

**THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS & ENERGY**

Petition of Richmond Connections, Inc.)	
d/b/a Richmond Networx Requesting that the)	
Massachusetts Department of)	
Telecommunications and Energy Institute a)	D.T.E. 03-45
Proceeding to Investigate the Establishment)	
of a Universal Service Fund for the)	
Commonwealth of Massachusetts)	

INITIAL COMMENTS OF VERIZON WIRELESS

These initial comments are submitted on behalf of Verizon Wireless and are in response to the Hearing Officer Notice dated May 29, 2003 in this docket regarding the Petition of Richmond Connections, Inc. ("Petitioner"). Verizon Wireless respectfully opposes the initiation of a proceeding to investigate the establishment of a state universal service fund ("SUSF") in Massachusetts because the Department of Telecommunications and Energy ("Department" or "DTE") lacks statutory authority to establish a fund and there is no valid policy justification to tax customers throughout Massachusetts to subsidize certain carriers' services or customers, including Petitioner's. If the Department determines to proceed with establishment of a fund, it should exempt wireless carriers from either contributing to or receiving funds from the SUSF, in keeping with the Department's precedent on deregulating the rates, entry and terms and conditions of CMRS carriers.

FACTUAL BACKGROUND

In order to create an SUSF, the Commission would need to raise revenue by imposing a tax or fee on telecommunications carriers, customers or services for the

purpose of subsidizing other carriers, customers or services. The Petitioner proposes that carriers “contribute” (*i.e.*, pay a tax, fee, assessment or surcharge) to an SUSF.

Distributions (*i.e.*, subsidies) from the SUSF would be used to “maintain affordable rates”, “encourage telecommunications competition”, “achieve regulatory parity”, and “encourage economic development in all areas of the Commonwealth through the equal availability of basic and advanced services.” *Letter Petition*, Pages 2-3. The Petitioner complains that it needs a subsidy in order to compete effectively with Verizon Communications, from which it purchases unbundled network elements to provide service in parts of Massachusetts. Notably, the Petition makes no suggestion or commitment to use universal service funding to build or support a network in remote parts of Massachusetts. In fact, the Petitioner’s proposal has little to do with ensuring that customers throughout Massachusetts have access to universal service.

I. THERE IS NO STATE STATUTORY AUTHORITY TO ESTABLISH A STATE UNIVESAL SERVICE FUND.

In order for the DTE (or any other Commonwealth agency) to establish an SUSF and raise revenue for it, there must be state statutory authorization. No such authorization exists. Thus, this matter should not be investigated and the Petition should be dismissed.

It is well established that Commonwealth agencies, like the DTE, that were created by the legislature have only those duties, obligations and powers granted to or conferred upon them expressly, or reasonably necessary to carry out the legislature’s intent. *Saccone v. State Ethics Commission*, 395 Mass. 326, 335 (1985). *See City of Newton v. Department of Public Utilities*, 367 Mass. 667, 679-680 (1975). The legislature “may not delegate the general power to make laws.” *Opinion of the Justices to*

the House of Representatives, 393 Mass. 2d 1209, 1219 (1984). The “legislature may delegate to a board or officer the working out of details of a policy adopted by the legislature.” *Powers v. Secretary of Administration*, 412 Mass. 119, 127 (1992).

The Massachusetts Supreme Court has further provided a standard to determine the limits of legislative delegation of power to Commonwealth agencies. The standard involves asking three questions in analyzing the delegation:

(1) Did the Legislature delegate the making of fundamental policy decisions, rather than just the implementation of legislatively determined policy; (2) does the act provide adequate direction for implementation, either in the form of statutory standards or, if the local authority is to develop the standards, sufficient guidance to enable it to do so; and (3) does the act provide safeguards such that abuses of discretion can be controlled?

Id. These delegation standards also apply to situations that involve taxation. *Opinion of Justices, supra*, at 1220.

There are no statutes that authorize the DTE or any other Commonwealth agency to require contributions of any kind from carriers or their customers to subsidize other carriers, services or customers. The only statutorily authorized assessment that funds any telecommunications service is the recently enacted statute to address 911 services - - part of which is to fund carriers’ cost in providing the service. 2002 Mass. Acts., Chapter 239; Mass. Gen. L. ch. 6A § 18H.

The statutes provide certain powers and duties for the DTE in telecommunications, including the regulation of rates of telecommunications carriers under their jurisdiction, *See e.g.* Mass. Gen. L. ch. 159, §§ 13-14, and the regulation of certain corporate actions and transactions of jurisdictional carriers. *See e.g.* Mass. Gen. L. ch.166. However, the Commission does not regulate the rates, entry, terms and

conditions of CMRS carriers operating in Massachusetts. *Re: Regulation of Commercial Mobile Radio Services*, D.P.V. 94-73 (August 5, 1994).¹

The term “universal service” does not appear in any telecommunications statutes that the DTE administers. In contrast, the term “universal service” does appear in three statutes that apply to the DTE regulation of gas and electric utilities. Mass. Gen. L. ch. 164, § 1F.(7) provides that the DTE is “authorized and directed to promulgate rules and regulations to establish service quality standards for each distribution, transmission and gas company, including, but not limited to, standards for universal service” Mass. Gen. L. ch. 164, § 1B.(d) requires “each distribution company” to “provide its customers with default service” and further requires that “in implementing the provisions of this section the department shall ensure universal service for all rate payers and sufficient funding to meet the need therefore.” Mass Gen. L. ch.164, § 1A.(a) requires that restructuring plans for electric companies include a “proposed programs to provide universal service for all customers”.

