Original: 2082

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Proposed Rulemaking on Competitive Safeguards for Telecommunications Utilities	:	**Docket Nos. L-00990141 M-00960799**

COMMENTS OF THE
PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE

I. INTRODUCTION

The Pennsylvania Office of Consumer Advocate ("OCA") hereby submits these Comments in response to the Proposed Rulemaking issued on January 29, 2000 regarding competitive safeguards for telecommunications utilities. 30 Pa. Bull. 539. As stated in the Proposed Rulemaking, this proceeding began on March 18, 1999 when the Pennsylvania Public Utility Commission ("Commission") entered an order directing that an Advanced Notice of Proposed Rulemaking be issued to solicit comments regarding the development of generic competitive safeguards under Sections 3005(b) and 3005(g)(2), 66 Pa.C.S. §§3005(b) & (g)(2), of the Public Utility Code. Id. That order also directed that the matter of imputation with regard to the provision of intraLATA service by local exchange carriers ("LECs") be consolidated with the rulemaking proceeding. Id. The Proposed Rulemaking further recognizes that the issue of competitive safeguards, including the establishment of Competitive Safeguard Regulations, was initially addressed by the Commission in its June 28, 1994 Final Order at Docket No. P-00930715 regarding Bell-Atlantic Pennsylvania, Inc.'s Petition for Alternative Regulation filed

under Chapter 30 of the Public Utility Code, 66 Pa.C.S. §§3001-3009 ("Bell Chapter 30 plan"). Id.

The Bell Chapter 30 Order, however, referred the issue of establishing Competitive Safeguard Regulations to the Office of Administrative Law Judge ("OALJ"). Id. The Commission also directed that a separate proceeding be established to promulgate generic regulations applicable for all LECs filing for alternative rate regulation under Chapter 30. Id. Therefore, the OALJ opened a Competitive Safeguards proceeding at M-00940587 in which a final order was entered on August 6, 1996 that determined Bell-specific competitive safeguards. Id. at 539-540. The instant Proposed Rulemaking was opened to provide all LECs and other interested parties an opportunity to provide comments on the need for developing generic competitive safeguards. Id. at 540.

The OCA did not earlier submit Comments or Reply Comments in this proceeding but submits these Comments now to express support for the establishment of appropriate competitive safeguards to aid in the development of a fully functioning competitive market for local telecommunications service in Pennsylvania. The OCA further comments upon how, in this competitive market, the Commission can make certain that the rates for noncompetitive telecommunications services should not subsidize or support the rates for competitive services.

In support of these Comments, the OCA states as follows.

II. COMMENTS

A. Competitive Safeguards Are Necessary For The Proper Development Of A Fully Functioning Competitive Market For Local Telecommunications Services.

Both Congress and the Pennsylvania Legislature have passed legislation that transforms the more than 100-year long regulation of local telephone service into a competitive market in an attempt to provide lower prices, better customer service, and technological advances that are often the fruit of competitive marketplaces. In adding Chapter 30 to the Public Utility Code, the Pennsylvania Legislature found it to be the policy of this Commonwealth to, *inter alia*:

> (4) provide diversity in the supply of existing and future telecommunications services and products in telecommunications markets throughout this Commonwealth
>
> * * * * * *
>
> (7) promote and encourage the provisions of competitive services by a variety of service providers on equal terms through all geographic areas of this Commonwealth [and]
>
> (8) encourage competitive supply of any service in any region where there is market demand.

66 Pa.C.S. §3001(4), (7) & (8). Therefore, the Pennsylvania Legislature sought to bring competition into a market that had previously operated as a regulated monopoly in Pennsylvania.

The OCA submits that the benefits intended by the implementation of Chapter 30 will only become a reality if effective competitive safeguards are established that will provide for the proper development of a fully functioning competitive market for local telecommunications services. Fortunately, in inaugurating this dramatic change, the Pennsylvania Legislature had the foresight to include provisions in Chapter 30 that sought to ensure that competitive safeguards

would be in place to help this dramatic change occur as the protection of government regulation was lifted. See, 66 Pa.C.S. §§ 3004(d)(4), 3005(b), 3005(g)(2) & 3009(b)(3), infra. These provisions express the intention of the Pennsylvania Legislature to create an environment in Pennsylvania where competitors and consumers alike will benefit from the operation of a competitive marketplace for local telecommunications services.

Pursuant to Section 3004 of Chapter 30, the Commission must ensure that providers of competitive services will not unduly or unreasonably prejudice or disadvantage a customer class or providers of competitive services. 66 Pa.C.S. §3004(d)(4). Furthermore, Section 3009 requires the Commission to establish such additional requirements and regulations as it determines to be necessary to ensure the protection of consumers. 66 Pa. C.S. §3009(b)(3). Additionally, Section 3005(b) charges the Commission to

> establish regulations to prevent local exchange telecommunications companies from engaging in unfair competition and require that local exchange companies provide reasonable nondiscriminatory access to competitors for all services and facilities necessary to provide competing services to consumers.

66 Pa.C.S. §3005(b). This would prohibit LECs from charging one competitor more than another for the same service so that all would be served in a fair and impartial manner. Therefore, the Pennsylvania Legislature has clearly expressed its intention to have competitive safeguards established so that a competitive market can develop for the provision of local telecommunications services.

The Commission has then used this proceeding to satisfy the Pennsylvania Legislature's intention. The OCA supports the competitive safeguards established in the Proposed Rulemaking *sub judice*. The OCA submits that the proposed regulations establish

competitive safeguards in furtherance of Chapter 30's mandate to encourage and promote competition in the provision of telecommunications products and services throughout Pennsylvania. In particular, the OCA supports Section 63.143(2) which indicates that

> an incumbent LEC may not give itself (or any of its affiliates, divisions or operating units) or any competitive LEC any preference or advantage over any other CLEC in the ordering, provisioning or repair of any services that it is obligated to provide CLECs under any applicable Federal or State law.

52 Pa. Code §63.143(2). The OCA submits that this provision, in conjunction with the other provisions of the Code of Conduct established in this Proposed Rulemaking, will help to promote and encourage competition in this marketplace and satisfy the requirements of Section 3005(b) of the Public Utility Code.

The OCA submits that these Competitive Safeguards established in this Proposed Rulemaking will ensure that the public interest, and not the interest of any individual or entity, will prevail in the creation of an environment in Pennsylvania where competitors and consumers alike will benefit from the operation of a competitive marketplace. Competition in the telecommunications industry will be an evolving phenomenon.

The Pennsylvania Legislature also made certain that the monopoly power of incumbent LECs, that still control virtually all switched access to consumers, is not used to subsidize or support other services. The OCA submits that competition has not arrived yet as incumbent LECs are still a dominate force in their local service territories. The provisions in these Competitive Safeguard Regulations are intended to provide for fair and open competition for all providers of telecommunications services and to guarantee protection of consumers. Therefore, the OCA submits that the Competitive Safeguards proposed in this Proposed

Rulemaking are appropriate.

B. In The Development Of A Fully Functioning Competitive Market For Local Telecommunications Services, Rates For Noncompetitive Telecommunications Services Should Not Subsidize Or Support The Rates For Competitive Services.

Chapter 30 of the Public Utility Code also specifically provides that it is the policy of this Commonwealth to ensure that rates for noncompetitive telecommunications services do not subsidize the competitive ventures of providers of telecommunications services. 66 Pa.C.S. §3001(3). Section 63.143(7) of the Competitive Safeguards iterated in the Proposed Rulemaking satisfies this policy as well as the requirement of Section 3005(g)(2) of Chapter 30 which provides that a LEC may not use revenues earned or expenses incurred in conjunction with noncompetitive services to subsidize or support any competitive services. 52 Pa. Code §63.431(7); 66 Pa.C.S. §3005(g)(2). Section 63.143(7) of the Competitive Safeguards further provides that an incumbent LEC may not provide goods or services to any affiliate, division or operating unit at a price below the incumbent LECs' cost or market price for the goods or services, whichever is higher. 52 Pa. Code §63.431(7). Furthermore, the incumbent LEC may not purchase goods or services from any affiliate, division or operating unit at a price above the market price for the goods or services. Id.

The OCA submits that it was the intent of the Pennsylvania Legislature in passing Chapter 30 to promote and encourage competition in the local telecommunications market so that customers would benefit from multiple suppliers who would provide more product choices at lower prices. This would not occur, however, and competition cannot arise in the provision of basic telephone service, if LECs can subsidize or support their competitive services and ventures

with revenues paid by consumers through its noncompetitive services. The OCA submits that when the difference between revenues paid by consumers for noncompetitive services and the expenses incurred for noncompetitive services is much more than for competitive services, then such revenues earned and expenses incurred in conjunction with the provision of noncompetitive services will support the incumbent LECs provision of the competitive service. Further, the requirement that revenues earned be greater than expenses incurred for the incumbent LECs services occurs due to the economies of scale on the incumbent LECs' network. Given the incumbent LECs position as provider of both noncompetitive and competitive services, it is possible to shift support from noncompetitive services to competitive services. As the Administrative Law Judges in Bell's Chapter 30 proceeding stated:

> Where a firm operates only in competitive markets, any attempt to overassign common costs to no group of services will result in either new entrants coming in to the market with better prices or customers leaving for lower-priced competitors. Where a firm offers both monopoly and competitive services on the other hand, market forces cannot prevent overassignment of costs to the monopoly services. Where a firm has monopoly customers, the firm will, if left unchecked, allocate a disproportionate amount of its costs to captive customers to better position itself in competitive markets.

Re: Bell Atlantic - Pennsylvania, Inc.'s Petition and Plan for Alternative Form of Regulation Under Chapter 30, Recommended Decision, Docket No. P-00930715 (issued April 21, 1994) at 455-56 (emphasis added). The OCA submits that this competitive issue is of paramount concern to consumers.

In order to ensure that subsidy and support did not exist, the Commission approved the Recommended Decision of Administrative Law Judge Corbett in the subsequent Competitive Safeguards proceeding which provided that Bell develop a pricing strategy for its

competitive services, which recognizes that all competitive services must in the aggregate contribute to all fixed, joint and common costs on the same percentage basis as its noncompetitive services. See, Investigation pursuant to Section 3005 of the Public Utility Code, 66 Pa.C.S. §3005, and the Commission's Opinion and Order at Docket No. P-00930715, to establish standards and safeguards for competitive services, with particular emphasis in the areas of cost allocations, cost studies, unbundling and imputation; and to consider generic issues for future rulemaking, Opinion and Order, Docket No. M-00940587 at 145 (entered August 6, 1996) ("Competitive Safeguards Order"). See also, Recommended Decision at 231 (entered February 21, 1996). In relying upon the associated provisions of Chapter 30 that the Commission should police the division between Bell's competitive and unregulated services and its regulated noncompetitive services, the Commission further provided that:

> if the allocation of joint and common costs is not accomplished in a fair and consistent manner, then the potential exists for competition to be fostered at the expense of universal service if such costs are underallocated to competitive services, or for competition to be unnecessarily impeded if such costs are overallocated to competitive services.

Id. at 141. Therefore, the Commission held that the review of revenues and expenses in the aggregate is but one test for monitoring the subsidy and support requirement and does not prevent the filing of individual complaints that address the per service necessity to avoid such subsidy and support. Id. 145.

The OCA, therefore, submits that the Commission recognized the subsidy and support problem with regards to Bell in the Competitive Safeguards proceedings, supra, and now, thru this Proposed Rulemaking, makes the safeguards developed in that proceeding

applicable to all incumbent LECs.

To that end, the Commission has also recognized its power to audit the accounting and reporting systems of LECs and their transactions with affiliates under Section 3009 of the Public Utility Code, 66 Pa. C.S. §3009(b)(1) and required Bell to continue to file Affiliated Interest Agreements and other relevant data or reports concerning its relationship with its affiliates for all types of transactions involving both competitive and noncompetitive services. Re: Bell Atlantic - Pennsylvania, Inc.'s Petition and Plan for Alternative Form of Regulation Under Chapter 30, Opinion and Order, Docket No. P-00930715 (entered June 28, 1994). The OCA submits that this requirement is intended to ensure that Bell does not use its revenues earned from noncompetitive telecommunication services to subsidize or support its rates for competitive services. The OCA further supports the current regulations proposed because they echo the protections provided in the Bell Chapter 30 Order and apply these requirements to all incumbent LECs in Pennsylvania.

Furthermore, the OCA submits that it is well accepted that, if a service is priced below the incremental costs to provide that service, the service will be subsidized. Furthermore, where a dominant provider can utilize revenues from noncompetitive services to subsidize or support competitive services, potential rivals who do not have access to such subsidy can be driven from the market. The OCA submits that competition in telecommunications markets will remain uneven. Some regions of Pennsylvania, and particular services, will enjoy the benefits of competition while others will not. This may result in harm to consumers as one consumer may be paying more for the same service than another consumer. The prohibition against subsidy and support was intended to make certain that some customers would not be forced to pay high prices

in order to subsidize and support the efforts of the incumbent to reduce prices in other more competitive markets.

