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February 8, 2024

**VIA ELECTRONIC FILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

RE: Rulemaking to Amend 52 Pa. Code §§ 63.161-63.171 (relating to Universal Service) Petition of the Pennsylvania Telephone Association for Order to Expand the Base of Contributing Carriers to the Pennsylvania Universal Service Fund to Include Wireless Carriers and VoIP Providers; Docket Nos. L-2023-3040646 and P-2010-2217748; **COMMENTS OF CTIA IN RESPONSE TO ADVANCE NOTICE OF PROPOSED RULEMAKING**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is the Comments of CTIA in Response to Advance Notice of Proposed Rulemaking in the above-captioned dockets. Copies of the Comments have been served.

Thank you for your attention to this matter. If you have any questions related to this filing, please do not hesitate to contact my office.

Very truly yours,

Todd S. Stewart  
*Counsel for CTIA*

TSS/jld  
Enclosure

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Rulemaking to Amend 52 Pa. Code §§ 63.161-63.171 (relating to Universal Service)	:	Docket No. L-2023-3040646
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	:	
Petition of the Pennsylvania Telephone Association for Order to Expand the Base of Contributing Carriers to the Pennsylvania Universal Service Fund to Include Wireless Carriers and VoIP Providers	:	Docket No. P-2010-2217748
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**COMMENTS OF CTIA IN RESPONSE TO  
ADVANCE NOTICE OF PROPOSED RULEMAKING**

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CTIA<sup>1</sup> hereby files these comments in response to the Advance Notice of Proposed Rulemaking (“ANOPR”) adopted by the Pennsylvania Public Utility Commission (“Commission”) on August 24, 2023, entered on September 20, 2023, and published in the Pennsylvania Bulletin on November 11, 2023.<sup>2</sup> In the ANOPR, the Commission invited comments from interested parties on the future of the Pennsylvania Universal Service Fund (“PA USF”).<sup>3</sup> As explained below, the Commission should discontinue the Pennsylvania Universal Service Fund, and in any event, cannot lawfully obligate wireless carriers to contribute to the PA USF.

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<sup>1</sup> CTIA – The Wireless Association® (“CTIA”) ([www.ctia.org](http://www.ctia.org)) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association’s members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry’s voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry’s leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

<sup>2</sup> 53 Pa.B. 7005 (for convenience, CTIA will use “ANOPR” for citations and in the text).

<sup>3</sup> *Id.* at 7015.

## I. INTRODUCTION

In the ANOPR, the Commission provides a full recitation of the PA USF's history, looking back over 40 years to events that preceded and informed the creation of the PA USF.<sup>4</sup> Given the detail the Commission provided, CTIA will not attempt to provide any historical summary here, except to say that CTIA understands and agrees that universal service is a principle that is as important today as it was when the PA USF was created.

The wireless industry supports universal service principles and participates in programs designed to achieve universal service. For instance, wireless is the predominant service choice for both the federal Lifeline program and Affordable Connectivity Program. The ready availability of wireless service across Pennsylvania is an important driver to achieve universal service goals. In fact, in Pennsylvania there are far more wireless subscriber connections, some 13.86 million,<sup>5</sup> than there are Pennsylvanians.<sup>6</sup>

Wireless providers are proud of their ongoing progress in expanding their networks, but also recognize that there are some areas where sparse populations, topography, and other factors have made the deployment of wireless networks more difficult. Wireless providers are constantly expanding their networks, and technological innovation is also pushing the boundaries of wireless coverage further into rural and difficult-to-serve areas.<sup>7</sup> With wireless service ubiquitously

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<sup>4</sup> *Id.* at 7006-7014.

<sup>5</sup> FCC Voice Telephone Services Report (June 2022), available at <https://www.fcc.gov/voice-telephone-services-report> (last visited February 6, 2024).

<sup>6</sup> Compare FCC Voice Telephone Services Report (June 2022) with United States Census Quick Facts, Pennsylvania, available at <https://www.census.gov/quickfacts/fact/table/PA/PST045222>, last visited February 6, 2024 (estimating Pennsylvania's population at 12,972,091 on July 1, 2022).

