

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of the Pennsylvania Telephone Association For Order to Expand the Base of Contributing Carriers to the Pennsylvania Universal Service Fund to Include Wireless Carriers and VoIP Providers	:	Docket No. P-2010-2217748
	:	
	:	
	:	
	:	

**ANSWER OF THE
OFFICE OF CONSUMER ADVOCATE
IN SUPPORT OF THE PETITION OF THE
PENNSYLVANIA TELEPHONE ASSOCIATION**

Pursuant to Section 5.61 of the regulations of the Pennsylvania Public Utility Commission (“Commission”), 52 Pa. Code § 5.61, the Pennsylvania Office of Consumer Advocate (“OCA”) hereby files this Answer in support of the Petition of the Pennsylvania Telephone Association for Order to Expand the Base of Contributing Carriers to the Pennsylvania Universal Service Fund to Include Wireless Carriers and VoIP Providers (“PTA Petition”) dated December 28, 2010. In support of its Answer, the OCA submits as follows:

I. INTRODUCTION

The OCA strongly supports the PTA Petition because it will help ensure adequate funding of the Pennsylvania Universal Service Fund (“PA USF”), thereby helping the Commonwealth to achieve the goal of universal telecommunications service for all Pennsylvanians. The Commission should expand the base of contributors to the PA USF to ensure that all telecommunications service providers that use the public switched telephone network (“PSTN”) in Pennsylvania contribute to support universal access to that network and to

help meet the Commonwealth's universal service goals. An adequately funded universal service fund is the third prong of a set of policy tools, including access charges and basic local service rates, which helps maintain universal telecommunications service at affordable rates.

The PA USF was created by the Commission as part of the 1999 Global Order¹ to assist the Commission in meeting its state and federal obligations to ensure universal access to telecommunications service. At the time, the Commission stated that:

The USF is a means to reduce access and toll rates for the ultimate benefit of the end-user and to encourage greater toll competition, while enabling carriers to continue to preserve the affordability of local rates.²

The Commission further stated that "with the subsequent enactment of Chapter 30, the Commission now has explicit authority to take appropriate actions to maintain universal service at affordable rates."³ As such, the Commission must ensure that the PA USF is properly functioning and adequately funded so that it can satisfy its state and federal universal service obligations.

Since its inception in 1999, the PA USF has remained relatively stable in size. As access charge rates are reduced, however, pressure on basic service rates and the PA USF as a means to maintain affordable universal service has increased. While access charge rates and basic local service rates have become the focus of significant litigation before this Commission in the past few years, the scope and size of the PA USF has not been addressed, nor has the PA USF been modified to reflect changes in the telecommunications industry since its creation more than a

¹ In re: Nextlink PA, 93 Pa PUC 172 (Sept. 30, 1999) (Global Order), *aff'd*, Bell Atlantic-Pennsylvania, Inc. v. Pa.P.U.C., 763 A.2d 440 (Pa. Cmwlth 2000) (Global Order Appeal), *vacated in part sub nom, MCI WorldCom, Inc. v. Pa.P.U.C.*, 844 A.2d 1239 (Pa. 2004).

² Id. at 238.

³ Id. at 242.

decade ago. The PTA Petition, however, provides the Commission with the opportunity to provide just such an examination to ensure that the PA USF is appropriately funded to meet the universal service goals and that the appropriate entities are in fact paying into the fund. This opportunity is particularly timely given the recent decision of the Federal Communications Commission (“FCC”) which, as discussed further below, specifically allows state commissions to require providers of Voice over Internet Protocol (“VoIP”) service to contribute to state universal service funds. In its recent decision, the FCC stated “the application of state universal service contribution requirements to interconnected VoIP providers does not conflict with federal policies and could, in fact, promote them.”⁴

The OCA supports the PTA Petition and supports the PTA proposal to expand the base of contributors to the PA USF to ensure that those entities that use the PSTN at any point in providing their service are contributing to support universal access to that network. This includes wireless carriers and interconnected VoIP providers who had limited or no commercial existence at the time the PA USF was established. Providing such assurance will further ensure: 1) that the parties currently paying into the PA USF are not paying more than they otherwise should be; and 2) that access charges and basic local service rates are set at appropriate levels to maintain universal service.

