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April 17, 2000

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FEDERAL EXPRESS

APR 17 2000

Mr. James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Avenue and North Street
Harrisburg, PA 17105-3265

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Re: Proposed Rulemaking Regarding Universal Service Funding Mechanism, Docket No. L-00000148

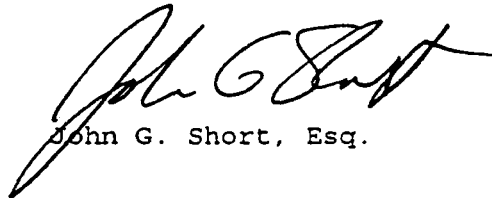
Dear Secretary McNulty:

Enclosed for filing with the Commission on behalf of The United Telephone Company of Pennsylvania and Sprint Communications Company, L.P. are an original and fifteen (15) copies of their Joint Comments in the above-referenced rulemaking.

Would you please time-stamp the additional copy of the Joint Comments with the date of April 17, 2000, as evidenced on the attached Federal Express receipt, and return it to me in the enclosed, self-addressed, stamped envelope.

If you have any questions regarding this filing, please contact the undersigned.

Sincerely,



John G. Short, Esq.

JGS/pn
Enclosures
cc: Service List

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Proposed Rulemaking)	Docket No. L-00000148
Regarding Universal Service)	
Funding Mechanism)	

JOINT COMMENTS OF
THE UNITED TELEPHONE COMPANY OF PENNSYLVANIA
AND
SPRINT COMMUNICATIONS COMPANY, L.P.

Pursuant to the Pennsylvania Public Utility Commission's ("Commission's") Proposed Rulemaking Order, which appeared in the Pennsylvania Bulletin on March 18, 2000, ("Order"), The United Telephone Company of Pennsylvania and Sprint Communications Company, L.P. (collectively referred to herein as "Sprint") respectfully submit these comments in response to the proposed rulemaking regarding a state universal service funding ("USF") mechanism.

I. INTRODUCTION

Sprint's perspective on universal service is neither solely one of an incumbent local telephone company nor one of an interexchange carrier, nor solely one of a new local exchange competitor. Rather, Sprint's perspective represents an accommodation of interests similar to those that the Commission must balance in this proceeding.

At the outset, Sprint supports the Commission's decision in the Global Order¹ to establish an interim USF and thus move forward in its

¹ Opinion and Order, Joint Petition of NEXTLINK Pennsylvania, Inc., et al. For Adoption of Partial Settlement Resolving Pending Telecommunications Issues and Joint Petition of Bell Atlantic Pennsylvania, Inc., et al. For Resolution of Global Telecommunications Proceedings, Docket Nos. P-00991648, P-00991649 (Pa. PUC Sept. 30, 1999)("Global Order").

efforts to address implicit subsidies. For the most part, the USF implementation regulations appear to be well-crafted. However, two changes are necessary before the regulations are finalized.

First, the Commission should reconsider the unnecessary burden of requiring operating companies to report their end-user intrastate retail revenues for the immediately prior month and use that information in calculating monthly contribution for that month. The administrative burden of such a requirement far outstrips the perceived benefit of having data that is so current.

Second, as the Commission is well aware, if the Global Order is amended with respect to The United Telephone Company of Pennsylvania's ("Sprint/United") participation in the USF as a recipient company, Sprint/United must be allowed the opportunity to revise its rate schedule to reflect the changes on a revenue neutral basis. The regulations should reflect the revenue neutrality of a recipient's participation in or termination from the USF.

**II. FUND CONTRIBUTION CALCULATIONS BASED ON MONTHLY INFORMATION ARE
NOT NECESSARY.**

Based on the Rural Telephone Company Coalition ("RTCC") calculations dated March 28, 2000, the size of the interim Pennsylvania USF is \$31,220,606 on an annual basis. The USF is to be used as a revenue neutral mechanism designed to eliminate local exchange carrier revenue shortfalls resulting from access charge reform.

The current proposal for calculation of carrier contributions (section 63.165) and collection of universal service fund contributions (section 63.169) would require that companies contributing to the fund base their monthly contribution on a calculation using their prior month's intrastate end-user telecommunications retail revenue. This calculation would determine, on a monthly basis, the portion of the Pennsylvania USF (based on RTCC 3/28/00 report) that the company must contribute by the end of the month or "within 30 days of issuance of the forms" by the administrator. See 63.169(a). The necessity of using the immediately prior month's end user retail revenues to allocate the Pennsylvania state fund every month has not been shown and outweighed by other considerations.

By comparison, the federal USF includes funding support for schools and libraries, high cost areas, rural healthcare, and low income customers. The current federal universal service fund distributes about \$4 billion based upon six-months of historic carrier data that is 60 to 90 days in arrears. The National Exchange Carrier Association (NECA) has administered the federal universal service fund for 15 years. NECA is also the current administrator for Pennsylvania's interim USF. Sprint believes that following a similar reporting period for the Pennsylvania USF will ease administrative burdens on the carriers and the administrator and will enable timely payments.

Sprint recommends reducing the administrative burden on both the USF administrator and the operating companies related to the monthly reporting requirements by using historic data for the revenue

reporting base from a period earlier than the immediately prior month. Instead, Sprint proposes that companies be allowed 45 days from the close of the period to report revenues on a semi-annual basis. The appropriate company-specific factor necessary to calculate the company's support to the fund for the coming six months could be calculated from that data. Using the individual companies' historic reported revenues and setting the contribution level for the coming six-month period 1) eliminates the administrative burden of monthly reporting, 2) companies know their contribution levels in advance insuring more timely payments, and 3) costs could be saved for both the pool administrator and the operating companies by eliminating unnecessary monthly data collection and reporting.

A few variations to this recommendation are available. The fund administrator could revise the factor quarterly as the fund balances dictate, still using the reported revenues in hand. Companies could report historic revenues quarterly rather than on a semi-annual basis and maintain minimal administrative burden if the factor and payments are developed prospectively.

If the Commission determines that end-user retail revenue from the immediately prior month is the proper monthly allocation device, the payment using that information should not be due to the fund administrator sooner than 30 to 45 days after the close of that month. The language of section 63.169 could be interpreted in such a way as to require the payment before this suggested 30 to 45 day period has ended. Sprint, and other companies, have significant accounting processes to execute in order to reach the point to prepare the transfer of funds or payment. After the books of the company are

closed for the month, the rest of the payment process can be severely hampered by an aggressive schedule that requires that payment be received in less than 30 days after the month ends.

**III. SPRINT WILL REVISE ITS RATE SCHEDULE IF EXCLUDED FROM THE STATE
UNIVERSAL SERVICE FUND.**

As the USF is currently structured to comply with the Global Order, Sprint/United is a recipient of the fund, and its access rates were reduced to ensure revenue neutrality.

As noted in footnote 3 of the Proposed Rulemaking Order, the January 18, 2000 Joint Petition filed to amend the Global Order would exclude Sprint/United from being a recipient of the USF. Footnote 3 states that the Commission will revise the regulations accordingly if Sprint/United is subsequently excluded.

Sprint is the only company currently "on the bubble" with respect to possible changes regarding its status as a USF recipient. Sprint/United should not be financially harmed for a change in the funding policy/procedures of the USF. The Global Order explicitly states that "[a]ll access reform/rate rebalancing is revenue neutral"² for Sprint/United. Thus, the regulations should explicitly state that the addition or termination of USF participation by a company is revenue neutral and that any such change in status will be administered by the Commission in a revenue neutral manner.

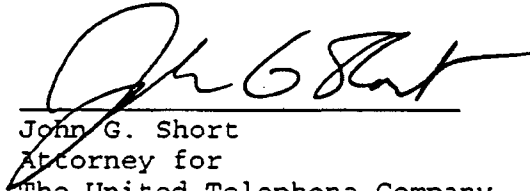
² Global Order, page 41.

The regulations dealing with creation of the USF must account for the entrance and exit of carriers as recipients. This proposed change assures that any such change in status is revenue neutral as contemplated by the Global Order, thereby eliminating any possible controversy in the future as to how a change in status should be accomplished.

IV. CONCLUSION

Sprint appreciates the opportunity to present these comments and requests that the Commission make these revisions when it finalizes the regulations.

Respectfully submitted,



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Dated: April 17, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code §1.54:

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Dated this 17th day of April, 2000.

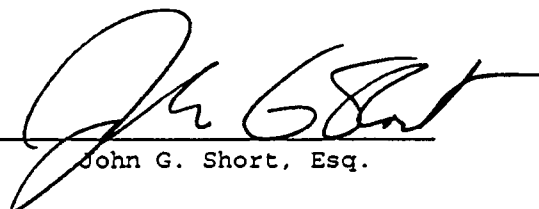
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Ronald F. Weigel
Director
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Original: 2104

May 2, 2000

John R. McGinley, Jr.
Chairman
Independent Regulatory Review Commission
14th Floor
333 Market Street
Harrisburg, PA 17101

Dear Chairman McGinley:

Re: Proposed Rulemaking Establishing a Universal Service Funding Mechanism
Docket No. L-00000148

Please find enclosed a copy of Bell Atlantic's comments that were filed with the Public Utility Commission on April 17, 2000 regarding the above Proposed Regulation.

We appreciate your consideration as it goes into final form and, as always, the assistance we receive on all regulations is most appreciated.

Sincerely,

A handwritten signature in cursive script that reads "Ronald F. Weigel".

Attachment

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Proposed Rulemaking Establishing a
Universal Service Funding Mechanism

Docket No. L-00000148

COMMENTS OF BELL ATLANTIC - PENNSYLVANIA, INC.

Bell Atlantic – Pennsylvania, Inc. (BA-PA) files these comments on the Commission's proposed rulemaking order and regulations purporting to establish a universal service funding mechanism, published at 30 *Pa. Bull.* 1549.

I. SUMMARY.

BA-PA appreciates the Commission's efforts to address the artificial system of implicit subsidies that have historically supported universal service in Pennsylvania. It is critical that regulators manage the transition from a fully regulated market to a competitive market cautiously, with due regard for market distortion and the unintended consequences that flow from virtually all attempts at economic regulation of competitive markets. BA-PA commends the Commission for the substantial time and effort it has dedicated to the conundrum of universal service over the years. The current proposed rulemaking, however, suffers from several fundamental legal defects, and the proposed regulations are seriously flawed. Specifically:

- BA-PA's pending appeal of the Commission's power to create and finance a universal service fund bars this proposed rulemaking.
- The Commission lacks the statutory power to establish or fund the USF.
- The size of the fund to be created exceeds the fund contemplated by the Commission's September 30, 1999 Opinion and Order.
- Contrary to the plan adopted by the Commission, the proposed rulemaking requires carrier contributions to be revised each month; this is both unworkable and unnecessary.
- The addition of a 5% "surcharge" to the estimated fund in order to account for uncollectables is excessive and, under Commission precedent, baseless.
- The proposed regulations fail to provide for annual changes in the fund size. The fund should be resized annually based upon access line growth.
- The administrator's duties with respect to reporting false submissions should include false submissions made with the intent of reducing a carrier's payments, as well as submissions made with the intent of obtaining fraudulent funding.

II. BA-PA's Pending Appeal Of The Commission's Power To Create And Finance A Universal Service Fund Bars The Proposed Rulemaking .

The issues of the Commission's ability to create and fund a USF is currently before the Commonwealth Court as part of its pending review of prior Commission orders.¹ Further action by the Commission on these matters is barred by Rule of Appellate Procedure 1701(a), and the proposed rulemaking is therefore illegal.

In the course of its long-standing universal service investigation, the Commission issued a series of orders on January 28, 1997, February 13, 1997 and July 31, 1997 (together, the "1997 USF Order") which, among other things, (a) determined that Chapter 30 of the Public Utility Code, 66 Pa. C.S. §§ 3001-3009, required the establishment of a state universal service funding mechanism, (b) established a basic universal service rate, and (c) determined a universal service costing methodology requiring BA-PA to make payments into a universal service fund.² On September 2, 1997, BA-PA petitioned the Commonwealth Court for review of these determinations. BA-PA's petition for review asserted, among other things, that "the Commission's Orders establishing a state universal service fund and funding mechanism are erroneous as a matter of law and exceed the

¹ *Bell Atlantic – Pennsylvania, Inc. v. Pennsylvania Public Utility Commission*, Commonwealth Court Docket No. 2420 C.D. 1997.