The Commission recognizes this problem in its Competitive Safeguards Order and, in an attempt to prevent this from taking place, required Bell-Atlantic Pennsylvania to ensure that prices for its competitive services, in the aggregate, make a reasonable contribution to cover the joint and common costs. Id. at 159-160. By placing the prohibition against "subsidy" and "support" in its regulations, the OCA believes the Commission has relied upon its earlier determination in the Competitive Safeguards Order. Therefore, Bell Atlantic - Pennsylvania, as well as other incumbent LECs, cannot take revenues paid by consumers for noncompetitive services, where prices are regulated by the Commission, and use that revenue to lower the prices it charges for competitive services, where prices are not regulated by the Commission and can be lowered below market cost so that competitors cannot compete with the price being offered. The OCA interprets the current regulations proposed as relying upon the determinations made in the Competitive Safeguards Order and suggest that the Commission may emphasize that it will interpret and apply that requirement consistently with its Order in that proceeding.

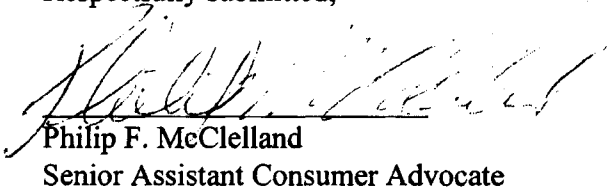
The OCA further submits that if rates for noncompetitive telecommunications services subsidize or support the rates for competitive services, incumbent LECs would have an unfair advantage in the marketplace and would be able to drive away their competitors until the incumbent LEC is left as the only viable option for the provision of local telecommunications services in their territory. Such a monopoly status of an unregulated utility is exactly what the Pennsylvania Legislature intended to avoid by enacting Chapter 30 as there would be no incentive for lower prices, better quality of service or advancement of communications

technologies. Therefore, the OCA submits support for the prohibition of rates for noncompetitive telecommunications services subsidizing the rates for competitive services so that the benefits of a competitive environment for the provision of local telecommunications services can come to fruition. The OCA submits that the enforcement of Section 63.143(7) will protect against the support of competitive services by noncompetitive services. Otherwise, noncompetitive services will shoulder costs associated with competitive services which competitive LECs would not be able to compete with.

III. CONCLUSION

The Pennsylvania Office of Consumer Advocate submits these Comments to support the adoption of the Competitive Safeguards Regulation as articulated in the Proposed Rulemaking being considered in this proceeding. The OCA submits that such safeguards will ensure that incumbent LEC's do not use their incumbent status inappropriately in a competitive environment for the provision of telecommunications services. The OCA further submits that the Commission should continue its efforts to prohibit subsidy or support for competitive services. The OCA, therefore, requests that the PUC consider these Comments regarding the regulations set forth as competitive safeguards in this matter.

Respectfully submitted,



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Dated: April 28, 2000

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CERTIFICATE OF SERVICE

Re: Proposed Rulemaking on Competitive Safeguards for Telecommunications Utilities
Docket Nos. L-00990141; M-00960799

I hereby certify that I have this day served a true copy of the foregoing document, Office of Consumer Advocate's Comments, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 28th day of April, 2000.

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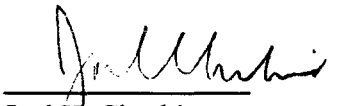

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EXHIBIT B

CODE OF CONDUCT

Subject to Section I of the Partial Settlement, the following will apply to ILECs with over 500,000 access lines at the time of Commission approval of this Partial Settlement.

1. No incumbent local exchange company shall give its competitive local exchange affiliate preferential treatment in the provision of goods and services.

2. No incumbent local exchange company shall provide any goods or services to its competitive local exchange affiliate below cost or market price, nor shall the company purchase goods or services from the competitive affiliate at a price above market, and no transaction between the two entities shall involve an anti-competitive cross-subsidy.

3. The incumbent local exchange company shall simultaneously make available to any competitor any market information not in the public domain that is supplied to any competitive local exchange affiliate.

4. Employees or agents of an incumbent local exchange company, who are responsible for the processing of an order or service of the operating system, shall not be shared with the competitive local exchange affiliate, and shall have offices physically separated. The competitive affiliate shall have its own direct line of management, and any shared facilities shall be fully and transparently allocated between the incumbent local exchange company and its competitive local exchange company affiliate.

5. No employee or agent of an incumbent local exchange company shall promote any service of its competitive local exchange affiliate.

6. No employee or agent of an incumbent local exchange company shall represent that any repair or restoration of service would have occurred earlier if the customer had obtained service from its competitive local exchange affiliate.

7. No incumbent local exchange company shall condition the provision of any regulated service on the purchase of service from its competitive local exchange affiliate.

8. No incumbent local exchange company may represent that the services provided by its competitive local exchange affiliate are superior, the services of other competitors are not reliable, or, that the continuation of certain services from the incumbent local exchange company are contingent upon purchase of the full range of services from its competitive local exchange affiliate.

9. Any incumbent local exchange company that bundles its services must provide the same opportunity at the same terms to competitors.

BELL PROPOSAL

APPENDIX VI

CODE OF CONDUCT

BA-PA and competitive local exchange carriers ("CLECs") operating in BA-PA territory shall comply with the following Code of Conduct:

1. BA-PA shall maintain a separate organization for the ordering, and for the processing and transmission of instructions to field forces for the provisioning, of any services to CLECs (including Unbundled Network Elements, UNE-Platform, or collocation), with its own direct line of management and employees separate from the employees involved in providing such services to BA-PA's retail customers.

2. BA-PA shall not give any preference to itself (or any of its divisions or operating units) over a CLEC in the ordering, provisioning or repair of any telecommunications services (including Unbundled Network Elements, UNE-Platform, or collocation)that it is obligated to provide to CLECs under applicable law

3. BA-PA will supply customer proprietary network information (CPNI) and aggregate CPNI to the CLECs in accordance with FCC regulations; and will use CPNI for its own purposes only in accordance with FCC regulations.

4. BA-PA employees shall use CLEC proprietary information (that is not otherwise available to BA-PA) received in the ordering, provisioning or repairing of telecommunications services provided to the CLEC solely for the purpose of providing such services to the CLEC. BA-PA shall not disclose such CLEC proprietary information to employees engaged in the marketing or sales of retail telecommunications services, unless the CLEC provides prior written consent to such disclosure.

5. No LEC employee while engaged in the installation of equipment or the rendering of services on behalf of a competitor shall disparage the service of the competitor, discourage the customer from switching service providers, or promote any service of the LEC.

6. No LEC employee while processing an order for the repair or restoration of service or engaged in the actual repair or restoration of service of any competitor shall either directly or indirectly represent to any end-user that such

repair or restoration of service would have occurred sooner if the end-user had obtained service from the LEC.

7. Any disputes concerning application of this Code shall be resolved under Abbreviated Dispute Resolution procedure.

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held August 26, 1999

Commissioners Present:

John M. Quain, Chairman
Robert K. Bloom, Vice Chairman, Dissenting Opinion attached
David W. Rolka
Nora Mead Brownell
Aaron Wilson, Jr.

	Docket No.
Joint Petition of Nextlink Pennsylvania, Inc.; Senator Vincent J. Fumo; Senator Roger Madigan; Senator Mary Jo White; the city of Philadelphia; The Pennsylvania Cable & Telecommunications Association; RCN Telecommunications Services of Pennsylvania, Inc.; Hyperion telecommunications, Inc.; ATX Telecommunications; CTSI, Inc.; MCI Worldcom; and AT&T Communications of Pennsylvania, Inc. for Adoption of Partial Settlement Resolving Pending Telecommunications Issues	P-00991648
Joint Petition of Bell Atlantic Pennsylvania, Inc., Conectiv Communications, Inc.; Network Access Solutions; and the Rural Telephone Company Coalition for Resolution of Global Telecommunications Proceedings	P-00991649

OPINION AND ORDER

against its competitors in the ordering, provisioning, and maintenance of network elements. MCI WorldCom Statement No. 4.0, at 19-20; Reply Brief of AT&T at 64; Initial Brief of Senators Madigan, Fumo, and White at 52. Second, AT&T's witness asserts that structural separation is a more appropriate remedy than functional separation, which is more difficult for regulators to oversee and enforce, where the market in question is in its infant stages of becoming competitive. AT&T Statement No. 1.0, at 23-24. Finally, several of the parties point out that structural separation has been adopted successfully in Pennsylvania's electric industry, in the telecommunications local exchange market in Rochester, New York and in Connecticut, and in the gas industry in Massachusetts; and it should now be used to open up Pennsylvania's local exchange markets. AT&T Statement No. 1.0, at 24-26; Senators' Statement No. 1, at 28, 30-32; Main Brief of AT&T at 85-87; Initial Brief of Senators Madigan, Fumo, and White at 53-57.

The witnesses for the State Senators also attempt to counter BA-PA's and GTE's arguments opposing structural separation. First, they contend that this Commission does have the legal authority to order structural separation, citing particularly Section 3005(h) of Chapter 30. Senators' Statement No. 1-A, at 6; Initial Brief of Senators Madigan, Fumo, and White at 55. That section specifically provides that the Commission may require LECs to provide competitive services "through a subsidiary which is fully separated from the local exchange telecommunications company."

Second, they argue that "structural separation in no way influences the manner in which the retail arm of BA-PA can use the BA-PA physical network. . . . Structural separation places the BA-PA retail affiliate in the same position as all other CLECs." Senators' Statement No. 1, at 29. Finally, these same witnesses argue that

applying structural separation only to BA-PA and GTE is not unduly discriminatory, because these two (2) companies control the largest percent of Pennsylvania's local exchange network. Id. at 29-30. The two (2) ILECs' networks remain the "bottlenecks" through which all other LECs must have access in order to provide local exchange services to customers.

These same parties also urge the Commission to accept the Code of Conduct in the 1648 Petition and to reject the Code in the 1649 Petition as being inadequate to prevent anticompetitive behavior. The parties particularly note the additional safeguards to protect CLECs from BA-PA and GTE engaging in various discriminatory practices included in the 1648 Petition that are missing in the 1649 Petition. AT&T Statement No. 1.0, at 28-32; MCI WorldCom Statement No. 4.0, at 20-31; Initial Brief of Senators Madigan, Fumo, and White at 61-63. Finally, we note that MCI WorldCom's endorsement of the 1648 Petition's Code of Conduct suggests additional provisions outlawing the use of tie-ins and imposing a stiff penalty for violations of the Code. MCI WorldCom Statement No. 4.0, at 22, 25.

C. Discussion

1. Structural Separation

Based upon the record in this proceeding and for the reasons discussed below, we conclude that structural separation is the most efficient tool to ensure local telephone competition where a large incumbent monopoly controls the market. The record in this proceeding shows that BA-PA controls over 90% of the local exchange access lines in its service territory at this time, and continues to control bottleneck

facilities in most, if not virtually all, local exchange markets where it currently operates.[206] This overwhelming competitive presence and concomitant ability to exercise market power, including the ability to provide itself with anticompetitive cross-subsidies and the opportunity and incentive to discriminate against competing telecommunications carriers in the provision of wholesale services, strongly supports our conclusion that structural separation is necessary to provide the local service competition envisioned under Chapter 30 and TA-96.

TA-96 and our own statutory mandate under Chapter 30 have as goals the provision of competitive services by alternative providers on equal and non-discriminatory terms. 47 U.S.C. §§251 and 271; 66 Pa. C.S. §3001. Both legislative enactments envision a telecommunications arena where competition creates savings and technological innovation for our nation and Pennsylvania. Both statutes recognize and authorize structural separation as a regulatory tool to implement a competitive market where unfair competition may result absent its implementation. 47 U.S.C. §272; 66 Pa. C.S. §3005(h).

BA-PA asserts that we have no legal authority to require structural separation of its wholesale and retail business operations. While BA-PA acknowledges the Commission's authority to order structural separation under Section 3005(h), BA-PA attempts to argue that this Commission, in effect, waived this authority when we failed to utilize it in our 1996 Competitive Safeguards Order at Docket No. M-00940587. BA-PA also argues that structural separation is inconsistent with Section 272 of TA-96, because

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206 See Appendices I, II, and III to NEXTLINK Pennsylvania Inc.'s Main Brief, Summaries of CLEC, ILEC, and of All LEC Access Lines as of 12/31/98, Sorted by Company Name (Prepared by PA Public Utility Commission, Bureau of Fixed Utility Services, Telecommunications Group). These summaries, which this Commission took administrative notice during the hearings (see transcript of proceedings at 1172), show that as of December 31, 1998, BA-PA controlled a minimum of 90.6% of all business access lines in its service territory and over 99% of the residential access lines in its service territory.

that section specifically spells out the type of services structural separation may be used for and dividing retail/wholesale operations is not one of them. BA-PA also asserts that this requirement is based on the false premise that BA-PA is a monopoly wholesale supplier when in fact competitors can obtain various network elements from a host of competing LECs. Finally, BA-PA claims that imposing such a requirement only on it would harm BA-PA in its ability to provide customers bundled service packages.