As such, the OCA files this Answer in support of the PTA Petition and respectfully requests that the Commission issue an order expanding the base of carriers contributing to the PA USF to include wireless carriers and interconnected VoIP providers, and to enter any other

⁴ In the Matter of Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenue, WC Docket No. 06-122, Declaratory Ruling (rel. Nov. 5, 2010)(FCC Nebraska/Kansas Order) at ¶16.

order necessary to accomplish the important public policy goal of maintaining and enhancing universal telecommunications service throughout Pennsylvania.

II. ANSWER

A. The Commission Has Explicit Statutory State And Federal Authority To Ensure Universal Service.

State and federal telecommunications laws recognize the importance of maintaining and enhancing the universal provision of basic local exchange telecommunications service.

Universal telephone service principles have been at the foundation of our Nation's telecommunications policy since the passage of the Federal Communications Act of 1934.

Section 151, for example, provides in pertinent part:

Purposes of Act; Federal Communications Commission created. For the purpose of regulating interstate and foreign commerce in communication by wire and radio *so as to make available, so far as possible, to all the people of the United States,* a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges...⁵

Since that time, it has been the policy of the United States to ensure that as many Americans as possible have access to affordable telecommunications service.

Federal law has been especially concerned about the high cost to provide telephone service to rural areas due to the geographic character of these areas. In 1996, Congress enacted the Federal Telecommunications Act of 1996, in part, to provide greater statutory guidance on universal service funding for customers in high cost rural areas as well as for low-income customers.⁶ Subsequently, federal law established a Universal Service Fund through which high

⁵ 47 U.S.C. § 151 (emphasis added).

⁶ 47 U.S.C. § 254(b)(3).

cost rural (and insular) regions of the Nation can receive support for their basic service through a contribution mechanism tied to interstate revenues.⁷ This is particularly relevant to the PTA Petition given that the recipients of PA USF funding are all rural telephone companies.

In addition, federal law requires that consumers in rural and high cost areas have access to telecommunications services that “are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”⁸ According to the FCC, the primary federal role in ensuring the statutory goal of reasonably comparable rural and urban rates for non-rural carrier customers is to enable reasonable comparability among states.⁹ States, on the other hand, “have primary responsibility for ensuring reasonably comparable rural and urban rates” within the state.¹⁰ Congress has further articulated as a universal service principle that “quality services should be available at just, reasonable and affordable rates.”¹¹

Similarly, at the state level, universal service principles have long been at the heart of our regulatory framework in Pennsylvania. Even while promoting the competitive provision of local telephone service, the Pennsylvania General Assembly made explicit in its landmark revisions to Pennsylvania telecommunication law in 1993 that competition was not to be promoted at the expense of universal service. In the original Chapter 30 legislation (Act 67 of 1993), since replaced by the new Chapter 30 (Act 183 of 2004), the very first line of that Act declared that:

⁷ In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 12 FCC Rcd. 8776, 1997 WL 236383 (rel. May 8, 1997) (“1997 FCC Order”).

⁸ 47 U.S.C. § 254(b)(3).

⁹ In the Matter of the Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 18 FCC Rcd. 22559, Order on Remand, ¶ 18 (rel. Oct. 27, 2003).

¹⁰ Id., ¶ 21.

¹¹ 47 U.S.C. § 254(b)(1).

§ 3001. Declaration of Policy.

The General Assembly finds and declares that it is the policy of this Commonwealth to:

- (1) Maintain universal telecommunications service at affordable rates¹²

When Chapter 30 was re-enacted in 2004, the universal service provision contained in the original Section 3001(1) was recodified in Section 3011(2). Section 3011(2) provides:

§ 3011. Declaration of Policy.

