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May 20, 2002

VIA HAND DELIVERY

James McNulty, Secretary
PA Public Utility Commission
400 North Street
P.O. Box 3265
Harrisburg, PA 17105-3265

SECRETARY'S BUREAU

Re: Rulemaking Re: Generic Competitive Safeguards Under 66 Pa. C.S. §§ 3005(b) and 3005 (g)(2)
Docket No. L-00990141

Dear Secretary McNulty:

Enclosed for filing, please find the original and 15 copies of Joint Comments of AT&T Communications of Pennsylvania LLC, CoreCom/ATX, Inc., and the Competitive Telecommunications Association to Proposed Rulemaking Order with regard to the above-referenced matter.

Respectfully submitted,

Alan C. Kohler
For WOLF, BLOCK, SCHORR and SOLIS-COHEN LLP

ACK/lww
Enclosure

DSH:32271.1/ATT004-149046

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Rulemaking Re: Generic Competitive Safeguards Under 66 Pa. C.S. §§ 3005(b) and 3005(g)(2)	:	Docket No. L-00990141

JOINT COMMENTS OF
AT&T COMMUNICATIONS OF PENNSYLVANIA LLC, CORECOM/ATX, INC., AND THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION
TO PROPOSED RULEMAKING ORDER

I. INTRODUCTION AND SUMMARY

This rulemaking represents a turning point in the Commission's efforts to bring meaningful competition to Pennsylvania's local markets. Since issuance of the *Global Order* in September of 1999,[1] the Commission has taken a hands off approach to local competition. In fact, review of the Commission's actions since issuance of the *Global Order* reveals that the Commission's most noteworthy and time consuming activities were the conduct of proceedings that resulted in the elimination of structural separation for Verizon Pennsylvania, Inc. ("Verizon") and a recommendation to authorize Verizon to provide in-region, long distance service -- regulatory actions that did nothing to further local competition. At the same time, little

[1] *Joint Petition of Nextlink Pennsylvania, Inc., et al.*, P-00991648, P-00991649 (September 30, 1999).

has been done over the past two years to promote and preserve development of the local market in Pennsylvania.[2]

The results, of course, are predictable. Competitive in-roads have remained relatively stagnant. Huge amounts of investment capital have been extracted by investors from the competitive local exchange carrier ("CLEC") industry segment. Consumers have seen little benefit from competitive development in Pennsylvania.

However, the Commission's response in this rulemaking is not predictable. Instead of pursuing the promulgation of strong functional separation/Code of Conduct rules to control Verizon's dominant market power and its dual role as monopoly wholesaler and retailer, as the Commission promised in April of 2001,[3] the Commission has issued a Proposed Rulemaking Order that takes a step backwards and now proposes to eliminate full functional separation entirely.[4]

In "watering down" these competitive safeguards, the Commission has relied heavily on the system of metrics and self-executing remedies that has been put in place in an attempt to

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2 These Comments are jointly submitted by AT&T Communications of Pennsylvania, LLC ("AT&T"), CoreCom/ATX, Inc. ("ATX") and The Competitive Telecommunications Association ("CompTel").

3 In its April 11, 2001 Order, the Commission abandoned structural separation and replaced it with full functional separation of Verizon's wholesale and retail business operations combined with a strong Code of Conduct. *Re: Structural Separation of Bell Atlantic Pennsylvania, Inc.'s, Retail and Wholesale Operations*, M-0001353 (April 11, 2001) ("*Functional Separation/Code of Conduct Order*"). The Commission designated this rulemaking to finalize the precise detail of these rules and found that the regulations promulgated under this rulemaking "will enable this Commission to efficiently and expeditiously achieve what has been our ultimate goal since the enactment of TA-96 – that is to open the local telecommunications market to competitors."

4 Chairman Thomas recognized this change in policy in his Statement accompanying the Proposed Rulemaking Order and found that the reasons put forth by Commissioner Fitzpatrick to eliminate wholesale/retail functional separation were not entirely convincing and should be revisited within this rulemaking process.

control Verizon's anti-competitive behavior. However, relevant data reveals that the metric/remedies system has not been effective, particularly since the issuance of the Commission's recommendation to authorize Verizon to provide in-region long distance service. Between July of 2000 and June of 2001, Verizon paid remedies in the range of $450,000 to $650,000 per month – an amount that, in and of itself, represents significant anti-competitive activity. However, in July of 2001, the month after the Commission issued its positive recommendation in Verizon's Section 271 proceeding, the remedy payments dramatically jumped to almost $1.5 million per month and have remained around that level to date. This data reveals that since its 271 recommendation, Verizon has more than doubled and, in some cases, tripled its anti-competitive behavior. Such backsliding by Verizon simply cannot be tolerated by this Commission.

The obvious negative effects on local competition presented by Verizon's backsliding should be very troubling to the Commission.[5] It should also prove to the Commission that, rather than blessing Verizon's current conduct, it needs to establish rules – such as full functional separation -- that require significant modification of Verizon's current structure and behavior.[6] However, blessing Verizon's current conduct is exactly what the Proposed Rulemaking Order does. As the Commission itself admits in proposing these rules, the rules, that maintain the

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5 In fact, at the recent Senate Appropriations Committee hearings, Chairman Thomas described Verizon's increased remedy payment levels as "unacceptably high."

6 Despite these clear and convincing facts, the Commission found in its Proposed Rulemaking Order that "full functional separation is an intrusive remedy designed to fix a problem that has not been shown to exist." 32 Pa. B. at 1989. This is despite the fact that both the Commission in its 1999 *Global Order* and the Commonwealth Court in its decision affirming the *Global Order* (*Bell Atlantic Pennsylvania, Inc., et al. v. Pennsylvania Public Utility Commission,* 763 A.2d. 440 (Pa. Cmwlth. 2000) determined that facts of record specifying Verizon's anti-competitive behavior against its CLEC competitors justified the remedy of structural separation – a far more intrusive remedy than full functional separation.

division of Verizon's wholesale operations rather than separating its wholesale operations from its retail operations, will not "require any significant changes to the manner in that the ILEC must conduct its business..."[7] Acceptance of this "business as usual" mentality is the exact approach the Commission rejected in its *Global Order* when the agency indicated such an approach "would be akin to allowing the fox to guard the hen house."[8]

Furthermore, the suggested abandonment of full functional separation leaves the proposed regulations in a technically unsound state, that, in certain instances, borders on the foolish. As specifically set forth below, rules are proposed that are internally unsound and have no practical effect or meaning. Taken together, the rules are neither reasonable nor feasible without significant modification.

Even given these flaws and gaping loopholes, it appears that Verizon will continue to fight any rules that apply to its operations. In this vein, the Commission must bring to a halt the significant momentum that has developed to lift rather than impose constraints on Verizon and other ILECs. As explained below, the proposed regulations would eliminate the effectiveness of over one-half of the provisions of the Interim Code of Conduct that has applied to Verizon since September of 1999. At a minimum, the Commission must maintain the competitive safeguards that currently exist and that were developed based on a huge evidentiary record rather than taking steps to gut the Code based on no evidence at all.

Overall, the Commission must return to a hands-on regulatory approach governing incumbent monopolists' behavior if any hopes for real competition are to be fulfilled. The proposed rules simply travel down the wrong road. However, as Chairman Thomas recognized

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7 32 Pa. B. at 1989.

8 *Global Order* at 236.

in his November 30, 2001 Statement, it is not too late for the Commission to reverse course through this rulemaking proceeding and develop a sound and effective approach that will deliver benefits for years to come.