<sup>7</sup> For example, wireless providers also are partnering with satellite providers to expand rural wireless coverage. *See, e.g.*, Emma Roth, "AT&T helped connect the first satellite 5G phone call," *The Verge* (September 19, 2023); Mitchell Clark and Richard Lawler, "T-Mobile and SpaceX Starlink say your 5G phone will connect to satellites next year," *The Verge* (August 25, 2022), <https://www.theverge.com/2022/8/25/23320722/spacex-starlink-t-mobile-satellite-internet-mobile-messaging>.

available and adopted across the Commonwealth, both commercially and through universal service programs, the Commission should recognize that universal service has been achieved, and that wireless service has played a large part in realizing that goal.

It is against this backdrop that the Commission “will now consider [the PA USF’s] continued validity and meaning.”<sup>8</sup> Unfortunately, despite this backdrop, among the first questions the Commission asks is whether the Commission should amend the definition of “contributing telecommunications providers” to include wireless carriers.<sup>9</sup> The Commission also asks whether it should expand the base of contributors from “retail intrastate revenues alone” to “revenues from all regulated and unregulated services provided over a supported network.”<sup>10</sup> CTIA hopes that the Commission will instead first ask whether the fund remains in any way relevant today, given the purpose it was created for. In short: it does not. Whatever the PA USF’s original purpose may have been, it has long-since outlived its usefulness and today, as CTIA explains below, it simply perpetuates legacy networks that should be examined for discontinuation rather than support.

CTIA also explains below that it would be unlawful for the Commission to obligate wireless carriers to contribute to the Pennsylvania Universal Service Fund (“PA USF”) and unlawful for the Commission to assess broadband service for PA USF contributions.

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<sup>8</sup> ANOPR at 7014.

<sup>9</sup> ANOPR at 7016, Appendix A, Question 1.b.ii.

<sup>10</sup> *Id.* at Question 20.

## II. THE COMMISSION LACKS JURISDICTION TO REQUIRE WIRELESS CARRIERS TO CONTRIBUTE TO THE PENNSYLVANIA UNIVERSAL SERVICE FUND.

In the ANOPR, the Commission asks whether it should amend the definition of “contributing telecommunications providers”<sup>11</sup> to include wireless carriers. It should not, as it would be unlawful for the Commission to obligate wireless carriers to contribute to the PA USF.

It is well-settled that the Commission has no jurisdiction over wireless carriers under Pennsylvania law. By statute, the Commission is vested with “authority to supervise and regulate all public utilities doing business in” Pennsylvania.<sup>12</sup> Wireless carriers, however, are not public utilities.<sup>13</sup> The Pennsylvania Supreme Court has long recognized the Commission’s lack of jurisdiction over wireless carriers, explaining that wireless carriers are “[c]learly . . . excluded from the definition of public utility” and are, therefore, not “regulated by the [Commission].”<sup>14</sup> Jurisprudence on this issue has remained consistent.<sup>15</sup> Accordingly, the Commission has no authority to regulate wireless carriers, which includes lacking the authority to require wireless carriers to contribute to the PA USF.

The Commission not only lacks express authority to impose PA USF obligations on wireless carriers, but any argument that it could look to its implied powers to find such authority is also unavailing. The Commission is a “creature of statute, it has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication.”<sup>16</sup> CTIA acknowledges that the Commonwealth’s declared policy embraces universal

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<sup>11</sup> 52 Pa. Code § 63.162.

<sup>12</sup> 66 Pa. C.S. § 501(b).

<sup>13</sup> See 66 Pa. C.S. § 102 (2)(iv) (“The term [‘public utility’] does not include . . . Any person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service.”).

<sup>14</sup> *Crown Communications v. Zoning Hearing Bd.*, 705 A.2d 427, 431 (Pa. 1997).

<sup>15</sup> *Crown Castle NG East v. Pennsylvania Public Utility Commission*, 234 A.3d 665 (Pa. 2020).