² *See Formal Investigation to Examine and Establish Updated Universal Service Principles and Policies for Telecommunications in the Commonwealth*, Pa. PUC Docket No. I-00940035, Opinion and Order entered Jan. 28, 1997, Order entered February 13, 1997 (granting reconsideration pending review on the merits); Order on Reconsideration entered July 31, 1997, *Universal Service Investigation*.

Commission's statutory powers," and that "[t]he Orders also violate Bell's Alternative Plan of Regulation approved by the Commission at Docket No. P-00930715."³

The proposed rulemaking constitutes an attempt to modify the USF and funding mechanism established by the 1997 USF Order and appealed by BA-PA. The proposed regulations purport to create a different USF and establish a new mechanism for its funding.

BA-PA's pending petition for review of the 1997 USF Order directly challenges the Commission's authority to establish a USF and a USF funding mechanism. Pennsylvania Rule of Appellate Procedure 1701(a) therefore bars the Commission from proceeding further on those matters.⁴ Pa. R.A.P. 1701(a). Yet that is precisely what the Commission's proposed rulemaking purports to do. This is underscored by the Commission's insistence that Chapter 30 provides the Commission with "explicit regulatory authority" to create and fund a USF⁵—the very legal issues presented by the pending appeal of the 1997 USF Order. The pending appeal and the rules of appellate procedure, however, cannot be ignored. Pennsylvania courts have consistently held that upon the filing of an appeal, Rule 1701(a) divests the lower court or governmental unit of subject matter jurisdiction,

³ Petition for Review (In the Nature of an Appeal), filed Sept. 2, 1997, *Bell Atlantic - Pennsylvania, Inc. v. Pennsylvania Pub. Util. Comm'n*, Pa. Commonwealth Ct. Docket No. 2420 C.D. 1997, at 10 & n.2.

⁴ Rule 1701 sets forth a limited number of exceptions to the prohibition of Rule 1701(a), none of which applies here.

⁵ See Proposed Rulemaking Order.

thus nullifying subsequent orders.⁶ Therefore, the filing of BA-PA's appeal of the 1997 USF Order stripped the Commission of authority to proceed on the creation and funding of a USF, and the proposed rulemaking is therefore a nullity.

III. The Commission Lacks The Power To Establish Or Fund The USF.

Under the proposed regulations, telecommunications carriers providing intrastate service *must* contribute to the USF for the purpose of subsidizing *other* carriers' provision of service to those other carriers' customers. The net effect of the rules is to tax BA-PA and its customers in order to subsidize rates of other telephone companies and their customers. The Commission lacks any statutory authority to impose such a tax.

The Commission only possesses the powers delegated to it by the Pennsylvania Legislature as set forth in the Public Utility Code.⁷ The Pennsylvania Supreme Court has already applied this principle to block an

⁶ See, e.g., *Montour Trail Council v. Pennsylvania Pub. Util. Comm'n*, 547 Pa. 367,368-370; 690 A.2d 703, 704-05 (1997) (by reason of party's appeal, Commission was precluded by Pa. R.A.P. 1701 from acting on another party's petition for clarification); *Dwight v. Girard Medical Center*, 623 A.2d 913, 917 (Pa. Cmwlth. 1993) (effect of Pa. R.A.P. 1701(a) is to render any order pertaining to party's claims made subsequent to party's appeal a nullity); *Kozak v. City of Philadelphia*, 313 Pa. Super. 89, 93 n.2; 459 A.2d 424, 426 n.2 (1983) (trial court lost jurisdiction over subject matter of case once appeal had been taken, rendering subsequent order a nullity); *Kaiser v. 191 Presidential Corp.*, 308 Pa. Super. 301,306; 454 A.2d 141, 144 (1982) (order denying exceptions entered subsequent to the filing of appeal is a nullity); ("Upon appellant's filing of his notice of appeal . . . , the court below was bereft of power to proceed further in the matter. Pa. R.A.P. 1701(a). The actions taken by that court thereafter fell within none of the limited exceptions to this general rule, and were thus legal nullities.")

⁷ *Process Gas Consumers Group v. Pennsylvania Pub. Util. Comm'n*, 511 Pa. at 96, 511 A.2d at 1319 (1986) (quoting *Green v. Milk Control Comm'n*, 340 Pa. 1, 3, 16 A.2d 9, 9 (1940), cert. denied, 312 U.S. 708 (1941)) ("[T]he grant of power by the legislature to an administrative commission must be precise. 'The power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. A doubtful power does not exist. Such tribunals are extra judicial. They should act within the strict and exact limits defined.'"); see also *National Fuel Gas Distribution Corp. v. Pennsylvania Pub. Util. Comm'n*, 464 A.2d 546 (Pa. Cmwlth. 1983).

unauthorized attempt by the Commission to create and administer a fund similar to the USF. In *Process Gas Consumers Group v. Pennsylvania Pub. Util. Comm'n*, 511 Pa. 88, 511 A.2d 1315 (1986), the Court invalidated the Commission's actions, holding that execution of the Commission's proposals required "the legislative powers of taxation and appropriation[,] [which] are not within the Commission's delegated authority."⁸

The facts of *Process Gas* are instructive. In response to the deregulation of natural gas, Congress enacted the Natural Gas Policy Act, which imposed surcharges on industrial consumers and shifted the funds to interstate pipelines, which were to use them to reduce the rates to eligible consumers in the states served by the pipelines.⁹ In an effort to keep the entire amount of surcharges paid by Pennsylvania customers within Pennsylvania, the Commission ordered jurisdictional utilities to impose a state "BFR" surcharge which rendered collection of the federal surcharge impossible.¹⁰ The Commission then used the monies generated by the BFR surcharge (the "BFR fund") to implement several conservation programs.¹¹ On appeal, this scheme was challenged as being outside the ratemaking process and bordering on taxation, a non-delegable power vested only in the General Assembly. The Supreme Court reversed, holding that the Commission had no power either to create or to dispose of the BFR fund.

⁸ *Process Gas*, 511 Pa. at 99, 511 A.2d at 1321.

⁹ *Id.* at 90-91, 511 A.2d at 1316-17.

¹⁰ *Id.* at 91, 511 A.2d at 1317.

The Commission has no more authority to create the USF than it did to create the BFR fund struck down in *Process Gas*.

The Proposed Rulemaking Order first relies on Chapter 30's declaration of legislative policies to "[m]aintain universal telecommunications service at affordable rates" and to "[e]nsure that customers pay only reasonable charges for local exchange telecommunications services."¹² The Commission also cites section 3009(b)(3) of the statute, which authorizes the commission to "establish such additional requirements and regulations as it determines to be necessary and proper to ensure the protection of consumers."¹³ None of these provisions, however, empowers the Commission to create a universal service fund or to require jurisdictional utilities to contribute to any such fund. General statements of legislative policy and the power to protect consumers do not constitute "legislative language clear and unmistakable" that authorizes the Commission to tax public utilities for the purpose of creating the USF.

The Commission's citation of section 254(f) of the federal Telecommunications Act is similarly unavailing.¹⁴ That provision merely authorizes *states* to create their own universal service funding schemes, provided

¹¹ *Id.* at 92-93, 511 A.2d at 1317-18.

¹² 66 Pa. C.S.A. §§ 3001(1), 3001(2).

¹³ 66 Pa. C.S.A. § 3009(b)(3). The "protection of consumers" appears to refer to the protection of consumers against deception and unfair trade practices. Whatever its precise meaning, "protection of consumers" simply cannot be reasonably construed to include the "subsidization of rates through the creation and administration of a universal service fund outside the ratemaking process."

¹⁴ Proposed Rulemaking Order at n.2.

that they do not interfere with the federal program.¹⁵ It does not authorize state *commissions* to do so.¹⁶ Thus, while the Pennsylvania General Assembly may be authorized by 47 U.S.C. § 254(f) to create a universal service fund, and while it might seek to delegate that authority to the Commission, it has neither exercised such authority nor delegated it to the Commission in “clear and unmistakable terms.”¹⁷ Thus, as was the case in *Process Gas*:

[T]hough the PUC proposals are laudatory . . . , their execution requires the legislative powers of taxation and appropriation. These powers are not within the PUC’s delegated authority.¹⁸

As Pennsylvania Courts have aptly noted:

Decisions concerning the kind and extent of subsidy which should be afforded to needy residential customers should, it

¹⁵ 47 U.S.C. § 254(f) provides:

STATE AUTHORITY.--A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

¹⁶ Congress’s use of the term “State” rather than “State commission” in section 254(f) was clearly deliberate. Both terms are defined in the Communications Act, 47 U.S.C.A. §§ 153(t), (v). The authors of the 1996 amendments to the Telecommunications Act explicitly referred to “state commissions” when they intended to confer responsibilities directly on those administrative bodies. *See, e.g.*, 47 U.S.C. § 214(e) (providing for designation of eligible carriers by state commissions), § 252(e) (providing for approval of interconnection agreements by state commissions). They deliberately chose not to do so in section 254(f).

¹⁷ Section 254(f) of the Communications Act does not conclusively answer the question even of *state* authority to create or delegate the authority to create universal service funding mechanisms. The Pennsylvania Constitution prohibits the legislature from making appropriations “for charitable, educational or benevolent purposes to any person or community.” *Pennsylvania Const.* art. 3, § 29. This prohibition applies with equal force to government agencies created by the legislature. *Schade v. Allegheny Co. Institution Dist.*, 386 Pa. 507, 126 A.2d 911 (1956).

¹⁸ *Process Gas*, 511 Pa. at 99, 511 A.2d at 1321.

seems, be left by regulatory agencies and courts to the legislative branch of government¹⁹

IV. The Size Of The Fund To Be Created Exceeds The Fund Contemplated By The Commission's September 30, 1999 Opinion And Order.

The Proposed Rulemaking Order reveals that certain carriers have "agreed" to revise their data in a manner that increases the size of the USF and BA-PA's initial payment of \$12 million. BA-PA never agreed to these revisions, and it certainly did not agree to any increase of its contribution to the USF.²⁰ These off-the-record attempts expand an illegal fund still further should be rejected.

V. Requiring Carrier Contributions To Be Revised Each Month Is Unworkable And Unnecessary.

The proposed regulations provide that contributing providers' assessment rates will be computed monthly, rather than annually as originally proposed. This adds substantial, unnecessary administrative costs not only to the providers, but to the administrator, whose expenses will be paid out of the fund, thus reducing the funds available for actually maintaining universal service. Furthermore, the requirement of monthly recalculation may prove impossible, as a practical matter, to meet.

¹⁹ *United States Steel Corp. v. Pennsylvania Pub. Util. Comm'n*, 360 A.2d 865, 871 (Pa. Cmwlth. 1978), cited with approval in *Process Gas*, 511 Pa. at 99, 511 A.2d at 1321.

²⁰ BA-PA offered to contribute up to \$12 million to the USF as part of a comprehensive settlement of telecommunications issues. That offer was conditioned upon the Commission's approval of the entire settlement proposal. The Commission did not approve the proposal, and BA-PA's offer consequently lapsed.

Assuming the Commission finds a legal means of instituting the USF, it should institute a more reasonable schedule for adjustment of carrier contributions. BA-PA suggests that the Commission match the procedure used for the federal universal service fund. Under the federal procedure, end-user revenue actuals are collected twice a year. Data for the six months ending June 30 are reported on September 1. Then actuals for the entire year (i.e., through December 31) (including any adjustments or true-ups) are reported on April 1 of the following year. Contribution amounts change quarterly based on this data. The FCC's Public Notice describing this procedure is attached hereto as Appendix A.

VI. The Addition Of A 5% “Surcharge” To The Estimated Fund In Order To Account For Uncollectables Is Excessive And Contrary to Prior PUC Determinations.