BA-PA is incorrect on each of these points. First, the state and federal legislative mandates noted above, as well as the Commission's general powers to regulate utilities pursuant to Section 501 of the Public Utility Code, 66 Pa. C.S. §501, most certainly contemplate the utilization of the most efficient regulatory tools to open and maintain competitive markets and protect the public interest. See, e.g., Pa. Pub. Util. Comm'n v. Philadelphia Elec. Co., 501 Pa. 153, 460 A.2d 734 (1983) (Commission has general administrative authority under Section 501 to supervise and regulate all public utilities). Indeed, the Commission finds on this record that absent structural separation of BA-PA's wholesale and retail operations to prevent cross-subsidization and discriminatory access to other telecommunications carriers, we cannot fulfill our Section 501 duty to enforce, execute and carry out our mandate under Chapter 30 to promote and encourage the provision of competitive services on equal terms throughout the Commonwealth. See 66 Pa. C.S. §§3001(2), (3), (7) and (8).

In addition, Section 3005(h) specifically provides for the use of structural separation as a regulatory tool for LECs serving over one (1) million access lines (which would currently only be BA-PA), "if the commission finds that there is a substantial possibility that the provision of the [competitive] service on a nonseparated basis will result in unfair competition."[207] Section 3005(h) is clearly applicable here because the

207 While the 1648 Petition seeks structural separation as to GTE as well, our Order today limits this remedy to BA-PA only. We note that this modification is completely consistent with Section

ultimate goal of this proceeding is to open up competition in all telecommunications markets in Pennsylvania, especially local competition. Although it is not necessary for the structural separation proceeding discussed below to conclude prior to the Commission's determination that the local exchange market is "irreversibly opened to competition,"[208] the proceeding will create the process for BA-PA to follow to facilitate that determination. In addition, this proceeding establishes a process leading to a formal declaration of all remaining retail local services as "competitive" under Chapter 30. As detailed in Sections XVIII of this Order, BA-PA's business services for customers generating $80,000 or more in annual total billed revenue (where Local Number Portability is available) will be declared "competitive" under Section 3005 upon entry of this Order, and its intraLATA toll services will be designated "competitive" upon BA-PA's receipt of Section 271 approval. Moreover, the fact that the Commission addressed this matter in a 1994 proceeding under Chapter 30, well in advance of the enactment of TA-96, does not preclude the Commission from imposing structural separation now based on the record in this proceeding.

As noted earlier, we have found that we cannot exercise our duty to enforce, execute, and carry out the pro-competition mandates of Chapter 30 absent structural separation. We also find that, given the length of time needed to actually accomplish structural separation for BA-PA (approximately one (1) year), it would be inefficient and more burdensome for BA-PA to require separate retail affiliates on a piecemeal basis as different parts of the local service market are declared competitive under the process we

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3005(h), which limits the use of structural separation to those LECs with over one (1) million access lines. We do not need to address, therefore, GTE's separate arguments as to why structural separation should not apply to it.

208 This is the standard that has been adopted by the United States Department of Justice in its evaluation of whether a Section 271 application should be approved by the FCC. See, e.g., In re: Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Michigan, CC Docket No. 97-137, "Evaluation of the United States Department of Justice," at 3 (Filed June 25, 1997).

have created in this Order. We expect that if we order the structural separation planning, hearing, and implementation process to begin now, i.e., upon entry of this Order, it can be accomplished within approximately the same time frame as BA-PA achieves Section 271 approval from the FCC and formal designation of its remaining retail services as competitive from this Commission. However, absent the structural separation of BA-PA's retail services, we find that mere functional separation of the sort proposed in the 1649 Petition will be inadequate to open Pennsylvania's telecommunications market to local service competition on fair and nondiscriminatory terms. Consistent with our responsibilities under Section 3005(h), therefore, we find, based on the record in this proceeding, that structural separation is a necessary safeguard to protect CLECs offering the same "competitive" services from unfair competition by BA-PA.

For its part, TA-96 recognizes the value of structural separation as an effective tool to prevent unfair competition by Bell operating companies.[209] Specifically, Section 272 of TA-96 requires that Bell operating companies, including their affiliates such as BA-PA, provide certain services through a structurally separate affiliate. Those enumerated services are: (1) manufacturing activities, as defined in Section 273(h) of TA-96; (2) origination of interLATA services other than incidental interLATA services, out of region services, or previously authorized activities (each as defined in TA-96); and, (3) interLATA information services other than electronic publishing and alarm monitoring services (both as defined in TA-96). Section 272(b) of TA-96 defines structural separation and sets forth substantially the same requirements which were suggested in the 1648 Petition. Moreover, recent FCC action, wherein the FCC is willing to forebear from enforcing the Section 271 unbundling requirements for the delivery of

209 Moreover, TA-96 envisions structural separation occurring prior to a Bell operating company offering long distance services. Our ordering BA-PA to separate its wholesale and retail businesses into two (2) separate corporate affiliates before it enters the long distance market is entirely consistent with the timing sequence contemplated in TA-96.

advanced telecommunications services for those ILECs willing to create a separate subsidiary, underscores the appropriateness of structural separation as a regulatory device for promoting and protecting competition under state and federal law.

In addition, nothing in Section 272 limits the use of structural separation by state commissions only to the services enumerated in that section. Moreover, the preemption language in Section 253 of TA-96 is not implicated, because the effect of this structural separation requirement is *to remove barriers to entry* by creating a level playing field for all LECs, including BA-PA's own retail operations, in obtaining necessary services from BA-PA's wholesale operations on a nondiscriminatory basis. Moreover, notwithstanding BA-PA's assertions to the contrary, structural separation does not prohibit, or have the effect of prohibiting, BA-PA from offering any interstate or intrastate telecommunications service in Pennsylvania. We agree with the testimony provided by Peter Bradford and Richard Silkman that requiring structural separation in no way affects the ability of BA-PA's retail affiliate to use the BA-PA physical network; it simply places BA-PA's retail arm in the same shoes as any other CLEC. Senators' Statement No. 1, at 29. Preemption under Section 253(d), therefore, is not at issue.

Similarly, BA-PA's reliance on our 1996 Competitive Safeguards Order for the position that this Commission has already considered and rejected imposing a separate subsidiary requirement on BA-PA completely ignores the clear statutory language that we "may, at any time, after notice and after opportunity to be heard . . ., rescind or amend any order made by [this Commission]." 66 Pa. C. S. §703(g). Consistent with this provision, the decision that separate subsidiaries are now necessary to ensure competition in BA-PA's local exchange markets was made only after all necessary parties, including BA-PA, received notice and had an opportunity to be heard on the issue in this proceeding and is based on consideration of all the evidence that was introduced therein.

First, this Commission has been frustrated, as has the FCC, other state commissions, and state and federal legislators, in the lack of progress in opening the local telecommunications markets to competition since the passage of TA-96 over three and one-half (3 1/2) years ago and, concomitantly, the issuance of our Competitive Safeguards Order shortly thereafter. To date, the FCC has rejected five (5) Section 271 applications and approved none so that we are no closer to competition today in the local exchange markets as we were in 1996.

In Pennsylvania, BA-PA was granted an alternative form of regulation pursuant to Chapter 30 in 1994.[210] Chapter 30 expressly anticipated that the alternative regulation of BA-PA, as the dominant incumbent in the state, would further be accompanied by competition in the local exchange market. See 66 Pa. C.S. §3009; MFS-I, et al. That has not happened. The important policy objective in Chapter 30 to promote competition remains largely unsatisfied. Instead, BA-PA still maintains a virtual monopoly in the Pennsylvania local exchange market, where it controls over 90% of the local business market, as measured by access lines, in its own service territory. See Appendices I, II, and III to NEXTLINK Pennsylvania Inc.'s Main Brief, supra note 6. These numbers are even worse in the local residential market where BA-PA continues to control almost 100% of the residential market, as measured by access lines, in its service territory. Id. In addition, the evidence presented by competitors to BA-PA in this proceeding and in earlier proceedings incorporated into this docket have presented numerous examples where BA-PA has abused its market power by providing competitors with less than comparable access to its network or engaged in other discriminatory conduct that prevented BA-PA customers from switching to a competitor. See, e.g., MCI

210 In re Bell Atlantic - Pennsylvania, Inc.'s Petition and Plan for Alternative Form of Regulation Under Chapter 30, Docket No. P-00930715 (Order entered June 28, 1994).

WorldCom Statement No. 4.0, at 23-30 (various examples provided); Covad Statement No. 2, at 4-10 (Covad witness describes collocation experience in Pennsylvania with BA-PA); AT&T Statement No. 3.0, at 13-24 (AT&T witness similarly describes collocation experience in Pennsylvania with BA-PA); Petition of Bell Atlantic-Pennsylvania, Inc. for a Determination that Provision of Business Telecommunications Services is a Competitive Service under Chapter 30 of the Public Utility Code, Docket No. P-00971307, Recommended Decision of ALJ Michael C. Schnierle at 46 (July 24, 1998) (litany of CLEC complaints arising from BA-PA's OSS cited to by Judge Schnierle; Docket No. P-00971307 and underlying record has been incorporated into this proceeding).

We find that BA-PA's continuing dominant market share, the lack of market entry in the residential market in the years since enactment of Chapter 30 and TA-96, and the substantial evidence presented in this docket of discriminatory access being provided to competitors supports our conclusion that Chapter 30's goal of promoting competition in the local telecommunications markets will not be achieved absent structural separation of BA-PA's wholesale and retail operations. In these circumstances, it follows that this Commission has the authority under Section 703(g) to modify its earlier determination regarding structural separation, an option that is expressly available to this Commission under Section 3005(h).

In finding that structural separation is an appropriate remedy to facilitate local telephone competition, we are also guided by this Commission's own recent success in implementing structural separation as part of our restructuring of the electric industry pursuant to Chapter 28 of the Public Utility Code. See, e.g., Application of PECO Energy Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code and Joint Petition for Partial Settlement, Docket Nos. R-00973953 and P-00971265

(Order entered December 23, 1997) [hereinafter PECO Restructuring Order]. In the PECO restructuring case, this Commission found that:

> functional separation of regulated [electric distribution company] functions and competitive generation functions is essential for the development of a vibrant competitive market. Structural separation through the establishment of fully independent entities is preferable whenever possible.

Id. at 128. The non-structural remedy proposed by BA-PA would be less effective in preventing market power abuses and more costly to enforce. This is because a non-structural approach would require continuing regulatory oversight and violations are more difficult to detect.

In making this determination concerning structural separation, we also take administrative notice from testimony presented by several parties in this proceeding that structural separation has successfully been implemented by other states in the tele-communications and gas industries. See AT&T Statement No. 1, at 24-26; Senators' Statement No. 1, at 28, 30-32; Main Brief of AT&T at 85-87; Initial Brief of Senators Madigan, Fumo, and White at 53-57.[211] Likewise, we find that the courts and the FCC have also favorably viewed structural separation as an effective remedy to mitigate potential cross-subsidy/cross-shifting problems in markets that are highly concentrated. California v. F.C.C., 905 F.2d 1217 (9th Cir. 1990) (court vacated and remanded FCC decision to abandon structural separation of enhanced and basic telecommunications services and rely instead on cost accounting regulations to provide regulatory protection against cross-subsidization, finding that the FCC had inadequate record support to

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211 See also Robert E. Burns et al., Market Analyses of Public Utilities: The Now and Future Role of State Commissions at 6 (National Regulatory Research Institute July 1999) (study recommends that state regulatory commissions should consider structural separation as a regulatory tool to offset potential cross-subsidization problems, especially where utility services are being provided in markets that are initially highly concentrated).

conclude that circumstances had changed sufficiently to reduce danger of cross-subsidization of competitive activities with monopoly revenues); Computer and Communications Indus. Ass'n, 693 F.2d 198, 218 (D.C. Cir. 1982) (court found that FCC properly imposed structural separation on only one (1) carrier that was dominant in the market), cert. denied, 461 U.S. 938 (1983); In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, at ¶¶ 13, 92-96 (Memorandum Opinion and Order, and Notice of Proposed Rulemaking, released August 7, 1998) (the FCC stated in its order that ILECs must make their high-speed data offerings, such as xDSL, available to CLECs on a wholesale basis and make xDSL equipment available as an UNE; however, these requirements could be avoided if an ILEC chooses to provide those services through a "truly separate affiliate").

In finding structural separation of BA-PA's wholesale operations from its retail operations as a necessary requirement to expedite competitive entry into BA-PA's local exchange markets, we conclude that it will result in a more appropriate and desirable regulatory structure once local competition truly develops. This is because a structurally separate BA-PA will reduce the level of necessary regulatory oversight over its deregulated retail operations. When true competition develops, BA-PA's retail operations will no longer require a heightened degree of oversight, and it will be regulated just like other CLECs, thereby allowing competition to replace regulation consistent with the competitive goals of Chapter 30 and TA-96.