<sup>16</sup> *Feingold v. Bell of Pennsylvania*, 383 A.2d 791, 794 (Pa. 1977) (emphasis added).

service principles,<sup>17</sup> but the Commonwealth’s policy is not an “expressly conferred” power from which another power can arise.<sup>18</sup>

Powers the Commission “exercises must be found in the expressed words of the enabling statute or by strong and necessary implication when required for its expressed powers.”<sup>19</sup> Similarly, “[t]he grant of power by the legislature to an administrative commission must be precise. ‘The power and authority must be conferred by legislative language clear and unmistakable. A doubtful power does not exist. Such tribunals are extrajudicial. They should act within the strict and exact limits defined.’”<sup>20</sup>

It is clear, then, that the Legislature’s general, broad policy statement cannot overcome its express exclusion of wireless carriers from the Commission’s jurisdiction. The Commonwealth’s policy is not a “clear and unmistakable” express conferral of power, and it would be unreasonable to infer that such a policy statement empowers the Commission to ignore the Legislature’s “clear and unmistakable” exemption of wireless carriers from the Commission’s jurisdiction. This conclusion is not changed by examination of the Commission’s “Powers and duties retained.”<sup>21</sup> In Section 3019, the Legislature indicates that the Commission has the power to “establish such additional requirements as are consistent with this chapter.”<sup>22</sup> Whatever such powers are, it would not be “consistent with this chapter” to exercise jurisdiction over wireless carriers. The

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<sup>17</sup> See e.g. 66 Pa.C.S. § 3011(2) (The Commonwealth’s policy is to “maintain universal telecommunications service at affordable rates....”).

<sup>18</sup> The Commonwealth’s policy declaration cannot empower the Commission to exercise inherently legislative powers of taxation and appropriation at all. See *Process Gas Consumers Group v. Pennsylvania Public Utility Commission*, 511 A.2d 1315 (Pa. 1986) (“*Process Gas*”) (concluding that the PUC, by creating a surcharge fund and ordering revenues from that fund to be used for conservation and other purposes, impermissibly exercised the legislative powers of taxation and appropriation).

<sup>19</sup> *Fairview Water Co. v. Pennsylvania Pub. Util. Comm’n*, 502 A.2d 162, 165-66 (1985).

<sup>20</sup> *Process Gas* at 1319.

<sup>21</sup> 66 Pa.C.S. § 3019(b).

<sup>22</sup> 66 Pa.C.S. § 3019(b)(3).

Commission cannot ignore that its want of jurisdiction over wireless carriers arises under the same chapter as does Section 3019. Accordingly, any strategy or mechanism the Commission chooses to achieve the Commonwealth’s policy goals simply cannot include an assessment imposed on non-jurisdictional wireless carriers over whom the Legislature has expressly deprived the Commission of even limited jurisdiction.<sup>23</sup>

The Commission should also consider that the current version of Chapter 30 of the Public Utility Code, which was promulgated after the PA USF was created, contains no express provisions authorizing the creation of a universal service fund, but does prohibit the Commission from imposing "any new Lifeline service discount that is not fully subsidized by the Federal Universal Service Fund."<sup>24</sup> The Legislature, clearly aware of the PA USF and its structure, chose to limit the PA USF’s growth and to constrain any further Commission action with the requirement it be consistent with the rest of the chapter – which includes the exclusion of wireless carriers from the Commission’s jurisdiction. Viewed against the plain language used, and further focused by this historical context, the Commission’s jurisdiction simply cannot be claimed to extend to wireless carriers for the purposes of PA USF assessments.

The Commission’s lack of jurisdiction under Pennsylvania law is not and cannot be cured by federal law for several reasons. First, statutes must be given their plain and ordinary meaning,<sup>25</sup> and Section 254(f) is merely permissive regarding state-established universal service funds, indicating that states “may adopt regulations.”<sup>26</sup> No reasonable reading of that statute would give

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<sup>23</sup> See *Delmarva Power & Light Co. v. Commonwealth*, 870 A.3d 901, 911 & n.25 (Pa. 2005) (Commission cannot assess electric generation suppliers (“EGSs”) for Commission administrative costs because EGSs are exempt from the definition of “public utility”). See generally 1 Pa. C.S. § 1933.

