

Regulatory Analysis Form		This space for use by IRRC <div style="border: 1px solid black; padding: 5px; text-align: center;"> RECEIVED 2002 APR -8 AM 11: 00 <small>INDEPENDENT REGULATORY REVIEW COMMISSION</small> </div> IRRC Number: <i>22464</i>
(1) Agency Pennsylvania Public Utility Commission		
(2) I.D. Number (Governor*s Office Use) L-00990141/57-224		
(3) Short Title Generic Competitive Safeguards for Telecommunications Utilities		
(4) PA Code Cite 52 Pa. Code §§ 63.141-63.145	(5) Agency Contacts & Telephone Numbers Primary Contact: Carl S. Hisiro 717-783-2812 and David Screven 717-787-2126, Law Bureau (legal) Secondary Contact: Gary Wagner, Bureau of Fixed Utility Services, 717-783-6175 (technical)	
(6) Type of Rulemaking (check one) <input checked="" type="checkbox"/> Proposed Rulemaking <input type="checkbox"/> Final Order Adopting Regulation <input type="checkbox"/> Final Order, Proposed Rulemaking Omitted	(7) Is a 120-Day Emergency Certification Attached? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes: By the Attorney General <input type="checkbox"/> Yes: By the Governor	
(8) Briefly explain the regulation in clear and nontechnical language. <p>The proposed rulemaking establishes competitive safeguards via a Code of Conduct in furtherance of the mandate in Chapter 30 of the Public Utility Code, 66 Pa. C.S. §§ 3001-3009, to encourage and promote competition in the provision of telecommunications products and services. Specifically, the proposed safeguards prevent discriminatory access for all services and facilities incumbent local exchange carriers (ILECs) are obligated to provide competitive local exchange carriers (CLECs), prevent the unlawful cross subsidization for competitive services from noncompetitive services by ILECs, and prevent local exchange carriers from engaging in unfair competition. The proposed rulemaking also requires ILECs with more than one million access lines to maintain a functionally separate wholesale organization with its own direct line of management and separate business records which will be subject to review by the Commission.</p>		
(9) State the statutory authority for the regulation and any relevant state or federal court decisions. 66 Pa. C.S. §§ 3005(b) and 3005(g)(2)		

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(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

Yes. 66 Pa. C.S. §§ 3005(b) and (g)(2). There are no deadlines for action.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

This proposed rulemaking is submitted to comply with the directives in Chapter 30 of the Public Utility Code to develop competitive safeguard regulations in order to promote competition in the telecommunications markets in Pennsylvania. The development of competition will be in the public interest because such competition will lower prices, improve the quality of products and services offered, and ultimately promote employment and economic expansion in the Commonwealth.

(12) State the public health, safety, environmental or general welfare risks associated with nonregulation.

None.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

All customers of telecommunications services will benefit from this rulemaking because enforcement of the standards of conduct will promote competition for telecommunications services. This increased competition will result in lower prices and/or greater service offerings over time. All telecommunications providers will also benefit because the competitive safeguards will remove entry barriers and create a more level playing field that will better able these providers to compete effectively and fairly for customers.

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- (14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

No person or entity will be adversely affected by this regulation. While some of the proposed regulations are only imposed on incumbent carriers, the regulations only prohibit what would be characterized as unfair methods of competition and do not otherwise restrict their ability to compete fully and fairly in the marketplace. In short, the regulations simply create a level playing field for all market participants.

- (15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

All local exchange telecommunications providers under the Commission's jurisdiction will be required to comply with the regulation. There are currently hundreds of ILECs and CLECs licensed to do business in Pennsylvania that will be subject to this rulemaking.

- (16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

The rulemaking went through an advance notice and an earlier proposed rulemaking order that were published in the Pennsylvania Bulletin, and the Commission received comments and reply comments from a number of parties. These parties included Verizon Pennsylvania, Inc.; AT&T Communicaitons of Pennsylvania, Inc.; The United Telephone Company of Pennsylvania and Sprint Communicaitons Company, LP; the Pennsylvania Telephone Association; the Telecommunications Resellers Association, the Office of Consumer Advocate; and the Office of Trial Staff. The earlier proposed rulemaking was subsequently withdrawn because of the operation of the sine die rule.

- (17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

There may be some modest training costs incurred by local exchange carriers to disseminate and educate employees about these provisions. Also, for any local exchange carrier that serves more than one million access lines (of which there is only one carrier in Pennsylvania at the current time that meets this criteria), there will be some undetermined costs incurred to maintain separate business records for its functionally separate wholesale organization required by the regulation.

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(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

Not applicable.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required.

The Commission will incur some undetermined costs to review and audit compliance with the provision requiring local exchange carriers with more than one million access lines to maintain a functionally separate wholesale organization with separate business records.

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(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
Total Savings						
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs						
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses						

(20a) Explain how the cost estimates listed above were derived.

Not measurable at this time.

Regulatory Analysis Form

(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

As already discussed, while there may be some costs associated with implementing these competitive safeguards, the benefits of promoting competition to the public outweigh any associated costs.

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

Not applicable.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

Not applicable.

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(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

Both the federal Telecommunications Act and Chapter 30 of the Public Utility Code share the same mandate to promote competition in the local telephone markets. The federal statute contains express language that it does not prohibit states from enforcing regulations or imposing requirements on telecommunications carriers that are necessary to further local telephone competition. Because these regulations are directed at eliminating unfair competition and promoting a level playing field among telecommunications providers in the state, they are viewed as being consistent with federal law.

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

Comparison with other states was not directly made. However, the proposed rulemaking, to the extent it successfully promotes entry and competition in Pennsylvania telecommunications markets, should not put Pennsylvania at a competitive disadvantage with other states.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

No.

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- (28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

No.

- (29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

Not applicable.

- (30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The regulation will become effective upon publication in the Pennsylvania Bulletin following review by the standing committees and the Independent Regulatory Review Commission.

- (31) Provide the schedule for continual review of the regulation.

The regulation will be reviewed on an ongoing basis after it becomes effective.

**FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU**

(Pursuant to Commonwealth Documents Law)

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2002 APR -8 AM 11:00

LEGISLATIVE REGULATORY
REVIEW COMMISSION

DO NOT WRITE IN THIS SPACE

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Copy below is hereby approved as to form and legality. Attorney General.

BY

Cristina S. Egan
(DEPUTY ATTORNEY GENERAL)

MAR 18 2002

DATE OF APPROVAL

☐ Check if applicable
Copy not approved. Objections attached

Copy below is hereby certified to be true and correct copy of a document issued, prescribed or promulgated by:

Pennsylvania Public Utility Commission
(AGENCY)

DOCUMENT/FISCAL NOTE NO. L-00990141/57-224

DATE OF ADOPTION November 30, 2001

BY

James J. McNulty
James J. McNulty

TITLE

(SECRETARY)

Copy below is hereby approved as to form and legality. Executive or independent Agencies.

BY

Bohdan R. Pankiw
Bohdan R. Pankiw
Chief Counsel

11-30-01
DATE OF APPROVAL

☐ Check if applicable. No Attorney General approval or objection within 30 days after submission.

L-00990141/57-224
Proposed Rulemaking
Generic Competitive Safeguards
Under 66 Pa. C.S. §§3005(b) and 3005(g)(2)
52 Pa. Code, Chapter 63

The Pennsylvania Public Utility Commission on November 30, 2001, adopted a proposed rulemaking order which establishes competitive safeguards to assure the provision of adequate and nondiscriminatory access by ILECs to CLECs for all services and facilities ILECs are obligated to provide CLEC carriers and to prevent cross subsidization and unfair competition. The contact persons are Gary Wagner, Bureau of Fixed Utility Services, 783-6175 and Carl S. Hisiro, Law Bureau, 783-2812.

EXECUTIVE SUMMARY

**L-00990141/57-224
Proposed Rulemaking
Re: Generic Competitive Safeguards
Under 66 Pa. C.S. §§ 3005(b) and 3005(g)(2)
52 Pa. Code, Chapter 63**

Sections 3005(b) and 3005(g)(2) of the Public Utility Code, 66 Pa. C.S. §§ 3005(b) and 3005(g)(2), require the Commission to establish regulations to prevent unfair competition, discriminatory access, and the subsidization of competitive services through revenues earned from noncompetitive services. On March 23, 1999, the Commission issued an Advance Notice of Proposed Rulemaking to solicit comments from jurisdictional telecommunication utilities and other interested parties regarding the development of generic competitive safeguards under Chapter 30 of the Public Utility Code.

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. The proposed regulations also require incumbent carriers with more than one million access lines to maintain a functionally separate wholesale organization with its own direct line of management and separate business records which will be subject to review by the Commission.

The contact persons are Carl Hisiro, Law Bureau (legal), 717 783-2812 and Gary Wagner, Fixed Utility Services (technical), 717 783-6175.

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held November 30, 2001

Commissioners present:

Glen R. Thomas, Chairman, Statement attached
Robert K. Bloom, Vice Chairman
Aaron Wilson, Jr.
Terrance J. Fitzpatrick, Statement attached

Rulemaking Re Generic Competitive
Safeguards Under 66 Pa. C.S. §§ 3005(b) L-00990141
and 3005(g)(2)

Implementation of the Telecommunications
Act of 1996: Imputation Requirements for M-00960799
the Delivery of IntraLATA Services by
Local Exchange Carriers

PROPOSED RULEMAKING ORDER

BY THE COMMISSION:

This proposed rulemaking establishes competitive safeguards in furtherance of the provisions of Chapter 30 of the Public Utility Code, 66 Pa. C.S. §§ 3001-3009, and Chapter 30's mandate to encourage and promote competition in the provision of telecommunications products and services throughout Pennsylvania.

A. Background and Procedural History

At the Public Meeting of March 18, 1999, the Commission entered an order directing that an Advance Notice of Proposed Rulemaking be issued to solicit comments regarding the development of generic competitive safeguards under 66 Pa. C.S. §§ 3005(b) and 3005(g)(2). That order also directed that the matter of imputation¹ with regard to the provision of intraLATA service by local exchange carriers ("LECs") be consolidated with the rulemaking proceeding. The Advance Notice was published April 10, 1999, at 29 Pa.B. 1895, and comments and reply comments on these issues were thereafter received from a number of interested parties.

Sections 3005(b) and 3005(g)(2) of the Public Utility Code, 66 Pa. C.S. §§ 3005(b) and 3005(g)(2), require the Commission to establish regulations to protect competition by preventing the subsidization of competitive services through revenues earned from noncompetitive services. Specifically, section 3005(b) requires regulations aimed at preventing unfair competition and ensuring that LECs provide reasonable nondiscriminatory access to their services and facilities by competitors. Section 3005(g)(2) requires regulations governing the allocation of costs for telephone services to prevent subsidization or support for competitive services with revenues earned or expenses incurred in conjunction with noncompetitive services.

¹ "Imputation" is a term of art. The term generally refers to those requirements necessary to ensure that an incumbent local exchange carrier ("ILEC") incorporates in its cost-of-service calculations the same access charges on itself as it imposes on other competitors for the delivery of any service function that both the ILEC and its competitors need to deliver a service.