II. BACKGROUND

In its landmark *Global Order*, after specifically finding that "BA-PA has abused its market power by providing competitors with less than comparable access to its network or engaged in other discriminatory conduct that prevented BA-PA customers from switching to a competitor," the Commission determined that structural separation of Verizon's wholesale and retail operations was "a necessary safeguard to protect CLECs offering the same 'competitive' services from unfair competition by BA-PA."[9] During the implementation of structural separation, the Commission specifically directed Verizon "to implement a functional separation of its wholesale and retail business operations by a separate division and abide by a Code of Conduct" that would govern Verizon until a permanent Code of Conduct could be finalized.[10] Verizon never took a single step to comply with the Commission's explicit instructions.

Following a lengthy proceeding to implement structural separation and an accompanying media and political assault by Verizon to defeat structural separation, the Commission issued an order abandoning structural separation and adopted a "functional" separation approach under that Verizon's wholesale and retail operations would be divided into separate divisions and governed by a strict code of conduct.[11] However, it was never the Commission's intent to weaken the competitive safeguards governing Verizon's operations, but merely to design those safeguards in

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9 *Global Order* at 228, 226.

10 *Global Order* at 235-237.

11 *Functional Separation/Code of Conduct Order* at 32-34.

a manner that is more efficient and less costly to implement.[12] The Commission described the comprehensive nature of the functional separation/Code of Conduct approach that is to govern this rulemaking proceeding as follows:

> Verizon must engage in the functional separation of its wholesale and retail units. This requires Verizon to separate its wholesale and retail divisions through application of a Code of Conduct in a way that provides non-discriminatory access to its wholesale division by all CLECs. This plan shall encompass personnel, accounting, record keeping, and business practices. We envision that the functional separation of Verizon's wholesale and retail units will be analogous to the functional separation we have ordered in the electric and gas industries, that has been implemented successfully. Precise details regarding the functional separation of specific elements shall be addressed in the reopened Competitive Safeguards proceeding. *See* Docket No. L-00990141.

Functional Separation/Code of Conduct Order at 33.[13]

Furthermore, the Commission directed that a proposed Code of Conduct introduced into the structural separation proceeding by ACER[14] should be used as the starting point for

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12 Commenters do not agree with this approach and believe that structural separation is a more effective approach that could have been implemented efficiently (and an approach that the Commission may have to return in the future). Nonetheless, Commenters have accepted the Commission's decision and is working with the Commission toward a functional separation/code of conduct approach that can effectively control Verizon's anti-competitive behavior.

13 In its *Global Order*, the Commission "hit the nail on the head" in describing the need for an aggressive competitive safeguards plan:

> The functional/structural separation issues arise because of BA-PA's dual role as both supplier and competitor to other local exchange carriers who must rely on BA-PA for the ordering, provisioning, maintenance, and operation of network elements the BA-PA's competitors need to provide their own local services to customers. If the potential conflict of interest created by this dual role is not adequately addressed, an unlevel playing field will be created, that will severely hamper the development of a new, vibrant and effective competitive telecommunications market in Pennsylvania."

Global Order at 216.

14 "ACER" refers collectively to ALTs, Covad, e.spire and Rhythm Links.

development of a permanent Code of Conduct in this rulemaking proceeding.[15] Finally, the Commission directed that the rulemaking be conducted in an expedited manner and that "[u]ntil completion of the final rulemaking in the Competitive Safeguard Proceeding, we expect Verizon to fully comply with the interim Code of Conduct set forth in the *Global Order*."[16]

On September 21, 2001, the Commission's Staff circulated draft competitive safeguard regulations for the purpose of seeking comments to determine the starting point for this rulemaking proceeding. The Staff Draft included provisions requiring Verizon to functionally separate its wholesale and retail operations and to be subject to a strict Code of Conduct. AT&T and others submitted extensive Comments to the Staff Draft that were generally favorable to the initiative.[17]

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15 *Functional Separation/Code of Conduct Order* at 34-35.

16 *Functional Separation/Code of Conduct Order* at 35.

17 AT&T's Comments to the Staff draft were generally favorable with one exception. In announcing the purpose of this rulemaking, the Commission determined "that the functional separation of Verizon's wholesale and retail units will be analogous to the functional separation we have ordered in the electric and gas industries, that has been successfully implemented." An essential component of functional separation in every electric and natural gas restructuring is the inclusion of a Provider of Last Resort ("PLR") as part of the incumbent function -- an element that was omitted in the Staff Draft. In fact, without the PLR function, and the associated consumer and competitive protections, electric competition would most certainly have not developed in Commonwealth in the manner that has placed Pennsylvania as a national leader regarding energy utility restructurings. To understand the necessity of a PLR goes to the root of an effective and efficient functional separation. In addition to providing universal service protection to consumers who do not choose a competitive retail provider, the PLR structure provides critical competitive safeguards by ensuring that Verizon's retail division does not inherit millions of customers at the time of the functional division. In this regard, the PLR assures fair and nondiscriminatory market development by placing Verizon's retail division in the same position as its retail competitors. Verizon's retail division, like other CLECs will and should be provided a full opportunity to compete for the base of PLR customers through the same means as other market participants.

On January 29, 2002, in an abrupt turnaround, the Commission entered the instant Proposed Rulemaking Order. In the Rulemaking Order, the Commission abandoned its stated purpose for this rulemaking proceeding -- that being to implement the precise details of the functional separation of Verizon's wholesale and retail operations -- and proposed regulations that omitted wholesale/retail functional separation entirely.

At the time of Public Meeting adoption of the Proposed Rulemaking Order, Chairman Thomas issued a Statement explaining his vote in favor of the Order. In his Statement, Chairman Thomas explained that his vote was only to get the rulemaking process commenced and recognized that the "regulations are very important to the overall integrity of our local phone market and we need to start the formal process that will result in a final rulemaking." The Chairman went on to question the Commission's exclusion of wholesale/retail functional separation and expressly indicated that the approach "represents a departure from the Commission's April 11, 2001 Order." Chairman Thomas found that the rationale for this departure was not entirely convincing and requested interested parties to shed light on this fundamental issue through comments submitted in the rulemaking process.

The Chairman's Statement is right on point. The express rationale for the Commission's departure from the stated purpose of this rulemaking – that being to establish the precise details of the functional separation of Verizon's wholesale and retail divisions – is that the Commission has recently completed a proceeding that resulted in a favorable recommendation regarding Verizon in-region, long distance entry and that Verizon's wholesale performance post-entry was governed by a comprehensive scheme of metrics and self-executing remedies that would effectively control anti-competitive behavior. However, even at the time the Proposed Rulemaking Order was considered at the Public Meeting, the Commission knew or should have

known that this rationale was not supported by pertinent facts – facts that have become even clearer since the end of November 2001 when the matter was considered. Data identifying the aggregate amount of remedy payments by Verizon indicates that Verizon's wholesale performance has rapidly deteriorated since July of 2001 when the Commission made its favorable Section 271 recommendation. The following chart identifies the aggregate remedy payments since July of 2000 through the most recent data:

CARRIER TO CARRIER PUC METRIC REMEDY SUMMARY VERIZON - PA	
Month	**Amount**
July, 2000	$624,000
August, 2000	$586,000
September, 2000	$580,000
October, 2000	$596,000
November, 2000	$612,000
December, 2000	$634,000
January, 2001	$592,000
February, 2001	$542,000
March, 2001	$480,000
April, 2001	$481,000
May, 2001	$668,000
June, 2001	$458,000
PUC 271 Recommendation	
July, 2001	$1,433,000
August, 2001	$1,468,000
September, 2001	$1,571,000
October, 2001	$1,409,000
November, 2001	$1,492,000
December, 2001	$1,275,000
January, 2002	$1,504,000
February, 2002	$1,585,000

March 2002	$1,479,000

It is readily apparent that, Verizon has experienced dramatically increased remedy payments since the Commission's 271 recommendation.[18] The only reasonable explanation for these dramatic increases is Verizon's backsliding since it received the Commission's Section 271 approval. Simply put, the Commission's Performance Assurance Plan, while well intentioned, has not and will not control Verizon's anti-competitive behavior now that the incentive of long distance entry has been removed. No matter how steep the remedy payments, Verizon will treat the payment as a cost of doing business necessary to preserve its market share. Only a fundamental modification of the manner in that Verizon conducts its business, that places its retail operations in the same relationship to Verizon's wholesale operations as unaffiliated CLECs in an enforceable manner, will result in effective safeguards. The Proposed Rulemaking Order fails miserably in designing such an effective solution.

Furthermore, the Commission's rationale for departing from wholesale/retail functional separation ignores the fact that functional separation with a strong Code of Conduct serves a related but different purpose than a Performance Assurance Plan. While metrics and remedies are primarily designed to assure that the operating or computer systems that serve Verizon's retail operations are equal to the systems that serve CLECs, a functional separation/Code of Conduct is primarily designed to control employees. The fact of the matter is that all Verizon employees, regardless of their jobs, work for the same company and have a common incentive to maximize the profit of their employer. As long as no controls are placed on the relationships and

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[18] From July 2000 through June 2001 the average Verizon aggregate remedy payment was $571,083. From July 2001 through March 2002, the average aggregate monthly payment jumped to $1,468,444 – an increase of more than 2½ times.

transactions between Verizon's retail operations and the wholesale operations that enable the provision of Verizon's retail service, anti-competitive behavior between people will be a natural and unavoidable result. As explained above and detailed below, all of the personnel, accounting, record keeping and business practice controls contained in the Proposed Rulemaking Order are restricted to Verizon's wholesale operating unit that serves CLECs and the remainder of Verizon's fully integrated operations. Because these controls are not applied where they would be meaningful – to the relationship between Verizon Retail and the wholesale or network operations that enable that retail service -- the proposed regulations miss the mark and many provisions are both meaningless and counterproductive.

With this background in mind, Commenters' Comments pertaining to the specific provisions of Annex A to the Proposed Rulemaking Order follows. Commenters' proposed modification to Annex A are attached as Appendix "A" in redline form.

III. SPECIFIC COMMENTS

Overall, the omission of wholesale/retail functional separation is the most glaring deficiency in Annex A. Furthermore, as indicated previously, the result of the omission renders many of the specific provisions in Annex A as nonsensical and meaningless. The result is proposed regulations that not only are completely inadequate in a post-271 environment, but actually deplete and eliminate many of the provisions of the Interim Code of Conduct currently applicable to Verizon.[19] As set forth below, the result of promulgation of Annex A would be to eliminate or render meaningless more than one-half of the nine substantive rules that currently govern Verizon's behavior. Certainly, the Commission never intended to relax the rules

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[19] The Interim Code of Conduct is attached as Appendix C to the *Global Order* and is attached as Appendix "B" to these Comments..

applicable to Verizon's conduct in a transitional post-271 period in that the incentive of long distance entry is no longer present.[20]

Throughout Section 63.143 of Annex A, as reflected in the attached redline, Commenters propose that the Commission's frequent reference to the term "wholesale operating unit" be replaced with references to the ILEC's wholesale and retail divisions (depending on the context) to return the regulation to an approach that requires wholesale/retail functional separation for Verizon.[21] This proposed modification throughout Annex A will not be discussed further.

A. Section 63.141 – Statement of Purpose and Policy.

Modifications are proposed to the regulation's policy statement to assure that the proper regulatory goals are established. It is important to emphasize that the Commission's objectives should not only be designed to assure that ILECs provide reasonable service to CLECs but also that the ILEC's wholesale division does not provide any preference to the ILEC's retail division.

Furthermore, the policy statement should recognize the inclusion of the PLR function in the ILEC's wholesale function. While the PLR function is a necessary transitional mechanism, it is important to move towards a fully competitive market in that all or most customers are served by competitive retail providers, thus limiting the retail activity of the wholesale division.[22]

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20 Certain provisions of the Code of Conduct apply to both ILECs and CLECs. As a matter of policy, applying a Code of Conduct to CLECs is inappropriate since the purpose of such a Code is to control market power. Since no CLEC is even close to having market power, the Code provisions should not apply. Furthermore, the Commenters are not aware of any issues that have been raised before the Commission regarding anti-competitive behavior by CLECs. Accordingly, inclusion of CLECs in Code provisions provides a remedy to a problem that does not exist.

21 Proposed Section 63.143, because it applies to ILECs with over 1,000,000 access lines, only applies to Verizon and its sister affiliate Verizon North (former GTE). Accordingly, these comments make specific reference to Verizon when discussing these provisions.

22 It is noteworthy that in several of the Commission's electric restructurings, competition for PLR customers has been accelerated by bidding out portions of the PLR customer

B. – Section 63.142 – Definitions.

A new definition of the term "Provider of Last Resort" or "PLR" is proposed to assure that the PLR is implemented in an appropriate manner generally consistent with electric and natural gas restructurings. As discussed above, inclusion of a properly structured PLR is important to an effective functional separation/code of conduct plan.[23]

C. Section 63.143 – Accounting and Audit Procedures for Large ILECs.

This subsection, combined with the definition of "Incumbent Local Exchange Carrier" at 63.142, properly clarifies that the requirements of the section not only apply to Verizon Pennsylvania, Inc., but to Verizon North, Inc. (former GTE), because under the definition Verizon North is a corporate subunit that provides local exchange service. Since the closing of the Bell Atlantic/GTE merger, it is beyond reasonable argument that all regulatory requirements placed on Verizon Pennsylvania must also apply to Verizon North, because Verizon North is part and parcel of the largest local exchange monopoly in the Commonwealth and, so far, has managed to evade local competition in its service territory.

1. Proposed Section 63.143(1)

Subsections 63.143 (1) and (2) should be modified to strictly define how the wholesale/retail functional separation of Verizon should be implemented. Under Commenters'

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base to retail competitors. While AT&T has not included PLR allocation in its redline, it is an issue that the Commission should continue to explore in the telecommunications area.