Finally, we note that our conclusion regarding structural separation in no way affects our pending deliberations of the Joint Application of Bell Atlantic and GTE Corporation (GTE) for approval of their agreement and plan of merger, at docket numbers A-310200F0002, A-311350F0002, A-310222F0002, and A-310291F0003. BA-PA, a wholly-owned subsidiary of Bell Atlantic, controls a substantial portion of the local

service market in Pennsylvania. GTE is another telecommunications holding company whose subsidiary, GTE North, Inc., controls the second largest local service market share in Pennsylvania. Should the merger be approved, Bell Atlantic will then control the two (2) subsidiaries operating in Pennsylvania with the largest local service market shares. The merger of these two (2) holding companies, Bell Atlantic and GTE, however, will have a much larger scope than just their Pennsylvania operations.[212]

2. Implementation of Structural Separation

Notwithstanding our findings on the necessity of structural separation to ensure fair competition in the local exchange markets, we recognize that this record does not contain the necessary detail for the Commission to implement immediate structural separation of the wholesale and retail business operations. Consequently, BA-PA and all other parties shall have a further opportunity to develop the record necessary for the Commission to make an informed decision regarding the implementation of structural separation. It is important, however, that we make clear again that structural separation is the alternative we have chosen. Therefore, we commit to examining and considering the newly-created record in detail so as to achieve structural separation in a reasonable and

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212 The instant proceeding affects only the two (2) holding companies' Pennsylvania operations and is, therefore, completely separate from review of the pending merger application. For instance, the structural separation requirement imposed by this Order only applies to BA-PA and will not require repositioning of any properties that would affect the network infrastructure commitments of these companies under Chapter 30 or otherwise. First, it is our intent with this structural separation requirement, that the network infrastructure will remain intact as part of the wholesale business operation. Secondly, this Order sets in place a procedure that will insure an adequate review of the positioning of each element of BA-PA's operations. This process, as will be further discussed in this Order, is completely consistent with the legislative mandates of Chapter 30 and is the most effective way to eliminate unfair competition in the supply of local telecommunications services. It will not, however, have any application to the way in which Bell Atlantic and GTE merge or operate their holding companies.

efficient manner and to assure a fair transition that is not confiscatory or unduly burdensome to BA-PA.

For the foregoing reasons, we will direct the structural separation of the wholesale and retail business operations of BA-PA in order to create a competitive telecommunications market in the Commonwealth. To accomplish this desirable goal, we will open a separate proceeding in order to allow BA-PA and all other parties a full and fair opportunity to present evidence as to which elements should or should not be separated to create a retail affiliate, and specifically to allow BA-PA the opportunity to demonstrate that separation of certain elements of its operations will be too burdensome or will result in a confiscatory expenditure. For example, we anticipate that, under an appropriate structural separation plan, the BA-PA retail affiliate would be allocated sufficient marketing, accounting, customer service and other personnel (including office space and computers) to continue to serve the current BA-PA retail customer base. On the other hand, the physical network facilities associated with the provision of telecommunications services (central office facilities, outside plant, inside wiring, etc.) would remain within the BA-PA wholesale affiliate. Thus, the network infrastructure will remain intact as part of the wholesale business operation and, further, will carry with it BA-PA's network modernization obligations.

We envision that cost and operations studies will be conducted to address these issues and that at the conclusion of the structural separation proceeding, we will have before us a complete record which will allow us to implement separation in a way which guarantees fair competition while at the same time ensuring that BA-PA can successfully compete without unnecessary financial burdens being placed on it.

Accordingly, BA-PA shall be ordered to file and serve on the parties to this proceeding, within sixty (60) days of the entry date of this Order, a plan that creates a separate affiliate to supply retail telecommunication services which will operate independently from BA-PA's wholesale operations.

(a) The plan shall be of sufficient detail to identify each component or element of retail service needed to be structurally separate and to allow a current and verifiable cost analysis of each component or element, and to provide the Commission with such cost analysis.

(b) Where BA-PA is of the belief that excessive cost or duplication will be required for a *specific* element to be structurally separate, it shall file a mitigation proposal for that element. BA-PA shall bear the burden of providing the Commission with the necessary current and verifiable cost support on this issue. Failure to do so shall result in the structural separation of the specific element as the Commission deems appropriate.

(c) The plan shall meet the structural and transactional requirements similar to those required by TA-96 for a separate affiliate to provide long distance service.

(d) Parties to this proceeding shall file comments within 60 days of service of BA-PA's structural separation plan and/or mitigation proposal regarding each element or component of said plan.

(e) Where a party disputes that BA-PA's characterization of an element is impractical for separation, and BA-PA has provided cost documentation and analysis in support of that argument, the party shall provide appropriate analysis and evidence supporting its position.

(f) The Commission will review the plan and/or alternate proposals and comments, and order implementation of specific elements where there are no contested facts.

(g) If the Commission's review reveals disputed facts concerning a specific element of the structural separation, the Commission will refer that element to the Office of Administrative Law Judge for an expedited hearing and recommended solution to be completed and returned to the full Commission within ninety (90) days of referral.

The above procedure will allow the necessary detail to be established to fully implement structural separation of the wholesale and retail business operations of BA-PA while ensuring that excessive cost and duplication of assets and employees are kept to a minimum. During the course of this structural separation proceeding, BA-PA should implement a functional separation of its wholesale and retail business operations by a separate division and abide by the Code of Conduct, which is discussed below and a copy of which is attached to the Order as Appendix C. The parties to this proceeding are further advised that we intend to facilitate a final Commission order implementing structural separation within one year of the effective date of this Order.

3. Code of Conduct

We also adopt the Code of Conduct contained in the 1648 Petition, as modified by this Order relating to structural separation as to BA-PA only,[213] as a further aid to prevent discrimination and other market power abuses by BA-PA in its local exchange markets. We believe that this Code of Conduct, in providing a more

213 The other modifications relate to limiting the Code of Conduct's applicability only to BA-PA, adding the words "or division" after "affiliate" throughout the document, and adding a new Paragraph 10 relating to invoking the Commission's alternative dispute resolution procedures to resolve possible violations of the Code of Conduct.

comprehensive set of competitive safeguard rules to follow than that contained in the 1649 Petition, will better protect the nascent competition developing in BA-PA's local exchange markets.

In adopting the 1648 Petition's Code of Conduct as modified, we reject BA-PA's contention that this Commission lacks the authority to require adherence to any code of conduct beyond that presented in its 1649 Petition without going through a formal rulemaking process. If BA-PA's position prevailed, that is, only codes of conduct agreeable to the company targeted by the code can be implemented by this Commission, it would be akin to allowing the fox to guard the hen house. We are aware of no authority that would allow the monopolist to have the final say over what rules it will have to follow to prevent market abuses against its would-be competitors.

We note that adoption of codes of conduct, as well as interim guidelines, has previously been used by this Commission in other instances to implement telephone and electric reform legislation.[214] We also believe it is important to emphasize that the "rules" contained in the adopted Code of Conduct are directed at preventing unfair competition and discriminatory access. To that end, the various types of conduct prohibited by these "rules" would also be contrary to both the letter and spirit of Chapter 30 and TA-96, and, in certain circumstances, could also violate the different state or federal antitrust laws and consumer protection laws. Therefore, other than structural separation (which we deal with separately in this Order), the Code of Conduct simply spells out those rules that BA-PA, as the largest ILEC by far in Pennsylvania, is expected to follow as it opens its local markets to competition.

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214 See, e.g., PECO Restructuring Order, at 128-29, 161 (adoption of a code of conduct specifically applicable to PECO Energy); Chapter 28 Electric Generation Customer Choice and Competition Act -- Customer Information -- Interim Requirements, Docket No. M-00960890F0008 (Order entered July 11, 1997); Re: Licensing Requirements for Electric Generation Suppliers -- Interim Licensing Procedures, M-00960890F0004 (Order entered February 13, 1997).

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EXHIBIT B

CODE OF CONDUCT

Subject to Section I of the Partial Settlement, the following will apply to ILECs with over 500,000 access lines at the time of Commission approval of this Partial Settlement.

1. No incumbent local exchange company shall give its competitive local exchange affiliate preferential treatment in the provision of goods and services.

2. No incumbent local exchange company shall provide any goods or services to its competitive local exchange affiliate below cost or market price, nor shall the company purchase goods or services from the competitive affiliate at a price above market, and no transaction between the two entities shall involve an anti-competitive cross-subsidy.

3. The incumbent local exchange company shall simultaneously make available to any competitor any market information not in the public domain that is supplied to any competitive local exchange affiliate.

4. Employees or agents of an incumbent local exchange company, who are responsible for the processing of an order or service of the operating system, shall not be shared with the competitive local exchange affiliate, and shall have offices physically separated. The competitive affiliate shall have its own direct line of management, and any shared facilities shall be fully and transparently allocated between the incumbent local exchange company and its competitive local exchange company affiliate.

5. No employee or agent of an incumbent local exchange company shall promote any service of its competitive local exchange affiliate.

6. No employee or agent of an incumbent local exchange company shall represent that any repair or restoration of service would have occurred earlier if the customer had obtained service from its competitive local exchange affiliate.

7. No incumbent local exchange company shall condition the provision of any regulated service on the purchase of service from its competitive local exchange affiliate.

8. No incumbent local exchange company may represent that the services provided by its competitive local exchange affiliate are superior, the services of other competitors are not reliable, or, that the continuation of certain services from the incumbent local exchange company are contingent upon purchase of the full range of services from its competitive local exchange affiliate.

9. Any incumbent local exchange company that bundles its services must provide the same opportunity at the same terms to competitors.

§ 63.143. Code of Conduct.

ILECs, unless otherwise noted, shall comply with the following requirements:

(1) An ILEC with more than 250,000 but less than 1,000,000 access lines shall maintain a functionally separate organization (the "wholesale operating unit") for the ordering and provisioning of any services or facilities to CLECs necessary to provide competing telecommunications services to consumers. The wholesale operating unit shall have its own direct line of management and keep separate books of accounts and records which shall be subject to review by the Commission under 66 Pa.C.S. § 506 (relating to inspection of facilities and records). For ILECs over 1,000,000 access lines, the Commission will determine for each such ILEC, after appropriate notice and hearing, whether this subsection will continue to apply or whether further safeguards will be necessary to protect CLECs from unfair competition and to ensure nondiscriminatory access to the ILEC's services and facilities. These other safeguards may include, for example, requiring the ILEC to structurally separate its retail and wholesale operations into separate corporate affiliates.

(2) An ILEC may not give itself (or any of its affiliates, divisions or operating units) or any CLEC any preference or advantage over any other CLEC in the provision of goods and services. ~~ordering, provisioning or repair of any services that it is obligated to provide CLECs under any applicable Federal or State law.~~

(3) An ILEC's wholesale operating unit employees shall use CLEC proprietary information (that is not otherwise available to the ILEC) received in the ordering, provisioning or repairing of any telecommunications services provided to the CLEC solely for the purpose of providing the services to the CLEC. An ILEC may not disclose the CLEC proprietary information to employees engaged in the marketing or sales of retail telecommunications services unless the CLEC provides prior written consent to the disclosure.

(4) An ILEC employee, while engaged in the installation of equipment or the rendering of services on behalf of a competitor, may not disparage the service of the competitor or promote any service of the ILEC.

(5) An ILEC employee, while processing an order for the repair or restoration of service or engaged in the actual repair or restoration of service of any competitor, may not either directly or indirectly represent to any end-user that the repair or restoration of service would have occurred sooner if the end-user had obtained service from the ILEC.

(6) An ILEC may not condition the sale, lease or use of any noncompetitive telecommunications service within the jurisdiction of the Commission on either of the following:

(i) The purchase, lease or use of any other goods or services offered by the ILEC.

(ii) A direct or indirect commitment not to deal with any CLEC.

(7) An ILEC may not use revenues earned or expenses incurred in conjunction with noncompetitive services to subsidize or support any competitive services. Specifically, an ILEC may not provide goods or services to any affiliate, division or operating unit at a price below the ILEC's cost or market price for the goods or services, whichever is higher. The ILEC may not purchase goods or services from any affiliate, division or operating unit at a price above the market price for the goods or services.

(8) An ILEC, its affiliates, divisions or operating units, may not state or imply any of the following:

(i) The services provided by the ILEC are inherently superior when purchased from the ILEC.

(ii) The service rendered by a competitor may not be reliably rendered.

(iii) The continuation of certain services from the ILEC are contingent upon taking the full range of services offered by the ILEC.

(9) An ILEC shall formally adopt and implement the provisions in this section as company policy and shall take appropriate steps to train and instruct its employees in their content and application.

(10) An ILEC shall simultaneously make available to any CLEC any market information not in the public domain that is supplied to any CLEC affiliate or division.

(11) An ILEC shall not joint market products or services with any CLEC affiliate or division unless the same opportunity to joint market under the same terms and conditions is made available to all other CLECs.

~~(10)~~ (12) A party allegedly harmed by a violation of any of the provisions in this section may invoke the Commission's alternative dispute resolution procedures to resolve the dispute. That action, however, does not preclude or limit additional private remedies or civil action.

AT&T Meeting 4/17/00

AT&T Statement 1.0

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

DIRECT TESTIMONY OF

JOHN LANGHAUSER

ON BEHALF OF

AT&T COMMUNICATIONS OF PENNSYLVANIA, INC.

