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ROBERT J. HARBISON, III
JOHN F. MIZNER, ESQ.
ROBERT E. NYCE, EXECUTIVE DIRECTOR
MARY S. WYATTE, CHIEF COUNSEL



PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
<http://www.irrc.state.pa.us>

INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

May 18, 2000

Honorable John M. Quain, Chairman
Pennsylvania Public Utility Commission
104 North Office Building
Harrisburg, PA 17105

Re: IRRC Regulation #57-214 (#2104)
Pennsylvania Public Utility Commission
Universal Service Fund

Dear Chairman Quain:

Enclosed are our Comments on the subject regulation. They are also available on our website at <http://www.irrc.state.pa.us>.

Our Comments list objections and suggestions for consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you would like to discuss these Comments, please contact my office at 783-5417.

Sincerely,

Robert E. Nyce
Executive Director

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Enclosure

cc: Elizabeth H. Barnes
Gary Wagner
Sherri DelBiondo
Office of General Counsel
Office of Attorney General
Lee Ann Labecki

Comments of the Independent Regulatory Review Commission

on

Pennsylvania Public Utility Commission Regulation No. 57-214

Universal Service Fund

May 18, 2000

We submit for your consideration the following objections and recommendations regarding this regulation. Each objection or recommendation includes a reference to the criteria in the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) which has not been met. The Pennsylvania Public Utility Commission (PUC) must respond to these Comments when it submits the final-form regulation. If the final-form regulation is not delivered by April 17, 2002, the regulation will be deemed withdrawn.

1. Regulatory Review Act Sections 5a(i)(1) and 5a(i)(3)(iv).

The PUCs Order and the Regulatory Analysis Form do not contain sufficient information to evaluate the economic and fiscal impact of this regulation or the regulation's reasonableness. There are four specific areas where we have concerns.

First, we are unable to determine the dollar amount of the overall Universal Service Fund (Fund). The Preamble indicates the annual amount of the Fund will be approximately \$30 million. However, the regulation does not specify any maximum or minimum limit on the actual dollar amount of the Fund, or directly tie the dollar amount to specific changes in local telecommunication provider's revenues.

Second, the regulation does not provide any limits on the services that may be supported by the Fund. The regulation sets forth the *current* intent of the Fund in Section 63.161(3). However, Section 63.164(1) states that the PUC may establish new programs eligible for universal service funding. Therefore, the regulation does not specify any limit on the scope of services that could be supported by the Fund.

Third, Section 63.171 (relating to *Sunset provision*) states the "Fund shall expire on December 31, 2003, unless the term of the Fund is extended by the Commission." The regulation would allow the term of the Fund to be extended by PUC order. The regulation does not specify under what authority or circumstances the PUC would extend the term of the Fund beyond December 31, 2003. Therefore, the term of the Fund is unclear, which could significantly affect Fund recipients.

Finally, the PUC did not provide an estimate of the operating cost of the Fund. These costs include those determined by competitive bid (the administrator and auditor), the reserve in Section 63.165(b), and the cost to telecommunications providers to report monthly to the administrator.

The Regulatory Review Act requires us to consider these costs in determining whether the regulation is in the public interest. The PUC must provide this information with the final-form regulation so that we can determine whether the regulation is in the public interest.

2. Section 63.161. Statement of purpose and policy. - Economic and fiscal impact; Adverse effects on competition; Need; Reasonableness; Clarity.

We have three concerns with Subsection (3). First, Subsection (3) uses the word “currently” in describing the intent and purpose of the Fund. The word “currently” implies the PUC may change the intent and purpose, which in turn will significantly change the economic impact and reasonableness of the Fund. Conversely, the PUC Order in the Preamble states the Fund will be used “to equalize the revenue deficits occasioned by mandated decreases in toll and access charges receipts.” The PUC should delete the word “currently” and establish reasonable bounds to the Fund in the regulation consistent with the PUC Order in the Preamble.

Second, Subsection (3) concludes “the manner by which the funds are used will be determined by applicable orders of the Commission [PUC]...” As written, the regulation would allow the PUC to change the regulation by order. This would deny the opportunity for public and legislative review under the Regulatory Review Act. Therefore, the PUC should delete the last sentence of Subsection (3).