The General Assembly finds and declares that it is the policy of this Commonwealth to:

- (2) Maintain universal telecommunications service at affordable rates¹³

The re-enacted Chapter 30 of the Public Utility Code also requires telephone companies to: “(3) Ensure that customers pay only reasonable charges for protected services which shall be available on a nondiscriminatory basis.”¹⁴ The concept of affordability is an explicit requirement that must be recognized in order to maintain universal telephone service at just and reasonable rates.

In light of these explicit federal and state obligations to maintain universal telephone service, the Commission established the PA USF to keep rural rates affordable and comparable. In doing so, the Commission has recognized the need to take steps to ensure universal service – particularly for rural areas – as competitive pressures in other areas could compromise revenue

¹² 66 Pa. C.S. § 3001(1)(repealed).

¹³ 66 Pa. C.S. § 3011(2).

¹⁴ 66 Pa. C.S. §§ 3011(3). “Protected service” includes, among other things, “service provided to residential or business consumers that is necessary to complete a local exchange call.” 66 Pa. C.S. § 3012.

support in high cost areas that had been available under the prior regulatory system. The Commonwealth Court affirmed the creation of the PA USF when affirming the Global Order in its entirety.¹⁵ In doing so, the Commonwealth Court stated that “the concern has always been to provide public service in telecommunications with affordability and reasonable uniformity in services and costs.”¹⁶

As a result, it is clear that the Commission has state and federal authority to maintain universal telecommunications service. The Commission has created the PA USF as one tool to satisfy those obligations. The Commission must ensure that the PA USF is adequately and fairly funded so that universal service is maintained and enhanced. The Commission should grant the PTA Petition to ensure that all service providers that use the PSTN when providing their service contribute to support access by all Pennsylvanians to that network.

B. The Commission Should Take This Opportunity To Consider And Expand The Base Of Contributors To The Pennsylvania Universal Service Fund.

In its Petition, the PTA requests that the Commission issue an order opening a docket to address expanding the base of carriers contributing to the PA USF to include wireless carriers and interconnected VoIP providers. PTA Petition at 20. The OCA strongly supports this request. The Commission has the authority to ensure an adequately funded PA USF and should act now. This opportunity is particularly timely as the FCC has just made clear that state commissions may require VoIP providers to contribute to a state universal service fund.

In the OCA’s view, the Commission has the authority to require wireless carriers and VoIP providers to contribute to the PA USF to aid the Commission in satisfying its state and federal universal service obligations to maintain and enhance universal telecommunications

¹⁵ Global Order Appeal, 763 A.2d at 492-93.

¹⁶ Id.

service. Pennsylvania statutory and case law demonstrate that Commission authority can be found by necessary implication when required for its expressed powers.¹⁷ In light of the Commission's expressed power to maintain and enhance universal service, the Commission has the necessary authority to direct that carriers that use the PSTN should be required to contribute to support that network. Since both wireless carriers and VoIP providers may use the PSTN when providing their service, the Commission has jurisdiction to require them to pay into the PA USF.¹⁸

As noted above, the Commission can be guided by a recent decision of the FCC that allows state commissions to require VoIP providers to contribute to state universal service funds. In a Declaratory Ruling released November 5, 2010, the FCC stated:

In this Declaratory Ruling, we advance the goals of universal service by ruling on a prospective basis that states may extend their universal service contribution requirements to future intrastate revenues of nomadic interconnected Voice over Internet Protocol (VoIP) service providers, so long as a state's particular requirements do not conflict with federal law or policies. Specifically, we conclude that state universal service fund contribution rules for nomadic interconnected VoIP are not preempted if they are consistent with the Commission's