ADDRESSING ISSUES XIV AND XVII

DOCKET NOS.
P-00991648
P-00991649

PETITION OF SENATORS AND CLECS
FOR ADOPTION OF PARTIAL SETTLEMENT

JOINT PETITION FOR GLOBAL RESOLUTION
OF TELECOMMUNICATIONS PROCEEDINGS

APRIL 22, 1999

with Section 271(c) of the Telecommunications Act, or 2) BA-PA is in material noncompliance with this Agreement."[14]

The Bell proposal reverses the burden of proof, without authority or justification. This is inconsistent with both the PUC's prior orders as well as my understanding of the standards that the FCC has established for state commissions when reviewing a 271 application.

IV. STRUCTURAL/FUNCTIONAL SEPARATION OF ILEC BUSINESS OPERATIONS

Q. CAN YOU EXPLAIN THE CONCEPTS OF STRUCTURAL AND FUNCTIONAL SEPARATION?

A. Yes. Both forms of separation are intended to accomplish the same purpose — to separate two business units of an entity with market power to assure that one business unit does not provide the other business unit with preferences or advantages in the marketplace. While functional separation formally divides the company into two distinct business units within the same operating company, structural separation goes further and requires that the corporate structure be modified so that each business unit is housed in a separate corporate affiliate.

Q. IS FUNCTIONAL SEPARATION INTENDED TO BE LESS EFFECTIVE THAN STRUCTURAL SEPARATION?

A. No. If functional separation is to be utilized, the regulator must be satisfied that the functional separation safeguards are equally effective as if there were structural separation. While in some instances functional separation may be more efficient than

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[14] Bell Petition, ¶145 (emphasis added).

structural separation, at the same time, functional separation is very difficult for regulators to oversee and enforce unless the oversight and enforcement is very focused. Accordingly, in my experience, in instances in which regulators are trying to address very specific problems in a market, they will adopt functional separation requirements.[15] However, when regulators are attempting to structure a market which is in its infant stages, structural separation is more appropriate.[16] Of course, this is the course the Commission appropriately took in structuring the competitive electric market in Pennsylvania.

Q. IS THE PENNSYLVANIA ELECTRIC MARKET EXAMPLE OF A GOOD ANALOGY HERE?

A. I think so. While I am not ultimately familiar with Pennsylvania electric restructuring, my understanding is that, at least for the major electric utilities, like PECO Energy Company ("PECO") and GPU, structural separation of the wholesale generation and retail business units is required and that a strict code of conduct governs the relationship between the two affiliates.[17] This is an appropriate structure for markets like the

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[15] For example, in 1996, the FCC adopted functional separation requirements for Bell to address very focused market development problems in the payphone industry — an industry which had been competitive for over 10 years.

[16] For example, the FCC required structural separation of ILEC long distance affiliates for years in order for those affiliates to retain non-dominant status.

[17] Essentially, under the major electric restructurings, the wholesale business unit, the generation company or Genco, must structurally separate from the distribution company. Furthermore, under several of the restructurings, including PP&L, additional structural separation is required between the monopoly retail arm of the company (the provider of last resort) and the competitive retail arm which

(continued...)

Pennsylvania electric market and the local telephone market where monopolies are in the process of being opened to competition.

Q. HAS THE STRUCTURAL SEPARATION IN THE ELECTRIC MARKET BEEN EFFECTIVE?

A. I am not familiar enough with that market to evaluate how effective the structural separation has been. However, I would note that it is my understanding that in the brief four month period since electric competition has been introduced in Pennsylvania, that market has apparently developed more meaningful competition in several markets than the local telephone market has developed in the over three years since the Telecommunications Act and almost six years since the enactment of Chapter 30.[18]

What is clear is that the Commission has taken more forceful action on the electric side than it has on the telecommunications side to open markets. I suspect that the structural separation requirements applied to electric companies is one of the factors

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[17](...continued)
competes in the marketplace. In other instances the electric companies voluntarily seperated competitive retail sales activities from their distribution/PLR activities.

[18] For example, based upon reports issued by the Pennsylvania Office of Consumer Advocate, over 34% of the load in the PECO Energy service territory is being served by a competitive supplier and 14.5% of the residential load is being served by a competitive supplier. PECO Energy's generation and competitive electric generation supplier activities are contained in separate corporate entities different than the entity that provides distribution and "supplier of last resort" functions. GPU, which has completely divested its "wholesale generation" function and whose competitive arm, again, is structurally separate from its distribution business, has 42.4% of its customer load being served by alternative suppliers. This after four months of retail competition.

which has enabled a more efficient transition than has been experienced in local telephone markets.

Q. HAVE YOU REVIEWED THE TWO PARTIAL SETTLEMENTS IN THE AREA OF STRUCTURAL SEPARATION?

A. Yes I have. The Senators/CLECs Settlement includes a strict structural separation requirement between the wholesale and retail arms of both Bell and GTE's operation. The Bell Settlement does claim adherence to a functional separation requirement for Bell, governed by a Code of Conduct;[19] however, my review reveals that the so-called functional separation provides little limitation on Bell's activities and would provide little or no protection to competitors and consumers.

Q. WHY DOES THE STRUCTURAL SEPARATION REQUIREMENT IN THE SENATORS/CLECS SETTLEMENT APPLY ONLY TO BELL AND GTE?

A. In reality, the structural separation requirement should apply to ILECs which are the monopoly providers of access to the switched network and which control dominant market share in their local markets. However, as a concession, the Senators/CLEC Settlement does not impose such a requirement on smaller ILECs because of the small size of their service territories and because of their rural telephone company status. However, such separation is critical for application to Bell and GTE, which if merged, would control approximately 90% of the local telephone market in Pennsylvania.

A. <u>Other Competitive Safeguards</u>

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[19] Bell Settlement, p. 48, ¶ 148, Appendix VI.

Q. CAN YOU EXPLAIN HOW THE SENATORS/CLECS SETTLEMENT IS STRUCTURED IN ADDRESSING THESE AND OTHER COMPETITIVE SAFEGUARD ISSUES?

A. Yes. As I have already explained, a structural separation requirement is applied to Bell and GTE. Furthermore, the Settlement includes "other competitive safeguards" which establish general principles governing the interaction between the wholesale and retail affiliates.[20] Finally, Exhibit B to the Settlement establishes a Code of Conduct which provides specific standards with which the two affiliates must abide.

Q. WHY ARE THE GENERAL PRINCIPLES OR OTHER SAFEGUARDS IMPORTANT?

A. The general principles are important because they emphasize that the structural separation requirement is intended to assure that preferences and advantages are not provided by Bell's and GTE's wholesale affiliates to Bell's and GTE's retail affiliates. The underlying premise of these principles is that if Bell's and GTE's wholesale arms, which own and operate the network upon which all competitors rely, is able to provide any preferences and advantages to Bell's and GTE's retail arms, which at the start control 95 - 100% of the local market in their respective service territories, competition will never develop. Bell and GTE's retail arms already have the embedded advantage of a dominant market share — other preferences and advantages must be precluded at all costs.

Q. CAN YOU DESCRIBE THESE GENERAL PRINCIPLES?

A. Yes. The principles merely require that the two affiliates operate completely separately from one another, not jointly own the network and associated assets, maintain separate

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[20] Senators/CLECs Settlement, p. 21 ¶ 44.

books and personnel, and that the retail affiliate be privy to the same service arrangements from the wholesale affiliate as its competitors and that the wholesale arrangements are provided pursuant to the same systems and procedures. The principles also preclude the provision of certain shared service functions, like installation and maintenance and that affiliate transactions be subject to Chapter 21 of the Public Utility Code as provided for by existing law.

Q. ARE THESE PRINCIPLES FAIR TO BELL?

A. Yes. The principles are very basic and, as a group, merely require that the wholesale affiliate treat the retail affiliate in the same manner as the wholesale affiliate treats unaffiliated CLECs. They are very similar to the requirements imposed in the electric context in affiliate and "GENCO" codes of conduct. Absent these basic principles, the structural separation requirement would have no teeth and would provide no protection to anyone.

B. <u>Code of Conduct</u>

Q. PLEASE DESCRIBE THE CODE OF CONDUCT ISSUES BEFORE THE COMMISSION.

A. Both partial settlements include a code of conduct and, while there are many similarities, there are fundamental differences which require the Commission's attention. As explained previously, the Code of Conduct included in the Senators/CLECs Settlement is designed to establish the specific standards which govern the interaction between the wholesale and retail affiliates. In marked contrast, the Bell Code of Conduct does not

even govern interaction between business units, but applies to Bell employees regardless of their responsibilities.

Q. WHY IS THE STRUCTURE OF BELL'S CODE OF CONDUCT A PROBLEM?

A. Because there is no legitimate functional separation of business units at all. Bell's code of conduct does separate out a group of employees to deal with CLECs but, amazingly, this is not the same group which provides service to Bell's retail arm. Accordingly, to the extent there is any functional separation in Bell's code, it functionally separates and formalizes a structure, which by its very nature, is unequal and anti-competitive by meshing together its own wholesale and retail arms and establishing a separate organization to deal with CLECs. An appropriate code would require that wholesale provisioning would be conducted by the same group for both Bell retail and CLEC retail service.

Q. CAN YOU CITE ADDITIONAL PROBLEMS WITH THE BELL CODE'S STRUCTURE?

A. Yes. Not only does it separate out an organization to deal only with unaffiliated CLECs, it requires that organization to have a separate direct line of management. At the same time, the Bell Code claims that the meshed together wholesale and retail arm of Bell's business will not provide any preference to itself that the separate organization provides to unaffiliated CLECs. The obvious question is how Bell would even know whether preferences were being provided given the completely separate treatment provided CLECs as compared to Bell's retail arm. This merely provides one example of why Bell's code functionally separates itself in the wrong way in order to provide itself with a

competitive advantage. Obviously, Bell's retail arm should be served by the same organization as the CLECs, so that a separate line of management actually provides a competitive safeguard rather than formalizing the opportunity for Bell to provide itself with preferences and advantages.

Q. ARE THERE PROBLEMS WITH THE SPECIFIC PROVISIONS OF BELL'S CODE?

A. The specific provisions are no better than the structure, and provide Bell with ample opportunity for competitive mischief. For example, rule no. 5 of Bell's code prohibits its employees from disparaging CLECs, discouraging customer switching and promoting its own service. However, these rules, which certainly appear to be facially valid, are restricted in their application to when an employee is installing equipment or rendering service for that specific competitor. It follows that Bell believes such activity is fine at all other times. This provision would not appear to prohibit Bell from engaging in the practice of trying to "steal back" a customer when Bell finds out through a service order that the customer has chosen a CLEC for local service. As long as the service representative didn't try to steal the customer back on the same call from the CLEC or the customer announcing the switch, Bell would be able to use its position as the wholesale provider to "win back" the customer. This kind of behavior is a complete abuse of Bell's position as the monopoly wholesale provider and should be strictly prohibited.

Bell's proposed Rule no. 2 generally prohibits preferences, but then restricts the application of the rule to activities "it is obligated to provide to CLECs under applicable law." So, for example, if Bell is of the view that it was not required to provide a

particular service arrangement to CLECs under law (for example, UNE-P in central offices with 2 collocators), the rule would still permit it to provide that wholesale service arrangement to itself in servicing its own retail customers. Again, the rule formalizes preferences rather than prohibiting them.

Finally, Bell's rules do not address activities which can be used to provide itself with advantages. Some examples are that, while Bell's code generally prohibits improper sharing of CLEC proprietary information, it does not preclude sharing or transferring of employees to the same end.[21]

Bell's code also permits dissemination or sharing of market information between wholesale and retail arms without making such information available to the internal CLEC organization or CLECs generally. Furthermore, the Code does not preclude the tying or bundling of products and services between the wholesale and retail arms of the business.

Q. YOU HAVE BEEN CRITICAL OF BELL'S CODE OF CONDUCT. CAN YOU ADDRESS THE CODE INCLUDED IN THE SENATORS/CLECs SETTLEMENT?

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[21] It is undeniable that Bell is capable of such tactics. For example, as I have explained previously, the FCC has implemented a functional separation requirement applicable to payphone services which also prohibits the dissemination of competitors' proprietary information from Bell's Network Services Division to its Payphone Division. However, recently, the primary Network Services Division contact with competing private payphone providers, Mr. Joe Romanowski, an individual with routine access to and knowledge of proprietary and competitively sensitive information, was transferred to its Payphone Division where that information can be used to Bell's competitive advantage.

A. Yes, the Senators/CLECs' Code of Conduct properly addresses the interaction between the wholesale and retail arms of Bell's and GTE's businesses. Not only is the code structured properly, but its specific terms are comprehensive in that they preclude all preferences, all advantages, and all anti-competitive interactions of the type I have discussed above.

Q. IS THE SENATORS/CLECs CODE FAIR TO BELL?

A. Yes, as long as you recognize that, because of its position as the provider of access to its monopoly public network and its overwhelming local market share, special rules need to be established to ensure a level playing field with its competitors, the Senators/CLECs Code is completely fair to Bell. In fact, as I have noted, the Senators/CLECs Code is very similar to the Codes of Conduct approved by the Commission in the various electric restructurings. This is particularly noteworthy because in those restructurings, the electric companies agreed to this type of separation and competitive safeguards. In contrast, Bell apparently will not.