<sup>24</sup> 66 Pa. C.S. §3019(f).

<sup>25</sup> See *Niz-Chavez v. Garland*, 141 S. Ct.1474, 1481 (2021).

<sup>26</sup> The fact that many states have no universal service funds illustrates this point. Were the language of Section 254 to be read to create an obligation to establish a fund, states such as Alabama, Delaware, Florida, Hawaii, Massachusetts, New Jersey, Tennessee, and Virginia that have no universal service funds would be in violation of federal law. See

rise to an *obligation* to create such a fund, and lacking any requirement to have a PA USF, it simply does not follow that the Commission can find jurisdiction to implement the PA USF arising under federal law.<sup>27</sup> Second, absent a federal or state *requirement* for the Commission to establish the PA USF, the only plausible reading of the impact of Section 254(f) is that if the Commission has authority to establish the PA USF, such a fund would need to conform to the limits of the Commission’s jurisdiction under state law – including its inability to require contributions from all intrastate telecommunications carriers.<sup>28</sup> Requiring contributions from wireless carriers that are beyond its jurisdiction would not be an available solution.

Thus, for the reasons explained above, the answer to whether the Commission should amend the definition of “contributing telecommunications providers” to include wireless is that it lacks jurisdiction to require wireless carriers to make such contributions.

### **III. THE COMMISSION IS PREEMPTED FROM ASSESSING BROADBAND INTERNET ACCESS SERVICES.**

In the ANOPR, the Commission inquires whether it should expand the base of contributors from “retail intrastate revenues alone” to “revenues from all regulated and unregulated services provided over a supported network.”<sup>29</sup> CTIA has already explained above that surcharges on wireless carriers would be impermissible, and this is true regardless of the service they provide. Thus, as to wireless carriers, the answer is no. CTIA also points out that federal law prohibits the

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State Universal Service Funds 2018: Updating the Numbers, Sherry Lichtenberg, Ph.D., National Regulatory Research Institute.

<sup>27</sup> The Commission should also consider that federal law separately defines “State” and “State Commission,” but uses only “State” in Section 254(f). *Compare* 47 U.S.C. §§ 153(47) and (48). Thus, if Section 254(f) confers any power to Pennsylvania – and it does not – such power would still not overcome the Commission’s lack of jurisdiction over wireless.

<sup>28</sup> CTIA notes that “equitable and nondiscriminatory” does not necessarily mean identical, although a non-identical, but “equitable and nondiscriminatory” contribution mechanism would require careful balancing. CTIA also notes that the current fund arose through a settlement agreement, so the parties had more latitude to structure the fund as they did.

<sup>29</sup> ANOPR at 7018, Appendix A, Question 20.



Commission from assessing broadband Internet access service (“BIAS”).<sup>30</sup> Accordingly, whatever services the Commission wishes to consider for PA USF contributions, it should exclude services, like BIAS, for which an express federal prohibition exists.

**IV. THE COMMISSION SHOULD CONSIDER THE PURPOSE OF THE UNIVERSAL SERVICE FUND AND CONCLUDE THAT THERE IS NO LONGER A NEED FOR THE FUND.**

The issues with the PA USF, as presently constituted, extend beyond the legal obstacles to expanding its contributions base discussed above. The PA USF is an anachronistic subsidy program, and rather than looking for ways to maintain it, the Commission should scrutinize it for extinction. The original purpose of the PA USF was to replace lost switched access subsidies. Putting aside any debate over whether that was a prudent use of public funding at the time of its inception, now that dozens of years have passed, there is no compelling argument that such a need still exists. In fact, since the establishment of the fund, every time the fund has been scrutinized by officials the conclusion has been the same: the PA USF should not continue to exist in its current form, if at all.<sup>31</sup>