The issue of competitive safeguards,² including the establishment of Competitive Safeguards Regulations,³ was initially addressed by this Commission in its June 28, 1994 Final Order at Docket No. P-00930715 disposing of the Bell Atlantic - Pennsylvania, Inc. (now known as Verizon Pennsylvania Inc.) Petition for Alternative Regulation filed pursuant to 66 Pa. C.S. §§ 3001-3009 (hereinafter referred to as "Chapter 30").⁴ The Bell Chapter 30 Order, however, referred the issue of establishing Competitive Safeguard Regulations to the Office of Administrative Law Judge ("OALJ"), and instructed the OALJ to use the Commission's Alternative Dispute Resolution ("ADR") process to address and resolve several issues.⁵

The issues referred to the OALJ in that order were cost allocation, unbundling, and imputation associated with competitive safeguards. We also directed that a separate proceeding be established to promulgate generic regulations applicable for all LECs filing for alternative rate regulation under Chapter 30. Consistent with these instructions, the OALJ opened a Competitive Safeguards Proceeding at M-00940587.

Following the publication of a Notice of Investigation Into Competitive Safeguards, the Commission received comments and reply comments from a number of interested parties. On August 6, 1996, we entered a final order in the

² The term "Competitive Safeguards" is a generic term referring to the multiple protections needed to foster competition in any specific industry that was previously regulated.

³ The term "Competitive Safeguard Regulations" refers to the regulations required by sections 3005(b) and 3005(g)(2) of the Public Utility Code.

⁴ In Re Bell Atlantic - Pennsylvania, Inc.'s Petition and Plan for Alternative Form of Regulation Under Chapter 30, Dkt. No. P-00930715 (Order entered June 28, 1994) ("Bell Chapter 30 Order").

⁵ Id. at 113-14.

Competitive Safeguards proceeding that was limited to Bell-specific competitive safeguards.⁶ The competitive safeguards approved by the Commission were submitted by BA-PA as part of its Chapter 30 competitive services deregulation plan, as modified by the Competitive Safeguards Order.

On September 9, 1996, in a separate proceeding, we entered an order regarding implementation of the federal Telecommunications Act of 1996 ("TA-96").⁷ The TA-96 Implementation Order addressed intraLATA services by BA-PA, but did not resolve the question of imputation for the delivery of intraLATA services by LECs other than BA-PA.

B. Rulemaking Issues and Associated Comments

As already noted, we opened the instant rulemaking at the March 18, 1999 Public Meeting via issuance of an Advance Notice of Proposed Rulemaking. The purpose of this Notice was to provide all LECs and other interested parties an opportunity to provide comments and reply comments on the need for developing generic competitive safeguards. We specifically asked for comments on cost allocation, unbundling, imputation, and on any other issues the parties thought would be appropriate in developing Competitive Safeguard Regulations under Chapter 30. We also invited parties to submit proposed regulatory language for consideration.

⁶ Investigation Pursuant to Section 3005 of the Public Utility Code to Establish Standards for Competitive Services, Dkt. No. M-00940587 (Order entered August 6, 1996) ("Competitive Safeguards Order").

⁷ Implementation of the Telecommunications Act of 1996, Dkt. No. M-00960799 (Order on Reconsideration entered September 9, 1996) ("TA-96 Implementation Order"). This Order modified in certain respects an earlier order entered on June 3, 1996, to implement TA-96. The June 3, 1996 Order found, inter alia, that all noncompetitive intraLATA toll services provided by any LEC should be subject to an imputation requirement. The September 9, 1996 Order suspended the imputation requirement as applied to all LECs other than BA-PA.

On or about May 25, 1999, the Commission received initial comments from Verizon Pennsylvania, Inc. (formerly Bell Atlantic-Pennsylvania, Inc) ("Verizon-PA")⁸, AT&T Communications of Pennsylvania, Inc. ("AT&T"), The United Telephone Company of Pennsylvania and Sprint Communications Company, LP ("Sprint"), GTE North Incorporated ("GTE"), the Pennsylvania Telephone Association ("PTA"), and the Telecommunications Resellers Association ("TRA"). Reply comments were thereafter filed on or about June 24, 1999, by Verizon-PA, AT&T, Sprint, PTA, and the Office of Trial Staff ("OTS"). These comments are discussed in the "Comments and Responses Document" attached to this Order as Appendix A.

C. Proceeding to Consider Global Resolution of Telecommunications Issues

At the Public Meeting following our decision in this proceeding to issue an Advance Notice of Proposed Rulemaking, we agreed to consolidate two competing petitions that attempted to resolve various significant and complicated telecommunications proceedings then pending before us.⁹ Among the issues raised in that consolidated proceeding that are relevant to the instant rulemaking proceeding are the following: 1) what network elements Verizon-PA must unbundle and provide to competitors, 2) how intraLATA toll imputation should be calculated for Verizon-PA, and 3) what standards of conduct should be included in

⁸ After the issuance of the Global Order, BA-PA changed its name to Verizon Pennsylvania Inc. when its parent company, Bell Atlantic Corporation, acquired GTE Corporation last year and formed Verizon Corporation ("Verizon"). For the sake of consistency, we shall use "Verizon-PA" throughout the remainder of this Order to refer to BA-PA and its successor company, Verizon Pennsylvania Inc.

⁹ Joint Petition of Nextlink Pennsylvania, Inc., et al. for Adoption of Partial Settlement Resolving Pending Telecommunications Issues, Dkt. No. P-00991648; and Joint Petition of Bell Atlantic - Pennsylvania, Inc., et al. for Global Resolution of Telecommunications Proceedings, Dkt. No. P-00991649 (Order entered April 2, 1999, consolidating the two proceedings).

a Code of Conduct to prevent unfair competition and to ensure nondiscriminatory access to Verizon-PA's services and facilities by competitors.

We resolved the consolidated proceeding, including the above three issues, by motion adopted at the August 26, 1999 Public Meeting, which motion was subsequently incorporated into an order entered September 30, 1999 ("Global Order") at P-00991648 and P-00991649. In addition to addressing these, and other significant, telecommunications issues, the Global Order also ordered Verizon-PA to structurally separate its retail and wholesale operations in Pennsylvania and directed the opening of a separate proceeding to implement structural separation.¹⁰

D. First Proposed Rulemaking Order and April 11, 2001 Order in Structural Separation Proceeding

Following the issuance of the Global Order, the Commission entered a Proposed Rulemaking Order in the instant proceeding on November 30, 1999. This proposed rulemaking contained a set of regulations in the form of a generic "Code of Conduct" that would be applicable to all ILECs to prevent unfair competition and cross-subsidization in any local exchange market within Pennsylvania. The proposed regulations were modeled after a similar "Code of Conduct" adopted for Verizon-PA in the Global Order, and were supplemental to the competitive safeguards embodied in the structural separation of Verizon-PA's retail and wholesale operations directed in the Global Order.

Subsequently, the Commission twice extended the date for filing comments to the proposed rulemaking because of the uncertainty surrounding the pending

¹⁰ On October 25, 2000, the Pennsylvania Commonwealth Court, in a unanimous *en banc* decision, upheld the Commission's Global Order.

appeals relating to the Global Order and the relevance their resolution may bear on the proposed rulemaking. Following the Commonwealth Court's decision affirming the Global Order, the Commission directed by Secretarial Letter dated January 3, 2001, that comments be filed by February 23, 2001. Comments were thereafter filed by Verizon-PA and Verizon North Inc., AT&T, the PTA, Sprint, OCA, and several other interested parties, including several legislative members, on or about February 23, 2001. These comments are discussed in the "Comments and Responses Document" attached to this Order as Appendix A.

In summary, most of the commenting parties agreed there should be a Code of Conduct, but there were many disagreements on what provisions should be included in the rulemaking. Several of the parties, Sprint, PTA, and ALLTEL Pennsylvania, Inc., argued that functional separation should not be imposed on ILECs with less than 1,000,000 access lines without due process rights being accorded to the ILEC. Others, such as AT&T and Verizon-PA, suggested modifications or additions to the proposed rulemaking. Finally, the Association for Local Telecommunications Services, Covad Communications Company, ACSI Local Switched Services, Inc. d/b/a e.spire, and Rhythms Links Inc. (collectively "ACER") submitted a set of comprehensive Code of Conduct provisions with its comments. These provisions attempt to more fully address the discriminatory and competitive concerns that are the focus of our rulemaking in this proceeding.

By letter dated March 22, 2001, to the Chairman of the Independent Regulatory Review Commission, however, the Commission thereafter withdrew the proposed rulemaking by operation of the sine die rule contained in 71 P.S. § 745.5. Moreover, on this same date at Public Meeting, the Commission approved a motion in its separate structural separation proceeding at M-00001353, offering Verizon-PA a functional, rather than a structural, separation of its retail

and wholesale operations and a structural separation of its advanced data services. In return for this change, Verizon-PA had to agree to several market-opening conditions and to termination of all litigation challenging the Global Order. One of these conditions was that the instant rulemaking proceeding would be reopened for the purpose of issuing a Second Proposed Rulemaking Order addressing the appropriate generic Code of Conduct to be promulgated pursuant to 66 Pa. C.S. §§ 3005(b) and (g)(2). Verizon-PA also had to agree that it would comply with this Code of Conduct.

On April 11, 2001, the Commission entered an order in the structural separation proceeding incorporating the terms of this March 22, 2001 motion.¹¹ Specifically, the order directed that the record in the instant competitive safeguards rulemaking proceeding was to be reopened and that the record from the underlying structural separation proceeding was to be incorporated into the instant proceeding to aid in the development of a new proposed rulemaking. In addition, the order directed the Law Bureau to review the Code of Conduct provisions proposed by ACER in the structural separation proceeding (which were the same as ACER proposed in its February comments in the instant proceeding) as to their appropriateness for inclusion in the proposed rulemaking.¹² On April 20, 2001, Verizon-PA notified the Commission that it was accepting the conditions offered in the April 11, 2001 Order in exchange for the Commission removing its earlier structural separation directive contained in the Global Order.¹³

¹¹ Re: Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations, Dkt. No. M-00001353 (Order entered April 11, 2001) ("Functional/Structural Separation Order").

¹² Functional/Structural Separation Order at ordering paragraph nos. 4-6.

¹³ The Commission subsequently issued a clarification order of its Functional/Structural Separation Order. Re: Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations, Dkt. No. M-00001353 (Order entered May 24, 2001 ("FSS Clarification Order")).

E. Discussion

These proposed regulations require ILECs with more than one million access lines to maintain a functionally separate wholesale organization for providing certain services to competitive local exchange carriers ("CLECs"), and impose a general code of conduct, applicable to all LECs, in order to prevent unfair competition and ensure nondiscriminatory access to an ILEC's services and facilities by competitors as mandated by Chapter 30 of the Public Utility Code. These proposed regulations reflect our consideration of all of the comments filed to date in this proceeding. They also reflect our consideration of the record developed in the structural separation proceeding at Docket No. M-00001353. We appreciate and thank all the commenting parties who provided worthwhile suggestions to aid the Commission in the development of its proposed regulations.