Q. DOES THAT COMPLETE YOUR DIRECT TESTIMONY?

A. Yes it does.

Original: 2082

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Proposed Rulemaking on Competitive Safeguards for Telecommunications Utilities	:	**Docket Nos. L-00990141 M-00960799**

COMMENTS OF THE
PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE

I. INTRODUCTION

The Office of Consumer Advocate ("OCA") hereby submits these Comments in response to the Proposed Rulemaking issued on February 10, 2001 regarding competitive safeguards for telecommunications utilities. 31 Pa. Bull. 809. As stated in the Proposed Rulemaking, this proceeding began on November 30, 1999 when the Public Utility Commission ("Commission") initiated a proposed rulemaking proceeding to establish competitive safeguards for all Pennsylvania local exchange companies ("LECs") in furtherance of the provisions of Chapter 30 of the Public Utility Code. Id., citing, 66 Pa.C.S. §3001 ("Chapter 30"). On two separate occasions, the Commission extended the filing of comments in this proceeding after receiving requests for a stay because of the uncertainty surrounding the pending appeals of the Commission's Global Order[1] and the relevance their resolution may bear on this rulemaking proceeding.

[1] See, Joint Petition of Nextlink, et al. and Joint Petition of Bell Atlantic, et al., 196 PUR 4th 172 (Pa.P.U.C. 1999)("Global Order"), aff'd, Bell Atlantic-Pennsylvania, Inc., et al. v. Pennsylvania Public Utility Commission, 2790, 2812, 2793, 2896, 2916 C.D. 1999 (October 25, 2000).

More specifically, the November 30, 1999 rulemaking proposed a Code of Conduct that is modeled closely after the Code of Conduct adopted for Verizon Pennsylvania, Inc.[2] in the Global Order. After various appeals were consolidated, the Commonwealth Court unanimously upheld the Commission's Global Order, on October 25, 2000. This decision included the aforementioned Code of Conduct. As indicated in the Pennsylvania Bulletin, there is no current pending appeal relating to the Code of Conduct and the Commission determined that it is now appropriate to re-establish a comment period for this proposed rulemaking.

The OCA recognizes that the issue of competitive safeguards, including the establishment of Competitive Safeguard Regulations, was initially addressed by the Commission in its June 28, 1994 Final Order at Docket No. P-00930715 regarding Verizon's Petition for Alternative Regulation filed under Chapter 30 of the Public Utility Code, 66 Pa.C.S. §§3001-3009 ("Verizon Chapter 30 plan"). The Verizon Chapter 30 Order, however, referred the issue of establishing Competitive Safeguard Regulations to the Office of Administrative Law Judge ("OALJ"). The Commission there also directed that a separate proceeding be established to promulgate generic regulations applicable for all LECs filing for alternative rate regulation under Chapter 30. The OALJ opened a Competitive Safeguards proceeding at M-00940587 in which a final order was entered on August 6, 1996 that determined Verizon-specific competitive safeguards.

The instant Proposed Rulemaking was opened to provide all LECs and other interested parties an opportunity to provide comments on the need for developing generic

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[2] Verizon Pennsylvania, Inc. is the former Bell Atlantic-Pennsylvania, Inc. that changed its name as a result of the merger with GTE, Inc. consummated June 16, 2000. Throughout these Comments, the OCA will refer to this utility company as Verizon.

competitive safeguards. The OCA litigated competitive safeguards issues in the prior proceeding at M-00940587 and submits these Comments now to express support for the establishment of appropriate and consistent competitive safeguards to aid in the development of a fully functioning competitive market for local telecommunications service in Pennsylvania. The OCA will then comment upon how, in this competitive market, the Commission can make certain that the rates for noncompetitive telecommunications services should not subsidize or support the rates for competitive services.

In support of these Comments, the OCA states as follows.

II. COMMENTS

A. Competitive Safeguards Are Necessary For The Proper Development Of A Fully Functioning Competitive Market For Local Telecommunications Services.

Both Congress and the Pennsylvania General Assembly have passed legislation that transforms the more than 100-year long regulation of local telephone service in an attempt to provide lower prices, better customer service, and technological advances that are often the fruit of competitive marketplaces. In adding Chapter 30 to the Public Utility Code, the Pennsylvania General Assembly found it to be the policy of this Commonwealth to, *inter alia*:

> (4) provide diversity in the supply of existing and future telecommunications services and products in telecommunications markets throughout this Commonwealth
>
> * * * * * *
>
> (7) promote and encourage the provisions of competitive services by a variety of service providers on equal terms through all geographic areas of this Commonwealth [and]

(8) encourage competitive supply of any service in any region where there is market demand.

66 Pa.C.S. §3001(4), (7) & (8). Therefore, the Pennsylvania General Assembly sought to bring competition into a market that had previously operated as a regulated monopoly in Pennsylvania.

The OCA submits that the benefits intended by the implementation of Chapter 30 will only become a reality if effective competitive safeguards are established. Fortunately, in inaugurating this dramatic change, the Pennsylvania General Assembly had the foresight to include provisions in Chapter 30 that sought to ensure that competitive safeguards would be in place to help this dramatic change occur as the protection of government regulation was lifted. See, 66 Pa.C.S. §§ 3004(d)(4), 3005(b), 3005(g)(2) & 3009(b)(3), infra. These provisions express the intention of the Pennsylvania General Assembly to create an environment in Pennsylvania where competitors and consumers alike will benefit from the operation of a competitive marketplace for local telecommunications services.

Pursuant to Section 3004 of Chapter 30, the Commission must ensure that providers of competitive services will not unduly or unreasonably prejudice or disadvantage a customer class or providers of competitive services. 66 Pa.C.S. §3004(d)(4). Furthermore, Section 3009 requires the Commission to establish such additional requirements and regulations as it determines to be necessary to ensure the protection of consumers. 66 Pa. C.S. §3009(b)(3). Additionally, Section 3005(b) charges the Commission to

> establish regulations to prevent local exchange telecommunications companies from engaging in unfair competition and require that local exchange companies provide reasonable nondiscriminatory access to competitors for all services and facilities necessary to provide competing services to consumers.

66 Pa.C.S. §3005(b). This would prohibit LECs from charging one competitor more than another for the same service so that all would be served in a fair and impartial manner. Therefore, the Pennsylvania General Assembly has clearly expressed its intention to have competitive safeguards established so that a competitive market can develop for the provision of local telecommunications services.

The Commission has then used this proceeding to satisfy the Pennsylvania General Assembly's intention. The OCA supports the competitive safeguards established in the Proposed Rulemaking *sub judice*. The OCA submits that the proposed regulations establish competitive safeguards in furtherance of Chapter 30's mandate to encourage and promote competition in the provision of telecommunications products and services throughout Pennsylvania. In particular, the OCA supports Section 63.143(2) which indicates that

> an incumbent LEC may not give itself (or any of its affiliates, divisions or operating units) or any competitive LEC any preference or advantage over any other CLEC in the ordering, provisioning or repair of any services that it is obligated to provide CLECs under any applicable Federal or State law.

52 Pa. Code §63.143(2). The OCA submits that this provision, in conjunction with the other provisions of the Code of Conduct established in this Proposed Rulemaking, will help to promote and encourage competition in this marketplace and satisfy the requirements of Section 3005(b) of the Public Utility Code.

The OCA submits that these Competitive Safeguards established in this Proposed Rulemaking will ensure that the public interest, and not the interest of any individual or entity, will prevail in the creation of an environment in Pennsylvania where competitors and consumers alike will benefit from the operation of a competitive marketplace. Competition in the

telecommunications industry will be an evolving phenomenon.

The Pennsylvania General Assembly also made certain that the monopoly power of incumbent LECs, that still control most switched access to consumers, is not used to subsidize or support other services. The OCA submits that residential competition has not arrived yet as incumbent LECs are still a dominate force in their local service territories. The provisions in these Competitive Safeguard Regulations are intended to provide for fair and open competition for all providers of telecommunications services and to guarantee protection of consumers. Therefore, the OCA submits that the Competitive Safeguards proposed in this Proposed Rulemaking are appropriate.

B. The Commission Should Affirm Its Prior Rulings So That Rates For Noncompetitive Telecommunications Services Should Not Subsidize Or Support The Rates For Competitive Services.

Chapter 30 of the Public Utility Code also specifically provides that it is the policy of this Commonwealth to ensure that rates for noncompetitive telecommunications services do not subsidize the competitive ventures of providers of telecommunications services. 66 Pa.C.S. §3001(3). Section 63.143(7) of the Competitive Safeguards iterated in the Proposed Rulemaking satisfies this policy as well as the requirement of Section 3005(g)(2) of Chapter 30 which provides that a LEC may not use revenues earned or expenses incurred in conjunction with noncompetitive services to subsidize or support any competitive services. 52 Pa. Code §63.431(7); 66 Pa.C.S. §3005(g)(2). Section 63.143(7) of the Competitive Safeguards further provides that an incumbent LEC may not provide goods or services to any affiliate, division or operating unit at a price below the incumbent LECs' cost or market price for the goods or

services, whichever is higher. 52 Pa. Code §63.431(7). Furthermore, the incumbent LEC may not purchase goods or services from any affiliate, division or operating unit at a price above the market price for the goods or services. Id.

The OCA submits that it was the intent of the Pennsylvania General Assembly in passing Chapter 30 to promote and encourage competition in the local telecommunications market so that customers would benefit from multiple suppliers who would provide more product choices at lower prices. This would not occur, however, and competition cannot arise in the provision of basic telephone service, if LECs can subsidize or support their competitive services and ventures with revenues paid by consumers through its noncompetitive services. The OCA submits that when the difference between revenues paid by consumers for noncompetitive services and the expenses incurred for noncompetitive services is much more than for competitive services, then such revenues earned and expenses incurred in conjunction with the provision of noncompetitive services will support the incumbent LECs provision of the competitive service. Further, the requirement that revenues earned be greater than expenses incurred for the incumbent LECs services occurs due to the economies of scale on the incumbent LECs' network. Given the incumbent LECs position as provider of both noncompetitive and competitive services, it is possible to shift support from noncompetitive services to competitive services. As the Administrative Law Judges in Verizon's Chapter 30 proceeding stated:

> Where a firm operates only in competitive markets, any attempt to overassign common costs to no group of services will result in either new entrants coming in to the market with better prices or customers leaving for lower-priced competitors. Where a firm offers both monopoly and competitive services on the other hand, market forces cannot prevent overassignment of costs to the monopoly services. Where a firm has monopoly customers, the firm will, if left

> unchecked, allocate a disproportionate amount of its costs to captive customers to better position itself in competitive markets.

Re: Bell Atlantic - Pennsylvania, Inc.'s Petition and Plan for Alternative Form of Regulation Under Chapter 30, Recommended Decision, Docket No. P-00930715 (issued April 21, 1994) at 455-56 (emphasis added). The OCA submits that this competitive issue is of paramount concern to consumers.

In order to ensure that subsidy and support did not exist, the Commission approved the Recommended Decision of Administrative Law Judge Corbett in the subsequent Competitive Safeguards proceeding which provided that Verizon develop a pricing strategy for its competitive services, which recognizes that all competitive services must in the aggregate contribute to all fixed, joint and common costs on the same percentage basis as its noncompetitive services. See, Investigation pursuant to Section 3005 of the Public Utility Code, 66 Pa.C.S. §3005, and the Commission's Opinion and Order at Docket No. P-00930715, to establish standards and safeguards for competitive services, with particular emphasis in the areas of cost allocations, cost studies, unbundling and imputation; and to consider generic issues for future rulemaking, Opinion and Order, Docket No. M-00940587 at 145 (entered August 6, 1996) ("Competitive Safeguards Order"). See also, Recommended Decision at 231 (entered February 21, 1996). In relying upon the associated provisions of Chapter 30 that the Commission should police the division between Verizon's competitive and unregulated services and its regulated noncompetitive services, the Commission further provided that:

> if the allocation of joint and common costs is not accomplished in a fair and consistent manner, then the potential exists for competition to be fostered at the expense of universal service if such costs are underallocated to competitive services, or for competition to be

> unnecessarily impeded if such costs are overallocated to competitive services.

Id. at 141. Therefore, the Commission held that the review of revenues and expenses in the aggregate is but one test for monitoring the subsidy and support requirement and does not prevent the filing of individual complaints that address the per service necessity to avoid such subsidy and support. Id. 145.

The OCA, therefore, submits that the Commission recognized the subsidy and support problem with regards to Verizon in the Competitive Safeguards proceedings, supra, and now, through this Proposed Rulemaking, makes the safeguards developed in that proceeding applicable to all incumbent LECs.

