>84</sup> See, e.g., *Texas Office of Public Utility Counsel, et al. v. F.C.C.*, 183 F.3d 393 (5th Cir. 1999) (the FCC “exceeded its jurisdictional authority when it assessed contributions for § 254(h) ‘schools and libraries’ programs based on the combined intrastate and interstate revenues of interstate telecommunications providers and when it asserted its jurisdictional authority to do the same on behalf of high-cost support”).

*C. Intrastate and Interstate Operations of Telecommunications Carriers in Pennsylvania*

Certified competitive telecommunications carriers in Pennsylvania conduct both intrastate and interstate operations within Pennsylvania consistent with the directives in the Commission's Implementation Orders that facilitate the market entry of such entities in accordance with Pennsylvania law and the letter and the spirit of the federal Telecommunications Act of 1996 (TA-96).<sup>90</sup> To the extent that the recommended Policy Statement directly or indirectly does or will limit the activities of these carriers to operate in Pennsylvania and offer intrastate or interstate services, this will constitute a clear contravention and modification of the Commission's Implementation Orders when the proposed Policy Statement at issue did not notice nor did it solicit comments in that regard. Such an outcome also ignores the realities and the constantly shifting nature of telecommunications network operations and access services. A private line or special access circuit that currently may be subject to the FCC's ten percent contamination rule and classified as interstate, may have a different jurisdictional allocation in the future depending on the nature of the various types of traffic that it handles. This shift will also change the jurisdictional revenue classification and reporting for the specific telecommunications carrier in question.

For the above-referenced reasons I will be respectfully dissenting from the disposition of this matter.

ANDREW G. PLACE,  
*Commissioner*

**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**

**COMPUTATION OF SECTION 510 ASSESSMENTS FOR JURISDICTIONALLY-MIXED TELECOMMUNICATIONS SERVICES—STATEMENT OF POLICY**

**§ 69.3701. Computation of Section 510 Annual Fiscal Assessments Related to Revenue from Jurisdictionally-Mixed Telecommunications Services.**

(A) This policy statement provides guidance to all jurisdictional telecommunications public utilities in complying with their statutory obligations under section 510 of the Public Utility Code, 66 Pa.C.S. § 510 (relating to assessment for regulatory expenses upon public utilities).

(B) All telecommunications carriers holding Certificates of Public Convenience (CPC) issued under Chapter 11 of the Public Utility Code (Code), 66 Pa.C.S. §§ 1101—1103 (relating to organization of public utilities and beginning of service; enumeration of acts requiring certificate; and procedure to obtain certificates of public convenience), are public utilities subject to the Commission's authority under Section 510 of the Code, 66 Pa.C.S. § 510 to impose annual fiscal assessments upon these carriers to cover their "reasonable share" of the costs of administering the Code.

<sup>90</sup> In re: Implementation of the Telecommunications Act of 1996, Docket No. M-00960799, Order entered June 3, 1996, 1996 WL 482990; Order on Reconsideration entered September 9, 1996, 26 Pa.B. 4588 (1996), 1996 WL 482990 (collectively Implementation Orders); Proposed Modifications to the Application Form for Approval of Authority to Offer, Render, Furnish, or Supply Telecommunications Services to the Public in the Commonwealth of Pennsylvania, Docket No. M-00960799, Final Order entered May 22, 2014.

(C) 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 operating revenues.

(D) All jurisdictional telecommunications public utilities holding Commission-issued CPCs are obligated by section 510 of the Code to file annual fiscal assessment reports with the Commission reporting 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 operating revenues.

(E) All jurisdictional telecommunications public utilities holding commission-issued CPCs in Pennsylvania provide jurisdictionally mixed-use telecommunications services.

(F) Some jurisdictional telecommunications public utilities in Pennsylvania that provide jurisdictionally mixed-use telecommunications services have reported zero gross intrastate operating revenues to the Commission for section 510 annual fiscal assessment purposes for their jurisdictionally mixed-use services.

(G) As their legal basis for reporting zero gross intrastate operating revenues related to their jurisdictionally mixed-use services, a majority have referred to the Federal Communications Commission's ten percent contamination rule to justify reporting zero gross intrastate operating revenues to the Commission.

(H) The Federal Communications Commission's ten percent contamination rule is set forth at 47 CFR 36.154 (relating to exchange line cable and wire facilities (C&WF)—Category 1—apportionment procedures) and is an administrative jurisdictional separations rule that states that the costs and revenues of a jurisdictionally mixed-use line are directly assigned to the interstate jurisdiction if the mixed-use services carry interstate traffic in a proportion greater than ten percent.

(I) The Federal Communications Commission's ten percent contamination rule does not preempt or otherwise preclude the obligation of jurisdictional telecommunications public utilities to report to the Commission's fiscal office their de facto gross intrastate operating revenues related to providing jurisdictionally mixed-use telecommunications services, without regard to any intrastate revenues deemed to be interstate pursuant to the ten percent contamination rule.

(J) De facto gross intrastate operating revenues are those gross intrastate operating revenues that are actually received for all telecommunications services and traffic between points that are both located within this Commonwealth, including the traffic traversing a special access circuit that is deemed interstate by the ten percent rule set forth in 47 CFR 36.154.

(K) The jurisdictional telecommunications carriers may submit to the Commission's fiscal office 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.

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