As stated by Administrative Law Judge (“ALJ”) Colwell nearly 15 years ago:

The PA USF is a fund which exists because the ratepayers of other telecommunications providers have paid the money, unwittingly, as a hidden tax. It is not “free money” to be plundered at will and without concern for its origins or for whether it is the best use of the money. All parties agree that the concept of universal service is a worthy one. This fund should be reconstructed ... for those companies who can meet a stringent

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<sup>30</sup> *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, RIF Order at 119, fn. 736 (“We note that we continue to preempt any state from imposing any new state universal service contributions on broadband Internet access service.”). This prohibition is consistent with the preexisting prohibition under the early Open Internet Order. *See Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5836-37, para. 490 n. 1477. (2015).

<sup>31</sup> *See* ALJ Colwell’s Recommended Decision in I-00040105 at 87 (July 22, 2009) (“Colwell RD”) (concluding that the fund should be reconstructed); *see generally* ALJ Melillo’s Recommended Decision in I-00040105 and C-2009-2098380, *et al.*, at 131-37.

test for determining that they serve an area whose costs are so high that the company itself deserves extra help for that area alone.

At some point, the market is meant to rely on competition to keep rates affordable. Institutionalizing the PA USF in its present form to provide subsidies to companies who do not have to prove need will not assist the market in reaching its goals and will, instead, provide barriers to entry for new carriers.

...[I]t is clear that there was no expectation by the Commission that the PA USF would be institutionalized in its present form.... The PA USF anticipated in the *Global Order* was intended to be an interim measure.... That “interim measure” has continued for ten years, and that is considerably longer than the Order anticipated.<sup>32</sup>

ALJ Colwell’s observations are as poignant and timely today as they were when made.

Continuing support for legacy networks is inefficient, distorts competition, and increases the financial burden on consumers. Worse still, it prolongs the life of the copper networks that have in large part been abandoned by the very consumers forced to support them. Indeed, legacy copper networks supported by the PA USF have no lasting place in the future of the telecommunications market. Federal policy supports the discontinuation of these networks, as reflected by the Broadband Equity, Access and Deployment (“BEAD”) Challenge Process Guidance. There, the National Telecommunications and Information Administration encouraged states to administer their BEAD programs to “facilitate the phase-out of legacy copper facilities.”<sup>33</sup> The Commission should consider and pursue this goal as it considers the future of the PA USF.

Pennsylvania sits at the cusp of a broadband deployment project that will, if successfully implemented, connect all Pennsylvanians to a modern network. The Commission should be looking at the most expedient way of discontinuing the PA USF in alignment with the BEAD

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<sup>32</sup> Colwell RD at 87-88.

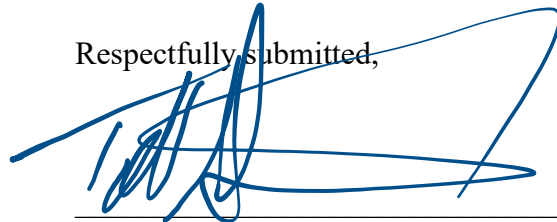
<sup>33</sup> BEAD Challenge Process Guidance, Version No. 1.2, at 8, <https://www.internetforall.gov/bead-challenge-process-policy> (November 1, 2023).

program.<sup>34</sup> Doing so will remove artificial support for copper networks that are intended to be replaced via the BEAD program. The Commission should also take note of federal support that Pennsylvania carriers receive, and for which they have committed to provide service without tying such commitment to continuing receipt of PA USF support.

## V. CONCLUSION

For the reasons expressed above, CTIA urges the Commission to take steps to dismantle and discontinue the PA USF. If the Commission elects to continue the PA USF, CTIA simply asks the Commission to recognize that it lacks jurisdiction to require wireless carriers to contribute to the fund.

Respectfully submitted,



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DATED: February 8, 2024

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<sup>34</sup> CTIA notes that there are other broadband deployment programs that the Commission should take note of, such as infrastructure programs under American Rescue Plan Act.