23 While important to a properly designed plan because it controls the market power of the incumbent's retail decision, wholesale/retail functional separation is still a valuable competitive safeguard without inclusion of a PLR. The distinction is that without a PLR, the ILEC's retail division inherits all of the existing ILEC retail customers, while in a PLR scenario the existing customers are placed in a PLR pool until such time as individual customers select a competitive retail provider, including Verizon's own retail division.

proposal, the Retail Division would consist of the retail sales, customer acquisition and customer care components of Verizon's business. The wholesale division should consist of all of the wholesale and network service functions that enable service to both CLECs and Verizon's retail division. Such a functional separation will go along way to assuring that Verizon's retail division will be provided service like any other CLEC. The wholesale division would also encompass the PLR function on a transitional basis until competition fully develops. At the same time, under Commenters' proposed Section 63.143, Verizon would be permitted to maintain certain aspects of its current organization by including a separate sub unit within its wholesale organization that deals exclusively with CLECs.[24]

2. Proposed Subsection 63.143(2).

This proposed subsection requires a separate direct line of management and separate accounting and business records for the unit and the employees that provide wholesale service to CLECs, but does not apply to the unit or employees that provide wholesale service to Verizon's retail operations. While the proposed subsection provides some value, its effects as a competitive safeguard are minimized by this partial application. It must be remembered that the Verizon ILEC owns and operates the network upon that all local service providers depend. Allowing the incumbent wholesale network provider and Verizon's retail operations to share management will virtually insure incentives for anti-competitive behavior because integrated management will have a common goal of maximizing Verizon's profits to the detriment of its CLEC competitors. In this regard, the proposed rule eviscerates Interim Code of Conduct Rule

[24] Such a proposal reflects a significant concession by AT&T and is included to assure that functional separation is not unnecessarily costly for Verizon to implement. The concession allows Verizon to continue to use completely separate Operation Support Systems ("OSS") for CLECs than for its own Retail Division, and in doing so, eliminates the requirement of integrated OSS – the primary cost driver in a structural separation scenario.

No. 4 that applies the direct line of management requirement to Verizon's retail division rather than a wholesale division that serves only CLECs. Essentially, the proposed regulation turns the currently effective interim rule on its head.[25]

At the same time, the proposed rule departs from one of the primary purposes of this rulemaking at the time it was initiated – that being to "encompass personnel, accounting, record keeping and business practices" between "Verizon's wholesale and retail units."[26] In contrast, the regulation as drafted only requires separate accounting and business records between the wholesale operating unit that serves CLECs and the remainder of Verizon's integrated wholesale/retail service. The regulation does nothing to control the relationship and internal transactions between Verizon's wholesale and retail units as originally intended. Without the record keeping and business practice requirements, the Commission will be unable to monitor anti-competitive behavior by Verizon, like cross-subsidization between wholesale and retail operations, one of the primary purposes of the regulations under the Commission's enabling statute as interpreted by this Commission and the Commonwealth Court.[27] To fix this departure from the original intended purpose and the enabling statute, the Commission should adopt Commenters' proposed modifications that apply the record keeping and business practice

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25 AT&T's proposed regulation cures this deficiency and also specifies that the separation of management should be up to the senior corporate office level. Because Verizon is not subject to structural separation, the management of the two divisions will merge at some point in the corporate structure – the question is at what point? Without adequate specificity, Verizon could separate management of retail and wholesale employees only up to the first line of supervision and then claim compliance with the regulation.

26 *Functional Separation/Code of Conduct Order* at 33.

27 *See* 66 Pa. C.S. §§ 3001(7); 3005(b), 3009(b)(2); *Bell Atlantic Pennsylvania, Inc.*, 763 A.2d at 466-467.

requirements to all of Verizon's wholesale operations, including those activities that underlie its own retail service.[28]

3. Proposed Subsection 63.143(3).

This subsection represents a perfect example of the misguided nature of the proposed rules. On the one hand, Section 63.143(1) makes it clear that the "wholesale operating unit" is the group of employees whose sole function is to provide wholesale service to CLECs.[29] On the other hand, proposed subsection 63.143(3) prohibits that same operating unit from engaging in retail customer acquisition activities – activities in that this set of employees could never engage since they have no contact with Verizon's retail service or customers in any form or fashion.[30]

Indeed, this rule would only have meaning if it applied to the group of employees that provide wholesale and network services to Verizon's retail operations that serve Verizon's retail customers. However, the rule is not applicable to this group of employees. In proposing this rule, the Commission fails to acknowledge that fair competition will not be possible as long as Verizon's wholesale operations are permitted to promote their own retail service to the detriment of unaffiliated CLECs. As written, the rule is meaningless and should be modified to provide an effective competitive safeguard.

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28 Section 63.144(4) of Annex A does impose a meaningful cross-subsidization prohibition on Verizon's entire operation. However, the regulation, while well intentioned, will be completely unenforceable and meaningless without applying record keeping and business practice requirements on all of Verizon's operations as well.

29 Under Verizon's existing structure, this division has operated under the name The National Marketing Center or "TISOC." This structure was established by Verizon around the time of passage of the Telecommunications Act of 1996. These employees, from the outset and continuing to this day, have exclusively provide wholesale service to CLECs and have no relationship to Verizon's retail service that is provided wholesale service through the integrated ILEC.

30 The proposed rule is analogous to prohibiting a utility lawyer from chasing ambulances.

4. Proposed Subsection 63.143(4)

Again, the proposed subsection restricting the sharing of employees and the allocation of costs of any shared resources only applies between the operating unit that serves CLECs and Verizon's own integrated wholesale/retail operations. While the rule as drafted provides some value, it significantly weakens Interim Code of Conduct Rule No. 4 that precludes the sharing of any ILEC employee that processes any order or service (from a CLEC or Verizon retail) from being shared with Verizon's retail division. The Interim Rule also requires that these employees have offices that are physically separated; a requirement that should be inserted into these rules.[31] Sharing wholesale and retail employees is just another means of potentially engaging in anti-competitive behavior to the detriment of a fair marketplace. The regulation should be modified to apply to all of Verizon's wholesale operations.

5. Proposed Subsection 63.143(5)

Transfer of employees from wholesale operations to retail operations is another way to provide preferences. The regulations properly restricts this activity but improperly only applies to the wholesale unit that serves CLECs and not to the wholesale operations that underlie Verizon's own retail service.

Furthermore, the provision should be modified to properly allocate the costs of training transferred employees so that the wholesale division does not become a training center for future retail division employees. Finally, the provision should include a requirement that the ILEC provide notice to the Commission when an employee is transferred from the wholesale division to the retail division. Such a notice requirement will provide the Commission with the necessary

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31 It should be clarified that physically separated offices means offices in different locations. Otherwise, Verizon could claim that it is already in compliance with the regulation because its employees do not share individual offices (or cubicles).

information to evaluate how frequently such transfers are occurring and whether the transfers are intended to evade this subchapter's competitive safeguards. Otherwise, the regulation's prohibition of using transfers "as a means to circumvent the code of conduct provisions" will be completely unenforceable.

6. Proposed Subsection 63.143(6)

The rule that prohibits employees of the wholesale unit which exclusively serves CLECs from promoting Verizon's retail service when those employees have no relationship to Verizon's retail service is meaningless as drafted. The potential for providing improper preference is between Verizon's wholesale operations that underlie Verizon's retail service and the Verizon retail operating unit. Essentially, the proposed subsection represents a rule without a purpose.

The proposed rule would also eviscerate Interim Code of Conduct Rule No. 5 that currently provides that "No employee or agent of an incumbent local exchange company shall promote any service of its competitive local exchange affiliate or division." The Interim Rule properly applies to all of Verizon's wholesale operations and their relationship with Verizon retail and the proposed rule should be modified accordingly.

7. Proposed Subsection 63.143(7)

Code of Conduct rules provide little value unless they are enforceable. Such rules are generally not enforceable unless strict record keeping requirements are imposed.

The proposed subsection properly requires that all transactions between Verizon and CLECs be documented, but does not impose the same requirement on the transactions between Verizon's wholesale operations and its own retail operations. Without imposing these record keeping requirements on Verizon's own operations, proposed Section 63.144(4)'s prohibition on cross-subsidization will be completely unenforceable.