The proposed regulations provide for the addition of a 5% “surcharge” to the estimated fund in order to account for uncollectables. This is excessive and contrary to PUC precedent. In calculating BA-PA's wholesale discount rate, the Commission deemed BA-PA's experience with interexchange carriers to be the best predictor of the uncollectables that will be generated by resellers of BA-PA's local services. Based on BA-PA's carrier access uncollectables experience, the Commission found that BA-PA's retail uncollectables expense would be 99.64% avoidable. *Pennsylvania Public Utility Commission v. Bell Atlantic - Pennsylvania, Inc.*, R-0099963578, slip op. 15 (Feb. 6, 1997). This translated to approximately .01% of projected wholesale revenues.

In other words, the Commission expected BA-PA to be able to collect 99.99% of charges billed to resellers. One would expect the USF administrator to collect at least as great a percentage of USF contributions, since the pool of contributing companies will include large, facilities-based carriers as well as resellers.

Therefore, an allowance for uncollectables greater than .01% of the total universal service fund is unreasonable and contrary to prior PUC determinations.

VII. The Fund Should Be Resized Annually Based Upon Access Line Growth.

The proposed regulations fail to provide for annual changes in the fund size. Any fund ultimately adopted by the Commission should be resized annually based upon access line growth.

VIII. The Administrator's Duties With Respect To Reporting False Submissions Should Include False Submissions Made With The Intent Of Reducing A Carrier's Payments, As Well As Submissions Made With The Intent Of Obtaining Fraudulent Funding.

The administrator's duties with respect to reporting false submissions should include false submissions made with the intent of reducing a carrier's payments, as well as submissions made with the intent of obtaining fraudulent funding. As the Commission's experience has shown in the context of its annual assessments, self-reporting of carrier data for purposes of fixing payment obligations can create serious problems.

\\


\\

IX. Conclusion.

BA-PA appreciates the opportunity to submit these comments.

Respectfully submitted,

Of Counsel:
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DATED: April 17, 2000

APPENDIX A

PUBLIC NOTICE



FEDERAL COMMUNICATIONS COMMISSION
445 12th STREET, S.W.
WASHINGTON, D.C. 20554

DA 00-517

News media information 202/418-0500 Fax-On-Demand 202/418-2830 Internet: <http://www.fcc.gov> [ftp.fcc.gov](ftp://ftp.fcc.gov)

CORRECTED VERSION

Released: March 7, 2000

Proposed Second Quarter 2000 Universal Service Contribution Factor

CC Docket No. 96-45

In this Public Notice, the Common Carrier Bureau announces the proposed universal service contribution factor for the second quarter of 2000.¹

Rules for Calculating the Contribution Factor

Contributions to the federal universal service support mechanisms are determined using a quarterly contribution factor calculated by the Commission. Under section 54.709 of the Commission's rules, the Commission shall calculate the quarterly contribution factor based on the ratio of total projected quarterly costs of the universal service support mechanisms to total end-user interstate and international telecommunications revenues.²

USAC Projections of Demand and Administrative Expenses

Pursuant to section 54.709(a)(3) of the Commission's rules,³ the Universal Service Administrative Company (USAC) submitted the following projections of demand and administrative expenses for the second quarter of 2000:⁴

¹ See 47 C.F.R. § 54.709(a).

² See 47 C.F.R. § 54.709(a)(2).

³ 47 C.F.R. § 54.709(a)(3).

⁴ In an order released concurrently with this Public Notice, the Commission waives the quarterly cap on collections and disbursements under the rural health care support mechanism for the first and second quarters of 2000, and waives the quarterly cap on disbursements under the schools and libraries support mechanism for the second quarter of 2000. See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, FCC 00-79 (rel. Mar. 7, 2000). These waivers will ensure that lags between the collection and disbursement of funds in these support mechanisms will not delay the disbursement of support to applicants in the first and second quarters of 2000. These waivers do not affect the *annual* collection and disbursement caps on the rural health care support mechanism and the schools and libraries support mechanism.

(\$ millions)

Program	Projected Program Support	Admin. Expenses	Application of Balance From Prior Period	Application of Interest Income	Application of Periodic True-Ups	Total Program Collection
Schools and Libraries	555.231	7.269	(50.438)	(13.909)	(17.221)	480.932
Rural Health Care	3.344	0.861	(0.000)	(0.009)	(0.094)	4.102
High-Cost	487.689	1.359	(0.000)	(0.600)	6.562	495.010
Low Income	125.705	0.346	(0.000)	(0.530)	0.841	126.362
TOTAL	1171.969	9.835	(50.438)	(15.048)	(9.912)	1106.406

USAC reports that, based on current data, it does not believe that it will need to disburse the full amount of funds that it was authorized to collect for the first year of the schools and libraries program.⁵ Specifically, USAC estimates that the schools and libraries program will have an unused balance of approximately \$202 million.⁶ According to USAC, this remaining balance will occur because: (1) although USAC has made funding commitments to certain schools and libraries, it has received no indication that the services requested have been or will be provided; (2) some schools and libraries ultimately may use only a portion of the funds committed to them; and (3) a portion of the funds reserved to pay for successful appeals of funding denials is not likely to be needed.⁷ We anticipate that USAC will be able to determine the actual amount of the unused balance at the close of the first quarter 2000.

We direct USAC to apply one-quarter of the estimated unused balance to reduce the collection requirement for the schools and libraries program in the first quarter of 2000. This action is consistent with Commission rules and precedent directing that unused contributions be credited back to contributors.⁸ Because the unused balance projected for the schools and libraries program is an estimate at this time, we find that it would be prudent to apply only one-

⁵ See *Federal Universal Service Programs Fund Size Projections & Contribution Base For the Second Quarter 2000 at 27* (filed by USAC Feb. 1, 2000) (*USAC Filing for Second Quarter 2000*).

⁶ USAC estimates that the schools and libraries program will have a total balance of approximately \$259 million in unused funds after all disbursements related to the first program year have been made. See *USAC Filing for Second Quarter 2000 at 27*. For the first quarter of 2000, the Common Carrier Bureau directed USAC to apply one quarter of estimated unused schools and libraries support funds, or \$57.250 million, against demand for that quarter. See *Proposed First Quarter 2000 Universal Service Contribution Factor*, CC Docket No. 96-45, Public Notice, DA 99-2780 (rel. Dec. 10, 1999). This yields a difference of approximately \$201.75 million in estimated remaining unused funds.

⁷ See *USAC Filing for Second Quarter 2000 at 27*.

⁸ See 47 C.F.R. § 54.507. Specifically, at the end of the fourth quarter of 1998, the rural health care program had a balance of approximately \$86 million because collections accrued faster than actual demand for program support. To ensure that unused collections were credited back to contributors, the Commission directed that the unused balance be applied over two quarters to reduce the contribution factors. See *Proposed First Quarter 1999 Universal Service Contribution Factors and Proposed Actions*, CC Docket No. 96-45, Public Notice, FCC 98-318 at 3-4 (rel. Dec. 4, 1998).

quarter of the estimated unused balance to reduce the contribution factor in the second quarter of 2000.⁹ When USAC files its projections of program demand and administrative expenses for the third quarter of 2000, it shall supply an updated estimate of the remaining balance that may be applied to reduce the collection requirement for the schools and libraries program in subsequent quarters of 2000.

USAC Projections of Industry Revenues

USAC submitted estimated end-user telecommunications revenues for January through June 2000 based on information contained in the September 1999 Telecommunications Reporting Worksheet (FCC Form 499-S).¹⁰ The amount is as follows:

Total Interstate and International End-User Telecommunications Revenues
from January 1, 1999 - June 30, 1999: \$39.216250 billion

Contribution Base

To determine the quarterly contribution base, we first reduce the six-month estimate of interstate and international end-user telecommunications revenues by the projected amount that will be exempted from the contribution base as a result of the limited international exception.¹¹ Next, we estimate quarterly revenues by dividing the six-month revenue estimate by two. Then, we decrease the revenue estimate by one percent to account for uncollectible contributions.¹² Accordingly, the quarterly contribution base for the second quarter of 2000 is as follows:

Quarterly Contribution Base for Universal Service Support Mechanisms

((Interstate and International - International Exception) / 2) - Uncollectibles

(((\$39.216250 billion - \$0.072355 billion) / 2) - 1%

\$19.376228 billion

⁹ See *Proposed First Quarter 2000 Universal Service Contribution Factor*, CC Docket No. 96-45, Public Notice, DA 99-2780 (rel. Dec. 10, 1999) (similarly applying one-quarter of estimated unused schools and libraries funds to offset projected expenses for the first quarter of 2000).

¹⁰ See Letter of Robert Haga, Universal Service Administrative Company, to Magalie R. Salas, FCC, dated February 24, 2000. The revenues on which contributions are assessed in the first and second quarters of 2000 are the revenues reported on the September 1999 Worksheet for the period from January through June 1999.

¹¹ See 47 C.F.R. § 54.706(c). See also *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Access Charge Reform*, CC Docket No. 96-262, Sixteenth Order on Reconsideration in CC Docket No. 96-45, Eighth Report and Order in CC Docket No. 96-45, Sixth Report and Order in CC Docket No. 96-262, FCC 99-290, at paras. 15, 19-29 (rel. Oct. 8, 1999).

¹² See *USAC Filing for Second Quarter 2000* at 29.

Proposed Contribution Factor

Using this quarterly contribution base, and the total program collection requirement from the table above, the proposed contribution factor for the second quarter of 2000 is as follows:

Contribution Factor for Universal Service Support Mechanisms

Total Program Collection / Quarterly Contribution Base

\$1.106406 billion / \$19.376228 billion

0.057101

If the Commission takes no action regarding the proposed contribution factor within the 14-day period following release of this Public Notice, the contribution factor shall be deemed approved by the Commission.¹⁵ USAC shall then use the contribution factor to calculate universal service contributions for the second quarter of 2000.

For further information, contact Praveen Goyal, Accounting Policy Division, Common Carrier Bureau, at (202) 418-7400, TTY (202) 418-0484.

¹⁵ See 47 C.F.R. § 54.709(a)(3).

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Original: 2014



April 17, 2000

VIA FEDERAL EXPRESS - OVERNIGHT DELIVERY

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
North Street & Commonwealth Avenue
North Office Building - Room B20
Harrisburg, PA 17120

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APR 17 2000

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

RE: Proposed Rulemaking Establishing a Universal Service Funding
Mechanism, Docket No. L-00000148

Dear Mr. McNulty:

I enclose for filing in the referenced matter the original and fifteen copies of Bell Atlantic - Pennsylvania, Inc.'s Comments.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

Christopher M. Arfaa

CMA/meb

Enclosure

cc: Via First Class U.S. Mail
Attached Certificate of Service

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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APR 17 2000

Proposed Rulemaking Establishing a
Universal Service Funding Mechanism

PA PUBLIC UTILITY COMMISSION
Docket No. E-0000018 BUREAU

COMMENTS OF BELL ATLANTIC - PENNSYLVANIA, INC.

Bell Atlantic – Pennsylvania, Inc. (BA-PA) files these comments on the Commission's proposed rulemaking order and regulations purporting to establish a universal service funding mechanism, published at 30 *Pa. Bull.* 1549.

I. SUMMARY.

BA-PA appreciates the Commission's efforts to address the artificial system of implicit subsidies that have historically supported universal service in Pennsylvania. It is critical that regulators manage the transition from a fully regulated market to a competitive market cautiously, with due regard for market distortion and the unintended consequences that flow from virtually all attempts at economic regulation of competitive markets. BA-PA commends the Commission for the substantial time and effort it has dedicated to the conundrum of universal service over the years. The current proposed rulemaking, however, suffers from several fundamental legal defects, and the proposed regulations are seriously flawed. Specifically:

- BA-PA's pending appeal of the Commission's power to create and finance a universal service fund bars this proposed rulemaking.
- The Commission lacks the statutory power to establish or fund the USF.
- The size of the fund to be created exceeds the fund contemplated by the Commission's September 30, 1999 Opinion and Order.
- Contrary to the plan adopted by the Commission, the proposed rulemaking requires carrier contributions to be revised each month; this is both unworkable and unnecessary.
- The addition of a 5% "surcharge" to the estimated fund in order to account for uncollectables is excessive and, under Commission precedent, baseless.
- The proposed regulations fail to provide for annual changes in the fund size. The fund should be resized annually based upon access line growth.
- The administrator's duties with respect to reporting false submissions should include false submissions made with the intent of reducing a carrier's payments, as well as submissions made with the intent of obtaining fraudulent funding.