1. Functional Separation of Retail and Wholesale Operations

Consistent with the Functional/Structural Separation Order entered April 11, 2001 at Docket No. M-00001353, this proposed rulemaking provides for the state's largest ILECs (those with one million or more access lines¹⁴) to maintain a functionally separate wholesale organization to provide pre-ordering, ordering and the processing and transmission of instructions to field forces for the provisioning of services, network elements, or facilities to CLECs necessary to provide competitive and noncompetitive telecommunications services to consumers. We find that the recommended approach will enable the Commission to monitor and prevent discriminatory conduct through the use of accounting rules and other business record keeping. Moreover, in adopting this more limited functional separation approach, the Commission believes that the imposition of "full" functional separation, which involves the reorganization and separation of all employees and facilities of the affected ILEC along wholesale/retail lines, is unnecessary. There are several reasons why we conclude that full functional separation is unnecessary.

First, and most importantly, full functional separation is an intrusive remedy designed to fix a problem that has not been shown to exist. Less than six months ago, the Commission concluded in Verizon-PA's section 271 proceeding under

¹⁴ In determining whether an ILEC has met the 1,000,000 access-line threshold, the proposed rulemaking has defined "ILEC" as broadly as possible to include any of the company's "affiliates, subsidiaries, divisions, or other corporate sub-units that provide local exchange service." Thus, for example, if an ILEC merges or acquires another LEC and creates a separate subsidiary to house the acquired company's local exchange business, the access lines acquired by the ILEC would be counted with its pre-existing access lines to determine if the 1,000,000 access-line threshold has been met. In addition, if the threshold is met, then the competitive safeguard regulation in question would apply to all affiliates or subsidiaries created by the transaction, even if the particular affiliate or subsidiary has less than 1,000,000 access lines. Applying this definition of ILEC to Bell Atlantic's recent acquisition of GTE Corporation, for instance, results in the competitive safeguard regulation applicable only to ILECs with more than 1,000,000 access lines being applicable to both Verizon-PA [the old BA-PA] and Verizon North Inc. [the old GTE North]. Both entities are subsidiaries of Verizon.

TA-96 that Verizon-PA's local telecommunications market had been irreversibly opened to competition.¹⁵ Specifically, the Commission concluded that Verizon-PA was providing wholesale services to CLECs in a nondiscriminatory fashion. The Federal Communications Commission agreed and granted Verizon-PA's application to provide long-distance service under section 271 of TA-96.¹⁶ This action followed a third-party test of Verizon-PA's operations support systems ("OSS") by our third-party consultant, KPMG Consulting, which concluded that Verizon-PA had remedied any major problems with the OSS.

Secondly, as part of the section 271 approval process, Verizon-PA agreed to withdraw court appeals from the Commission's earlier adoption of a performance assurance plan ("PAP").¹⁷ The PAP contains detailed standards for Verizon-PA's wholesale services to CLECs, and also contains self-executing penalties for Verizon-PA's failure to meet these standards. Verizon-PA could pay roughly up to \$183 million per year for failure to meet the performance standards in the PAP.¹⁸ These standards and penalties are in addition to the Commission's normal enforcement processes and penalties. Finally, full functional separation is likely to

¹⁵ Re: Application of Verizon Pennsylvania, Inc., et al. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the Commonwealth of Pennsylvania, CC Docket No. 01-138 (Consultative Report of the Pennsylvania Public Utility Commission, filed June 25, 2001).

¹⁶ Re: Application of Verizon Pennsylvania, Inc., et al. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the Commonwealth of Pennsylvania, CC Docket No. 01-138 (Memorandum Opinion and Order, rel. Sept. 19, 2001).

¹⁷ Letter dated June 7, 2001, from Julia Conover, Vice President and General Counsel, Verizon Pennsylvania Inc., to James J. McNulty, Secretary, Pennsylvania Public Utility Commission.

¹⁸ Re: Performance Measures Remedies, Docket No. M-00011468, at 32 (Recommended Decision, entered Sept. 28, 2001).

result in significant additional costs and duplication of resources, while the benefits to competition are speculative.

The proposed regulation sets forth the required business record keeping rules necessary to implement this form of functional separation. The proposed regulation will also permit the sharing of common resources, so long as the costs thereof are properly allocated between the ILEC's wholesale operating unit and the ILEC's other relevant operations. As such, the Commission does not anticipate that the imposition of a functionally separate wholesale organization will require any significant changes to the manner in which the ILEC must conduct its business, other than to maintain separate business records that account for tariffed and non-tariffed transactions between the wholesale operating unit and the rest of the ILEC's operations. The ILEC was and will continue to be under an obligation to provide non-discriminatory wholesale services to CLECs when measured against the wholesale services it provides to its own retail operations.

Finally, we find it unnecessary to include any language in the proposed rulemaking relating to the Commission's ability to order further safeguards not expressly delineated herein to protect against unfair competition and to ensure nondiscriminatory access to the ILEC's services and facilities. The Commission clearly has the ability and authority to adopt new safeguards as the need arises. For example, if functional separation, as proposed herein, does not create the level playing field that is the focus of Chapter 30's competitive provisions, then the Commission has the authority to require the ILEC to provide the affected competitive service through a separate corporate affiliate. 66 Pa. C.S. § 3005(h).

2. Unbundling of Basic Service Functions

Chapter 30 is clear on its face that LECs must:

... unbundle each basic service function on which the competitive service depends and shall make the basic service functions separately available to any customer under nondiscriminatory tariffed terms and conditions, including price, that are identical to those used by the local exchange telecommunications company and its affiliates in providing the competitive service.

66 Pa. C.S. § 3005(e)(1). Pursuant to section 3002, “basic service functions” are defined as those basic components of the LEC’s network that are “necessary to provide a telecommunications service and which represent the smallest feasible level of unbundling capable of being tariffed and offered as a service.” Thus, whenever a LEC obtains competitive classification of any of its local services pursuant to Chapter 30, the LEC must unbundle the “basic service functions” used to provide that local service.

As the statutory language is clear on this point, there is no further need to create a regulation mandating this result. Verizon-PA’s attempt, therefore, to impose the same “necessary and impair” standard that is imposed by TA-96 for unbundling network elements must be rejected in applying Chapter 30’s own unbundling requirement. This conclusion is also consistent with this Commission’s prior pronouncements on this issue. Global Order at 67-68; Competitive Safeguards Order at 158.

3. Imputation for IntraLATA Toll Services

Similarly, we are satisfied that no additional rulemaking is required at this time on the issue of imputation. In the recent Global Order, we held, with respect to service level imputation, that Verizon-PA’s total toll revenues must exceed total

imputed switched access and carrier charges on an aggregated toll services level. Consolidated Global Order at 240-42. The Global Order, which closed the docket at M-00960799, as well as our earlier TA-96 Implementation Order, however, did not address the question of imputation for the delivery of intraLATA services by ILECs other than Verizon-PA.

In addressing this issue now, we agree with the PTA that there is no evidence that interexchange carriers ("IXCs") are unable to compete today with the ILECs in the intraLATA toll market. Further, we take administrative notice of the fact that the toll market is subject to increasingly intense price competition as many IXCs are setting their rates on a national level using flat rates that have no relationship with the access rates of any specific ILEC.¹⁹ Finally, we know of no evidence to refute AT&T's own witness that predatory pricing is extremely unlikely to occur;²⁰ and, even if predatory pricing does occur, the federal antitrust laws are already available to address this type of conduct. Frankly, we are wary of taking any regulatory action that may discourage the aggressive pricing of toll services by any and all competitors, including ILECs, in that market. We also note that we can always revisit this issue at a later date if there is evidence that ILECs are engaging in predatory pricing in intraLATA toll markets in Pennsylvania.

¹⁹ Sprint, for example, has implemented a "Sprint Simple Seven" plan that offers intrastate, intraLATA long distance to residential and business customers at a flat rate of 7 cents per minute and the payment of a monthly service charge. The other national IXCs, AT&T and MCI, have similar long distance plans in effect.

²⁰ A survey of recent court cases that involved predatory pricing claims, for example, found that the defendant prevailed in every case because the plaintiff was unable to prove one or more elements necessary to make out a successful claim.

4. Unfair Competition and Cross Subsidization Issues

We are proposing today a set of regulations in the form of a generic “Code of Conduct” in section 63.144 of Annex A that will be applicable to all LECs to prevent unfair competition and cross-subsidization in any local exchange market within Pennsylvania.²¹ We believe these proposed regulations, in providing a comprehensive set of competitive safeguard rules pursuant to 66 Pa. C.S. § 3005(b), are necessary to prevent unfair competition, discrimination, cross subsidies, and other market power abuses by LECs in their local exchange markets, and are, therefore, in the public interest.

We note that parts of the proposed regulations are modeled after similar provisions contained in the “Code of Conduct” adopted for Verizon-PA in the Global Order and other provisions are modeled after the ACER Code of Conduct offered in the structural separation proceeding. In addition, as with the competitive safeguard regulations adopted for the Pennsylvania electric industry,²² the instant regulations are directed not only at ILECs as the entities with market power, but at CLECs as well in specific circumstances to prevent unfair methods of competition.

In this regard, we cannot fully accept Verizon-PA’s position that any regulation should be equally imposed on all LECs and not just incumbents pursuant to the doctrine of regulatory parity. The Commission also recognizes that at least some CLECs have name recognition and sizable financial resources.

²¹ In issuing these proposed regulations, the Commission recognizes that it has adjudicated many of the same issues herein in other proceedings. The Commission does not intend to disturb those earlier rulings, such as its findings and holding in the Competitive Safeguards Order, through these regulations, but instead the proposed rulemaking is intended to build upon that foundation.

²² 52 Pa. Code §§ 54.121-54.122. We also note that the proposed regulations herein are modeled in part from Code of Conduct provisions adopted for the electric industry.

However, without market power, CLECs cannot curb the entry of new providers by their control of bottleneck facilities, set prices above competitive levels, or engage in unlawful predatory pricing to eliminate competition.

We recently took this same approach in adopting streamlined tariff filing regulations for the telecommunications industry, noting that “‘regulatory parity’ with respect to rate regulation between ILECs and CLECs is not appropriate until the playing field for specific services or business activities becomes more competitive/level.” Rulemaking Re Updating and Revising Existing Filing Requirement Regulations 52 Pa. Code §§ 53.52-53.53 -- Telecommunication Utilities, Dkt. No. L-00940095, at 13 n.7 (Proposed Rulemaking Order entered September 30, 1999) (“Streamlined Tariff Filing Proceeding”).²³ The transition to competition in the local exchange markets requires the development of sufficient competitive safeguards to ensure that new entrants will have a fair and equal opportunity to compete for customers that previously belonged solely to the incumbent provider. However, in those instances where the proposed standard of conduct does not rely on the LEC having market power to be effective, the standard is drafted so that it is equally applicable to ILECs and CLECs.

In developing our proposed competitive safeguard regulations, we have not prescribed rules that will restrict joint marketing activities because we are not convinced that such a restriction is necessary to foster competition in the local exchange markets. Additionally, we reject Verizon-PA’s request that informational tariffs for competitive services should be eliminated, as this issue was part of our rulemaking proceeding relating to streamlining tariff filing

²³ This rulemaking was finalized by order entered June 2, 2000, at the same docket.

requirements.²⁴ We also reject AT&T's request that the Commission expand the type of information required in a notice an ILEC uses to request "competitive" status classification under section 3005(a) as both unnecessary and contrary to the plain language requirements mandated in customer notices.