8. Proposed Subsection 63.143.(8)

The audit provision, as currently drafted, is discretionary and inadequate. First, subsection (8) should mandate an annual audit.[32] Second, the audit should be conducted under 66 Pa.C.S. §516(a) and the procedures required thereunder. Under those procedures, it is the Commission, not Verizon, which conducts the audit.[33] Furthermore, it is the Commission not Verizon that must select the independent auditor. Finally, under 66 Pa.C.S. §516(b), the contract with the independent auditor should provide for payment by Verizon and should require the audit firm to work under the direction of the Commission and its staff.

There is simply no reason that the Commission should depart from normal, statutory audit procedures in this area. Indeed, it is questionable whether the Commission has authority to do so. The Commission's audit procedures were designed and have effectively worked to assure meaningful, objective audits outside of the control of the audited utility. The proposed rule ignores these procedures, and in doing so, would provide an opportunity for ILECs to improperly influence audit results.

9. Proposed Subsection 63.143(9)

The subsection properly intends to assure that Verizon does not evade the regulations through corporate reorganization. However, the rule should be modified to address both competitive and noncompetitive services. Verizon could just as easily attempt to evade the rules through a separation of noncompetitive service functions as it could through a separation of competitive service functions.

D. Section 63.144 – Code of Conduct

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32 The current language states that an "independent compliance review may be conducted."

33 It is patently absurd to allow a utility to conduct its own compliance audit even through use of an independent auditor particularly when that independent auditor is retained directly by the utility.

Unlike ~~Section 63~~.143, proposed Section 63.144 applies to all ILECs (and in certain cases CLECs), not just to Verizon and Verizon North.

1. Proposed Subsection 63.144(1)(i)

The provision should be clarified to not only preclude discrimination but to require service parity. More importantly, the provision as currently drafted includes an unnecessary loophole that allows the ILEC to provide preferences or advantages to itself if those preferences or advantages are expressly permitted by state or federal law. The "qualifier" is inappropriate because a preference or advantage could be technically permitted as a general matter but have an anti-competitive affect in the context of providing local telephone service. Moreover, this qualifier will be subject to ongoing dispute as to what is or is not expressly permitted by state and federal law and will result in an unenforceable provision. The provision of preferences and advantages by an incumbent to itself are intolerable in a competitive market. No qualifications are necessary.

It is noteworthy that this subsection is analogous to Provision No. 1 of the Interim Code of Conduct that is currently applicable to Verizon's operations. Provision No. 1 includes no such qualifying clause and there is no supportable reason why the Code should be weakened in this area.[34] In initiating this rulemaking, the Commission made it clear that is intended to strengthen the Interim Code and remove loopholes. The subsection, as drafted, does not comport with this intent and should be modified accordingly.

2. Proposed Subsection 63.144(1)(ii)

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34 The language in the proposed regulation would also weaken the ACER Code that the Commission identified as the starting point for this proceeding.

The first sentence of the subsection properly prohibits the placing of anti-competitive conditions on service offerings. However, the remainder of the provision that requires the components of a bundle to be offered separately represents an effective safeguard at best. It appears that this language intended to be analogous to Provision No. 9 in the Interim Code, which provides that "Any incumbent local exchange company that bundles its services must provide the same opportunity at the same terms and conditions to competitors." The Interim Code's provision provides an important protection that controls the ILEC's ability to cross subsidize competitive services in bundled service offerings and controls the ILEC's ability to improperly leverage its incumbency in its bundling practices.

Commenters' redline proposes language that would maintain the protection of Provision No. 9 of the Interim Code in a more practical and straightforward manner that focuses directly on the potential for cross-subsidization between competitive and non-competitive services in a bundled service package. However, at a minimum, the existing protection of Provision No. 9 of the Interim Code must be maintained and, if anything, strengthened.

3. Proposed Subsection 63.144(2)

The proposed rule provides important restrictions on ILEC employees regarding services provided on behalf of a competitor. However, these provisions do not cure the deficiencies in previous rules that do not prevent preferences and discrimination between wholesale and retail employees involving Verizon's own service.

4. Proposed Subsection 63.144(4)

The rule provides a well-designed standard for precluding improper cross subsidization by prohibiting all internal transactions between the ILEC's wholesale operations and the ILEC's own retail operations at a price below cost, market price or the tariffed rate, thatever is higher. While the rule is well-designed on a stand alone basis, previous rules (specifically proposed

subsections 63.143(2) and 63.143(7)) do not require the ILEC to keep separate wholesale and retail books and records or to otherwise record transactions between the wholesale operations and retail operations. Without such record keeping, the cross-subsidization standard is completely unenforceable and, in fact, no one, including the Commission, will have any idea whether Verizon is cross-subsidizing or not.

5. Proposed Subsection 63.144(5)

This subsection omits a critical rule that has governed Verizon since September 1999. Interim Code Provision No. 3 provides as follows:

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

The rule precludes Verizon's retail operations from gaining an unearned advantage through its relationship with the wholesale operations that own and operate the network upon that all local providers depend. If Verizon's wholesale operations are permitted to feed Verizon's retail operations with commercially valuable information and withhold that information from other CLECs, fair competitive will not be possible.

The proposed regulation must be modified to insert the Interim Rule and then to clarify that rule by defining "market information" and imposing notice of dissemination procedures. Commenters' redline provides language that would result in an effective competitive safeguard and that language should be adopted.

6. Proposed Section 63.145 – Remedies.

This provision must provide the "meat on the bones" if the Commission's functional separation/code of conduct plan is to be successful. The simple fact is that without meaningful enforcement and the threat of substantial remedial action, no competitive safeguard can accomplish its intended purpose.

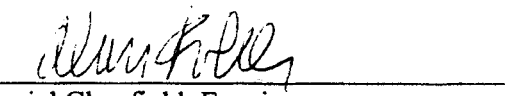
Accordingly, the provision should be strengthened to assure that the subchapter is enforceable and subject to all available, potential remedies. First, language should be added that addresses systematic violation of the regulations and makes all available remedies, including structural separation, reclassification of competitive services (66 Pa.C.A. §§3005(d) and 3008(c)), and service prohibitions' depending on the seriousness of the systematic violations. Only the threat of such severe penalties will assure that compliance is taken seriously.

Second, the Commission should reorganize internally to enable it to adequately enforce this subchapter. In this regard, Commenters' redline includes language under that the Commission would establish an Enforcement Division dedicated to enforcing the provisions of this subchapter.

IV. CONCLUSION

The Commission should modify the regulations to implement an effective functional separation/code of conduct plan as originally directed in its April 11, 2001 *Functional Separation/Code of Conduct Order*. To accomplish this purpose, the Commission should adopt the modifications included in Commenters' attached redline.

Respectfully submitted,



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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, to forbid and prevent an incumbent local exchange carrier form providing preferential treatment to its retail affiliate or division 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. In the interests of promoting competition and assuring universal service, these regulations maintain a provider of last resort function with the incumbent local exchange carrier's wholesale division; however, it is the policy of this Commonwealth to accelerate the advancement of competition and to reduce the role of the PLR over time and limit any retail functions assigned to the wholesale division to support its PLR obligation. 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.

Provider of Last Resort (PLR) – The retail function provided on a transitional basis by an incumbent local exchange carrier's wholesale division to provide telecommunications services to subscribers who have not affirmatively selected or subscribed to the Incumbent local exchange carriers retail division or a competitive local exchange carrier for the provision of such telecommunications services.