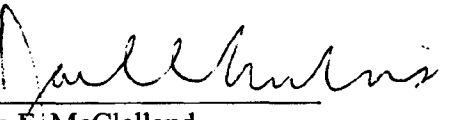
To that end, the Commission has also recognized its power to audit the accounting and reporting systems of LECs and their transactions with affiliates under Section 3009 of the Public Utility Code, 66 Pa. C.S. §3009(b)(1) and required Verizon to continue to file Affiliated Interest Agreements and other relevant data or reports concerning its relationship with its affiliates for all types of transactions involving both competitive and noncompetitive services. Re: Bell Atlantic - Pennsylvania, Inc.'s Petition and Plan for Alternative Form of Regulation Under Chapter 30, Opinion and Order, Docket No. P-00930715 (entered June 28, 1994). The OCA submits that this requirement is intended to ensure that Verizon does not use its revenues earned from noncompetitive telecommunication services to subsidize or support its rates for competitive services. The OCA further supports the current regulations proposed because they echo the protections provided in the Verizon Chapter 30 Order and apply these requirements to all incumbent LECs in Pennsylvania.

The Commission recognized this problem in its Competitive Safeguards Order and, in an attempt to prevent this from taking place, required Verizon to ensure that prices for its competitive services, in the aggregate, make a reasonable contribution to cover the joint and common costs. Id. at 159-160. By placing the prohibition against "subsidy" and "support" in its regulations, the OCA believes the Commission has relied upon its earlier determination in the Competitive Safeguards Order. Therefore, Verizon, as well as other incumbent LECs, cannot take revenues paid by consumers for noncompetitive services, where prices are regulated by the Commission, and use that revenue to lower the prices it charges for competitive services, where prices are not regulated by the Commission and can be lowered below market cost so that competitors cannot compete with the price being offered. The OCA interprets the current regulations proposed as relying upon the determinations made in the Competitive Safeguards Order and suggest that the Commission may emphasize that it will interpret and apply that requirement consistently with its Order in that proceeding. The OCA is concerned that the value of the Commission's earlier rulings on this point in the Competitive Safeguards Order must not be overlooked as this issue is developed in this rulemaking. The OCA suggests that the Commission should reemphasize the importance of those rulings in the Order entered in response to these Comments.

III. CONCLUSION

The Pennsylvania Office of Consumer Advocate submits these Comments to support the adoption of the Competitive Safeguards Regulation as articulated in the Proposed Rulemaking being considered in this proceeding. The OCA submits that such safeguards will ensure that incumbent LEC's do not use their incumbent status inappropriately in a competitive environment for the provision of telecommunications services. The OCA further submits that the Commission should continue its efforts to prohibit subsidy or support for competitive services. The OCA, therefore, requests that the PUC consider these Comments regarding the regulations set forth as competitive safeguards in this matter.

Respectfully submitted,



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Dated: February 23, 2001

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CERTIFICATE OF SERVICE

Re: Proposed Rulemaking on Competitive Safeguards for Telecommunications Utilities
Docket Nos. L-00990141; M-00960799

I hereby certify that I have this day served a true copy of the foregoing document, Office of Consumer Advocate's Comments, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 23rd day of February, 2001.

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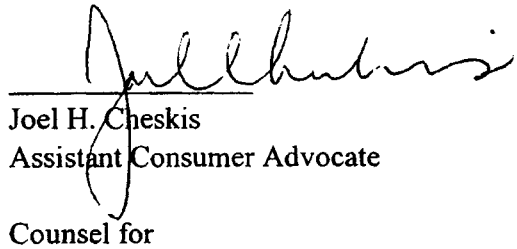

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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PUBLIC UTILITY COMMISSION

PROPOSED RULEMAKING ESTABLISHING COMPETITIVE SAFEGUARDS APPLICABLE TO INCUMBENT LOCAL EXCHANGE CARRIERS	:	**Docket No. L-00990141**

COMMENTS OF
AT&T COMMUNICATIONS OF PENNSYLVANIA, INC.

I. INTRODUCTION

In issuing its Global Order,[1] after considering literally thousands of pages of evidence, the Commission adopted a Code of Conduct which is currently in effect and which will, if retained, promote and protect competition in Pennsylvania's local exchange market.[2] The Commission deemed it necessary to embrace such a strong and effective Code of Conduct because it found that the evidence offered by Verizon Pennsylvania Inc.'s ("Verizon") competitors in the Global proceedings "presented numerous examples where [Verizon had] abused its market power by providing competitors with less than comparable access to its network or engaged in other discriminatory conduct that prevented [Verizon] customers from

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1 Joint Petition of NEXTLINK, et al., P-00991648, Joint Petition of Bell Atlantic, et al., P-00991649 (September 30, 1999).

2 The Code of Conduct was adopted by the Commission separate and apart from structural separation and was binding irrespective of structural separation. Indeed, the Commission imposed the Code on Verizon independently so that it was applied to Verizon's existing wholesale and retail operating divisions while the details of implementing structural separation were addressed through continuing litigation. Significantly, although the Global Code by its terms took effect immediately on September 3, 1999, evidence developed on the pending Section 271 docket shows that Verizon to date has refused to implement that Code.

switching to a competitor." Global Order at 228. In light of its findings of market power abuse and other discriminatory conduct by Verizon, the Commission rejected the provisions proposed by Verizon, explicitly finding the provisions too weak and ineffective to protect competition. Id. at 235-36.[3] This determination was in turn affirmed by the Commonwealth Court, which held that the Global Code was fully supported in the law and on the evidence developed in the Global proceeding.[4]

On November 18, 1999, the Commission proposed a permanent Code of Conduct that would apply to all incumbent local exchange carriers ("ILECs") in Pennsylvania, and a Proposed Rulemaking Order ("PRO") issued at this docket.[5] While the PRO purports to be based on the Global Order Code, as detailed below, the PRO sets forth a Code that is significantly different from and inferior to the Global Code that the Commission had just adopted after numerous months of litigation and the substantial evidence submitted pursuant thereto. Despite the PUC's characterization of Verizon's code in the Global Order as "akin to allowing the fox to guard the

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3 The Commission's assessment of Verizon's proposals were recently confirmed by Administrative Law Judge Weismandel, who held that Verizon's proposals "dilute" the Global Code and would "retard, rather than promote competition." Re Structural Separation of Verizon Pennsylvania, Inc. Retail and Wholesale Operations, M-00001353, 14-15 (Rec. Dec. issued January 23, 2001).

4 See Bell Atlantic Pennsylvania, Inc. v. Pennsylvania Public Utility Commission, No. 2790 C.D. 1999, et. al. (October 25, 2000), Slip Op. at 35-43.

5 Following issuance of the PRO and prior to the time comments were due, the Commission suspended the rulemaking because of the pendency of appellate litigation brought by Verizon challenging the Commission's legal authority to establish such a code both on statutory and constitutional first amendment grounds. Following affirmation by Commonwealth Court the Commission lifted the suspension and directed the submission of comments in response to the PRO.

hen house," many of the fox's proposals have somehow insinuated themselves into the PRO. The Commission should rectify these deficiencies, and revise the proposed regulation in the manner described below to comport with the Code of Conduct that it adopted in the Global Order, and that indeed is in effect now. The Commission should further clarify that this regulation applies to all ILECs in Pennsylvania.

II. COMMENTS

A. THE COMMISSION MUST MODIFY THE PROPOSED CODE TO ENSURE THAT IT WILL SUCCESSFULLY PREVENT MARKET ABUSES AND ALLOW FOR THE DEVELOPMENT OF MEANINGFUL COMPETITION.

In the Global Order and in other associated orders, the Commission has aptly described the reason and need for a strong, comprehensive set of competitive safeguards. The dual role of Verizon and other ILECs, as both the CLECs' provider of network elements and wholesale services and their largest and most powerful competitor, provides the incumbents with both the motive and opportunity to discriminate against CLECs and provide preferential treatment and cross-subsidization to their retail affiliate or division. As the Commission has observed: "If the potential conflict of interest created by this dual role is not adequately addressed, an unlevel playing field will be created, which will severely hamper the development of a new, vibrant and effective competitive telecommunications market in Pennsylvania." Global Order at 216 (emphasis added).

In order to prevent such an unlevel playing field and eliminate the severe obstacles to competition, the Commission adopted a fair, balanced and effective Code of Conduct in the Global Order. In so doing, the Commission rejected the terms proposed by Verizon which would

have merely allowed the continuation of, and would have even codified, the market abuses already found to exist by the Commission.

Absolutely nothing has occurred since the Commission's adoption of the Global Code to warrant the "watering down" of that Code, much less one that adopts any of Verizon's proposed provisions. Indeed, since the adoption of the Global Code, the Commission's initial rejection of Verizon's code provisions has been reaffirmed by both the Commonwealth Court and a presiding ALJ. As indicated previously, the Commonwealth Court affirmed the Global Order Code of Conduct through its October 25, 2000 Opinion and Order. Furthermore, in his Recommended Decision in the structural separation implementation proceedings, Administrative Law Judge Weismandel faced a proposed code by Verizon that was identical in most respects to the one Verizon proposed in the Global proceedings and which contained provisions that can be found in the proposed rulemaking Code. In rejecting Verizon's proposal, ALJ Weismandel bluntly and accurately found that "Verizon's proposed code of conduct . . . would retard, rather than promote competition . . . ." Recommended Decision at 14 (emphasis added).[6] Judge Weismandel further noted that Verizon's suggested code "dilute[d]" the Global Code and contained "numerous provisions that discriminate[d] against CLEC competitors and in favor of Verizon's retail operations or the proposed advanced services data affiliate." Id. at 14-15.

Notwithstanding these determinations above, the Code proposed in this rulemaking inexplicably diminishes or eliminates protections previously embraced by the Commission. The

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[6] Re Structural Separation of Verizon Pennsylvania, Inc. Retail and Wholesale Operations, M-00001353 (Rec. Dec. issued January 23, 2001).

Commission must reconsider these changes, and return to the Code the teeth necessary to assure parity and prevent discriminatory practices.

1. The Commission must require that the ability to bundle services be offered to CLECs at terms which are the same as those offered to a competitive retail affiliate or division.

Based upon the voluminous evidence submitted during the Global proceeding, the Commission included in its Global Order the following provision as part of the Code of Conduct:

> 9. Any incumbent local exchange company that bundles it services must provide the same opportunity at the same terms to competitors.

Global Order at Appendix C. The Commission's Global Code wisely contained this provision as it is the cornerstone of nondiscrimination in the provision of services and facilities. The Commission correctly understood that the ability of an incumbent's retail affiliate or division to bundle services offered by different affiliates or divisions would impede competition and provide the ILEC with an unfair advantage. In contrast, the equal treatment of all competitors by an ILEC would promote competition.

Without explanation, this provision calling for equal treatment of competitors by ILECs has been omitted from the proposed Code of Conduct.[7] Adding to the confusion surrounding the deletion of this important provision is the Commission's Statement of purpose and policy in Section 63.141 of Annex A. In that section of the proposed regulations, the Commission

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[7] In the proposed rulemaking order, the Commission does indicate that it has not restricted joint marketing between the ILEC and its retail marketing affiliates because the Commission is not convinced that such a restriction is necessary to foster competition. Certainly, ¶ 9 of the Global Code did not restrict or prohibit joint marketing. Instead, ¶ 9 merely required that the ability to market joint services be made available to all competitors at equal terms.

identifies the establishment of safeguards which will "assure the provision of reasonable nondiscriminatory access on comparable terms by ILECs to CLECs for all services and facilities necessary to provide competing telecommunications services to consumers" as a goal of the subchapter. (emphasis added). Despite declaring this purpose, the Commission fails to include any provisions in the regulations which will actually succeed in establishing such parity.[8] To the contrary, the Global Order's Code of Conduct contained such a provision, and ¶ 9 from the Global Code should be reinserted into Section 63.143 of the proposed Code.

2. The Commission must require the equal disclosure of market information to all CLECs.

Just as the Global Code properly recognized the importance of equal treatment in the bundling of services, it also properly required equal treatment by the wholesale ILEC affiliate or division in the disclosure of market information. The Global Order Code stated:

> 3. The incumbent local exchange company shall simultaneously make available to any competitor any market information not in the public domain that is supplied to any competitive local exchange affiliate or division.

Global Order at Appendix C. This provision of the Global Code is a key safeguard to ensuring fair and nondiscriminatory competition in the local market. Once again, however, the proposed Code at Section 63.143 fails to include that important safeguard.

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[8] Similarly, Verizon's previously proposed codes, which were rejected by the Commission, failed to include a provision similar to ¶ 9 of the Global Code. This omission was a key reason ALJ Weismandel found that Verizon's code would "retard" competition "because it allow[ed] Verizon to package the affiliate's data services with its conventional (monopoly) circuit-based services, thereby leveraging its current legacy monopoly power." Recommended Decision at 14.

By including ¶ 3 in the Global Code, the Commission acknowledged that an ILEC's wholesale affiliate or division, because of the services it provides to CLECs, will receive and collect commercially valuable information about the CLECs and the local telecommunications market. The Global Code, ¶ 3, ensured that the ILEC could not utilize that information to the advantage of its competitive affiliate or division and at the expense of the other CLECs. The ILEC had two choices, both of which resulted in a fair and non-preferential outcome: either it shared the information with no competitors, — including its own retail arm — or it shared the data with all competitors.