II. BA-PA's Pending Appeal Of The Commission's Power To Create And Finance A Universal Service Fund Bars The Proposed Rulemaking .

The issues of the Commission's ability to create and fund a USF is currently before the Commonwealth Court as part of its pending review of prior Commission orders.¹ Further action by the Commission on these matters is barred by Rule of Appellate Procedure 1701(a), and the proposed rulemaking is therefore illegal.

In the course of its long-standing universal service investigation, the Commission issued a series of orders on January 28, 1997, February 13, 1997 and July 31, 1997 (together, the "1997 USF Order") which, among other things, (a) determined that Chapter 30 of the Public Utility Code, 66 Pa. C.S. §§ 3001-3009, required the establishment of a state universal service funding mechanism, (b) established a basic universal service rate, and (c) determined a universal service costing methodology requiring BA-PA to make payments into a universal service fund.² On September 2, 1997, BA-PA petitioned the Commonwealth Court for review of these determinations. BA-PA's petition for review asserted, among other things, that "the Commission's Orders establishing a state universal service fund and funding mechanism are erroneous as a matter of law and exceed the

¹ *Bell Atlantic – Pennsylvania, Inc. v. Pennsylvania Public Utility Commission*, Commonwealth Court Docket No. 2420 C.D. 1997.

² *See Formal Investigation to Examine and Establish Updated Universal Service Principles and Policies for Telecommunications in the Commonwealth*, Pa. PUC Docket No. I-00940035, Opinion and Order entered Jan. 28, 1997, Order entered February 13, 1997 (granting reconsideration pending review on the merits); Order on Reconsideration entered July 31, 1997, *Universal Service Investigation*.

Commission's statutory powers," and that "[t]he Orders also violate Bell's Alternative Plan of Regulation approved by the Commission at Docket No. P-00930715."³

The proposed rulemaking constitutes an attempt to modify the USF and funding mechanism established by the 1997 USF Order and appealed by BA-PA. The proposed regulations purport to create a different USF and establish a new mechanism for its funding.

BA-PA's pending petition for review of the 1997 USF Order directly challenges the Commission's authority to establish a USF and a USF funding mechanism. Pennsylvania Rule of Appellate Procedure 1701(a) therefore bars the Commission from proceeding further on those matters.⁴ Pa. R.A.P. 1701(a). Yet that is precisely what the Commission's proposed rulemaking purports to do. This is underscored by the Commission's insistence that Chapter 30 provides the Commission with "explicit regulatory authority" to create and fund a USF⁵—the very legal issues presented by the pending appeal of the 1997 USF Order. The pending appeal and the rules of appellate procedure, however, cannot be ignored. Pennsylvania courts have consistently held that upon the filing of an appeal, Rule 1701(a) divests the lower court or governmental unit of subject matter jurisdiction,

³ Petition for Review (In the Nature of an Appeal), filed Sept. 2, 1997, *Bell Atlantic - Pennsylvania, Inc. v. Pennsylvania Pub. Util. Comm'n*, Pa. Commonwealth Ct. Docket No. 2420 C.D. 1997, at 10 & n.2.

⁴ Rule 1701 sets forth a limited number of exceptions to the prohibition of Rule 1701(a), none of which applies here.

⁵ See Proposed Rulemaking Order.

thus nullifying subsequent orders.⁶ Therefore, the filing of BA-PA's appeal of the 1997 USF Order stripped the Commission of authority to proceed on the creation and funding of a USF, and the proposed rulemaking is therefore a nullity.

III. The Commission Lacks The Power To Establish Or Fund The USF.

Under the proposed regulations, telecommunications carriers providing intrastate service *must* contribute to the USF for the purpose of subsidizing *other* carriers' provision of service to those other carriers' customers. The net effect of the rules is to tax BA-PA and its customers in order to subsidize rates of other telephone companies and their customers. The Commission lacks any statutory authority to impose such a tax.

The Commission only possesses the powers delegated to it by the Pennsylvania Legislature as set forth in the Public Utility Code.⁷ The Pennsylvania Supreme Court has already applied this principle to block an

⁶ See, e.g., *Montour Trail Council v. Pennsylvania Pub. Util. Comm'n*, 547 Pa. 367,368-370; 690 A.2d 703, 704-05 (1997) (by reason of party's appeal, Commission was precluded by Pa. R.A.P. 1701 from acting on another party's petition for clarification); *Dwight v. Girard Medical Center*, 623 A.2d 913, 917 (Pa. Cmwlth. 1993) (effect of Pa. R.A.P. 1701(a) is to render any order pertaining to party's claims made subsequent to party's appeal a nullity); *Kozak v. City of Philadelphia*, 313 Pa. Super. 89, 93 n.2; 459 A.2d 424, 426 n.2 (1983) (trial court lost jurisdiction over subject matter of case once appeal had been taken, rendering subsequent order a nullity); *Kaiser v. 191 Presidential Corp.*, 308 Pa. Super. 301,306; 454 A.2d 141, 144 (1982) (order denying exceptions entered subsequent to the filing of appeal is a nullity); ("Upon appellant's filing of his notice of appeal . . . , the court below was bereft of power to proceed further in the matter. Pa. R.A.P. 1701(a). The actions taken by that court thereafter fell within none of the limited exceptions to this general rule, and were thus legal nullities.")

⁷ *Process Gas Consumers Group v. Pennsylvania Pub. Util. Comm'n*, 511 Pa. at 96, 511 A.2d at 1319 (1986) (quoting *Green v. Milk Control Comm'n*, 340 Pa. 1, 3, 16 A.2d 9, 9 (1940), *cert. denied*, 312 U.S. 708 (1941)) ("[T]he grant of power by the legislature to an administrative commission must be precise. 'The power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. A doubtful power does not exist. Such tribunals are extra judicial. They should act within the strict and exact limits defined.'"); see also *National Fuel Gas Distribution Corp. v. Pennsylvania Pub. Util. Comm'n*, 464 A.2d 546 (Pa. Cmwlth. 1983).

unauthorized attempt by the Commission to create and administer a fund similar to the USF. In *Process Gas Consumers Group v. Pennsylvania Pub. Util. Comm'n*, 511 Pa. 88, 511 A.2d 1315 (1986), the Court invalidated the Commission's actions, holding that execution of the Commission's proposals required "the legislative powers of taxation and appropriation[,] [which] are not within the Commission's delegated authority."⁸

The facts of *Process Gas* are instructive. In response to the deregulation of natural gas, Congress enacted the Natural Gas Policy Act, which imposed surcharges on industrial consumers and shifted the funds to interstate pipelines, which were to use them to reduce the rates to eligible consumers in the states served by the pipelines.⁹ In an effort to keep the entire amount of surcharges paid by Pennsylvania customers within Pennsylvania, the Commission ordered jurisdictional utilities to impose a state "BFR" surcharge which rendered collection of the federal surcharge impossible.¹⁰ The Commission then used the monies generated by the BFR surcharge (the "BFR fund") to implement several conservation programs.¹¹ On appeal, this scheme was challenged as being outside the ratemaking process and bordering on taxation, a non-delegable power vested only in the General Assembly. The Supreme Court reversed, holding that the Commission had no power either to create or to dispose of the BFR fund.

⁸ *Process Gas*, 511 Pa. at 99, 511 A.2d at 1321.

⁹ *Id.* at 90-91, 511 A.2d at 1316-17.

¹⁰ *Id.* at 91, 511 A.2d at 1317.

The Commission has no more authority to create the USF than it did to create the BFR fund struck down in *Process Gas*.

The Proposed Rulemaking Order first relies on Chapter 30's declaration of legislative policies to "[m]aintain universal telecommunications service at affordable rates" and to "[e]nsure that customers pay only reasonable charges for local exchange telecommunications services."¹² The Commission also cites section 3009(b)(3) of the statute, which authorizes the commission to "establish such additional requirements and regulations as it determines to be necessary and proper to ensure the protection of consumers."¹³ None of these provisions, however, empowers the Commission to create a universal service fund or to require jurisdictional utilities to contribute to any such fund. General statements of legislative policy and the power to protect consumers do not constitute "legislative language clear and unmistakable" that authorizes the Commission to tax public utilities for the purpose of creating the USF.

The Commission's citation of section 254(f) of the federal Telecommunications Act is similarly unavailing.¹⁴ That provision merely authorizes *states* to create their own universal service funding schemes, provided

¹¹ *Id.* at 92-93, 511 A.2d at 1317-18.

¹² 66 Pa. C.S.A. §§ 3001(1), 3001(2).

¹³ 66 Pa. C.S.A. § 3009(b)(3). The "protection of consumers" appears to refer to the protection of consumers against deception and unfair trade practices. Whatever its precise meaning, "protection of consumers" simply cannot be reasonably construed to include the "subsidization of rates through the creation and administration of a universal service fund outside the ratemaking process."

¹⁴ Proposed Rulemaking Order at n.2.

that they do not interfere with the federal program.¹⁵ It does not authorize state *commissions* to do so.¹⁶ Thus, while the Pennsylvania General Assembly may be authorized by 47 U.S.C. § 254(f) to create a universal service fund, and while it might seek to delegate that authority to the Commission, it has neither exercised such authority nor delegated it to the Commission in “clear and unmistakable terms.”¹⁷ Thus, as was the case in *Process Gas*:

[T]hough the PUC proposals are laudatory . . . , their execution requires the legislative powers of taxation and appropriation. These powers are not within the PUC’s delegated authority.¹⁸

As Pennsylvania Courts have aptly noted:

Decisions concerning the kind and extent of subsidy which should be afforded to needy residential customers should, it

¹⁵ 47 U.S.C. § 254(f) provides:

STATE AUTHORITY.--A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

¹⁶ Congress’s use of the term “State” rather than “State commission” in section 254(f) was clearly deliberate. Both terms are defined in the Communications Act, 47 U.S.C.A. §§ 153(t), (v). The authors of the 1996 amendments to the Telecommunications Act explicitly referred to “state commissions” when they intended to confer responsibilities directly on those administrative bodies. See, e.g., 47 U.S.C. § 214(e) (providing for designation of eligible carriers by state commissions), § 252(e) (providing for approval of interconnection agreements by state commissions). They deliberately chose not to do so in section 254(f).

¹⁷ Section 254(f) of the Communications Act does not conclusively answer the question even of *state* authority to create or delegate the authority to create universal service funding mechanisms. The Pennsylvania Constitution prohibits the legislature from making appropriations “for charitable, educational or benevolent purposes to any person or community.” *Pennsylvania Const.* art. 3, § 29. This prohibition applies with equal force to government agencies created by the legislature. *Schade v. Allegheny Co. Institution Dist.*, 386 Pa. 507, 126 A.2d 911 (1956).

¹⁸ *Process Gas*, 511 Pa. at 99, 511 A.2d at 1321.

seems, be left by regulatory agencies and courts to the legislative branch of government¹⁹

IV. The Size Of The Fund To Be Created Exceeds The Fund Contemplated By The Commission's September 30, 1999 Opinion And Order.

The Proposed Rulemaking Order reveals that certain carriers have "agreed" to revise their data in a manner that increases the size of the USF and BA-PA's initial payment of \$12 million. BA-PA never agreed to these revisions, and it certainly did not agree to any increase of its contribution to the USF.²⁰ These off-the-record attempts expand an illegal fund still further should be rejected.

V. Requiring Carrier Contributions To Be Revised Each Month Is Unworkable And Unnecessary.

The proposed regulations provide that contributing providers' assessment rates will be computed monthly, rather than annually as originally proposed. This adds substantial, unnecessary administrative costs not only to the providers, but to the administrator, whose expenses will be paid out of the fund, thus reducing the funds available for actually maintaining universal service. Furthermore, the requirement of monthly recalculation may prove impossible, as a practical matter, to meet.