¹⁷ See e.g., 66 Pa. C.S. § 501; PECO Energy Company v. Pa. P.U.C., 568 Pa. 39, 791 A.2d 1155 (2002), citing, Feingold v. Bell of Pennsylvania, 477 Pa. 1, 383 A.2d 791 (Pa. 1977) ("the power of the Commission is statutory, arising either from the express words contained in the enabling statute or by a strong and necessary implication from those words"); see also, Rogoff v. The Buncher Co., 395 Pa. 477, 151 A.2d 83 (1959) and Pennsylvania Builders Assoc v. Pa. P.U.C., 85 Pa Cmwlt. 604, 483 A.2d 1025 (1984), citing, Western Pennsylvania Water Company v. Pa. P.U.C., 10 Pa. Cmwlt. 533, 538, 311 A.2d 370, 373 (1973) ("A regulatory agency may have implied powers, with respect to matters not specifically stated in the enabling statute, if they are within the legislative intent.").

¹⁸ The Commission should reject any arguments that it does not have authority to require wireless carriers to contribute to the PA USF based on Crown Communications v. Zoning Hearing Bd., 550 Pa. 266, 705 A.2d 427 (1997) or Passarell v. AT&T Wireless Services, Inc., Docket No. C-20028278, Opinion and Order (entered Aug. 14, 2003). Crown Communications, for example, was limited to "what test should be applied to determine whether a business entity was a public utility *for zoning purposes* where the zoning ordinance does not define the term." Crown Communications, 550 Pa. at 273 (emphasis added). In addition, in Passarell, the Commission dismissed a complaint regarding rate and billing matters but noted that "our restraint regarding Formal Complaints concerning customer service or quality of service by wireless providers, which authority exists notwithstanding federal preemption of state regulation of rates or market entry, *does not preclude the Commission from future action concerning wireless carriers.*" Passarell at n.1 (emphasis added). As such, neither Crown Communications nor Passarell preclude the Commission from requiring wireless carriers to contribute to the PA USF.

contribution rules for interconnected VoIP providers and the state does not enforce intrastate universal service assessments with respect to revenues associated with nomadic interconnected VoIP services provided in another state.¹⁹

The FCC has clearly declared that state commissions may require VoIP providers to contribute to a state universal service fund. The Commission should act on this declaration to ensure that its PA USF is adequately and fairly funded.

The FCC's decision was prompted in large part by the ability to now "separate the interstate and intrastate revenues of interconnected VoIP providers for purposes of calculating universal service contributions."²⁰ As a result, the FCC found that there is "no basis at this time to preempt states from imposing universal service contribution obligations on providers of nomadic interconnected VoIP service that have entered the market, so long as state contribution requirements are not inconsistent with the federal contribution rules and policies governing interconnected VoIP service."²¹ The FCC held that "the application of state universal service contribution requirements to interconnected VoIP providers does not conflict with federal policies, and could, in fact, promote them."²²

Including VoIP providers in the base of contributors to the PA USF would also be consistent with the Pennsylvania Voice over Internet Protocol Freedom Act ("VoIP Freedom Act") enacted by the Pennsylvania General Assembly in 2008.²³ The VoIP Freedom Act prohibited any state department, agency or commission from taking any action that would

¹⁹ FCC Nebraska/Kansa Order, *supra*, at ¶1.

²⁰ Id. at ¶15.

²¹ Id.

²² Id. at ¶16. The FCC further noted the success of states in resolving the allocation of wireless intrastate revenues for purposes of state universal service contributions. Id. at ¶21.

²³ 73 P.S. §§ 2251.1, *et seq.*

regulate VoIP service, or IP-enabled service.²⁴ Significantly, however, the General Assembly specifically retained the powers and duties of the Commission to “enforce applicable federal or state statutes or regulations relating to (iii) universal service fund fees.”²⁵ As a result, the Commission’s authority to require VoIP providers to pay into the PA USF is preserved by the VoIP Freedom Act.