The proposed Code fails to contain such a safeguard, and thus serves as an enabler of discriminatory and unfair practices. If the Commission adopts Section 63.143 as a final regulation, then it will have codified the ability of Verizon and other ILECs to gather commercially valuable information and share that information with only their competitive affiliates or divisions. In short, absent this provision, the proposed regulation will establish an unfair advantage to the ILECs. Therefore, the Commission should reinsert ¶ 3 of the Global Code into the proposed Code at Section 63.143.[9]

3. Section 63.143 should be revised to preclude all preferential treatment and unfair advantages in the provision of wholesale services and facilities.

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[9] In so doing, the Commission would achieve consistency between the codes of conduct for the telecommunications, natural gas, and electricity industries since the gas code of conduct and the electric code of conduct included similar marketing or customer information dissemination provisions. See 66 Pa. C.S. § 2009(c)(2); Interim, Binding Gas Standards of Conduct Rule B(8); and 52 Pa. Code § 54.122(2).

The Commission's Global Order Code of Conduct clearly and forcefully prohibited preferential treatment by an ILEC in favor of its competitive affiliate or division. The Global Code reads as follows:

> 1. No incumbent local exchange company shall give its competitive local exchange affiliate or division preferential treatment in the provision of goods and services.

Global Order at Appendix C. This provision represents the most basic purpose of a code of conduct — to ensure that the incumbent does not discriminate in favor of its competitive affiliate or division to the detriment of other competitors. No discrimination allowed, period.

Unfortunately, the Commission's proposed Code abandons this basic tenet of fairness, and instead includes only a partial ban of discrimination and preferential treatment. Muddying the Global Code's clear language, the proposed regulation adds two qualifications: (1) preferential treatment cannot occur in regard to "ordering, provisioning or repair of any services" that (2) the ILEC is "obligated to provide CLECs under any applicable Federal or State law." Annex A at § 63.143(2). This proposed language dilutes the Global Code by allowing ILECs to continue to engage in discriminatory practices so long as their discrimination involve functions other than the ordering, provisioning and repair of services, such as the sale of real estate or surplus equipment that the PUC regulates. Similarly, this provision would limit its reach only to services "mandated" by state or federal law — whatever that means. This provision thus opens the door to arguments by Verizon that particular instances of discrimination are not barred because in Verizon's view, the service is not mandated by state or federal law.

These qualifications undermine the basic principle of the Global Code's provision. If the ILEC sells valuable market information to its affiliate, that information should be made available

to non-affiliates as well. In context, the watered down provision in the proposed rulemaking has lost the basic equality principle which was similarly eliminated from the Global Code's provisions on the opportunity to market bundled services and the obligation to share market information. Regardless of the service or function, a fair market will only result if all discriminatory and preferential treatment is barred.

While it is no surprise that this diluted provision mirrors language suggested by Verizon, the Commission's proposal of such a provision is a significant surprise. The Commission rejected this language in issuing the Global Order, finding it to be less comprehensive than the alternative and to provide insufficient protection to competition. Global Order at 135-36. In addition, ALJ Weismandel found such a provision to constitute a dilution of the Global Code and to allow for discrimination. Recommended Decision at 14-15. The Commission got it right the first time, and should replace the language in Section 63.143(2) with the language found at ¶ 1 of Appendix C to the Global Order.

4. The Commission should require additional separation of employees and offices between ILEC affiliates or divisions to ensure sufficient structural and functional separation and to safeguard competition.

One of the main goals of the Global Code was to provide for real separation of competitive and non-competitive ILEC affiliates or divisions and thereby prevent cross-subsidization and support. Accordingly, the Global Order required as follows:

> 4. Employees or agents of an incumbent local exchange company, who are responsible for the processing of an order or service of the operating system, shall not be shared with the competitive local exchange affiliate or division, and shall have offices physically separated. The competitive affiliate or division shall have its own direct line of management, and any shared facilities shall be fully and transparently allocated between the

> incumbent local exchange company and its competitive local exchange company affiliate or division.

Global Order at Appendix C. By separating employees and office space, the Global Code took strong steps toward eliminating the opportunity for cross-subsidization.

In the proposed Code, the Commission expresses as a purpose and policy behind the regulations the prevention of cross-subsidization and support for competitive services. Nonetheless, the proposed Code once again neglects to follow the Commission's prior findings as to the appropriate level of safeguards and fails to contain a provision prohibiting the sharing of employees and office space. Section 63.143(1) does require an ILEC's competitive affiliate or division to have its own direct line of management and keep separate books. Also, Section 63.143(7) prohibits the use of revenues earned or expenses incurred in conjunction with non-competitive services to support any competitive services. However, these provisions fail to go far enough in providing the comprehensive protections necessary to ensure that structural and functional separation are implemented as intended and that the "nascent competition" in Pennsylvania's local markets is adequately protected.

Additionally, the provisions inject ambiguity into what was the plain language of the Global Code. For instance, are an ILEC's wholesale affiliate or division's employees and office space "expenses incurred in conjunction with wholesale services?" If so, those employees and that office space may not be used to support the activities of the retail affiliate or division, and thus may not be shared. However, if the employees and offices do not constitute expenses, then such sharing would be allowed, not only ensuring cross-subsidization but also creating an

environment that would facilitate the impermissible sharing of sensitive information regarding CLECs or market conditions.

Thus, the Commission should choose the strong over the diluted, the clear over the vague, and reinsert ¶ 4 from Appendix C to its Global Order into the proposed Code at Section 63.143.

B. THE COMMISSION SHOULD CLARIFY THE APPLICATION OF THE PROPOSED CODE TO SMALLER ILECs, AND SHOULD EXTEND THE STRUCTURAL SEPARATION PROCESS TO VERIZON NORTH.

The proposed Code is internally inconsistent in regard to its application to smaller ILECs. Nowhere in the proposed regulations are any ILECs explicitly excluded from complying with the rules set forth in the Code, specifically those found in Section 63.143(2)-(10). However, Section 63.143(1)'s requirement to functionally separate only applies to ILECs with more than 250,000 access lines. Thus, a plain reading of the proposed regulations is that ILECs with 250,000 or less access lines do not have to functionally separate, but do have to comply with the remaining rules in the proposed Code. The inconsistency results from the fact that several of those rules appear to implicitly require functional separation in order for an ILEC to be in compliance therewith. See § 63.143(2), (3) and (7).

The Commission should eliminate this ambiguity over the proposed Code's application to ILECs with 250,000 or less access lines by requiring a level of functional separation sufficient to ensure compliance with the policies embodied in the proposed Code, subsections (2) through (10). Neither TA-96 nor the General Assembly in enacting Chapter 30 envisioned a subgroup of ILECs that would be provided free rein to engage in discriminatory and unfair practices. All Pennsylvanians, regardless of the size of their ILEC, deserve to enjoy full, vibrant local competition and all of the benefits associated therewith.

In addition to clarifying the proposed Code's application to smaller ILECs, the regulations should be revised so as to allow for the potential structural separation of Verizon North. As written, Section 63.143(1) contemplates Commission proceedings to determine if additional safeguards are needed, including structural separation, only for ILECs with over one million access lines. By definition, only Verizon would qualify for such additional competitive safeguards.

Particularly in light of the merger between Verizon and GTE North, thus creating Verizon North, the Commission should clarify the application of the Global Code to Verizon PA's sister company. Verizon North operates nearly 800,000 access lines in Pennsylvania, and possesses significant ability to leverage its market power and impede competition in its territory. The Verizon–GTE North merger only served to multiply both Verizon's and Verizon North's market power and increase each companies' ability to engage in anti-competitive conduct. Accordingly, the regulations should be clarified to assure that the same Code of Conduct adopted for Verizon PA also apply to Verizon PA's sister company, Verizon North.

C. THE COMMISSION MUST NOT RETREAT FURTHER FROM THE GLOBAL ORDER CODE OF CONDUCT.

As surely as the sun will rise tomorrow, the ILECs will submit comments to the Commission complaining that the proposed Code is too strict and places them at a competitive disadvantage. In the name of "protecting competition and not competitors," the ILECs will attempt to dilute and delete provisions of the proposed Code — just as Verizon attempted in the past. The Commission rejected similar attempts in the Global proceeding, properly identifying

Verizon as the fox trying to make sure the door to the hen house remained unlocked, and it must reject these attempts again in this rulemaking process.

As noted throughout these comments, the Commission has already found that Verizon has a history of market abuses and discriminatory conduct. Global Order at 228. Verizon's prior efforts to have a weaker, ineffective Code of Conduct adopted were characterized by this Commission as less comprehensive and insufficient to protect competition. Id. at 235-36. Similarly, a Commission administrative law judge found that Verizon's diluted code would retard competition and allow it to discriminate in favor of its competitive affiliate. Recommended Decision at 14. To date, the Commission has remained steadfast in requiring structural and functional separation for ILECs and in demanding that ILECs adhere to a serious Code of Conduct in order to protect and promote local competition. If that local competition is to truly develop in Pennsylvania, the Commission must remain steadfast through this rulemaking process and reject the ILECs' attempt to reduce the proposed Code to a paper tiger.

A redacted version of AT&T's proposed modifications to the PRO's Annex A is attached hereto.

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APPENDIX A

§ 63.143. Code of Conduct.

ILECs, unless otherwise noted, shall comply with the following requirements:

(1) An ILEC with more than 250,000 but less than 1,000,000 access lines shall maintain a functionally separate organization (the "wholesale operating unit") for the ordering and provisioning of any services or facilities to CLECs necessary to provide competing telecommunications services to consumers. The wholesale operating unit shall have its own direct line of management and keep separate books of accounts and records which shall be subject to review by the Commission under 66 Pa.C.S. § 506 (relating to inspection of facilities and records). ~~For ILECs over 1,000,000~~ An ILEC with 250,000 access lines or less shall functionally separate to the degree necessary to comply with these regulations. For ILECs with over 600,000 access lines, the Commission will determine for each such ILEC, after appropriate notice and hearing, whether this subsection will continue to apply or whether further safeguards will be necessary to protect CLECs from unfair competition and to ensure nondiscriminatory access to the ILEC's services and facilities. These other safeguards may include, for example, requiring the ILEC to structurally separate its retail and wholesale operations into separate corporate affiliates.

(2) An ILEC ~~may~~ shall not give itself (or any of its affiliates, divisions or operating units) or any CLEC any preference or advantage over any other CLEC in the ~~ordering, provisioning or repair of any services that it is obligated to provide CLECs under any applicable Federal or State law.~~ provision of any goods or services.

~~(3)~~(3) Employes or agents of an ILEC with more than 250,000 access lines, who are responsible for the processing of an order or service of the operating system, shall not be shared with the competitive local exchange affiliate or division, shall have offices physically separated, and any shared facilities shall be fully and transparently allocated between the ILEC and its competitive local exchange affiliate or division.

(4) An ILEC's wholesale operating unit employes shall use CLEC proprietary information (that is not otherwise available to the ILEC) received in the ordering, provisioning or repairing of any telecommunications services provided to the CLEC solely for the purpose of providing the services to the CLEC. An ILEC may not disclose the CLEC proprietary information to employes engaged in the marketing or sales of retail telecommunications services unless the CLEC provides prior written consent to the disclosure.

~~(4)~~(5) An ILEC employe, while engaged in the installation of equipment or the rendering of services on behalf of a competitor, may not disparage the service of the competitor or promote any service of the ILEC.

~~(5)~~(6) An ILEC employe, while processing an order for the repair or restoration of service or engaged in the actual repair or restoration of service of any competitor, may not either directly or indirectly represent to any end-user that the repair or restoration of service would have occurred sooner if the end-user had obtained service from the ILEC.

~~(6)~~(7) An ILEC may not condition the sale, lease or use of any noncompetitive telecommunications service within the jurisdiction of the Commission on either of the following:

(i) The purchase, lease or use of any other goods or services offered by the ILEC.

(ii) A direct or indirect commitment not to deal with any CLEC.

~~(7)~~(8) An ILEC may not use revenues earned or expenses incurred in conjunction with noncompetitive services to subsidize or support any competitive services. Specifically, an ILEC may not provide goods or services to any affiliate, division or operating unit at a price below the ILEC's cost or market price for the goods or services, whichever is higher. The ILEC may not purchase goods or services from any affiliate, division or operating unit at a price above the market price for the goods or services.

~~(8)~~(9) An ILEC, its affiliates, divisions or operating units, may not state or imply any of the following:

(i) The services provided by the ILEC are inherently superior when purchased from the ILEC.

(ii) The service rendered by a competitor may not be reliably rendered.

(iii) The continuation of certain services from the ILEC are contingent upon taking the full range of services offered by the ILEC.

(10) An ILEC shall simultaneously make available to any CLEC any market information not in the public domain that is supplied to its competitive affiliate or division.

(11) Any ILEC that bundles its services must provide the same opportunity at the same terms to all CLECs.

(12)~~(9)~~ An ILEC shall formally adopt and implement the provisions in this section as company policy and shall take appropriate steps to train and instruct its employes in their content and application.

~~(10)~~(13) A party allegedly harmed by a violation of any of the provisions in this section may invoke the Commission's alternative dispute resolution procedures to resolve

the dispute. That action, however, does not preclude or limit additional private remedies or civil action.