¹⁹ *United States Steel Corp. v. Pennsylvania Pub. Util. Comm'n*, 360 A.2d 865, 871 (Pa. Cmwlth. 1978), cited with approval in *Process Gas*, 511 Pa. at 99, 511 A.2d at 1321.

²⁰ BA-PA offered to contribute up to \$12 million to the USF as part of a comprehensive settlement of telecommunications issues. That offer was conditioned upon the Commission's approval of the entire settlement proposal. The Commission did not approve the proposal, and BA-PA's offer consequently lapsed.

Assuming the Commission finds a legal means of instituting the USF, it should institute a more reasonable schedule for adjustment of carrier contributions. BA-PA suggests that the Commission match the procedure used for the federal universal service fund. Under the federal procedure, end-user revenue actuals are collected twice a year. Data for the six months ending June 30 are reported on September 1. Then actuals for the entire year (i.e., through December 31) (including any adjustments or true-ups) are reported on April 1 of the following year. Contribution amounts change quarterly based on this data. The FCC's Public Notice describing this procedure is attached hereto as Appendix A.

VI. The Addition Of A 5% "Surcharge" To The Estimated Fund In Order To Account For Uncollectables Is Excessive And Contrary to Prior PUC Determinations.

The proposed regulations provide for the addition of a 5% "surcharge" to the estimated fund in order to account for uncollectables. This is excessive and contrary to PUC precedent. In calculating BA-PA's wholesale discount rate, the Commission deemed BA-PA's experience with interexchange carriers to be the best predictor of the uncollectables that will be generated by resellers of BA-PA's local services. Based on BA-PA's carrier access uncollectables experience, the Commission found that BA-PA's retail uncollectables expense would be 99.64% avoidable. *Pennsylvania Public Utility Commission v. Bell Atlantic - Pennsylvania, Inc.*, R-0099963578, slip op. 15 (Feb. 6, 1997). This translated to approximately .01% of projected wholesale revenues.

In other words, the Commission expected BA-PA to be able to collect 99.99% of charges billed to resellers. One would expect the USF administrator to collect at least as great a percentage of USF contributions, since the pool of contributing companies will include large, facilities-based carriers as well as resellers. Therefore, an allowance for uncollectables greater than .01% of the total universal service fund is unreasonable and contrary to prior PUC determinations.

VII. The Fund Should Be Resized Annually Based Upon Access Line Growth.

The proposed regulations fail to provide for annual changes in the fund size. Any fund ultimately adopted by the Commission should be resized annually based upon access line growth.

VIII. The Administrator's Duties With Respect To Reporting False Submissions Should Include False Submissions Made With The Intent Of Reducing A Carrier's Payments, As Well As Submissions Made With The Intent Of Obtaining Fraudulent Funding.

The administrator's duties with respect to reporting false submissions should include false submissions made with the intent of reducing a carrier's payments, as well as submissions made with the intent of obtaining fraudulent funding. As the Commission's experience has shown in the context of its annual assessments, self-reporting of carrier data for purposes of fixing payment obligations can create serious problems.

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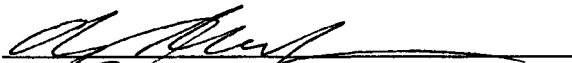
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IX. Conclusion.

BA-PA appreciates the opportunity to submit these comments.

Respectfully submitted,

Of Counsel:
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Counsel for
BELL ATLANTIC - PENNSYLVANIA, INC.

DATED: April 17, 2000

APPENDIX A

PUBLIC NOTICE



FEDERAL COMMUNICATIONS COMMISSION
445 12th STREET, S.W.
WASHINGTON, D.C. 20554

DA 00-517

News media information 202/418-0500 Fax-On-Demand 202/418-2830 Internet: <http://www.fcc.gov> [ftp.fcc.gov](ftp://ftp.fcc.gov)

CORRECTED VERSION

Released: March 7, 2000

Proposed Second Quarter 2000 Universal Service Contribution Factor

CC Docket No. 96-45

In this Public Notice, the Common Carrier Bureau announces the proposed universal service contribution factor for the second quarter of 2000.¹

Rules for Calculating the Contribution Factor

Contributions to the federal universal service support mechanisms are determined using a quarterly contribution factor calculated by the Commission. Under section 54.709 of the Commission's rules, the Commission shall calculate the quarterly contribution factor based on the ratio of total projected quarterly costs of the universal service support mechanisms to total end-user interstate and international telecommunications revenues.²

USAC Projections of Demand and Administrative Expenses

Pursuant to section 54.709(a)(3) of the Commission's rules,³ the Universal Service Administrative Company (USAC) submitted the following projections of demand and administrative expenses for the second quarter of 2000:⁴

¹ See 47 C.F.R. § 54.709(a).

² See 47 C.F.R. § 54.709(a)(2).

³ 47 C.F.R. § 54.709(a)(3).

⁴ In an order released concurrently with this Public Notice, the Commission waives the quarterly cap on collections and disbursements under the rural health care support mechanism for the first and second quarters of 2000, and waives the quarterly cap on disbursements under the schools and libraries support mechanism for the second quarter of 2000. See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, FCC 00-79 (rel. Mar. 7, 2000). These waivers will ensure that lags between the collection and disbursement of funds in these support mechanisms will not delay the disbursement of support to applicants in the first and second quarters of 2000. These waivers do not affect the *annual* collection and disbursement caps on the rural health care support mechanism and the schools and libraries support mechanism.

(\$ millions)

Program	Projected Program Support	Admin. Expenses	Application of Balance From Prior Period	Application of Interest Income	Application of Periodic True-Ups	Total Program Collection
Schools and Libraries	555.231	7.269	(50.438)	(13.909)	(17.221)	480.932
Rural Health Care	3.344	0.861	(0.000)	(0.009)	(0.094)	4.102
High-Cost	487.689	1.359	(0.000)	(0.600)	6.562	495.010
Low Income	125.705	0.346	(0.000)	(0.530)	0.841	126.362
TOTAL	1171.969	9.835	(50.438)	(15.048)	(9.912)	1106.406

USAC reports that, based on current data, it does not believe that it will need to disburse the full amount of funds that it was authorized to collect for the first year of the schools and libraries program.⁵ Specifically, USAC estimates that the schools and libraries program will have an unused balance of approximately \$202 million.⁶ According to USAC, this remaining balance will occur because: (1) although USAC has made funding commitments to certain schools and libraries, it has received no indication that the services requested have been or will be provided; (2) some schools and libraries ultimately may use only a portion of the funds committed to them; and (3) a portion of the funds reserved to pay for successful appeals of funding denials is not likely to be needed.⁷ We anticipate that USAC will be able to determine the actual amount of the unused balance at the close of the first quarter 2000.

We direct USAC to apply one-quarter of the estimated unused balance to reduce the collection requirement for the schools and libraries program in the first quarter of 2000. This action is consistent with Commission rules and precedent directing that unused contributions be credited back to contributors.⁸ Because the unused balance projected for the schools and libraries program is an estimate at this time, we find that it would be prudent to apply only one-

⁵ See Federal Universal Service Programs Fund Size Projections & Contribution Base For the Second Quarter 2000 at 27 (filed by USAC Feb. 1, 2000) (*USAC Filing for Second Quarter 2000*).

⁶ USAC estimates that the schools and libraries program will have a total balance of approximately \$259 million in unused funds after all disbursements related to the first program year have been made. See *USAC Filing for Second Quarter 2000* at 27. For the first quarter of 2000, the Common Carrier Bureau directed USAC to apply one quarter of estimated unused schools and libraries support funds, or \$57.250 million, against demand for that quarter. See *Proposed First Quarter 2000 Universal Service Contribution Factor*, CC Docket No. 96-45, Public Notice, DA 99-2780 (rel. Dec. 10, 1999). This yields a difference of approximately \$201.75 million in estimated remaining unused funds.

⁷ See *USAC Filing for Second Quarter 2000* at 27.

⁸ See 47 C.F.R. § 54.507. Specifically, at the end of the fourth quarter of 1998, the rural health care program had a balance of approximately \$86 million because collections accrued faster than actual demand for program support. To ensure that unused collections were credited back to contributors, the Commission directed that the unused balance be applied over two quarters to reduce the contribution factors. See *Proposed First Quarter 1999 Universal Service Contribution Factors and Proposed Actions*, CC Docket No. 96-45, Public Notice, FCC 98-318 at 3-4 (rel. Dec. 4, 1998).

quarter of the estimated unused balance to reduce the contribution factor in the second quarter of 2000.⁹ When USAC files its projections of program demand and administrative expenses for the third quarter of 2000, it shall supply an updated estimate of the remaining balance that may be applied to reduce the collection requirement for the schools and libraries program in subsequent quarters of 2000.

USAC Projections of Industry Revenues

USAC submitted estimated end-user telecommunications revenues for January through June 2000 based on information contained in the September 1999 Telecommunications Reporting Worksheet (FCC Form 499-S).¹⁰ The amount is as follows:

Total Interstate and International End-User Telecommunications Revenues
from January 1, 1999 - June 30, 1999: \$39.216250 billion

Contribution Base

To determine the quarterly contribution base, we first reduce the six-month estimate of interstate and international end-user telecommunications revenues by the projected amount that will be exempted from the contribution base as a result of the limited international exception.¹¹ Next, we estimate quarterly revenues by dividing the six-month revenue estimate by two. Then, we decrease the revenue estimate by one percent to account for uncollectible contributions.¹² Accordingly, the quarterly contribution base for the second quarter of 2000 is as follows:

Quarterly Contribution Base for Universal Service Support Mechanisms

$((\text{Interstate and International} - \text{International Exception}) / 2) - \text{Uncollectibles}$

$((\$39.216250 \text{ billion} - \$0.072355 \text{ billion}) / 2) - 1\%$

\$19.376228 billion

⁹ See *Proposed First Quarter 2000 Universal Service Contribution Factor*, CC Docket No. 96-45, Public Notice, DA 99-2780 (rel. Dec. 10, 1999) (similarly applying one-quarter of estimated unused schools and libraries funds to offset projected expenses for the first quarter of 2000).

¹⁰ See Letter of Robert Haga, Universal Service Administrative Company, to Magalie R. Salas, FCC, dated February 24, 2000. The revenues on which contributions are assessed in the first and second quarters of 2000 are the revenues reported on the September 1999 Worksheet for the period from January through June 1999.

¹¹ See 47 C.F.R. § 54.706(c). See also *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Access Charge Reform*, CC Docket No. 96-262, Sixteenth Order on Reconsideration in CC Docket No. 96-45, Eighth Report and Order in CC Docket No. 96-45, Sixth Report and Order in CC Docket No. 96-262, FCC 99-290, at paras. 15, 19-29 (rel. Oct. 8, 1999).

¹² See *USAC Filing for Second Quarter 2000* at 29.

Proposed Contribution Factor

Using this quarterly contribution base, and the total program collection requirement from the table above, the proposed contribution factor for the second quarter of 2000 is as follows:

Contribution Factor for Universal Service Support Mechanisms

Total Program Collection / Quarterly Contribution Base

\$1.106406 billion / \$19.376228 billion

0.057101

If the Commission takes no action regarding the proposed contribution factor within the 14-day period following release of this Public Notice, the contribution factor shall be deemed approved by the Commission.¹³ USAC shall then use the contribution factor to calculate universal service contributions for the second quarter of 2000.

For further information, contact Praveen Goyal, Accounting Policy Division, Common Carrier Bureau, at (202) 418-7400, TTY (202) 418-0484.

¹³ See 47 C.F.R. § 54.709(a)(3).