Finally, we agree with Verizon-PA and Verizon North Inc. on two specific issues raised in the companies' February 2001 comments. First, we agree that a total prohibition of certain advertising claims, such as claims of superiority, may violate the First Amendment. The United States Supreme Court has held that states may not place an absolute bar on certain types of potentially misleading information if it may be presented in a way that is not deceptive. Bates v. State Bar of Arizona, 433 U.S. 350 (1977); see also In re RMJ, 455 U.S. 191 (1982). The Court stated the preferred remedy is not a complete prohibition but a requirement of disclaimers or explanation to assure that the consumer is not misled. Bates, 433 U.S. at 384. We have, therefore, added the phrase, "unless the statement can be factually substantiated" to the advertising restrictions contained in section 63.144(3)(ii) & (iii) of the proposed Code of Conduct.²⁵

The second issue relates to whether the proposed Code of Conduct, when it becomes final, should supercede and replace any other Codes of Conduct, such as the Code of Conduct adopted in the Global Order for Verizon-PA, in effect for any

²⁴ In the final regulations adopted in the Streamlined Tariff Filing Proceeding, CLECs and ILECs offering competitive services must continue to file informational tariffs and price lists. 52 Pa. Code § 53.58(d). We should note that in the Streamlined Tariff Filing Proceeding, Verizon-PA supported the proposed regulations, including the provision relating to the filing of informational tariffs for competitive services.

²⁵ Proposed advertising bans on superiority claims by professional licensing boards have attracted the attention of the Federal Trade Commission and the Pennsylvania Office of Attorney General in the past. Both agencies have routinely opposed complete bans on superiority claims on First Amendment grounds. In 1985, the Pennsylvania Office of Attorney General advocated the use of disclaimers or other qualifying language that protects truthful advertising claims of superiority to the State Dental Council and Examining Board, which board adopted this recommendation at 49 Pa. Code § 33.203(a)(3).

LEC in Pennsylvania. We agree that having two or more Codes of Conduct in existence may be confusing and make compliance and enforcement more difficult. The proposed Code of Conduct that is contained in section 63.144 of Annex A, therefore, should supercede and replace any existing Codes of Conduct when it becomes final.

As this is a proposed rulemaking, we invite all interested parties to comment on whether they believe that these proposed competitive safeguard regulations go far enough to protect competition. In the absence of proof that the quality of Verizon-PA's (as the state's only ILEC with more than one million access lines) wholesale services has deteriorated; however, we believe the focus of the comments should be on the Code of Conduct provisions rather than the form of functional separation this Commission should impose on the state's largest ILECs.

Accordingly, under sections 501, 1501, 3005(b) and 3005(g)(2) of the Public Utility Code, 66 Pa. C.S. §§ 501, 1501, 3005(b), and 3005(g)(2); sections 201 and 202 of the Act of July 31, 1968, P. L. 769 No. 240, 45 P.S. §§ 1201-1202, and the regulations promulgated thereunder at 1 Pa. Code §§ 7.1, 7.2 and 7.5; section 204(b) of the Commonwealth Attorneys Act, 71 P.S. 732.204(b); section 745.5 of the Regulatory Review Act, 71 P.S. § 745.5; and section 612 of The Administrative Code of 1929, 71 P.S. § 232, and the regulations promulgated thereunder at 4 Pa. Code §§ 7.251-7.235, we are considering adopting the proposed regulations set forth in Annex A, attached hereto; **THEREFORE,**

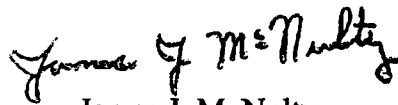
IT IS ORDERED:

1. That the proposed rulemaking at L-00990141 will consider the regulations set forth in Annex A.
2. That the Secretary shall submit this Order and Annex A to the Office of Attorney General for review as to form and legality and to the Governor's Budget Office for review of fiscal impact.
3. That the Secretary shall submit this Order and Annex A for review and comment to the Independent Regulatory Review Commission and the Legislative Standing Committees.
4. That the Secretary shall certify this Order and Annex A, and deposit them with the Legislative Reference Bureau to be published in the Pennsylvania Bulletin. The Secretary shall specify publication of the Order in accordance with 45 Pa. C.S. § 727.
5. That an original and 15 copies of any comments referencing the docket number of the proposed regulations be submitted within 30 days of publication in the Pennsylvania Bulletin to the Pennsylvania Public Utility Commission, Attn.: Secretary, P.O. Box 3265, Harrisburg, PA 17105-3265. Reply comments will be due 15 days from the last date of the 30-day comment period.
6. That the contact persons for this rulemaking are Gary Wagner, Bureau of Fixed Utility Services, 717-783-6175 (technical), and Carl S. Hisiro, Assistant Counsel, Law Bureau, 717-783-2812 (legal). Alternate formats of this document

are available to persons with disabilities and may be obtained by contacting Sherri DelBiondo, Regulatory Coordinator, Law Bureau 717-772-4579.

7. That a copy of this Order and Annex A shall be served upon the Pennsylvania Telephone Association, the Telecommunications Resellers Association, all jurisdictional telecommunication utilities, the Office of Trial Staff, the Office of Consumer Advocate, and the Small Business Advocate.

BY THE COMMISSION,

A handwritten signature in cursive script, reading "James J. McNulty".

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: November 30, 2001

ORDER ENTERED: **JAN 29 2002**

ANNEX A

TITLE 52. PUBLIC UTILITIES PART I. PUBLIC UTILITY COMMISSION SUBPART C. FIXED SERVICE UTILITIES CHAPTER 63. TELEPHONE SERVICE

Subchapter K. COMPETITIVE SAFEGUARDS

§ 63.141. Statement of purpose and policy.

This subchapter establishes competitive safeguards to assure the provision of adequate and nondiscriminatory access by incumbent local exchange carriers to competitive local exchange carriers for all services and facilities incumbent local exchange carriers are obligated to provide competitive local exchange carriers under any applicable Federal or State law, to prevent the unlawful cross subsidization or support for competitive services from noncompetitive services by incumbent local exchange carriers, and to prevent local exchange carriers from engaging in unfair competition. These competitive safeguards are intended to promote the Commonwealth's policy of establishing and maintaining an effective and vibrant competitive market for all telecommunications services. The Code of Conduct contained in section 63.144 below supercedes and replaces any other Codes of Conduct applicable to any local exchange carrier.

§ 63.142. Definitions.

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

Competitive local exchange carrier (CLEC) -- A telecommunications company that has been certificated by the Commission as a competitive local exchange carrier under the Commission's procedures implementing the federal Telecommunications Act of 1996, or under the relevant provisions at 66 Pa. C.S. § 3009(a) (relating to additional powers and duties) and its successors and assigns. The term shall include any of the competitive local exchange carrier's affiliates, subsidiaries, divisions, or other corporate sub-units that provide local exchange service.

Competitive service -- A service or business activity offered by an incumbent or competitive local exchange carrier that has been classified as competitive by the Commission under the relevant provisions of 66 Pa. C.S. § 3005 (relating to competitive services).

Incumbent local exchange carrier (ILEC) -- A telecommunications company deemed to be an incumbent local exchange carrier pursuant to section 251(h) of the federal Telecommunications Act of 1996, 47 U.S.C. § 251(h), and its successors and assigns. The term shall include any of the incumbent local exchange carrier's affiliates, subsidiaries, divisions, or other corporate sub-units that provide local exchange service.

Local exchange carrier (LEC) -- A local telephone company that provides telecommunications service within a specified service area. Local exchange carriers encompass both ILECs and CLECs.

Market price -- Prices set at market-determined rates.

Noncompetitive service -- Any protected telephone service as defined in

66 Pa. C.S. § 3002 (relating to definitions), or a service that has been determined by the Commission as not a competitive service.

Subscription activities – All activities conducted by an ILEC to formalize the acquisition of a customer or to maintain the provision of a customer's telecommunications services. The activities shall include all conduct relating to the provision of information to prospective customers regarding the ILEC's services and the enrollment of individuals or businesses as customers.

Telecommunications service – A utility service, involving the transmission of signaling, data, and messages, which is subject to the Commission's jurisdiction.

§ 63.143. Accounting and audit procedures for large ILECs.

Any ILEC with more than 1,000,000 access lines shall maintain a functionally separate wholesale organization (the "wholesale operating unit") and shall be subject to the following requirements:

(1) The wholesale operating unit of the ILEC shall consist of employees and other resources necessary to perform the following wholesale functions:

(i) Pre-ordering, ordering and the processing and transmission of instructions to field forces for the provisioning of services, network elements (as defined under 47 U.S.C. § 153(29)), or facilities to CLECs necessary to provide competitive or noncompetitive services to consumers.

(2) The wholesale operating unit of the ILEC shall have its own direct line of management and shall keep separate accounting and business records which shall be subject to review by the Commission in accordance with the provisions of 66 Pa. C.S. § 506 (relating to inspection of facilities and records). The ILEC shall keep its separate accounting and business records, and all other books, memoranda, and documents that support the entries in such separate records so as to be able to furnish readily full information as to any item included in any such record.

(3) The wholesale operating unit of the ILEC shall not engage in any marketing, sales, advertising, or subscription activities directed at retail customers.

(4) Employees or agents of the ILEC's wholesale operating unit shall not be shared with any of the ILEC's other operations. The costs associated with any shared resources shall be fully allocated and accounted for between the ILEC's wholesale operating unit and its other relevant operations based on the proportionate use of those facilities. The costs of any other employees, assets and other resources associated with performing the wholesale functions described in subsection 63.143(1)(i) above shall be allocated using appropriate allocation factors.

(5) Any employee of the ILEC wholesale operating unit may transfer to the ILEC's other operations, provided such transfer is not used as a means to circumvent the provisions of this subchapter. Any employee of the ILEC wholesale operating unit shall not provide information to the ILEC's retail operations that it would otherwise be precluded from having pursuant to the provisions of this subchapter.

(6) No employee or agent of the ILEC wholesale operating unit shall promote any retail service of the ILEC or any other LEC's retail services. All referrals made by employees or agents of the ILEC's wholesale operating unit shall identify all available providers of service on an equal and nondiscriminatory basis.

(7) The ILEC shall maintain contemporaneous records documenting all tariffed and nontariffed transactions between its wholesale operating unit and its other operations. Such records shall be available for public inspection during normal business hours.

(8) An independent compliance review may be conducted every calendar year to ascertain and verify the ILEC's compliance with the provisions of this subchapter as directed by the Commission on an as-needed basis. The ILEC will retain, subject to Commission approval, an independent consultant to conduct this compliance review. The ILEC shall select the independent consultant through a competitive bid process. To help ensure the objectivity of the results, Commission staff will monitor the ILEC's consultant selection process, the scope of the compliance review, the progress of the consultant's work, and the report preparation process. An original and ten copies of the final report as well as an electronic version will be submitted to the Commission no later than March 31, following the calendar year covered in the report. The consultant's final report, to include recommendations for change where necessary, will be made available for public inspection during normal business hours.

(9) Nothing in this section shall prohibit the ILEC from providing any competitive service through a separate corporate division or affiliate; however, the

competitive safeguards imposed by this subchapter will continue to be fully applicable to the ILEC and its division or affiliate.

§ 63.144. Code of conduct.