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

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 retail and wholesale divisions ~~wholesale organization (the "wholesale operating unit")~~ and shall be subject to the following requirements:

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

(A) Sales.

(B) Marketing.

(C) Advertising.

(D) Subscription activities.

(E) Customer information and billing inquiries.

(2) The wholesale division of the ILEC shall consist of employees, assets and other resources necessary to perform the following wholesale functions:

(A) ~~(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 either its retail division or CLECs necessary to provide competitive or noncompetitive services to consumers.

(B) Service installation.

(C) Maintenance and repair services.

(D) Billing and collection services to the extent necessary to carry out the PLR function.

(E) Operator services to the extent necessary to carry out the PLR function.

(F) All other network functions, including maintenance, improvement, engineering, planning, reliability, security and modernization.

(G) The obligation to serve as PLR in the ILEC's service territory.

(H) Where service functions, like billing and collection services and operator services, are required by the ILEC's wholesale division to provide services to PLR customers, the Commission may determine that such functions should be procured through a competitive bidding process.

(3) The ILEC may maintain a separate sub-unit or other organization within its wholesale division for the provision of any services or facilities to affiliated or non-affiliated CLECs. Any

separate sub-unit or other organization permitted under this subsection shall be subject to all of the requirements of this subchapter governing the conduct of an incumbent local exchange carrier's wholesale division.

(2 4) The wholesale and retail divisions ~~operating unit~~ of the ILEC shall have its own direct line of management up to the senior corporate officer level 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 5) The wholesale division ~~operating unit~~ of the ILEC shall not engage in any marketing, sales advertising, or subscription activities directed at retail customers.

(4 6) Employees or agents of the ILEC's wholesale division ~~operating unit~~ shall not be shared with any of the ILEC's other operations and shall have offices physically separated in different locations from the ILEC's retail division. The costs or market price associated with any shared resources shall be fully allocated and accounted for between the ILEC's wholesale division ~~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 both retail and ~~the~~ wholesale functions ~~described in subsection 63.143(1)(i) above~~ shall be allocated using appropriate allocation factors.

(5 7 Any employee of the ILEC wholesale division ~~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. However, the costs of any training the employee has received in the year prior to such transfer shall be allocated to the retail division. An ILEC which intends to transfer an employee from

the wholesale ~~division~~ to the retail division shall provide notice of its intent to transfer to the Commission and shall include a statement of the purpose of the transfer. Any employee of the ILEC wholesale division ~~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~~8) No employee or agent of the ILEC wholesale division ~~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~~9) The ILEC shall maintain contemporaneous records documenting all tariffed and nontariffed transactions between its wholesale division ~~operating unit~~ and its other operations, including its retail division. Such records shall be available for public inspection during normal business hours.

(~~8~~10) An independent audit of compliance ~~review may~~ shall 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 annual compliance audit shall be conducted under 66 Pa.C.S. §516(a) and shall be consistent with Commission audit procedures under which the Commission ~~The ILEC~~ will retain~~, subject to Commission approval~~ an independent consultant to conduct this compliance audit pursuant to a three-year contract through a competitive bid process ~~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.

(911) Nothing in this section shall prohibit the ILEC from providing any competitive or noncompetitive service through a separate corporate division or affiliate instead of its retail division; 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~~. and shall furnish all goods and services offered to its retail division to all LECs on the same terms and conditions. The speed and quality of the wholesale division's response to requests for service shall be equal whether the request originates with the ILEC's retail division or a CLEC.

(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 competitive services so long as the ILEC continues to offer any noncompetitive service contained in the bundle on an individual basis and at a price, notwithstanding subsection (e)(1), that is no greater than the difference between the bundled price less the price at which the competitive service is offered on a stand-alone basis. An ILEC shall offer to CLECs for

resale any bundled competitive and noncompetitive services it provides to end-users at the same price it offers such bundled services to end-users less the wholesale discount approved by the Commission and shall make the unbundled network elements associated with those services available to CLECs as may be required by applicable law.

(2) Employee conduct.

(i) No ILEC 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 ILEC to the end-user.

(ii) No ILEC 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 ILEC.

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

(iii) An ILEC 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 and shall not subsidize competitive services in any other manner. 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 shall simultaneously make available to any competitor any market information not in the public domain that is supplied to the ILEC's competitive local exchange affiliate, division, or other corporate sub-unit. The term market information shall include any information which is would be useful to a LEC in acquiring customers or providing service to customers. The ILEC shall establish procedures for dissemination of this market information, including procedures assuring notification of dissemination, and shall provide notification to each LEC of these procedures.

(ii) 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 ILEC 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 ILEC 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 and recommend remedies,

including but not limited to, divestiture. The Commission has established an Enforcement Division to enforce this subpart, which is the primary responsibility of the employees of the Division. Upon the discovery of systematic violations of this subchapter, the Commission will consider all available remedies under its enabling authority including but not limited to the structural separation of Verizon's wholesale and retail operations, the reclassification of competitive services, and a prohibition on offering the specific retail services to which the violations have occurred..

f

APPENDIX C

This Code of Conduct will become effective immediately upon approval of the Commission's Order at Dkt Nos. P-00991648 and P-00991649

Unless otherwise directed by this Commission, the following Code of Conduct will apply to BA-PA's operations in Pennsylvania:

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

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

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

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

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

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

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

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

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

10. Any party allegedly harmed by a violation of any of these Code of Conduct provisions may invoke the Commission's alternative dispute resolution procedures to resolve the dispute.

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FILE NO.
5550/09

May 20, 2002

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RE: Rulemaking – Generic Competitive Safeguards Under 66 Pa. C.S. §§ 3005(b) and 3005(g)(2)
Docket No. L-00990141

XO Pennsylvania, Inc.'s Initial Comments on Proposed Rulemaking Order

Dear Mr. McNulty:

Enclosed please find an original and fifteen copies of XO Pennsylvania, Inc.'s Initial Comments on the Proposed Rulemaking Order in the above-referenced proceeding. Please call if there are any questions in this matter.

Very truly yours,

RHOADS & SINON LLP

By: James H. Cawley
James H. Cawley

Enclosures

cc: Per attached certificate of service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Rulemaking Re: Generic Competitive Safeguards Under 66 Pa. C.S. §§ 3005(b) and 3005(g)(2)	)))	Docket No. L-00990141

XO PENNSYLVANIA, INC.'S INITIAL COMMENTS ON PROPOSED RULEMAKING ORDER

I. INTRODUCTION

1. Adherence to Previous Pro-Competitive Initiatives

XO Pennsylvania, Inc. ("XO"), welcomes the opportunity to submit its Initial Comments in response to the Commission's Proposed Rulemaking Order.[1] XO appreciates the efforts of the Commission to formally codify various rules that are intended to promote the development of fair and robust competition in the provision of telecommunications services by competing telecommunications carriers, in accordance with the applicable statutory provisions of the federal Telecommunications Act of 1996 ("TA '96"), and Chapter 30 of the Public Utility Code.