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**BEFORE THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

**REGULATORY
REVIEW COMMISSION**

Rulemaking Re Establishing : Docket No. L-00000148
Universal Service Regulations at :
52 Pa. Code §§63.141-63.151 :

SECRETARY'S BUREAU
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**Comments of the Office of Consumer Advocate
In Support of the Universal Service Fund**

The Office of Consumer Advocate (OCA) supports the creation of a Universal Service Fund by the Public Utility Commission (PUC or Commission). The Commission has recently published its Order explaining and setting forth its proposed universal service regulations. Universal Service Fund, V. 30, No. 12, Pa. Bul. at 1549, March 18, 2000 (Universal Service Order). The OCA submits that the preservation and extension of universal service should be one of the primary goals of the Commission as the telecommunications industry continues to change. Competition within that industry will also create new challenges in order to make sure that all consumers will be able to obtain service at affordable and just and reasonable rates. Accordingly, the OCA files its Comments below as follows:

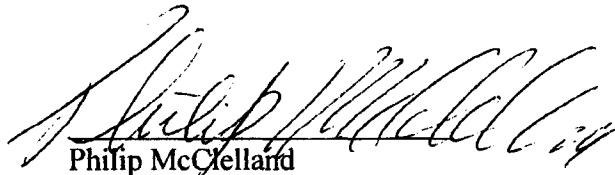
The Commission has recognized that the General Assembly has given it a clear directive to “[m]aintain universal telecommunications services at affordable rates” Universal Service Order at 1552, § 63.161(1). The OCA particularly supports the PUC’s intention to use the Universal Service Fund (USF) in order to allow companies “to reduce their access service charges and toll rates, and to reduce and cap certain local service charges to consumers on a revenue-neutral basis thereby encouraging greater toll competition while at the same time continuing to maintain the affordability of

local service rates for end-user customers.” Id. at § 63.161(3).

The PUC also explains the mechanisms that it wishes to put in place in order to administer the USF. Universal Service Order at 1552-55. The OCA has participated in these discussions and submits that these are reasonable administrative mechanisms that should result in a fair and adequate method of collecting and distributing these funds.

The OCA also particularly supports § 63.170 of the proposed regulations that would prohibit a “customer or end-user surcharge to recover its contribution to the Fund.” Universal Service Order at 1555. The OCA submits that it is particularly appropriate that the PUC should not allow additional surcharges that would be applied to the very charges that the Commission is attempting to maintain at a reasonable level. The Commission was correct in taking this step. It would be inappropriate to support and surcharge universal service at the same time.

Respectfully submitted,



Philip McClelland
Senior Assistant Consumer Advocate

Counsel for:
Irwin A. Popowsky
Consumer Advocate

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

Dated: April 17, 2000
57881

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PENNSYLVANIA REGULATORY
REVIEW COMMISSION

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

COPY

**RULEMAKING RE ESTABLISHING
UNIVERSAL SERVICE FUND
REGULATIONS AT 52 PA. CODE DOCKET NO. L-00000148
§§ 63.141 – 62.152**

**INITIAL COMMENTS OF
AT&T COMMUNICATIONS OF PENNSYLVANIA, INC.**

The Commission's motivation in establishing an interim intrastate universal service fund ("USF") – that is, to facilitate some minor restructuring of carrier access rates as a first step in eliminating the bloat in those charges – is on the mark. Unfortunately, while the Commission is on the right philosophical path, the Proposed Rulemaking Order suffers from a flawed implementation methodology.

Specifically, rather than relying upon a competitively neutral funding mechanism — as required under the federal Telecommunications Act of 1996 — the Commission seeks to impose a disproportionate financial burden of the fund on competitive local exchange companies ("CLECs"), interexchange ("IXCs") and other telecommunications providers that must pay access and other wholesale charges to local exchange companies. By insisting that contributions be based on each provider's end user retail revenues — *excluding* all wholesale services such as access, resale (toll or local), and unbundled network elements — incumbent local exchange companies receive an unfair and unjustified reduction in the amount of contributions that they should pay. Concomitantly, all other

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providers that must buy wholesale services from LECs in order to provide telecommunications services to end users are required to pay contributions on these wholesale revenues, even though these revenues are simply passed through to LECs.

This fundamental flaw in the Commission's proposal must be revised to ensure competitive neutrality in the new fund's implementation. Accordingly, as described below, the fund contribution mechanism should be revised to base contributions on each carrier's gross intrastate revenues, minus payments to other carriers for wholesale services.

Other features of the proposed rules also must be modified to make the fund truly competitively neutral and compliant with state and federal law. First, the definition of Universal Service Fund Recipient, as set forth in Section 63.142, must be modified to allow a CLEC that is operating in the service territory of an ILEC other than Bell Atlantic and GTE, and that has been certified by the Commission as an eligible telecommunications carrier pursuant to 47 U.S.C. §214(e), to be a Universal Service Fund Recipient.

Second, the USF must be set up to be administered as efficiently and cost effectively as possible. This goal, however, is completely thwarted by the proposed rules' mandate for a specific uncollectibles percentage that must be included in the calculation of the fund size. The proposed rules should be modified to provide the Commission with flexibility to prescribe, as the need may arise – if there is a need at all -- the specific percentage level for uncollectibles.

Third, administrative costs associated with administering the fund should be borne only by those fund contributors that also receive disbursements from the fund. Given that the fund was established to benefit small companies, these companies should be required to bear these costs as a cost of doing business.

Fourth and last, all stakeholders -- and especially contributors to the fund -- should be entitled to a formal advisory role in the administration of the USF.

AT&T has amended Annex A to set forth each of its specific proposed language changes to the regulations. These changes are contained in Exhibit A to these Comments.

I. THE PROPOSED CONTRIBUTION METHODOLOGY IS NOT COMPETITIVELY NEUTRAL AND MUST BE REVISED TO BE CONSISTENT WITH STATE AND FEDERAL LAW.

Under the Commission's proposal, contributions to the USF would be based entirely on the revenues from the sale of retail services. Thus, ILECs that provide wholesale services to other carriers -- services such as carrier access services, resold local services, and unbundled network elements -- would not include those revenues in their contribution base. At the same time, the CLECs, IXCs and other telecommunications provider that must purchase these wholesale services to provide their own service will be forced to pay contribution on retail rates that necessarily reflect the cost of these wholesale services.

This methodology is not competitively neutral and is discriminatory on its face. The proposal penalizes any company that must pay access charges or wholesale charges to an incumbent local exchange company. If this is not

reason enough to revise the contribution methodology to be more competitively neutral and nondiscriminatory, as required by state and federal law, the Commission's Order reflects a completely unwarranted and unexplained departure from the Commission's prior determination which, while flawed, nonetheless represents a preferred outcome compared to the present proposal.

The proposed definition for the contribution revenue base set forth in Section 64.142 of Annex A is as follow:

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

The Proposed Rulemaking Order simply relies on the Global Order as the basis for establishing the end-user revenue contribution.¹ The Global Order, however, had little independent justification for this contribution methodology. All that the Commission offered by way of an explanation was the following:

The 1648 Petitions urge that contributions to the fund should be based upon each carrier's revenues offset by payments to the other contributing carriers. AT&T St. No. 2, Darrah testimony, (Revised), p. 24. However, as pointed out by Rural Coalition witness Laffey, whose testimony we find credible, this proposed revision would directly benefit - AT&T to the detriment of other carriers. As a matter of public policy, universal service fund contributions are a cost of doing business that should not impact the method of allocating funding. The Small Company Plan's proposal to fund contributions on the

¹ Proposed Rulemaking Order at 7.

basis of each carrier's end-user revenues produces the most competitively neutral distribution of the funding responsibility.²

Witness Laffey, however, did not explain—and in fact, cannot explain—how it is that AT&T would benefit, to the detriment of other carriers, if the end-user revenue net of payments to other carriers' methodology would be adopted. The fact of the matter is that it is the incumbent local exchange companies—large and small alike — that will reap an unjustified and unfair benefit from the end-user revenue methodology. By excluding all access and wholesale payments from the incumbents' USF revenue contribution base, the incumbents' payments into USF will be smaller than they otherwise would be. At the same time, the carriers that must make these payments to the incumbents — in order to be able to provide service to end users — are unfairly penalized. There is no legitimate reason why the wholesale payments should be included when CLECs and IXCs must compute their USF contributions, but the same funds are excluded from the incumbents' contribution calculation.

As local competition is stimulated and develops within the Commonwealth, the likely outcome will be that the ILECs' wholesale revenues — from access, resale and UNEs — will continue to grow. As IXCs and CLECs expand their provision of service to end user customers — thereby realizing the Legislature's public policy goal of competition — these competitors will be penalized by having to include these additional revenues in the calculation of their USF contributions. At the same time, incumbents will receive a greater and

² Global Order, P-00991648 et seq. (September 30, 1999) at 147.

greater financial advantage over competitors as the relative amount of their revenues that they derive from wholesale services and that they can shield from USF contributions continues to grow.

Given that the PUC's proposed contribution methodology has a disparate and adverse financial impact on CLECs and IXC's, and confers an unwarranted financial benefit on the incumbents, the PUC's conclusion that the end-user revenue methodology excluding wholesale revenues is competitively neutral is demonstrably wrong. The federal Telecommunication Act requires that universal service mechanism must be funded on an equitable and nondiscriminatory basis. 47 U.S.C. §254(b)(4). "Equitable and nondiscriminatory" is synonymous with competitively neutral.³ In cases construing Section 253, which also contains a competitive neutrality standard, the FCC has made clear that all telecommunications carriers must be treated similarly. One group of carriers—especially new entrants—shall not be subject to disparate adverse treatment at the same time that another group—such as incumbents—is exempt from such treatment. Yet, that is precisely the result that will occur unless the PUC modifies the contribution methodology.

In AVR, L.P. d/b/a Hyperion of Tennessee, L.P., CC Docket No. 98-92, FCC 99-100 (Order Rel. May 27, 1999), the FCC preempted a section of a Tennessee statute that sought to restrict competition in service areas with fewer

³ "We agree with the Joint Board that, as a guiding principle, competitive neutrality is consistent with several provisions of section 254 including the explicit requirement of equitable and nondiscriminatory contributions." In re Federal-State Joint Board on Universal Service, CC

than 100,000 lines. In rejecting an attempted “competitively neutral” defense of the statute on the basis that all new entrants would be subject to the same restriction, the FCC explained:

We reject the Tennessee Authority’s contention that ‘competitive neutrality’ can be interpreted under section 253(b) to mean only that non-incumbents must be treated alike while incumbents may be favored. As we explained in our *Silver Star Reconsideration*, a state legal requirement would not as a general matter be ‘competitively neutral’ if it favors incumbent LECs over new entrants (or vice-versa). Neither the language of section 253(b) nor its legislative history suggests that the requirement of competitive neutrality applies only to one portion of the local exchange market—new entrants—and not to all carriers in that market. The plain meaning of section 253(b) and the pro-competitive policy of the 1996 Act undermine the Authority’s argument. **Indeed, in various similar contexts the Commission has consistently construed the term ‘competitively neutral’ as requiring competitive neutrality among the entire universe of participants and potential participants in a market.** We reaffirm our holding in the *Silver Star Reconsideration* that section 253(b) cannot save a state legal requirement from preemption pursuant to sections 253(a) and (d) unless, *inter alia*, the requirement is competitively neutral with respect to, and as between, *all* of the participants and potential participants in the market at issue.⁴

The FCC specifically pointed to its prescribed policies in number portability, separations reform and access charge reform to confirm that the 1996

Docket No. 96-45, FCC 97-157, Report and Order (May 8, 1997 as amended by errata issued June 4, 1997) at ¶48.

⁴ *Id.* at ¶16 (emphasis added) (footnotes deleted).

Act requires the implementation of competitively neutral policies that must treat fairly incumbents and new entrants alike.⁵

Unfortunately, the PUC has missed the boat in its proposed rulemaking order. This mistake, however, can be remedied by modifying the final rules to prescribe the end user revenue net of carrier payment methodology.

Even more vexing is the PUC's unexplained departure from its earlier decision in the 1996 Universal Service Rulemaking Order to require that contributions be based on gross intrastate revenues — without allowing incumbents to exclude any wholesale revenues and without allowing IXCs and CLECs to exclude wholesale payments that they must make to incumbents. At that time, and after carefully reviewing the parties' respective positions on contribution methodology, the PUC concluded:

In Annex A, we proposed that the basis for the assessment rate be based upon the relative amount of intrastate business a given carrier is conducting in Pennsylvania. Consistent with this theory, the Commission proposed the assessment rate be computed by comparing a carrier's gross intrastate operating revenues generated by contributing telecommunications carriers.