All LECs, unless otherwise noted, shall comply with the following requirements:

(1) *Nondiscrimination.*

(i) An ILEC shall not give itself, including any local exchange affiliate, division, or other corporate sub-unit, or any CLEC any preference or advantage over any other CLEC in the preordering, ordering, provisioning, or repair and maintenance of any goods, services, network elements (as defined under 47 U.S.C. § 153(29)), or facilities unless expressly permitted by state or federal law.

(ii) An ILEC shall not condition the sale, lease, or use of any noncompetitive service on the purchase, lease or use of any other goods or services offered by the ILEC or on a direct or indirect commitment not to deal with any CLEC. Nothing in this paragraph, however, prohibits an ILEC from bundling noncompetitive services with other noncompetitive services or with competitive services so long as the ILEC continues to offer any noncompetitive service contained in the bundle on an individual basis.

(2) *Employee conduct.*

(i) No LEC employee while engaged in the installation of equipment or the rendering of services to any end-user on behalf of a competitor shall disparage the service of the competitor or promote any service of the LEC to the end-user.

(ii) No LEC employee while processing an order for the repair or restoration of service or engaged in the actual repair or restoration of service on behalf of a 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.

(3) Corporate advertising and marketing.

(i) A LEC shall not engage in false or deceptive advertising with respect to the offering of any telecommunications service in this Commonwealth.

(ii) A LEC shall not state or imply that the services provided by the LEC are inherently superior when purchased from the LEC unless the statement can be factually substantiated.

(iii) A LEC shall not state or imply that the services rendered by a competitor may not be reliably rendered or is otherwise of a sub-standard nature unless the statement can be factually substantiated.

(iv) An ILEC shall not state or imply that the continuation of any service from the ILEC is contingent upon taking other services offered by the ILEC.

(4) Cross subsidization.

(i) An ILEC shall not use revenues earned or expenses incurred in conjunction with noncompetitive services to subsidize or support any competitive services. An ILEC shall not provide any assets, goods or services to its competitive local exchange affiliate, division, or other corporate sub-unit at a price below the ILEC's cost, market price, or

tariffed rate for said goods or services, whichever is higher, nor shall the ILEC purchase any assets, goods or services from its competitive affiliate, division, or other corporate sub-unit at a price above the market price or tariffed rate for said goods or services.

(5) Information sharing and disclosure.

(i) An ILEC's employees, including but not limited to its wholesale employees, shall use CLEC proprietary information (that is not otherwise available to the ILEC) received in the pre-ordering, ordering, provisioning, billing, maintenance, or repairing of any telecommunications services provided to the CLEC solely for the purpose of providing such services to the CLEC. ILEC employees shall not disclose such CLEC proprietary information to other employees engaged in the marketing or sales of retail telecommunications services unless the CLEC provides prior written consent to such disclosure. This provision does not restrict the use of aggregated CLEC data in a manner that does not disclose proprietary information of any particular CLEC.

(ii) Subject to customer privacy or confidentiality constraints, a LEC employee shall not disclose, directly or indirectly, any customer proprietary information to the LEC's affiliated or nonaffiliated entities unless authorized by the customer pursuant to 52 Pa. Code § 63.135 (relating to customer information).

(6) Adoption and dissemination.

(i) Every LEC shall formally adopt and implement the applicable Code of Conduct provisions as company policy or modify its existing company policy as needed in order to be consistent with the applicable Code of Conduct provisions. Every LEC

shall also disseminate the applicable Code of Conduct provisions to its employees and take appropriate steps to train and instruct its employees in their content and application.

§ 63.145. Remedies.

Any violation of the provisions of this subchapter allegedly harming a party may be adjudicated using the Commission's Interim Guidelines for Abbreviated Dispute Resolution Process, at Docket Nos. P-00991648 and P-00991649, which are published at 30 Pa.B. 3808 (July 28, 2000), or any successor Commission alternative dispute resolution process, to resolve the dispute. Any such action, however, will not preclude or limit additional available remedies or civil action, including the filing of a complaint concerning the dispute or alleged violations with the Commission under relevant provisions of the Public Utility Code. The Commission may also, where appropriate, impose penalties pursuant to 66 Pa. C.S. § 3301 (relating to civil penalties for violations) or refer violations of the Code of Conduct provisions set forth herein to the Pennsylvania Office of Attorney General, the Federal Communications Commission, or the United States Department of Justice.

LEGISLATIVE SUMMARY

L-00990141/57-224

Proposed Rulemaking

Re: Generic Competitive Safeguards

Under 66 Pa. C.S. §§ 3005(b) and 3005(g)(2)

52 Pa. Code, Chapter 63

Sections 3005(b) and 3005(g)(2) of the Public Utility Code, 66 Pa. C.S. §§ 3005(b) and 3005(g)(2), require the Commission to establish regulations to prevent unfair competition, discriminatory access, and the subsidization of competitive services through revenues earned from noncompetitive services. On March 23, 1999, the Commission issued an Advance Notice of Proposed Rulemaking to solicit comments from jurisdictional telecommunication utilities and other interested parties regarding the development of generic competitive safeguards under Chapter 30 of the Public Utility Code.

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. The proposed regulations also require incumbent carriers with more than one million access lines to maintain a functionally separate wholesale organization with its own direct line of management and separate business records which will be subject to review by the Commission.

An outline of the major points of the proposed rulemaking is provided below:

- **Section 63.141 -- Statement of purpose and policy.** Sections 3005(b) and (g)(2) of the Public Utility Code require the Commission to establish regulations to prevent unfair competition, discriminatory access, and the subsidization of competitive services through revenues earned from noncompetitive services. The purpose for creating these regulations is to meet this statutory requirement. The regulations will also promote the Commonwealth's policy of establishing and maintaining an effective and vibrant competitive market for telecommunications services.
- **Section 63.142 -- Definitions.** This section provides a list of relevant terms.
- **Section 63.143 -- Accounting and audit procedures for large ILECs.** This section establishes the requirement that any ILEC with more than one million access lines must maintain a functionally separate wholesale organization with its own direct line of management and separate business records.
- **Section 63.144 -- Code of conduct.** This section establishes the specific list of competitive safeguards applicable to all local exchange carriers that are necessary to protect and promote competition in the telecommunications industry within Pennsylvania. Among the specific safeguards promulgated are prohibitions against disparaging services of a competitor, claiming repairs would have occurred sooner if the incumbent had been used, and asserting that the carrier's services are inherently superior to those offered by competitors. The regulations also prohibit an incumbent carrier from conditioning the sale,

lease, or use of any noncompetitive telecommunications service on the purchase, lease, or use of another product or service from the incumbent or on a commitment not to deal with any competitive local exchange carrier.

- **Section 63.145 -- Remedies.** This section establishes the remedies available to aggrieved parties arising from any violation of sections 63.143 or 63.144.

The contact persons are Carl Hisiro, Law Bureau (legal), 717 783-2812 and Gary Wagner, Fixed Utility Services (technical), 717 783-6175.

APPENDIX A

**Rulemaking Re Generic Competitive
Safeguards Under 66 Pa. C.S. §§ 3005(b)
and 3005(g)(2)**

Docket No. L-00990141

**Implementation of the Telecommunications
Act of 1996: Imputation Requirements for
the Delivery of IntraLATA Services by
Local Exchange Carriers**

Docket No. M-00960799

COMMENTS AND RESPONSES DOCUMENT

A. Comments to the Commission's March 23, 1999 Order Initiating an Advanced Notice of Proposed Rulemaking

By Order entered on March 23, 1999, at Docket No. L-00990141, the Commission issued an Advanced Notice of Proposed Rulemaking which sought comments on two issues: (1) whether the Commission should establish regulations on the subject of safeguards for services declared competitive under Chapter 30; and (2) whether access charges should be imputed into ILEC toll services for pricing purposes. Comments and Reply Comments were submitted by Verizon-PA (formerly Bell Atlantic-PA, Inc.), GTE North, Inc. ("GTE"), AT&T Communications of Pennsylvania, Inc. ("AT&T"), the United Telephone Company of Pennsylvania and Sprint Communications Company, L.P., (collectively "Sprint"), and other interested parties. Their comments are discussed below.

Verizon-PA

According to Verizon-PA, any regulations promulgated by the Commission should be governed by three overriding principles: 1) any regulation should be competitively

neutral and should be equally imposed on all LECs and not just incumbents, i.e., the doctrine of regulatory parity should be preserved as between ILECs and competitive local exchange carriers ("CLECs"); 2) the regulations must safeguard competition, not protect competitors; and 3) the regulations should not burden competitive services offered by LECs with any more additional obligations than is necessary to promote competition. Verizon-PA Comments at 2-4.

Applying these principles to the issues raised in our March 23, 1999 Order at this docket, Verizon-PA argues that the unbundling requirement, as interpreted in the August 6, 1996 Competitive Safeguards Order, which requires Verizon-PA to unbundle each network function that it uses to provide a competitive service, regardless of whether competitors actually need access to the function in order to provide competing services, is unnecessarily burdensome. Id. at 5-6; Verizon-PA Reply Comments at 6-8. Verizon-PA argues, instead, that the Commission should adopt the same standard recently imposed by the United States Supreme Court in AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999), on the unbundling requirement contained in section 251(c)(3) of TA-96. This standard would require a LEC to provide the unbundled network element to competitors only where "necessary to provide competing services to consumers." Verizon-PA Comments at 7. See also Verizon-PA Reply Comments at 7-8. Otherwise, Verizon-PA asserts, unrestricted unbundling would discourage investment and innovation in local network facilities by new entrants and would undermine those competitors that have deployed their own networks from competing effectively against those competitors that simply

lease the same facilities from the ILEC at total-element-long-run-incremental-cost ("TELRIC") prices. Verizon-PA Reply Comments at 8-10.

As to imputation, Verizon-PA recommends that any "competitive safeguards regulations only require LECs to impute the rates for 'necessary' BSFs [basic service functions], plus the total service long run incremental cost ["TSLRIC"] of non-necessary facilities, into the price charged for competitive services." Verizon-PA Comments at 8. Further, Verizon-PA asserts that imputation should be performed at the "service-market level," rather than at the individual customer level, so as to promote "one-stop shopping" for telecommunications services that are now in demand by business customers. In making this argument, Verizon-PA dismisses out-of-hand the proposition that more severe imputation rules are necessary to avoid "price squeezes" by ILECs, asserting that the federal antitrust laws are already in place to address this type of problem if it should occur, and noting through AT&T's own expert that "predatory behavior . . . is extremely unlikely to occur." Verizon-PA Reply Comments at 5.

Finally, Verizon-PA recommends that informational tariffs for competitive services should be eliminated and that requiring cost and revenue allocation studies imposes needless costs on services that are competitive in nature. Verizon-PA Comments at 10-12. On the informational tariff issue, Verizon-PA argues that competition may be thwarted if LECs are required to post their prices for all to see, "since competitors would have the advantage of knowing the LEC's prices when setting its [sic] own." Id. at 10.