Finally, we understand that rates will be restructured to accommodate competition. However, we question why the term “and cap” is included in Subsection (3). The term should be deleted unless the PUC can justify its use.

3. Section 63.162. Definitions. - Economic and fiscal impact; Reasonableness; Clarity.

Consistent use of terms

The body of the regulation uses terms that are not defined in Section 63.162. For example, the terms “carrier” and “telecommunications provider” are used in Section 63.165. For clarity, the PUC should review the regulation for terms that are not defined and replace them with defined terms.

Assessment rate

This definition provides a basic explanation of the term, while also providing the formula for the monthly contribution. Substantive language, such as the formula, should not be included in a term’s definition. The PUC should limit the definition of this term to its base explanation and move the formula for the assessment rate to Section 63.165 (relating to *Calculation of contributions*).

Basic universal service

Although this term is defined in Section 63.162, it is not used elsewhere in the regulation. Therefore, it should be deleted from Section 63.162.

Contributing telecommunications providers

The concluding sentence of this definition states, "...except that wireless carriers *will be* exempt from this subchapter." (Emphasis added.) Wireless carriers are currently exempt under both state law (66 Pa. C.S. § 102(2)(iv)) and federal law (47 U.S.C. § 332). Therefore, for clarity, the regulation should state "...wireless carriers *are* exempt from this subchapter." (Emphasis added.) Additionally, the PUC should include in this definition citations to state and federal law regarding the wireless services exemption.

End-user revenue

The definition of "end-user revenue" states that 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." By excluding these services from the Incumbent Local Exchange Company's (ILEC's) calculation of end-user revenue, the ILEC's payments will be smaller than they otherwise would be.

One potential Competitive Local Exchange Company (CLEC) commented that the use of end-user revenue is not competitively neutral, and that "each carrier's gross intrastate revenues, minus payments to other carrier's (sic) for wholesale services" should be used. The PUC should explain why "end-user intrastate retail revenue" is the most appropriate vehicle to accomplish competitive neutrality.

Fund recipient

We have two concerns with this definition. First, "fund recipient" is defined as "[A]n entity or person who receives funds from the Fund." This sentence is vague. The PUC should clarify who is an eligible fund recipient in the final-form regulation.

Second, the definition includes "[A]ll incumbent local exchange carriers operating in the Commonwealth, with the exception of Bell Atlantic-Pennsylvania, Inc. and GTE, shall be eligible Fund recipients." This is a substantive provision. As noted in our discussion of the definition of "assessment rate," substantive provisions should not be included in a term's definition. Therefore, we suggest that this sentence be moved to Section 63.163 (relating to *Universal service fund administration*).

Local service provider

The definition of this term uses the undefined phrase "basic local exchange services." The PUC should explain the meaning of "basic local exchange services" in the final-form regulation.

4. Section 63.163. Universal service fund administration. - Need; Clarity.

Subsection (a)

We have three concerns with Subsection (a). First, it describes a competitive bidding process, but does not state the term of the contract. The PUC should amend Subsection (a) to provide the length of the contract awarded.

Second, Subsection (a) describes the administrator's responsibilities. The description generally describes the criteria listed in Section 63.166 (relating to *Administrator criteria*). For clarity, the PUC should reference Section 63.166, and consider whether the last two sentences of Subsection (a) are needed.

Third, for improved clarity, the term "affiliate" should be defined or explained.

Subsection (d)

The last sentence in this subsection is not clear. While local service providers are to submit universal service reimbursement claims to the administrator, to whom will the administrator be making payments on those claims? The final-form regulation should be amended to specify to whom payment on claims is to be made. The most appropriate parties would appear to be Fund recipients.

Subsection (e)

Who is "any other interested party"? "Contributing telecommunications providers" and "Fund recipients" should automatically receive a copy of the report so that they can effectively comment under Subsection (f). However, the regulation is unclear as to who will be served with copies of the report. The PUC should also clarify who can request the administrator's annual report in the final-form regulation.