* * *

⁵ *Telephone Number Portability*, Third Report and Order, FCC 98-82, CC Docket No. 95-116, ¶ 53 (rel. May 12, 1998) (a competitively neutral cost recovery mechanism "(1) must not give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber, and (2) must not disparately affect the ability of competing service providers to earn a normal return"); *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, Notice of Proposed Rulemaking, 12 FCC Rcd 22120, 22132 at ¶ 24 (1997) ("Competitive neutrality would require that separations rules not favor one telecommunications provider over another or one class of providers over another class"); *Access Charge Reform Price Cap Performance Review for Local Exchange Carriers*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21443-44 at ¶ 206 (1996) ("If in practice only incumbent LECs can receive universal service support, then the disbursement mechanism is not competitively neutral").

[W]e continue to believe that our original view on this issue is the most rational method for determining universal service contribution. From a financial perspective, the view is a middle ground between industry interests, not preferred by anyone and fair to all. Furthermore, this view bases the assessment rate(s) on the proportionate amount of intrastate business a given carrier conducts in Pennsylvania or in a given market, which we continue to believe is an appropriate measure. Such a measure is not undermined by the fact that, by the nature of this business, carriers incur business costs to each other which may be viewed by some as involving some level of double counting.⁶

While the gross intrastate operating revenue method is certainly not AT&T's preferred approach—for the reasons explained above and more thoroughly in the Global proceeding — it is certainly fairer than the mechanism adopted in the proposed rulemaking. The Commission's reversal of its prior determination in the 1996 Universal Service Rulemaking Order to adopt this "middle ground" approach to USF contributions is unexplained, and in fact cannot be justified. The Commission has offered absolutely no explanation why the conclusion it reached in 1996 is no longer valid. That is because there is no changed circumstance to justify the Commission's departure from its prior holdings.

Pennsylvania appellate courts have held that administrative agencies are required to sufficiently explain its departures from its prior decisions. In National Fuel Gas Distribution Corporation v. Pennsylvania PUC, 677A.2d 861, 1996 Pa. LEXIS 210 (Pa. Commw. 1996), Commonwealth Court reversed the

Commission's summary disallowance of the utility's request for an inflation expense allowance in computing the company's costs. The Commission's failure to explain its decision, coupled with its prior decisional law in which it permitted inflation expense allowance using a methodology comparable to that used by National Fuel Gas, constituted reversible error. Citing from another appellate case, Standard Fire Insurance Co. v. Insurance Department, 148 Pa. Cmwlth. 350, 611 A.1d 356, 359 (1992), the Commonwealth Court held:

While an administrative agency is not bound by the rule of *stare decisis*, [citation omitted], an agency does have the obligation to render consistent opinions, and should either follow, distinguish or overrule its prior precedent. [Citations omitted].

The PUC's decision to base contributions on end user revenues – and to explicitly exclude from that revenue base the payments ILECs receive from other carriers -- cannot withstand judicial scrutiny, considering the paucity of explanation or rationale to explain its departure from its own prior precedent. Furthermore, as explained above, the PUC's proposal is not competitively neutral, but instead will unfairly favor incumbent carriers. For all of the reasons, the PUC should modify the proposed rules to base contributions on gross intrastate operating revenues net of payments to other carriers, or alternatively, simply based on gross intrastate operating revenues.⁷

⁶ 1996 Universal Service Rulemaking Order at 42, 43.

⁷ The specific language of the proposed revision, as set forth in AT&T's Exhibit A to these Comments, is, "Gross Intrastate Operating Revenue. The amount of gross intrastate operating revenues reported in annual assessment reports filed with the Commission under 66 Pa. C.S. §510. If the provider's assessment report does not accurately reflect the provider's total gross intrastate operating revenues, the provider shall supplement its assessment report with an affidavit identifying the total amount of revenues and the difference from the amount identified in

II. CLECS MUST BE PERMITTED TO RECEIVE UNIVERSAL SERVICE FUNDS.

The proposed definition of Universal Service Fund Recipient, at Section 63,142, must be modified to include qualified CLECs as potential fund recipients.⁸ This revision is essential in order to comply with the federal Act requirements that universal service subsidies must be administered in an equitable and nondiscriminatory manner, in accordance with 47 U.S.C. §254. Additionally, the revision is essential in order to promote the development of effective local exchange competition in Pennsylvania.

While at the present time, the USF appears to be configured to provide funding only for small ILEC revenue neutral access and toll reductions, Section 63.144(a) clearly contemplates PUC discretion to establish new programs, and to modify and restructure existing programs for universal service funding. CLECs must be able to qualify to receive any available universal service funding that may be introduced in the future. The enabling regulations for the Universal Service Fund should be sufficiently flexible to accommodate this potential situation without having to resort to amending the regulations in the future.

the assessment report and any other information required by the Commission. If a provider does not file an assessment report, the provider shall submit an affidavit to the Commission by March 31st of each year identifying the provider's gross intrastate operating revenues for the previous year.

⁸ A CLEC must first obtain eligible telecommunications carrier status, pursuant to 47 U.S.C. §214(e) and must be operating in the service territory of an incumbent LEC that qualifies to receive USF benefits.

III. THE RULES SHOULD NOT PRESCRIBE A SPECIFIC UNCOLLECTIBLES PERCENTAGE AND INSTEAD SHOULD PROVIDE THE PUC WITH SUFFICIENT FLEXIBILITY TO ESTABLISH A COST EFFECTIVE LEVEL OF UNCOLLECTIBLES EXPENSE.

The proposed rules, at Section 64.145, are unnecessarily prescriptive in establishing a 5% uncollectibles amount to be included in calculating annual fund contributions. Since this is a new program, there is obviously no historical basis upon which to rely to establish the need for an uncollectibles surcharge, much less one set as high as 5%. Indeed, in setting up the interim Universal Service Fund, there was consensus among the parties that a one month advance contribution amount would establish a sufficient "cushion" to accommodate the possibility of uncollectibles and monthly variations in contribution payments and disbursements.

Further, Section 63.145 (a) and (b) are ambiguous and could easily be construed to conflict with each other. Section 63.145 imposes a 5% uncollectibles surcharge on an annual basis, that is computed as a percentage of the estimated annual size of the fund, that appears to be computed without regard to any remaining, unspent funds that accumulated from prior years. At the same time, Section 63.145(b) contemplates the establishment of an additional reserve "as may be necessary for the proper administration of the USF" from funds that may be remaining at the end of each disbursement year. The unspent, remaining funds net of the reserve amount, will be carried forward as a credit toward the next year's fund size.

The combined impact of these two subsections is that, even though there

may be funds remaining at the end of a disbursement period that will be used to offset the contributions for next year's fund, the uncollectibles percentage will be fixed at 5% and applied against the total amount—not just the net amount that must be collected—of the next year's fund size. Under this methodology, the annual amount of unspent funds will continue to grow in perpetuity simply by virtue of imposing a fixed (and excessive) uncollectibles percentage.

The Commission should establish a more flexible framework for sizing the annual amount of the Universal Service Fund and should clarify this regulation so as to eliminate the ambiguity and apparent conflict between subsections (a) and (b). Rather than fixing the uncollectibles percentage in the regulation, the Commission should establish an annual uncollectibles percentage based on actual experience. This uncollectibles percentage should only be applied to the net amount that must be collected for the upcoming year. Further, the Commission must be required to identify the reasons why an additional reserve is necessary before withholding any funds from being carried forward for the next year, under subsection (b).

IV. THE COSTS OF ADMINISTERING AND AUDITING THE FUND SHOULD BE PAID FOR BY THE FUND BENEFICIARY-RECIPIENTS AND NOT BY THE FUND CONTRIBUTORS.

The proposed rules, at Section 63.144, 63.145(a), 63.148(a) should be revised to make clear that the fund recipients are solely responsible for paying for the administrative and auditing costs associated with operating the Universal Service Fund. As Section 63.142 explains, the Fund is being established as a

revenue stream for small ILECs. As the fund beneficiaries, these companies, and not the fund contributors, should bear the expense of administering the program. Obviously, as the base of beneficiaries grows to include CLECs and other carriers, those new beneficiaries should also bear the expenses of the fund.

V. ALL STAKEHOLDERS — AND ESPECIALLY CONTRIBUTORS — SHOULD BE ENTITLED TO A FORMAL ADVISORY ROLE IN THE ADMINISTRATION OF THE UNIVERSAL SERVICE FUND.

The Commission's proposed administration and oversight of the fund administrator must be expanded to provide contributors with an ongoing consultative role in the administration of the USF. The workshop approach that the PUC has authorized its staff to pursue in establishing an interim Universal Service Fund has been productive for establishing an ongoing dialogue that facilitates cooperative implementation among the parties. Unfortunately, the proposed regulations do not—but should—contemplate the continuation of this consultative process.

The ongoing cooperation and support of contributor companies must be acknowledged as a key ingredient to the success of the Universal Service Fund. PUC staff and the fund administrator—once that entity is selected—should actively seek the advice and input of contributor companies on an ongoing basis as new administrative issues or questions may arise. This request can be easily accommodated by amending Section 64.144 to require that the Commission solicit the comments of interested parties before establishing guidelines and

procedures to be followed or implemented by the fund administrator. Likewise, the Administrator's duties at Section 63.147(a)(24) should be amended to require that interested parties' informal comments be solicited before the PUC establishes guidelines and procedures for the administrator.

VI. CONCLUSION

The proposed rules governing the interim USF should be amended as described above to bring the fund into conformance with federal and state law, and to ensure that the fund meets the PUC's goals for that mechanism.

Respectfully submitted,

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Dated: April 17, 2000

AT&T Communications of Pennsylvania, Inc.
Proposed Revisions to Universal Service Rules

ANNEX A

TITLE 52. PUBLIC UTILITIES
PART 1. PUBLIC UTILITIES COMMISSION
Subpart C. FIXED SERVICE UTILITIES
CHAPTER 63. TELEPHONE SERVICE
Subchapter K. UNIVERSAL SERVICE

§63.141 Statement of purpose and policy.

On July 8, 1993, the General Assembly enacted Chapter 30 of the Public Utility Code, 66 Pa. C.S. §§3001, *et seq.*, which provides for the regulatory reform of the telephone industry in Pennsylvania. The General Assembly's first declaration of policy in enacting Chapter 30 is to "[m]aintain universal telecommunications services at affordable rates while encouraging the accelerated deployment of a universally available state-of-the-art, interactive, public switched broadband telecommunications network in rural, suburban and urban areas."

66 Pa. C.S. §3001(1). The General Assembly assigned to the Commission and the Commonwealth's telecommunications providers responsibility for assuring and maintaining universal service in the Commonwealth. Given an increasingly competitive telecommunications marketplace, it is necessary to establish a

competitively-neutral universal service funding mechanism to assure and maintain universal service and to promote the development of competition in telecommunications markets throughout Pennsylvania. The Universal Service Fund (“USF” or “Fund”) is currently intended for the purpose of allowing rural telephone companies to reduce their access charges and toll rates, and to reduce and cap certain local service charges to consumers on a revenue-neutral basis thereby encouraging greater toll competition while at the same time continuing to maintain the affordability of local service rates for end-user customers. The manner by which these funds shall be used will be determined by applicable orders of the Commission including but not limited to the order entered on September 30, 1999, at P-00991648 and P-00991649, as amended by the order entered on November 5, 1999.

§63.142 Definitions

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

Assessment rate. - The percentage rate which when multiplied by each contributing telecommunications provider’s total gross intrastate end-user telecommunications retail revenue net of payments to other carriers for the prior month will equal that provider’s monthly contribution to the annual universal service fund budget. Each contributing telecommunications provider’s assessment rate is computed annually pursuant to Section 63.145.

Basic Universal Service. An evolving set of telephone services, as defined by the Commission, which represents the set of services essential for a Pennsylvanian to participate in modern society at any point in time.

Contributing telecommunications providers. All telecommunications carriers that provide intrastate telecommunications services. Whether a provider or class of providers is a telecommunications carrier will be determined based upon whether the provider or class of providers is considered a telecommunications carrier under federal law as interpreted by the Federal Communications Commission except that wireless carriers will be exempt from the provisions of this subchapter.