AT&T

AT&T contends, on the other hand, that imputation should be applied on a disaggregated basis, apply to all ILECs, and include all BSFs that the ILEC uses to provide services. AT&T Comments at 4-13; AT&T Reply Comments at 4-8. AT&T asserts that section 3005 of the Public Utility Code requires that “each telecommunications service must pass an imputation test.” AT&T Comments at 5 (emphasis in original). Otherwise, applying imputation on an aggregated basis would allow an ILEC to price individual services below the rates for the BSFs that the ILEC uses to provide the same service, which in turn would allow the ILEC to price discriminate by charging less where competition was robust and charging more where there was little or no competition. Id. AT&T then cites to several earlier Commission orders as precedent for its position. Id. at 6-7.

AT&T further argues that we should reject Verizon-PA’s argument that imputation should only apply to those BSFs that are deemed “necessary” for the provision of a competitor’s service. In making this argument, AT&T asserts that the Commission need not and should not rely on the United States Supreme Court’s recent decision in AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999), as this position is inconsistent with the plain language of Chapter 30. Id. at 8-9; AT&T Reply Comments at 4-6. That language, it contends, requires ILECs to unbundle all of the BSFs the ILEC uses to provide the competitive service under the same price, terms, and conditions at which the BSFs are used in the ILEC’s services, without regard to whether those BSFs are necessary or essential. AT&T Comments at 13-15; AT&T Reply Comments at 5-6.

AT&T also argues that Verizon-PA's suggestion that any competitive safeguards should apply equally to ILECs and CLECs under the doctrine of "regulatory parity" should be rejected because new entrants do not possess the type of market power that would warrant application of any such safeguards to them. AT&T Reply Comments at 3-4. Finally, AT&T recommends that the notice an ILEC uses to request classification of a service as "competitive" under section 3005 should be expanded to include the various factors that are required to show that the service is truly competitive. AT&T Comments at 17-19.

Sprint

Sprint supports the Commission's efforts to adopt competitive safeguards that are generic in nature, but emphasizes that the safeguards must be uniform and consistently applied to all non-Bell ILECs. Sprint's Reply Comments at 1. In this regard, Sprint supports AT&T's position that the proposed regulations should be directed at ILECs only. However, Sprint disagrees with AT&T's position that imputation should be applied on a disaggregated, service-by-service basis. Id. at 2. Instead, it asserts, consistent with Verizon-PA's position, that intraLATA toll imputation should be on an aggregated, total service basis. Id. Sprint also recommends that there should be a three-year transition period to an imputation standard for those non-Verizon-PA ILECs that do not meet such a standard today. Id. at 3.

On other issues, Sprint supports requiring the unbundling of any competitive services that involve the transmission of messages (as opposed to such services as billing and collection where it asserts unbundling should not be required), and argues that

competitive services priced above TSLRIC cannot, by definition, involve unlawful cross-subsidization. Sprint Comments at 3-4. Finally, Sprint contends that new regulations are unnecessary under section 3005(b) as the language in the statute itself is sufficient for establishing the proper guidelines for Commission analysis of competitive services under that section of Chapter 30. Id. at 4.

Pennsylvania Telephone Association (PTA)

The PTA asserts that LEC-only imputation that is not applicable to interexchange carriers (“IXCs”) is one-sided and places the LECs at a serious competitive disadvantage. PTA Comments at 4; PTA Reply Comments at 2-3. This is because many IXCs are setting their toll pricing on a national level using flat rates that have no relationship to the access rates of any particular LEC. Further, the PTA asserts ILECs at least can only provide intraLATA toll services, whereas IXCs can offer customers a complete package of toll services. Additionally, the PTA states that there is no concrete evidence that IXCs are unable to compete with the LECs in the intraLATA toll market, as demonstrated by the fact that IXCs have gained about a 30% market share since the introduction of competition in the intraLATA toll market in 1997. PTA Comments at 6-8.

On the issue of cross-subsidization and cost allocation, the PTA argues that cross-subsidies are equally possible with large, international IXCs as they are with ILECs. Id. at 8. In any event, PTA contends that the issue is mooted by the Chapter 30 process, which requires that Chapter 30 plans contain price cap provisions or provisions that require prices for competitive services cover their long run incremental cost. PTA Reply Comments at 4. The PTA also agrees with Sprint that creating competitive safeguard

regulations beyond the language already contained within Chapter 30 appears to be both redundant and unnecessary; that instead the regulations should simply mirror the language already contained in sections 3005(e) and (g). PTA Comments at 9-12.

Finally, the PTA strongly disagrees with AT&T's attempt to expand the notice requirements to include the extensive evidentiary material that must be considered under section 3005(a)(1), claiming that such expansion will violate the plain language requirements usually mandated in customer notices. PTA Reply Comments at 5.

Telecommunications Reseller Association (TRA)

The TRA supports the adoption of competitive safeguard regulations as a necessary tool to protect and promote competition by preventing LECs from engaging in unfair competition. TRA Comments at 7-9. The TRA then focuses its substantive remarks on accounting and non-accounting safeguards that are particularly focused on Verizon-PA but are generally directed at other ILECs as well. *Id.* at 9-15. The TRA recommends accounting safeguards that focus upon cost allocation and affiliate transaction rules designed to protect ratepayers from subsidizing the competitive services offered by ILECs. In this regard, the TRA suggests consideration of the accounting rules used by the Federal Communications Commission in Parts 32 and 64 of its regulations as a model for what is needed in Pennsylvania. In particular, the TRA urges regulations that would require the ILEC to conduct itself at arm's length with its affiliates, to reduce any agreements to writing and make them available for public inspection, and to agree to appropriate regulatory oversight through the use of audits. *Id.* at 12.

As to non-accounting safeguards, the TRA recommends at least functional separation between the ILEC and its affiliates with the affiliate or subsidiary being required to maintain its own books and records. Id. at 13. The TRA also suggests that the safeguards should prohibit the ILEC and its affiliates “from using in common any leased or owned physical property on which network facilities are located” or the sharing of computer software capacity. Id. 13-14. Finally, the TRA contends that ILECs should be required to provide unaffiliated entities the same goods or services that it provides itself or its affiliates at the same rates, terms, and conditions, and that disclosure of these transactions should be mandated. Id. at 14.

GTE

GTE takes the position that additional competitive safeguards at this time are not necessary. GTE concludes that existing FCC regulations provide sufficient competitive safeguards to prevent unfair competition. Similarly, according to GTE, imputation need not be addressed now because (1) there is no evidence that IXCs have been adversely affected by any pricing conduct on the part of ILECs, and (2) imputation is directly linked to universal service and access reform and those issues must first be resolved. GTE Comments at 1-4.

Office of Trial Staff (OTS)

Finally, OTS in its reply comments disagrees with the PTA that imputation for non-Verizon-PA ILECs is not a necessary competitive safeguard, and disagrees with Verizon-PA that imputation should be performed at a service-market level. OTS Reply Comments at 1-3. The OTS argues that imputation at a service-market level “fails to

protect against anticompetitive pricing arrangements because it would permit Verizon-PA to price individual toll services below the BSFs for that service, but to offset that by pricing other toll services at higher levels.” Id. at 3. The OTS also argues that the Commission should not provide ILECs with the responsibility for determining whether to include rates for a competitive service in an informational tariff; that discretion must rest solely within the Commission. Id. at 3-4.

B. Comments to the Commission’s November 30, 1999 Proposed Rulemaking Order setting forth competitive safeguards for telecommunications utilities.

By Secretarial Letter dated January 3, 2001, the Commission requested that interested parties file comments to the Commission’s November 30, 1999 Proposed Rulemaking Order published at 30 *Pa. B.* 539 (Jan. 29, 2000). The Proposed Rulemaking Order set forth a Code of Conduct. Comments to the proposed Code of Conduct were thereafter filed by Verizon-PA, AT&T, ACER, Sprint, Office of Consumer Advocate (“OCA”), the PTA, and several other interested parties, including several legislative members, on or about February 23, 2001. Their comments, referencing the provisions in the Code of Conduct set forth in the November 30, 1999 Proposed Rulemaking, are discussed below.

Verizon Pennsylvania, Inc. and Verizon North, Inc. (collectively “Verizon-PA”)

Verizon-PA states that since the Commission intends for this proposed Code of Conduct to apply to all Pennsylvania ILECs, it should make clear that the proposed Code supercedes and replaces any other Code of Conduct applicable to Verizon-PA or any other local exchange carrier. Verizon-PA Comments of February 23, 2001, at 3.

Verizon-PA states that the language of section 63.143(1) requiring functional separation should be modified so as to require companies to “maintain a functionally separate organization (the ‘wholesale operating unit’) for the ordering, and for the processing and transmission of instructions to field forces for the provisioning of any services or facilities to CLECs necessary to provide competing telecommunications services to consumers.” Id. Verizon-PA argues that having two separate, duplicate organizations, one to provision service to retail customers and another to provide service to CLEC customers, will result in unnecessarily increased costs and rates will diminish service levels for all customers. Id. at 4. Verizon-PA states that its modified language will achieve the desired result of “providing competing telecommunications services to consumers” while still preserving the highest levels of service and the greatest possibility of parity performance for CLEC service. Id.

Verizon-PA states that the final sentence of section 63.143(1) should be modified or eliminated. Id. Verizon-PA argues that the sentence should be eliminated as unnecessary surplus because the Commission’s authority to impose other competitive safeguards upon an individual carrier, after proper notice and hearing and upon proper evidence, is provided by statute. Id. at 5. Verizon-PA states that the need to list examples unnecessarily confuses the matter. Id. Additionally, Verizon-PA states that since the Commission’s authority to impose structural separation as a remedy is still in dispute and challenged by Verizon-PA before the state Supreme Court, the sentence should be eliminated. Id.

In the alternative, Verizon-PA states that if the Commission feels the need to give an “example” of another competitive safeguard, the sentence should be modified to comport with the appropriate statutory language. Id. at 6. Verizon-PA argues that the reference in the proposed regulation is to full wholesale/retail separation without regard to whether “all wholesale” or “all retail” services have been declared statutorily competitive and, thus, is beyond the Commission’s authority. Id. at 7 Verizon-PA states if the structural separation example must be given, that modifying language be included which tracks the limitations of 66 Pa. C.S. § 3005(h). Id. Verizon-PA states that the portion of section 63.143(2) prohibiting preferences for one CLEC over another requires clarification. Id. at 8. Verizon-PA states that it agrees with PTA the it would be more workable to prohibit “any unreasonable preference.” Id.

Verizon-PA states that it agrees with PTA’s comment that section 63.143(6) is unnecessary, confusing and should be eliminated. Id. Verizon-PA states that as presently worded, the provision could be read to prohibit ILECs from bundling noncompetitive services with any other service. Id. Verizon-PA argues that such a prohibition would unfairly limit ILECs’ ability to compete and also harm consumers and competition. Id. Verizon-PA states that it suspects the Commission’s intent was simply to prohibit ILECs from improperly “conditioning” availability of a noncompetitive services to also require a consumer to purchase other services offered by the ILEC. Id. Verizon-PA asserts that the Commission in other proceedings has clearly contemplated that ILECs will bundle competitive and noncompetitive services and, thus, proposed the following modifying language for section 63.413(6):

An ILEC shall not condition the provision or continuation of any regulated service on the purchase of additional retail services from the ILEC. Nothing in this provision prohibits the ILEC from bundling services so long as the ILEC continues to offer any regulated service contained in the bundle on an individual basis.

Id. at 9.