Although these Commission efforts are commendable, the instant Proposed Rulemaking Order presents a number of regulatory alternatives that are not fully compatible with the Commission's pro-competitive initiatives in the *Global Order*.[2] Similarly, the Commission's proposed rulemaking is not fully compatible with the intent and direction the Commission

[1] *Rulemaking Re Generic Competitive Safeguards Under 66 Pa. C.S. §§ 3005(b) and 3005(g)(2)*, Docket Nos. L-00990141, M-00960799, Order entered January 29, 2002, 32 Pa.B. 1986 (April 20, 2002).
[2] *Joint Petition of Nextlink Pennsylvania, Inc., et al.*, Docket Nos. P-00991648 & P-00991649, Order entered September 30, 1999, 196 PUR4th 172, *aff'd Bell Atlantic-Pennsylvania v. Pa. Pub. Util. Comm'n*, 763 A.2d 440 (Pa. Cmwlth. 2000).

expressed in its Order addressing the need for structural or functional separation for the retail and wholesale operations of Verizon Pennsylvania Inc. ("Verizon-Pa." or "VZ-Pa.").[3]

The *Global Order* recognized the dominant position that Verizon-Pa. possessed in the markets for local exchange markets where it operates.[4] The Commission also found in the *Global Order* that VZ-Pa.'s "continuing dominant market share, the lack of market entry in the residential market in the years since enactment of Chapter 30 and TA-96, and the substantial evidence presented in this docket of discriminatory access being provided to competitors supports our conclusion that Chapter 30's goal of promoting competition in the local telecommunications markets will not be achieved absent structural separation of BA-PA's wholesale and retail operations."[5] Following a lengthy evidentiary adjudication, the Commission concluded the following in its *Functional/Structural Separation Order*:

> Verizon must engage in the functional separation of its wholesale and retail units. This requires Verizon to separate its wholesale and retail divisions through the application of a Code of Conduct, in a way which provides for non-discriminatory access to its wholesale division by all CLECs. This plan shall encompass personnel, accounting, record keeping and business practices. We envision that the functional separation of Verizon's wholesale and retail units will be analogous to the functional separation we have ordered in the electric and gas industries, which has been implemented successfully.

*Functional/Structural Separation Order, slip op.*at 32-33.

However, the Proposed Rulemaking Order has concluded "that full functional separation is unnecessary" and that it "is an intrusive remedy designed to fix a problem that has not been

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[3] *Re: Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations*, Docket No. M-00001353, Order entered April 11, 2001 ("*Functional/Structural Separation Order*" or "*FSS Order*").

[4] *Global Order, slip op.* at 222-223, 196 PUR4th 172, 269.

[5] *Id.*, at 229, 196 PUR4th 272.

shown to exi[s]t."[6] Instead, the Commission, through this Proposed Rulemaking Order is essentially converting the issue of the functional separation of Verizon-Pa.'s retail and wholesale operations and the associated Code of Conduct into a "required business record keeping" set of proposed regulations.[7]

This approach represents a significant change in the Commission's focus. Moreover, it is unlikely to provide adequate safeguards for the preservation and enhancement of competition in the various telecommunications services markets within this Commonwealth. The Commission has undertaken this changed approach without sufficiently addressing whether the factors that initiated the Commission's examination of the structural/functional separation for the retail and wholesale operations of VZ-Pa. in the first place have also changed. It does not appear that the Commission relied on any examination of the *market structure* characteristics in Pennsylvania's markets for competing telecommunications carriers and services, or whether there have been any significant changes in the market since the issuance of the landmark *Global Order* that was affirmed in its *totality* by the Commonwealth Court. Indeed, the Commission appears to recognize that incumbent local exchange carriers ("ILECs") in general, and the combination of Verizon-Pa. and Verizon North Incorporated ("Verizon North" or "VZ-North") in particular, inherently possess "market power."[8] Nevertheless, the Commission seems to rely on the outcome of the Pennsylvania and Federal Communications Commission ("FCC") Section 271 proceeding for VZ-Pa. to support the conclusion "that Verizon-PA's local telecommunications market has been irreversibly opened to competition."[9]

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[6] *Proposed Rulemaking Order* at 10, 32 Pa.B. 1986, 1989.
[7] *Id.* at 12, 32 Pa.B. 1989.
[8] *Id.* at 15, 32 Pa.B. 1990.
[9] *Proposed Rulemaking Order* at 11, 32 Pa.B. 1986, 1989 (citation omitted).

Clearly, opening the Pennsylvania telecommunications services markets to competition does not automatically mean that such competition is sustainable or robust, especially in view of the market power that ILECs such as Verizon-Pa. and Verizon-North already possess. Policing this significant market power, with proposed regulations that mainly rely on accounting safeguards - rather than a complete, enforceable, and functional plan for separation of the retail and wholesale operations of VZ-Pa. - will not ensure the sustainability and robustness of competition in Pennsylvania's telecommunications services markets.

2. Interest of XO Pennsylvania

XO (formerly known as NEXTLINK Pennsylvania, Inc.) is a duly authorized facilities-based CLEC that operates within the service areas of certain major ILECs in Pennsylvania. XO also possesses statewide authority to operate as a competitive access provider. XO has participated in numerous proceedings before the Commission that addressed various issues of telecommunications competition and regulation.

II. DISCUSSION

XO offers the following specific comments on the proposed regulations. To the extent that XO does not offer comments on specific sections of the proposed regulations, such absence of comments should not be construed as an assent to the proposed language of the regulations.

1. Proposed 52 Pa. Code § 63.141 – Statement of Purpose and Policy

The proposed statement of purpose and policy should encompass the ILEC's affiliates and subsidiaries that may be engaged in the provision of both competitive and non-competitive telecommunications services. Already, the language in the proposed Code of Conduct Section 63.144(1)(i) references "any local exchange affiliate, division, or other corporate sub-unit." Furthermore, the actual or potential joint marketing and offering of service packages to end-user

consumers by ILECs mandate that the inclusion of the appropriate terminology relating to the ILECs' subsidiaries or affiliates will emphasize the goal of the proposed rules "to prevent local exchange carriers from engaging in unfair competition" and inappropriate cross-subsidization.

2. Proposed 52 Pa. Code § 63.142 – Definitions

The proposed definitions should be expanded. The language of the proposed regulations that follow the definitions section attempt to identify various terms and the context in which they are used within the proposed rulemaking. Most significantly, the definitions section does not describe the nature of an ILEC's "retail" and "wholesale" units, services or operations. (In fact, the "wholesale operating unit" and its parameters are identified later at proposed 52 Pa. Code § 63.143(1)). With respect to the applicability of the proposed regulations to the ILEC combination of VZ-Pa. and VZ-North, it is important to establish in the definitions section whether the contemplated "wholesale operating unit" encompasses any "retail" services or functions that may be akin to the obligations of a "provider of last resort" ("POLR"), and whether such POLR obligations are permanent or transitional.[10]

Other proposed definitions may also be unduly restrictive. The proposed regulations appear to focus exclusively on the relationship between ILECs and CLECs. However, there are other categories of telecommunications carriers that operate in the Commonwealth, such as competitive access providers ("CAPs"), which, because of their status as "telecommunications carriers" under federal law, are entitled to the ILECs' wholesale services that are the subject of the present proposed rulemaking.[11] An additional clarification referencing those

[10] *See generally* 52 Pa. Code § 54.31 (POLR definition under Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. §§ 2801, 2807(e)(3) *et seq.*).
[11] *See generally* 47 U.S.C. §§ 153(44) & 251.

"telecommunications carriers that are lawfully entitled to interconnect and obtain wholesale services from an ILEC" would improve the proposed definitions section.

3. Proposed 52 Pa. Code § 63.143 – Accounting and Audit, Large ILECs

The proposed rulemaking properly encompasses the ILEC operations of both Verizon-Pa. and Verizon-North. The scope of the proposed rulemaking adequately reflects the merger between the respective corporate parents of the two entities that has been approved by both this Commission and the FCC.