Subsection (f)

This subsection does not state where comments on the administrator's report are to be filed. The words "with the Commission" should be inserted so that it reads "...file comments on the administrator's report with the Commission...."

5. Section 63.164. Commission oversight. - Economic and fiscal impact; Reasonableness; Clarity.

Subsection (a)

This subsection requires the PUC to issue an order establishing "a budget, assessment rate for contributing telecommunications providers and administrative guidelines...." The size of the Fund, however, is not one of the items to be established in the PUC Order. This is a fundamental aspect of the proposed rulemaking, and the PUC should include the size of the Fund or the process for determining the size of the Fund in this section of the final-form regulation.

Paragraphs (1) to (4)

Paragraphs (1) to (4) provide for alteration of the Fund by establishing new programs, terminating existing programs, reallocating the budget among programs, and modifying support formulas or benefits within a program. It is unclear what these "programs" are and what economic impact these alterations would have.

The PUC Order in the Preamble states the Fund will be used to equalize revenue deficits that result from changes in toll and access charges. It appears Paragraphs (1) to (4) go beyond the intent of the

Fund expressed in the PUC Order. Consistent with our comment on Section 63.161(3), the PUC should delete Paragraphs (1) to (4).

Paragraph (6)

This paragraph establishes the compensation for the administrator and the auditor of the Fund. Doesn't the competitive bidding process (Section 63.163, relating to *Universal service fund administration*) establish the compensation of the administrator and the auditor? The PUC should transfer the components of Paragraph (6) in this section to Section 63.163(a).

Subsection (b)

The final sentence of Subsection (b) allows the PUC to "...order required adjustments to Fund assessments, distributions, necessary rule changes and other relevant items as appropriate." As noted earlier, the PUC should limit the scope of the Fund to the requirements consistent with the PUC Order in the Preamble, and not amend the regulation through additional PUC orders.

Subsection (c)

Subsection (c) requires telecommunications service providers to supply "[S]upplemental and forecast information that may be requested by the Commission...." When would the PUC need "forecast" information? Commentators stated that developing such information can be costly and time consuming, requiring the development of studies and projections that are not usually performed. The PUC should explain the need for this information.

6. Section 63.165. Calculation of contributions. - Need.

Subsection (a)

Size of fund (X)

Subsection (a) states "...the administrator will calculate the upcoming year's size of the Fund...." The regulation discusses the size of the Fund but, as discussed in our first comment, does not specify the process for determining the size of the Fund. Therefore, it is unclear how the administrator will determine the size of the Fund.

Surcharge for uncollectibles (Y)

The regulation specifies a 5% surcharge for uncollectibles. The Preamble states the 5% surcharge is a cushion for uncollectibles and may be subsequently adjusted. However, the administrator can borrow money under Section 63.167(22), assess late fees under Section 63.167(4), and refer all delinquencies that persist beyond 90 days to the PUC under Section 63.167(6). Given these other provisions, the PUC should justify the need for a surcharge for uncollectibles, and why the specific amount of 5% is needed without any history.

Commission approved administrative and auditing expenses (Z)

The calculation includes the "Commission approved" administrative and auditing expenses. Section 63.163(a) states the administrator and auditor will be selected by competitive bid. Therefore, it is unclear why the phrase "Commission approved" is needed.

Monthly calculations

Commentators believe the use and submission to the administrator (see Section 63.167(2)) of monthly calculations of contributions is burdensome and unnecessary. They believe an annual calculation will stabilize revenue flow and reduce administrative costs. One commentator explained that monthly calculations also have the potential to affect revenue neutrality. The PUC should explain the need to calculate contributions on a monthly basis, and why the additional administrative costs, as compared to a quarterly, semi-annual or annual calculation, are justified.

Access line growth

Commentators suggested adding a factor to reflect access line growth. The formula in the regulation does not directly accommodate fluctuations in the number of access lines for each company. The PUC should add an adjustment factor to include fluctuations in the number of access lines.

Undefined terms

Subsection (a) should use the defined term "*contributing telecommunications providers*" consistently. (Emphasis added.) If the intent is to have all telecommunications providers provide end-user revenues, "telecommunications providers" should be defined so that the providers know whether they are required to file.