Verizon-PA states that all but the first sentence of section 63.143(7) should be eliminated. Id. Verizon-PA states that the first sentence merely repeats the statutory requirements of 66 Pa. C.S. § 3005(g)(2) and therefore is not objectionable. Id. Verizon-PA argues, however, that the remainder of the paragraph in this section does not go to cross-subsidization, and therefore does not really “specify” how an ILEC should proceed to avoid violating the cross-subsidization prohibition in section 3005(g)(2). Id. at 10. Verizon-PA states that for this reason the language is confusing *non-sequitur* and should be eliminated. Id.

Moreover, Verizon-PA asserts that the additional language following the word “specifically” is also problematic because it attempts to address affiliated interest issues but is inconsistent with the requirements of the Public Utility Code regarding affiliated interests. Id. Verizon-PA states that it would be confusing to comply with two sets of affiliated interest requirements, and that there is no reason to impose different requirements in the proposed Code. Id. at 11.

Verizon-PA states that section 63.143(8) should be eliminated because it illegally restrains ILECs and their employees from exercising constitutionally-protected First Amendment rights. Id. at 11-12. Verizon-PA argues that the U.S. Supreme Court has rejected such restraints on speech. Id. at 12. Verizon-PA also argues that this provision

would foster consumer confusion and consumer deception and be impossible to follow.

Id. at 13. Lastly, Verizon-PA argues that this provision is unnecessary as CLECs are already protected by the prohibition on “promotion” and “disparagement” set forth in section 63.143(4). Id.

AT&T

According to AT&T, the proposed regulations set forth a Code of Conduct that is significantly different from and inferior to the “Code of Conduct” the Commission had previously adopted in the Global Order. AT&T Comments of February 23, 2001, at 2. AT&T states that the Commission adopted a fair, balanced and effective Code of Conduct in the Global Order so as to prevent an unlevel playing field and eliminate severe obstacles to meaningful competition. Id. at 3. AT&T states that in order to give “teeth” to the Code proposed in the rulemaking, the Commission must include provisions that assure parity and prevent discriminatory practices by the ILEC towards competing carriers. Id. at 5.

AT&T argues that the proposed Code of Conduct should include a provision requiring any ILEC that bundles its services to provide the same opportunity at the same terms to its competitors. Id. AT&T asserts that this provision is the “cornerstone of nondiscrimination in the provision of services and facilities” because it provides for the equal treatment of competitors by an ILEC. Id. AT&T states that since the proposed Code fails to include any such provision which will actually succeed in establishing parity for competing carriers, paragraph 9 of the Global Order’s Code of Conduct should be reinserted into Section 63.143 of the proposed Code.

Additionally, AT&T asserts that proposed Code should include a provision that requires equal disclosure of market information to all CLECs. Id. at 6. AT&T argues that this provision is a key safeguard to ensuring fair and nondiscriminatory competition in the local market. Id. AT&T further argues that failing to include such a provision in the proposed Code will result in an unfair advantage to the ILECs as they will be able to gather commercially valuable information and share that information with only their competitive affiliates or divisions. Id. at 7. Therefore, AT&T asserts that the Commission should reinsert paragraph 3 of the Global Order's Code of Conduct into the proposed Code at section 63.143. Id.

AT&T also asserts that the proposed Code does not clearly and forcefully prohibit preferential treatment by an ILEC in favor of its competitive affiliate or division. AT&T argues that the proposed Code includes only a partial ban on discrimination and preferential treatment. Id. at 8. AT&T further states that a partial ban on discrimination and preferential treatment is vague as it allows ILECs to continue to engage in discriminatory practices so long as their discrimination involves "functions or services that are not mandated by state or federal law." Id. AT&T states that this qualification opens the door to arguments by Verizon-PA that particular instances of discrimination are not barred because, in Verizon-PA's view, the service is not mandated by state or federal law. Id. AT&T asserts that regardless of the service or function, a fair market will only result if all discriminatory and preferential treatment is barred. Id. at 9. Therefore, AT&T requests that the Commission replace the language in section 63.143(2) with the language at paragraph 1 of Appendix C of the Global Order's Code of Conduct.

AT&T asserts that the proposed Code 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. While acknowledging that the proposed Code contains sections relating to separation and cross-subsidization of ILEC affiliates and divisions, AT&T argues that these provisions do not go "far enough" in providing the comprehensive protections necessary to ensure that structural and functional separation are implemented. Id. at 10. Moreover, AT&T argues that the provisions inject ambiguity into what it deemed was the "plain language" of the Global Order's Code. Id. Thus, AT&T requests the Commission to reinsert paragraph 4 from Appendix C of the Global Order's Code of Conduct into the proposed Code at section 63.143. Id. at 11.

Additionally, AT&T asserts that the proposed Code is internally inconsistent in regards to its application to smaller ILECs and must be clarified. Id. AT&T argues that a plain reading of the proposed regulations set forth in section 63.143(1)-(10) is that ILECs with 250,000 access lines or less do not have to functionally separate, but do have to comply with the remaining rules in the proposed Code. Id. AT&T argues that the inconsistency results from the fact that several of the proposed rules implicitly appear to require functional separation in order for an ILEC to be in compliance. Id. Therefore, AT&T requests that the Commission clarify the application of the proposed Code to smaller ILECs (those with 250,000 access or less) by requiring a level of functional separation sufficient to ensure compliance with the policies embodied in the proposed Code.

Lastly, AT&T requests the Commission to revise the proposed Code so as to allow for the potential structural separation of Verizon North, Inc. (formerly GTE North, Inc.). AT&T asserts that as written, the proposed Code would only subject Verizon-PA to additional competitive safeguards if deemed necessary. AT&T argues that Verizon North, Inc. operates nearly 800,000 access lines in Pennsylvania, and possesses significant ability to leverage its market power and impede competition in its territory. Therefore, AT&T requests that the proposed regulations be clarified to assure that the same Code of Conduct adopted for Verizon-PA also applies to Verizon-PA's sister company, Verizon North, Inc.

ACER

ACER asserts that the use of an effective and enforceable Code of Conduct, applicable to all ILECs and their affiliates, is necessary to preclude discrimination by ILECs against their competitors. ACER Comments of February 23, 2001, at 1. ACER asserts that the Code of Conduct set forth in the Commission's Global Order should be the starting point for any future Code of Conduct because there is no evidence that indicates a less-stringent Code will benefit local telecommunications competition. Id. ACER recommends that the Commission incorporate the comprehensive rules that it proposed in the Structural Separations case at Docket No. M-00001353 into the Code of Conduct. ACER states its comprehensive rules effectively take into account the creation of retail affiliates and are capable of being enforced by audit. Id. at 1, 11. Below is a discussion on each requirement that ACER proposed.

ACER proposed incorporating “Nondiscrimination Rules” that require ILECs to provide all goods, services, facilities and information on a non-discriminatory basis to all retail market participants. Id. at 3. ACER argues that the theoretical potential of CLECs opting into arrangements established between incumbents and their affiliates does not obviate the need for nondiscrimination rules in this area. Id.

ACER proposed rules that require ILECs, their affiliates and non-affiliated CLECs to use the same OSS functions, interfaces and business processes, such as for ordering a loop or obtaining a collocation arrangement. Id. ACER argues that separate OSS functions and personnel would provide incumbent affiliates superior “time to market” and service quality. Id. at 4. ACER asserts that without comprehensive rules against discriminatory OSS and vigorous enforcement of rules, incumbents will continue to favor their own affiliates over non-affiliated entities in ordering and provisioning wholesale network elements and services. Id. ACER further states that structural remedies alone are insufficient to remedy or prevent discriminatory wholesale service by ILECs, however, elimination of preferential access to OSS in a Code of Conduct will be a major step toward that goal. Id.

ACER proposed rules requiring ILECs and their affiliates to make available simultaneously any information not in the public domain that either entity provides to the other. Id. at 5. ACER states that CLECs are reasonably concerned over information sharing among ILECs and their affiliates. Id. ACER argues that ILECs have the incentive to delay competitors’ access to options that are or can be built into the network until the incumbent is ready to make use of them. Id. ACER asserts that the Global

Order was clear that incumbents should not attempt to limit its competitors' retail service offerings to those it can or is willing to offer. Id.

ACER proposed rules requiring an ILEC to keep appropriate separation between itself and its affiliates (including, but not limited to, office space, equipment, and employees). Id. at 5-6. ACER states that such a prohibition would avoid inappropriate sharing of information and the potential for preferential treatment of affiliates over non-affiliates. Id. at 6.

ACER proposed a series of transfer pricing rules (relating to network elements, services and goods exchanged between incumbent and their affiliates and wholesale discounts on exchanges between the incumbent and their affiliates) so as to ensure that cross-subsidization does not occur between the incumbent and retail affiliates. Id. ACER states that these transfer pricing rules are similar to those adopted in the Global Order and the rules the Commission has adopted for Pennsylvania electric utilities. Id. at 7.

ACER proposed three rules in the area of marketing and corporate advertising. Id. at 8. ACER asserts that there should be no joint marketing between regulated and competitive retail services such as local telephone service and advanced services. Id. ACER states that restrictions on joint marketing of services is important for ensuring the nondiscriminatory provision of wholesale telecommunications services. Id. ACER also proposed requiring incumbents to include various disclosures in their advertising, which would assist customers in understanding that incumbents and their affiliates are separate entities. Id. ACER states that these joint marketing and advertising restrictions are

similar to prohibitions and disclosures mandated by the Commission in the Pennsylvania electric industry. Id. at 9.

ACER proposed rules governing record keeping, disclosure, audits and structural separation metrics. Id. at 10. ACER states these rules would enable the Commission to govern more appropriately affiliate transactions between incumbents and their affiliates. Id. at 9.

Lastly, ACER states that it supports the use of an abbreviated dispute resolution (ADR) process as the means to provide prompt resolution of disputes among the parties regarding compliance with the Code of Conduct rules. Id. at 10. ACER asserts that the Commission should expand the scope of the issues subject to resolution in the ADR process to include disputes that arise under the Code of Conduct resulting from this rulemaking. Id.

Sprint

According to Sprint, the blanket use of access lines to demarcate imposition of functional separation is unnecessary. Sprint Comments of February 23, 2001, at 1. Sprint argues that sections 63.143(2) through (10) of the proposed Code, coupled with both the language in Chapter 30 itself and the existing PUC-approved Chapter 30 Plans of the various ILECs are sufficient for establishing the necessary competitive safeguard guidelines. Id. at 1-2.

Sprint states that the proposed Code creates an absolute presumption that all Commission-regulated ILECs with 250,000 to 1 million access lines must undertake functional separation. Id. at 4-5. Sprint argues, however, that there has been absolutely

no record support for the assumption that the market share allegedly associated with ILECs having between 250,000 and 1 million access lines constitutes, *ipso facto*, an exercise of market power such that a functional separation requirement becomes necessary in all instances and for all ILECs meeting the threshold. Id. at 5. Sprint states that the Commission should impose such a drastic measure only after an ILEC it has been demonstrated that the ILEC is impeding development of a competitive telecommunications marketplace. Id. at 6.