As the PTA noted in its Petition, Dr. Robert Loube, a national consultant whose practice focuses on providing expert advice regarding telecommunications regulation and the OCA’s expert witness in the two intrastate access proceedings now pending before the Commission, has examined the impact of expanding the base of contributors to the PA USF. *See, PTA Petition* at 8-9. Dr. Loube estimated that the PA USF revenue base would increase by \$4.4 billion solely by adding wireless revenue. This figure is the product of multiplying 9.9 million wireless subscribers in Pennsylvania as of June 2008, the average wireless monthly revenue of \$49.57 per customer as of June 2009 and a 74% state wireless factor.²⁶

At the time of his testimony, Dr. Loube was unable to estimate the additional revenue associated with VoIP telephony service. However, given that the current assessable intrastate revenue base in Pennsylvania is approximately \$2.9 billion, the impact of calculating the addition of wireless carriers to the current base of assessable revenue alone shows that it would

²⁴ 73 P.S. § 2251.4.

²⁵ 73 P.S. § 2251.6(1)(iii).

²⁶ *See, Investigation Regarding Intrastate Access Charges and IntraLata Toll Rates of Rural Carriers and the Pennsylvania Universal Service Fund*, Docket No. I-00040105 and *AT&T Communications of Pennsylvania LLC, TCG New Jersey, Inc. and TCG Pittsburgh, Inc. v. Armstrong Telephone Company – Pennsylvania, et al.*, Docket No. C-2009-208380, *et al.*, Direct Testimony of Dr. Robert Loube on Behalf of Pennsylvania Office of Consumer Advocate, dated January 20, 2010, at 17-18. Wireless monthly revenue data taken from CTIA Semi-Annual Wireless Industry Survey. The state wireless factor is the ratio of intrastate to total wireless end users revenue as per FCC “Telecommunications Industry Revenues, 2007,” September 2009, Table 6, line 423. *See also, FCC Local Competition Report* at <http://www.fcc.gov/wcb/iatd/comp.html>. Given the continued increase in wireless usage in Pennsylvania and nationwide, the subscription number may now in fact be higher.

more than double the revenue base to \$7.3 billion. Therefore, including wireless carriers as contributors to the PA USF alone would reduce any single carrier's contribution to the PA USF by more than half.

Finally, expanding the base of contributors to the PA USF is competitively neutral. Wireless carriers and VoIP providers that currently do not support the PA USF have an advantage over wireline and other carriers that are required to support the PA USF. A more level playing field in the competitive market would be created if all carriers that use the PSTN share in the cost of the PSTN. Expanding the base of contributors to the PA USF to include wireless carriers and VoIP providers will help ensure that those carriers that use the PSTN when providing their service contribute to support universal access to that network.

As such, the Commission has the authority to require wireless carriers and VoIP providers to contribute to the PA USF, as the PTA contends. The Commission should expand the scope of contributors to the PA USF to ensure that all service providers that use the PSTN when providing their service contribute to support universal access to that network and the universal service goals it achieves. Doing so would reduce the contribution rate of any individual contributor and create a more level playing field in the competitive provision of telecommunications service.

III. CONCLUSION

WHEREFORE, the Pennsylvania Office of Consumer Advocate respectfully requests that the Public Utility Commission consider this Answer in support of the Petition of the Pennsylvania Telephone Association for Order to Expand the Base of Contributing Carriers to the Pennsylvania Universal Service Fund to Include Wireless Carriers and VoIP Providers dated

December 28, 2010. The Commission should grant the Petition and direct that all service providers that use the public switched telephone network at any point in providing their service are required to contribute to the Pennsylvania Universal Service Fund to support universal access to that network.

Respectfully submitted,



Joel H. Cheskis, Esquire
PA Atty I.D. # 81617
Assistant Consumer Advocate

For: Irwin A. Popowsky
Consumer Advocate

Office of Consumer Advocate
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048

Dated: January 20, 2011
137651