The term "carrier" is used in Subsection (a), but it is not defined in the regulation. For clarity, the PUC should either use one of the defined terms in Subsection (a), or define the term "carrier" in Section 63.162.

Subsection (b)

Reserve

Subsection (b) mentions "...such reserve as may be necessary for the proper operation of the Fund." It is unclear what reserve is contemplated. The PUC should explain what reserve is needed for the proper operation of the Fund and how the amount will be determined.

7. Section 63.166. Administrator criteria. - Clarity.

Subsection (1)

This subsection states the administrator shall be neutral, impartial and independent. However, the context of the neutrality, impartiality and independence is unclear. The PUC should amend this provision to state the specific entities for which the administrator must demonstrate neutrality, impartiality and independence.

Subsection (2)

The phrase “common carrier” is undefined and should be clarified.

Subsection (3)

This provision would exclude all affiliates, including telecommunications providers outside of Pennsylvania. The PUC should explain whether that is the intent. Also, the term “affiliate” should be defined or explained.

Subsection (4)

Under Paragraph (ii), a direct financial interest exists when the administrator or board member owns equity interests in bonds or equity instruments issued by any telecommunications carrier. This provision should be amended to clarify whether it applies if *any* equity interest is held, or only if the holding exceeds a specified percentage amount.

This subsection should also require the administrator to report to the PUC any change that occurs in the administrator’s board composition.

8. Section 63.167. Administrator’s duties. - Economic and fiscal impact; Reasonableness; Need; Clarity.

This section begins with the phrase, “[A]t a minimum, the administrator shall have the following duties....” We have several questions relating to the inclusion of this phrase. Why is this characterized as minimum duties? Are there other duties the PUC envisions for this position that are not enumerated in the list that follows? If other duties are implied, but not specified, how can potential bidders know what additional resources could be required? The PUC should explain the inclusion of the phrase “[A]t a minimum,” or delete it from the final-form regulation.

Subsection (1)

This subsection uses the term “entities obligated to pay into the Fund” to describe those parties that the administrator is required to track. Why is the PUC using this phrase instead of the defined term “contributing telecommunications providers”? For increased clarity, the PUC should use the defined terms within the body of the regulation.

Subsection (2)

Subsection (2) allows the administrator to “[D]evelop appropriate forms...to report monthly contributions and provide a copy of the form on a monthly basis to those companies for completion.” We have five concerns regarding the creation and filing of these forms.

First, the term “appropriate” is vague and unnecessary. The PUC should consider deleting this term from the final-form regulation.

Second, is the development of these forms left solely to the administrator? The way this section is written, there is no opportunity for the PUC to offer input on, or approve, the forms. Is this the PUC's intent?

Third, if the PUC is not involved in developing these forms, how will the PUC ensure that the information requested on these forms is not duplicative or burdensome? The PUC should explain how, or if, it will work with the administrator to ensure that the forms do not ask for previously requested information, and are not burdensome to complete.

Fourth, while the defined term "contributing telecommunications providers" is used in this paragraph, the term "companies" is also used in the place of the defined term. For clarity, the PUC should use the defined term.

Finally, as we commented on Section 63.165(a), the PUC should explain the need to report contributions on a monthly basis.

Subsection (3)

This provision allows the administrator to ensure the accuracy and completeness of calculations and to contact those contributing telecommunications providers "whose accounts contain unexplained variances...." We have two concerns regarding Subsection (3). First, the term "calculations" is vague. For greater clarity, the PUC should replace the term "calculations" with the term "reported revenue and Fund assessments."

Second, the term "carrier" is used in the place of the defined term, "contributing telecommunications provider." For clarity, the PUC should use the defined term.

Subsection (4)

If an ILEC is a net recipient of the Fund, why would the administrator require the ILEC to send in a monthly assessment or withhold the ILEC's disbursement if its assessment is overdue? The Fund is designed to be revenue neutral. Some contributing telecommunications providers will either receive a net disbursement, or owe nothing. The PUC should provide for net disbursement in the final-form regulation.