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

Gross Intrastate Operating Revenue. The amount of gross intrastate operating revenues reported in annual assessment reports filed with the Commission under 66 Pa. C.S. §510. If the provider's assessment report does not accurately reflect the provider's total gross intrastate operating revenues, the provider shall supplement its assessment report with an affidavit identifying the

total amount of revenues and the difference from the amount identified in the assessment report and any other information required by the Commission. If a provider does not file an assessment report, the provider shall submit an affidavit to the Commission by March 31st of each year identifying the provider's gross intrastate operating revenues for the previous year.

Local service provider. A telecommunications company to which telephone customers subscribe for basic local exchange services.

Universal Service Fund Recipient. An entity or person who receives funds from the Universal Service Fund. All incumbent local exchange carriers operating in Pennsylvania, with the exception of Bell Atlantic-Pennsylvania, Inc. and GTE, and any competitive local exchange provider operating in the service territory of an incumbent local exchange carrier other than Bell Atlantic-Pennsylvania, Inc and GTE, shall be eligible USF recipients.

§63.143 Universal service fund administration.

- (a) The Commission will designate within the context of a competitive bidding process a third-party administrator and a fund auditor to establish, maintain, and audit the Universal Service Fund consistent with the provisions of this subchapter. The third-party administrator designated by the Commission will be independent and will not be affiliated with any contributing telecommunications provider or any other party with a vested interest in the Fund. The administrator shall be responsible for general administration of the Fund, the preparation of an annual report to the Commission, and maintaining the financial viability of the Fund.
- (b) The Fund shall be administered in a manner ensuring that the USF is exempt from state, federal, and local taxes. The Fund administrator shall seek tax exempt status from the Internal Revenue Service.
- (c) The Fund shall be established and kept separate and apart from any other Commonwealth general fund.
- (d) The administrator shall be responsible for assessing contributing telecommunications providers for contributions to the Fund as provided for in Sections 63.145, Calculation of contributions. The administrator shall also be responsible for receiving, validating, and paying universal service reimbursement claims submitted by local service providers.

- (e) The administrator shall file with the Commission and the auditor by July 1 of each year an annual report which shall include an income statement of the Fund's activity for the preceding calendar year, a list of recommendations pertaining to operations of the Fund, and a proposed budget and assessment rates for the upcoming year. A copy of the report will be served contemporaneously upon the Office of Consumer Advocate and any other interested party.
- (f) Interested parties shall be provided the opportunity to file comments to the administrator's report within 30 days of its submission to the Commission.

§63.144 Commission oversight.

(a) The Commission will issue an order within 90 days of receipt of the administrator's annual report, which establishes a budget, assessment rate for contributing telecommunications providers, and administrative guidelines for the upcoming calendar year. The order may address but is not limited to the following:

- (1) establishing new programs eligible for universal service funding,
- (2) terminating the eligibility for universal service funding of existing programs,
- (3) reallocating the budget among programs,

- (4) modifying support formulas or benefits within a program,
- (5) raising or reducing assessment levels consistent with Section 63.145, and
- (6) reviewing and establishing compensation for the administrator and the auditor including reimbursement of reasonable administrative expenses related to the Fund. These expenses shall be paid for solely by the USF recipients, and allocated proportionately among the USF recipients based on their respective shares of USF receipts.

(b) The Commission shall perform an annual review of USF recipients to verify their continued eligibility and that each eligible local service provider has received and is projected to receive USF entitlements. Subject to such reviews, the Commission will order required adjustments to USF assessments, distributions, necessary rule changes, and other relevant items as appropriate.

(c) Supplemental and forecast information that may be requested by the Commission to assure a complete review shall be provided by telecommunications service providers to the Commission within 45 days of the Commission's written request. Where data required is not provided within 45 days of the request, the Commission may impose applicable

remedies, including withholding future support from the USF and/or penalties as provided under the Public Utility Code.

§63.145 Calculation of Contributions.

(a) All telecommunications providers shall submit either an assessment report pursuant to 66 Pa.C.S. §510 or an an affidavit to the administrator by March 31st April 1 of each year, identifying the provider's total gross intrastate end-user operating telecommunications retail revenue for the prior calendar year, and if applicable, the amount of payments to other carriers that shall be a reduction to the gross intrastate operating revenues for purposes of calculating the USF contribution, for the previous calendar year. A copy shall be served upon the Commission. In determining a contributing telecommunications provider's assessment rate, the administrator will calculate the upcoming year's size of the fund and add to that 5% times the estimated size of the fund plus the Commission approved administrative and auditor expenses for the upcoming year and divide that sub-total amount by the aggregate statewide gross intrastate operating end-user telecommunications retail revenue for the year, net of payments to other carriers. This percentage rate will then be multiplied by each carrier's individual intrastate gross end-user operating telecommunications retail

revenue net of payments to other carriers for the prior month to yield that carrier's monthly contribution. This calculation is illustrated as follows:

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

X = size of fund

~~Y = surcharge for uncollectables (5% times X)~~

~~Z = Commission approved administrative and auditing expenses~~

A = aggregate state-wide ~~end-user~~ gross intra-state retail revenue net of payments to other carriers for the previous calendar year

B = carrier's individual ~~end-user~~ gross intra-state retail revenue net of payments to other carriers for the prior month

C = carrier's monthly contribution

(b) To the extent the funding received from providers in any one year exceeds the disbursements required for the USF plus the cost of administering the USF (including such reserve as may be necessary for the proper administration of the USF as determined by the Commission), any unexpended and unencumbered moneys shall remain in the USF, and the subsequent year's Fund size reduced by that surplus.

§63.146 Administrator criteria.

The administrator shall meet the following criteria:

- (a) The administrator shall be neutral, impartial, and independent;

- (b) The administrator shall not advocate specific positions before the Commission in non-universal service administrative proceedings related to common carrier issues;
- (c) The administrator shall not be an affiliate of any provider of telecommunications services; and
- (d) If the administrator has a board of directors that includes members with direct financial interests in entities that contribute to or receive support from the Fund, no more than a third of the board members may represent any one category (e.g., local exchange carriers or interexchange carriers) of contributing carriers or support recipients, and the Board's composition must reflect the broad base of contributors to and recipients of Fund assets. For purposes of this restriction, a direct financial interest exists:
 - (1) where the administrator or board member is an employee of a telecommunications carrier,
 - (2) owns equity interests in bonds or equity instruments issued by any telecommunications carrier, or
 - (3) owns mutual funds that invest more than 50% of its assets in telecommunications securities.

§63.147 Administrator's duties.

- (a) At a minimum, the administrator shall have the following duties:

- (1) maintain a database to track entities obligated to pay into the fund,**
- (2) develop appropriate forms to be used by all telecommunications service providers to report monthly contributions and provide a copy of the form on a monthly basis to those companies for completion,**
- (3) review the carrier forms to ensure completeness and accuracy of calculations and contact providers whose accounts contain unexplained variances in reported revenues or USF assessments,**
- (4) assess late-payment charges of 1.5% per month on contributors that are 30 days past due (no disbursements shall be made to any recipient that has any outstanding contributions due until the administrator has received such contributions and associated late fees).**
- (5) send initial notices of delinquency to all delinquent contributors when a payment is 30 days past due and follow up with at least one subsequent written notice and/or phone call to the contributor to pursue collection of USF payments due,**
- (6) maintain logs of notices of delinquent contributors and refer to the Commission for further enforcement, on a monthly basis, all delinquencies that persist beyond 90 days,**

- (7) inform the Commission if it has reason to believe that any company has submitted false information to the administrator with the intent of obtaining fraudulent funding or if any other irregularity occurs in the operation or administration of the Fund,
- (8) invest Fund moneys in instruments designed to minimize risk of loss while providing maximum liquidity; permitted investments shall include:
 - (i) marketable obligations directly and fully guaranteed by the United States government;
 - (ii) federally insured checking, money market accounts or certificates of deposit;
 - (iii) other accounts which the Commission approves.
- (9) promptly advise the Commission if the administrator's data analysis projects a potential fund shortfall or if USF disbursements exceed receipts for a given period,
- (10) in January of each year, mail reporting forms to each telecommunications service provider to acquire appropriate intrastate gross operating revenue data from all contributing telecommunications providers data to compute the statewide

aggregate intrastate gross operating revenues net of payments to other carriers, end-user telecommunications retail revenues,

- (11) cooperate with the independent auditor selected by the Commission and provide data and information reasonably required to support audit activities,
- (12) promptly respond to incidental or occasional Commission requests for information pertaining to Fund administration,
- (13) maintain adequate principal liability insurance coverage, criminal liability coverage, and a sufficient umbrella liability policy,
- (14) prepare reports of fund activity for the Commission on a monthly basis detailing carrier assessments, delinquent payers, late-payment charges (if applicable), fund disbursements, interest earned, and cumulative results,
- (15) maintain records by contributor and by recipient in each program,
- (16) provide any additional reports as requested by the Commission,
- (17) maintain a statement of financial condition (balance sheet) and income statement for the total fund, and a sources and uses of funds statement, which will tie to the total fund income statement.

- (18) deliver the balance sheet, income statement, and sources and uses of funds statement to the auditor by May 1 of each year so that the auditor may prepare its report.
- (19) maintain a system of internal controls.
- (20) consider the auditor's report in preparing the annual report for submission to the Commission and include any undercollections or overcollections identified by the audit report in developing a proposed budget for the upcoming fiscal year.
- (21) submit the administrator's annual report by July 1 (60 days after the audit report is due
- (22) with prior Commission approval, borrow monies to cover the short-term liabilities of the Fund caused by undercollections
- (23) if short-term borrowing is necessary, the administrator shall provide formal notice on a timely basis to the Commission which identifies the amount, the proposed lending source, and the terms and conditions of the loan,
- (24) comply with procedures and guidelines established by the Commission after the Commission obtains informal comments from interested parties, but may request the Commission amend, modify or delete procedures or guidelines, (the administrator will not have the authority to develop or interpret the

Commission's procedures or guidelines with respect to the Fund, and any dispute between the administrator and any contributing telecommunications provider shall be submitted to the Commission for resolution).

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

(26) treat any competitive and financial information received as confidential and proprietary and only release said information upon order of the Commission (this restriction shall not apply to any information that the Commission has determined shall be publicly released),

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

§63.148 Auditor's duties.

The auditor shall have the following duties:

- (a) An independent external auditor chosen by the Commission shall audit the USF records covering both collections and disbursements for the fiscal years. ~~The costs for conducting audits shall be included in the~~

~~computation of USF requirements. The cost of the audit shall be paid for solely by USF recipients.~~ Thereafter, the USF shall be audited in the same manner annually.

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

§63.149 Collection of universal service fund contributions.

- (a) At the beginning of each month, the administrator will provide monthly reporting forms to each contributing telecommunications provider.

~~Each~~ The carriers shall calculate ~~their~~ its contribution on the form taking into account ~~the intrastate operating revenues, net of payments to other carriers, received two months ago.~~ ~~their prior month's intrastate end-user telecommunications retail revenue.~~ Within 30 days of issuance of the reporting forms, each carrier will complete the form using the calculation as described in Section 63.145 and remit the form to the administrator along with its monthly contribution in full. ~~For example, at the beginning of March, the administrator will provide a monthly~~

reporting form on which each provider shall report its intrastate gross operating revenues for the month of January, and must submit the reporting form and monthly payment by the beginning of April.

(b) Failure to make timely payment will result in the levy of appropriate interest and penalties on the delinquent contribution or any other remedy available under law.

(c) If a carrier's contribution to the USF in any given year is less than a Commission-determined *de minimus* amount, that carrier will not be required to submit a contribution.

§63.150 End-user surcharge prohibited.

No telecommunications service provider may implement a customer or end-user surcharge to recover its contribution to the USF.

§63.151 Sunset provision.

The USF shall expire on December 31, 2003, unless the term of the fund is extended by the Commission. Any moneys remaining in the Fund upon dissolution shall be returned to contributors participating in the fund as of the date of dissolution in their pro-rata share.

§63.152 Enforcement.

A telecommunications service provider that fails to pay, in a timely manner, any contribution required under these regulations may be prohibited from providing service in the Commonwealth, and may be subject to other fines and penalties as prescribed under the Public Utility Code.