The statutes authorize two other assessments by the DTE - - neither of which relates to universal service or an SUSF. Mass. Gen. L. ch. 24A, § 3 authorizes assessments by the DTE on intrastate revenues of electric, gas, telephone and telegraph companies under supervision of the DTE to fund activities by the Attorney General’s Office that involve public utilities and the DTE. Mass. Gen. L. ch. 25, § 18 authorizes assessments by the DTE to assess the intrastate operating revenues of electric, gas, cable television, telephone and telegraph companies under the jurisdiction of the DTE to fund

¹ The Department is preempted from regulating the rates or entry of wireless carriers, pursuant to 47 U.S.C. § 332(c)(3).

operations of the DTE. Both statutes have explicit limitations on the amount of the assessments.

Given the lack of authority granted by the statutes to establish a SUSF, or even the mention of universal service in connection with telecommunications services, Petitioner's request must be dismissed. Petitioner fails to point to any express statutory authority for the DTE to do what Petitioner requests. Moreover, even if one tried to imply such power, there would be no way to imply the other necessary, statutory aspects of any such delegation, such as the direction as to how to provide universal service and safeguards such that abuses of discretion can be controlled. *See Powers, supra*.

Other states have appropriately terminated investigations into potential SUSFs based upon a lack of statutory authority. For example, in 1999, the Michigan Public Service Commission dismissed with prejudice a petition to investigate and determine the need for a SUSF. *Re: Telecommunications Association of Michigan*, Case U-11899 Opinion and Order, (September 28, 1999).² In dismissing the petition, the Commission relied upon the lack of statutory authority to create a universal service mechanism. *Id.*³ In 2000, the Michigan Legislature enacted a statute to explicitly authorize the Michigan PSC to create such an "intrastate universal service fund." See, 2000 Mich. Pub. Acts 295; Mich. Comp. Laws § 484.2316a.

Similarly, in New Hampshire, the Commission found that while the federal statutes gave the state the freedom to address universal service in many ways, it needed

² This and other Michigan PSC telecommunications orders are available on the Internet at the following uniform resource locator (URL): <http://cis.state.mi.us/mpsc/orders/comm>.

³ In 2003, the Michigan Public Service Commission again opened a proceeding to consider the creation of a state USF. Under statutory authority granted since its prior order, it found there was no need to create a SUSF. Michigan Public Service Commission, Case no. U-13477, Order Concluding Investigation (February 5, 2003).

specific state statutory authority to establish a SUSF. New Hampshire Public Utility Commission, Order No. 23,602, Docket DT 00-015 (December 22, 2000).⁴ The New Hampshire Order explicitly discusses the type of legislation that the New Hampshire Commission thought was appropriate to be able to potentially proceed with a SUSF. *Id.*, at pp. 12-14. The next year, New Hampshire enacted statutes to authorize a SUSF under certain circumstances. 2001 N.H. Laws 220; N.H. Rev. Stat. Ann. § 374:22-p.

In sum, there is no statutory delegation of power to the DTE or any other agency of the Commonwealth to raise funds for or to distribute funds for universal service in connection with telecommunications services. That being the case, there are also no statutory standards prescribed with respect to policy, implementation or safeguards governing any such activity. Since there simply is no statutory basis authority for a Massachusetts SUSF, Verizon Wireless respectfully submits that this matter should be dismissed with prejudice.

II. THE PROPOSED FUND WILL NOT PROMOTE UNIVERSAL SERVICE IN MASSACHUSETTS.

Even if the Department had authority to create a state universal service fund, the Petitioner's proposal should be rejected, because it seeks to subsidize some carriers' customers or services in Massachusetts without any demonstration of need. Moreover, by taxing all consumers of telecommunications service, the program would actually increase the price of service, making service less affordable to consumers across Massachusetts. The Commission should not promote such cross subsidization unless there is a demonstrated need for such relief in order to provide access to affordable service.

⁴ Order available at New Hampshire Public Utility Commission website. The specific uniform resource locator (url) is: <http://www.puc.state.nh.us>.

Richmond has failed to make any showing of need for a subsidy or for creation of a state fund. While it asserts that it cannot “provide competitive rates and still cover their internal costs and Verizon’s charges, ” it makes no showing that it has taken all reasonable steps to reduce its operational costs or to operate as efficiently as possible. Richmond should not be looking to competitive carriers, like Verizon Wireless, to tax its customers (thereby making its service more expensive) in order to enable Richmond to reduce its prices to its customers. Universal service should not be misused to subsidize one set of competitors at the expense of another. Instead, it should only be looked to when customers would otherwise lack service, or only be offered service at unreasonable rates. Notably lacking in the Richmond Petition is any mention of customer need or impact. Thus, if the Commission does not deny the Petition with prejudice on grounds of lack of jurisdiction, it should do so because Richmond shows no need for the creation of a state universal service fund.

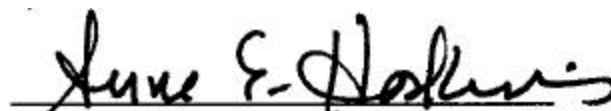
Moreover, if the Commission does not deny the petition, it should, consistent with its regulatory treatment of CMRS carriers, exempt CMRS carriers from contributing to the SUSF. The proposed fund is intended to subsidize certain landline local exchange carriers, which should not be done at the expense of CMRS carriers and their customers.

CONCLUSION

For the reasons stated above, Verizon Wireless urges the Department to deny the Petition of Richmond Connections, Inc. to initiate an investigation into the establishment of a SUSF for the Commonwealth of Massachusetts.

Respectfully submitted,

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A handwritten signature in black ink, reading "Anne E. Hoskins", written over a horizontal line.

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