Additionally, we question the use of the word "contributors." We understand that the administrators are assessing late-payment charges on contributors. However, the inclusion of the percentage penalty would be better applied to late "contributions." Therefore, the PUC should consider changing the term "contributors" to "contributions."

Subsection (5)

This provision requires the administrator to "follow up" with delinquent contributors when a payment is 30 days past due. When will the administrator "follow up"? How long after the initial notice is sent should the administrator wait to "follow up" with the contributor? The PUC should clarify this timeline in the final-form regulation.

Additionally, this subsection is wordy and somewhat redundant. The PUC should consider stating that initial notices will be sent to delinquent contributors when a payment is 30 days past due. The administrator will follow up this notice with at least one subsequent written notice, phone call, or both to pursue collection of Fund payments due.

Subsection (7)

This provision requires the administrator to inform the PUC if there is “reason to believe that a company has submitted false information to the administrator with the intent of obtaining fraudulent funding or if any other irregularity occurs....” We have five concerns with this subsection.

First, there is no timeline for either the administrator’s report to the PUC, or the PUC’s action against the potentially guilty contributing telecommunications provider. This subsection should include timelines for action.

Second, if the administrator believes a contributing telecommunications provider is guilty of submitting false information or another irregularity, and the PUC agrees, the type of action taken against a contributing telecommunications provider should be specified. The regulation should include either a citation to corrective action or the penalty that will be assessed to the contributing telecommunications provider.

Third, why is the scope of this subsection limited to “obtaining fraudulent funding”? There are several other infractions an administrator may be able to report to the PUC, including under-reporting end-user revenue. For increased clarity, the PUC should broaden the scope of false information required to be reported in this subsection.

Fourth, for clarity, the word “it” should be replaced with the term “the administrator.”

Finally, as in Subsection (5), the term “companies” is used instead of the defined term. For clarity, the PUC should use the term “contributing telecommunications providers.”

Subsection (8)

This subsection allows the administrator to “[I]nvest Fund moneys in instruments designed to minimize risk of loss while providing maximum liquidity.” What specific funds will the administrator have to invest?

Additionally, where will the return on investment be placed? Will any profit be reinvested in the selected instruments, or will the moneys be placed into the Fund? The PUC should state its intent in this subsection.

Subsection (9)

This subsection requires the administrator to “[P]romptly advise the Commission if the administrator’s data analysis projects a potential Fund shortfall, or if Fund disbursements exceed receipts for a given period.” We have three questions regarding this subsection.

First, does the administrator need to report every potential shortfall to the PUC? Taken literally, Subsection (9) requires the administrator to report a shortfall of one penny to the PUC. This could be a burdensome requirement. The PUC should consider including a minimum amount of a shortfall that the administrator must report.

Second, the “administrator’s data analysis” duty is not mentioned anywhere else in Section 63.167. Is this requirement included in the “reports of Fund activity” in Subsection (14)? The PUC should explain.

Finally, the phrase “for a given period” is vague. For clarity, the PUC should specify this period of time in the final-form regulation.

Subsection (10)

This subsection requires the administrator to mail reporting forms to contributing telecommunications providers. Is it necessary to require the forms to be mailed? Can the administrator send these forms electronically or by fax?

Subsection (12)

Subsection (12) requires contributing telecommunications providers to “[P]romptly respond to incidental or occasional Commission requests for information....” We have two questions regarding this subsection. First, what constitutes “promptly”? The PUC should explain.

Second, the words “incidental or occasional” are superfluous, and should be deleted.

Subsection (15)

Subsection (15) requires the administrator to “[M]aintain records by contributor and by recipient in each program.” The need for the phrase “each program” is unclear. Since there is only one program, the PUC should delete the phrase “each program.”

Subsections (18), (20) and (21)

Subsection (18) requires the balance sheet, income statement and sources and uses of funds statement to be delivered to the auditor by May 1 of each year (so that the auditor can prepare its report). Section 63.168 requires the auditor’s report to be submitted by July 1. However, these provisions conflict with Subsection (21), which requires the administrator’s annual report to be submitted by July 1 (60 days *after* the audit report is due). These dates also conflict with the Preamble, which requires the auditor to submit the (completed) audit report to the PUC and administrator on May 1. Additionally, it is impractical for the administrator to consider the auditor’s report when preparing the administrator’s annual report (due by July 1) if Section 63.168(2) requires the auditor’s report on the same day (i.e., July 1).