Office of Consumer Advocate

OCA states that competitive safeguards are necessary for the proper development of a fully functioning competitive market for local telecommunications service in Pennsylvania. OCA Comments of February 23, 2001, at 3. The OCA states that the benefits intended by the implementation of Chapter 30 will only become reality if effective competitive safeguards are established. Id. at 4. OCA asserts the competitive issue it is most interested in is cross-subsidization between competitive services and noncompetitive services. Id. OCA desires the Commission not to overlook its earlier ruling set forth in the Competitive Safeguards Order. Id. at 10. As a result, OCA supports the Commission's safeguard against noncompetitive services subsidizing competitive services set forth in section 63.143(7). Id. at 11.

PTA

PTA asserts that the Commission's Proposed Rulemaking Order entered on November 30, 1999, goes far beyond its original scope by proposing a Code of Conduct. PTA Comments of February 23, 2001, at 2. PTA states that a Code of Conduct was not

an issue in the original NOPR and no party had suggested that a Code was needed. Id. PTA argues that the November 30, 1999 Order disposed of both of the issues presented for comment in the original NOPR and, therefore, should have ended the proceeding. Id. PTA requests the Commission to discontinue the Proposed Rulemaking Order and terminate this docket. Id.

PTA states that no party has made a claim that a Code is needed for non-Verizon-PA ILECs in Pennsylvania. Id. at 3. PTA asserts that this issue was not raised in the global proceedings either. Id. PTA states that the Commission should fashion a remedy only after examination of the actual circumstances involved in an allegedly anti-competitive situation. Id. at 4.

PTA states that resale and UNE provisioning are absent from all but three ILEC territories in Pennsylvania today. Id. at 8. PTA argues that without some level of need and some better understanding of the associated costs, the Commission should not propose a Code of Conduct applicable to non-Verizon-PA ILECs. Id. PTA further argues that all ILECs can not be treated as though they were the same size. Id. PTA states that regulatory “blanket” solutions are adverse to real marketplace solutions and open competition. Id.

Additionally, PTA argues that the imposition of a Code of Conduct applicable to all ILECs is based on the erroneous theory that all ILECs have market power and the ability to “curb the entry of new providers.” Id. at 3. PTA states that an overwhelmingly majority of CLECs certified in Pennsylvania are corporate giants who clearly possess market power themselves. Id. at 5.

PTA also argues that CLECs have the opportunity and the incentive to advance unfair competition. Id. at 6. PTA states that the Commission should establish a truly balanced policy that treats all competitors (ILECs, IXCs, and CLECs) equally, unless there is evidence that a competitor is competing unfairly. Id.

In the alternative, PTA had specific comments and objections to various provisions of the proposed Code of Conduct. Id. at 9-11. PTA states that the language in section 63.143(2) appears to prohibit any “preference or advantage whatsoever” and should be clarified so as to allow for “reasonable” preferences and advantages.

PTA comments that for section 63.143(3), CLECs should mark their information as proprietary rather than placing this burden on ILECs to make such a determination.

PTA states that the language “to any end-user” should be included in section 63.143(4) so as to be consistent with the subsection (5), both provisions prohibit an ILEC from disparaging a competitor’s service.

PTA states that section 63.143(6) is unneeded and confusing. PTA argues that a blanket prohibition on ILECs’ ability to obtain exclusive customer contracts or to bundle noncompetitive services together with competitive services is an overly broad and unfair limitation of the ILECs’ ability to compete. PTA states that there is no identification of what is meant by the phrase “noncompetitive telecommunications service.” PTA further argues that this provision would prevent ILECs from entering into long-term exclusive contracts for telecommunications service as they could arguably be read as “a direct or indirect commitment not to deal with any CLEC.” PTA requests that this provision be excluded from the proposed Code.

PTA states that the second sentence in section 63.143(7) is overly broad and not germane to the topic at issue in establishing a Code (ILEC/CLEC relationship). PTA states that there is no description in the proposed rulemaking which describes why this provision is necessary. PTA argues that if the Commission's intent is to address ILEC preference to an affiliated CLEC, then section 63.143(2) already covers the situation. PTA further argues that the provision exceeds the requirements of the Public Utility Code regarding affiliated relations. PTA requests the Commission to delete the second sentence of section 63.143(7).

PTA states that section 63.143(8) is anti-competitive and must be deleted from the proposed Code. PTA argues that this provision prevents an ILEC from exercising its First Amendment rights and also from telling the truth. PTA states that if the statement is false, there are existing legal remedies available to the allegedly injured party. PTA further states that the provision is overly broad because it also extends the prohibition to the ILEC's "affiliates, division, or operating units." PTA states that this matter is beyond the Commission's jurisdiction and, therefore, should be stricken. Lastly, PTA states that section 63.143(8) should be revised so that it clearly states that the Code of Conduct must not be construed as giving rise to any civil remedy.

Commonwealth Telephone Company and ALLTEL Pennsylvania, Inc.

Commonwealth and ALLTEL both assert that functional separation for all ILECs having 250,000 to 1,000,000 access lines is unnecessary and unfounded. Each company states that no claims alleging that they engaged in anticompetitive or discriminatory behavior were ever raised in any proceeding before the Commission. Each company

states that the Commission lacks the statutory authority to impose functional separation. ALLTEL and Commonwealth state that section 3005(h) allows for structural separation as a regulatory tool only for LECs having 1,000,000 access lines and after a determination that a substantial possibility exists that "provision of the [competitive] service on a non-separated basis will result in unfair competition."

Additionally, they argue that section 3005(h) does not confer power to the Commission to functionally separate, either expressly or through implication, its retail and wholesale operations. Each company states that functional separation imposes significant operational burdens upon them and oppose functional separation of non-Verizon-PA ILECs. The companies asserts that existing statutory and regulatory protections, such as Chapter 30 Plans and provisions governing affiliate interest agreements, adequately ensure promotion and development of a robust competitive market without the imposition of functional separation.

MCIWorldCom Communications, Inc.

WorldCom states that it supports the adoption of the Commission's proposed Code of Conduct and believes such regulation of incumbent behavior is necessary and essential for the development of vibrant competition within Pennsylvania. MWCOC Comments of February 23, 2001, at 1.

The Hon. Roger A. Madigan and the Hon. Mary Jo White (collectively "Senators")

State Senators Madigan and White jointly state that they support the adoption of the original, more stringent Code of Conduct that the Commission prescribed in the Global proceeding to govern Verizon-PA's behavior. Senators' Comments of February

23, 2001, at 1. The Senators assert that a vigorous Code of Conduct is essential to assure that ILECs cannot unfairly use their monopoly power to usurp competitors' efforts to compete fairly in the provision of local exchange service. Id. The Senators state that long ago the General Assembly made the pronouncement that competition among local telecommunications providers is in the public interest by enacting Chapter 30. Id. at 2. The Senators assert that the watered-down version of the Code of Conduct set forth in the proposed rulemaking inexplicably deviates from the Global Order's Code of Conduct and would not preclude incumbents' abuse of their market power. Id. The Senators further assert that there is no evidence that Verizon-PA has taken any concrete steps to mitigate its track record of discriminatory conduct so as to justify the possible dilution of the Code of Conduct. Therefore, the Senators state that the Commission must not retreat from the pro-competitive measures of the Global Order, but rather must require Verizon-PA to adhere to the Code of Conduct set forth therein. Id. at 2-3.

The Honorable Allen G. Kukovich

State Senator Kukovich states that he supports the Commission's efforts to develop an even playing field for local phone service competition, but is concerned that the Code of Conduct set forth in the proposed rulemaking will not accomplish that objective. Kukovich Comments of February 23, 2001, at 2. Senator Kukovich asserts that the proposed rulemaking, inexplicably deviates from the interim Code of Conduct and proposes substantially less restrictive provisions. Id. Senator Kukovich asserts that two provisions in particular substantially diminish the effectiveness of the proposed Code. Id. at 3.

Senator Kukovich states that the same terms and conditions in the Global Order's Code of Conduct must be implemented, on a permanent basis, in order to ensure the development of local phone service competition and the prevention of anti-competitive behavior. Id. at 3. Senator Kukovich urges the Commission to ensure that the Code of Conduct as originally proposed and outlined in the Global Order remains the adopted policy of the Commission. Id.

Specifically, Senator Kukovich states that section 63.143(2) in the proposed Code should be modified to preclude all preferences and disadvantages, similar to the provision in the Global Order's Code of Conduct. Id. at 6. Additionally, Senator Kukovich states that the Commission completely omitted the provision requiring equal disclosure of ILEC marketing information to all competitors. Id. at 9. Further, Senator Kukovich asserts that the Commission should clarify the application of the proposed Code to smaller ILECs, as well as, modify the proposed Code so as to establish procedures for the structural separation of Verizon North, Inc. Id. at 11-14.

House Consumer Affairs Committee, State Senators Boscola and Tomlinson

For various reasons, each commenter states that the Commission should delete any reference to structural separation within the proposed Code.



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA

GLEN R. THOMAS
CHAIRMAN

April 8, 2002

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

Re: L-00990141/57-224
Proposed Rulemaking
Generic Competitive Safeguards
Under 66 Pa. C.S. §§3005(b) and 3005(g)(2)
52 Pa. Code, Chapter 63

Dear Chairman McGinley:

Enclosed please find one (1) copy of the proposed rulemaking and the Regulatory Analysis Form prepared in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." Pursuant to Section 5(a) of the Regulatory Review Act of June 30, 1989 (P.L. 73, No. 19) (71 P.S. §§745.1-745.15) the Commission is submitting today a copy of the proposed rulemaking and Regulatory Analysis Form to the Chairman of the House Committee on Consumer Affairs and to the Chairman of the Senate Committee on Consumer Protection and Professional Licensure.

The purpose of this proposal is to assure the provision of adequate and nondiscriminatory access by ILECs to CLECs for all services and facilities and to prevent cross subsidization and unfair competition. The

contact persons are Carl Hisiro, Law Bureau, 783-2812 and Gary Wagner, Bureau of Fixed Utility Services, 783-6175.

The proposal has been deposited for publication with the Legislative Reference Bureau.

Very truly yours,

A handwritten signature in black ink that reads "Glen Thomas". The signature is written in a cursive, flowing style.

Glen R. Thomas
Chairman

Enclosures

cc: The Honorable Clarence D. Bell
The Honorable Lisa Boscola
The Honorable Dennis M. O'Brien
The Honorable Joseph Preston, Jr.
Legislative Affairs Director Perry
Chief Counsel Pankiw
Assistant Counsel Hisiro
Mr. Wagner
Regulatory Coordinator DelBiondo
Ms. Labecki

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT
TO THE REGULATORY REVIEW ACT

ID Number: L-00990141/57-224

Subject: Generic Competitive Safeguards Under 66 Pa. C.S.
§§3005(b) and 3005(g)(2)

Pennsylvania Public Utility Commission

TYPE OF REGULATION

- ☒ Proposed Regulation
- ☐ Final Regulation with Notice of Proposed Rulemaking Omitted.
- ☐ Final Regulation
- ☐ 120-day Emergency Certification of the Attorney General
- ☐ 120-day Emergency Certification of the Governor

FILING OF REPORT

Date

Signature

Designation

APR 3 2002

Lila Burris

HOUSE COMMITTEE

Consumer Affairs

APR 08 2002

James E. Zalusky

SENATE COMMITTEE

Consumer Protection and
Professional Licensure

4-8-02

Elena Pagan

Independent Regulatory
Review Commission

Attorney General

Legislative Reference
Bureau

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