In the final-form regulation, the timeline requirements in Subsection (18), Subsection (20), Subsection (21), Section 63.168 and the Preamble need to be reconciled.

Subsection (23)

Subsection (23) requires the administrator to “provide formal notice (whether short-term borrowing is necessary) on a timely basis....” The phrase, “on a timely basis” is vague. The PUC should consider adding a specific minimum time period that an administrator must follow to alert the PUC if short-term borrowing is needed.

Subsection (24)

This subsection requires compliance with procedures and guidelines established by the PUC, and permits the administrator to request the PUC to amend, modify or delete procedures or guidelines. What “procedures and guidelines” are there? Why aren’t these in the regulation?

Additionally, we question why this subsection doesn’t include compliance with the PUC’s existing regulations. The PUC should explain.

Subsection (26)

This subsection instructs the administrator to treat competitive and financial information received as confidential and proprietary. However, the paragraph also states, “[This] restriction does not apply to information that the Commission has determined to be publicly released.” The PUC should explain what information specifically it would ask the administrator to publicly release.

9. Section 63.168. Auditor’s duties. - Clarity.

Subsection (1)

What is the meaning of the sentence: “Thereafter, the Fund shall be audited in the same manner annually”? The PUC should amend this sentence or explain its meaning.

Subsection (2)

As discussed previously in our comments on Subsections (18), (20) and (21) of Section 63.167, the July 1 date for completion and submission of the auditor’s report is inconsistent with Section 63.167(18) and the Preamble, and should be reconciled.

10. Section 63.169. Collection of universal service fund contributions. - Economic and fiscal impact; Clarity.

Subsection (a)

We have two concerns with Subsection (a). First, it is unclear why each carrier is required to return the form “within 30 days of issuance.” This could cause unnecessary costs in tracking when the forms were issued. The PUC should consider requiring the administrator to issue the forms on the first day of the month and requiring the carrier to return them by the last day of the month.

Second, the phrase “end-user telecommunications retail revenue” is used. For clarity, the PUC should use the defined phrase “end-user revenue” in its place.

Subsection (b)

It is unclear what the phrase "levy of appropriate interest" means. Section 63.167(4) specifies a late payment charge of 1.5% per month. If this is the "appropriate interest," Subsection (b) should include this percentage or a reference to Section 63.167(4).

Subsection (c)

We have two concerns with Subsection (c). First, the phrase "a Commission determined *de minimus* amount" is vague. The PUC should delete the term "de minimus" and replace it with an actual dollar amount.

Our second concern is contributions in Subsection (c) are for "any given year." Since other provisions are based upon monthly amounts, it is unclear how an annual amount would be evaluated. The PUC should state how to do this calculation, or make the time periods consistent.

11. Section 63.170. End-user surcharge prohibited. - Reasonableness; Clarity.

The intent of this provision is unclear. As written, it states that a provider may not implement a surcharge to recover its contribution to the Fund. Does this mean that a provider cannot show a surcharge on the customer's bill? Does it bar a provider from recovering these contributions through any type of direct or indirect charge?

12. Section 63.171. Sunset provision. - Statutory authority; Reasonableness; Need; Clarity.

Section 63.171 provides that the Fund will expire on December 31, 2003, "unless the term of the Fund is extended by the Commission." We have two concerns with the phrase "unless the term of the Fund is extended by the Commission." First, if the PUC wants to rescind this regulation at some point, it should do so by promulgating another regulation. For this reason, this provision should be deleted in the final-form version of this regulation.

Second, since 66 Pa. C.S. Chapter 30 expires December 31, 2003, what authority would the PUC use to extend the Fund?

13. Section 63.172. Enforcement. - Clarity.

This section states that a telecommunications service provider that fails to pay a contribution in a timely manner may be prohibited from providing service in this Commonwealth. Are there any other enforcement actions other than withdrawing a provider's certificate? If so, the final-form regulation should be amended to reflect the applicable statutory or regulatory provisions.