Proposed 52 Pa. Code § 63.143(1)(i). Other lawfully eligible telecommunications carriers should be included in the language of the proposed rule as appropriate recipients of the ILECs' wholesale operating unit functions and services.

Proposed 52 Pa. Code § 63.143(2). The language of the proposed section focuses only on the structure and operation of the ILEC's "wholesale operating unit." In contrast, the existing Code of Conduct Rule No. 4 for Verizon-Pa. under the *Global Order* also specifies the following:

> The competitive affiliate or division shall have its own direct line of management, and any shared facilities shall be fully and transparently allocated between the incumbent local exchange company and its competitive local exchange company affiliate or division.

Global Order Appendix C, 196 PUR4th 322.

To the extent that the proposed rulemaking fails to simultaneously address and impose the *same* safeguards and accounting separation requirements *equally* to *both* the retail and wholesale operational units of the ILEC, it will not be able to achieve the requisite result. For example, *unless* the retail and wholesale ILEC units have different and distinct lines of management, there will always be a significant possibility that the ILEC will engage in

discriminatory and anticompetitive conduct. The proposed language in this section should simultaneously address and impose the *same* safeguards and accounting separation requirements *equally to both* the retail and wholesale operational units of the ILEC that are already in place through Rule No. 4 of the Code of Conduct in the *Global Order*.

Proposed 52 Pa. Code § 63.143(4). The proposed language in this section again addresses the ILEC's wholesale unit and its application does not equally extend to the ILEC's retail unit. Thus, presently the proposed section affords lesser safeguards protection than the existing Rule No. 4 of the Code of Conduct in the *Global Order*.

The proposed language also creates a technical ambiguity that may prove difficult to administer and lead to unnecessary litigation. The proposed language makes reference to the use of "appropriate allocation factors" for the allocation of shared costs between the ILEC's wholesale functions and its other operations. It is unclear, however, from the language of the proposed rulemaking whether these allocation factors are either in existence or will be developed in some fashion under the oversight of the Commission. For example, a number of ILECs, including VZ-Pa. and VZ-North, may still use accounting and allocation parameters and factors for their regulated and unregulated operations that were developed under Part 64 of the FCC's regulations and associated cost allocation manuals. The fact that Verizon-Pa. failed to sustain its burden of proof mandated by the Commission's *Global Order* during the Structural/Functional Separation proceeding at Docket No. M-00001353, creates significant doubts on whether the important issue of developing and using the appropriate cost allocation factors contemplated in the proposed rulemaking should be left to the complete discretion of the ILEC.[12]

The Commission must treat the issue of cost allocation parameters and factors for the ILEC wholesale unit with great care since such matters may easily be the subject of anti-competitive and discriminatory conduct and abuse. XO proposes that either the proposed

[12] *Functional/Structural Separation Order* at 21.

rulemaking must explicitly draw a connection to appropriate and applicable FCC cost allocation parameters and standards, or the Commission must actively oversee the development of such parameters and standards for the ILECs' wholesale units and their operations within the Commonwealth.

Proposed 52 Pa. Code § 63.143(6). The proposed language in this section should be made compatible with the language of Rule No. 5 of the Code of Conduct under the *Global Order* which properly prohibits *all* employees or agents of an ILEC from promoting "any service" of the ILEC's "competitive local exchange company affiliate or division." Thus, unlike the proposed rulemaking, Rule No. 5 properly prohibits *all* categories of ILEC wholesale unit personnel (including those that may service the wholesale needs of the ILEC's retail unit), from promoting the services of the ILEC's retail unit.

Proposed 52 Pa. Code § 63.143(7). The proposed language provides adequate assurances for the establishment of enforceable record keeping requirements regarding the operations of the ILEC's wholesale unit. However, such records should not become inaccessible under the guise of confidentiality protection for a variety of reasons. For example, the ILEC's wholesale unit may seek confidentiality protection for such records under the guise of filing a series of affiliated interest agreements involving its other operational units, and alleging that such records must be afforded confidential protection by the Commission.

Proposed 52 Pa. Code § 63.143(8). The proposed language in this section provides the ILECs with considerable discretion on framing the context and meeting the standards of the contemplated periodic compliance review. The Commission possesses sufficient statutory authority under 66 Pa. C.S. § 516(a)&(c) to conduct independent audits of public utilities and of the ILECs that are the subject of the proposed rulemaking. The applicable statutory parameters that are entailed at 66 C.S. § 516(a)&(c) should also apply here and the language in the proposed

section should be modified accordingly limiting the discretion of the ILECs in managing their own compliance reviews.

2. Proposed 52 Pa. Code § 63.144 – Code of Conduct

Proposed 52 Pa. Code § 63.144(1)(i). The proposed language in this section permits an ILEC to give a "preference or advantage" to "itself" and to "any local exchange affiliate, division, or other corporate sub-unit, or any CLEC" over "any other CLEC," where such preference or advantage is "expressly permitted by state or federal law." The existing Rule No. 1 of the *Global Order* Code of Conduct clearly does not contain such an exception and, consequently, it provides a much superior competitive safeguard for the conduct of ILECs. The proposed exception in this section can and will lead to unnecessary litigation on when and what "preference or advantage" is permitted by applicable state or federal law.

The proposed exception is ambiguous and may be subject to misinterpretation and confusion. For example, Verizon-Pa.'s business practices grant VZ-Pa. a preference over CLECs in obtaining information about dark fiber availability. VZ-Pa.'s business rules prescribe that CLECs may submit queries about available dark fiber resources in Verizon-Pa.'s network. These CLEC queries are directed to the VZ-Pa. TIRKS data base. If dark fiber inventory is not available in TIRKS, then the CLEC will receive a negative response to its query. If the retail unit of Verizon-Pa. receives a negative response to its TIRKS query, VZ-Pa. may inquire of its engineers whether there is other dark fiber that has been deployed in the network that may not otherwise be listed in TIRKS as available, because the fiber may not be attached to a fiber termination point on both ends. If the Verizon-Pa. retail unit identifies such dark fiber that is deployed in the network, the retail unit can then make use of those facilities. However,

competing CLECs will be completely unaware of these facilities and will be unable to utilize them.

In the dark fiber scenario described above, Verizon-Pa.'s business rules govern its practices for handling CLEC dark fiber queries. Even though the Commission has not expressly ruled upon or approved VZ-Pa.'s procedures – either as applied to CLECs or to VZ-Pa.'s own retail operations – Verizon-Pa. may claim that its dark fiber procedures are sanctioned by state law.

Accordingly, to avoid these ambiguities, the exception should be eliminated altogether. At the very least, the exception should be available only if Verizon-Pa. obtains express prior approval from the Commission for any preferences that it wants to give to its own retail unit operations.

Proposed 52 Pa. Code § 63.144(1)(ii). Rule No. 9 of the Code of Conduct in the *Global Order* applicable to Verizon-Pa. clearly states that any "incumbent local exchange company that bundles its services must provide the same opportunity at the same terms to competitors."[13] It is unclear if the proposed language in this section achieves the same result as the existing Rule No. 9 of the Code of Conduct. For example, it is unclear whether the proposed rulemaking provides sufficient safeguards in preventing anticompetitive cross-subsidization of an ILEC's competitive services by its non-competitive services when both categories of services are contained in the same bundled package. Thus, it appears that the language of Rule No. 9 in the Code of Conduct of the *Global Order* should also be adopted for purposes of the proposed rulemaking.

Proposed 52 Pa. Code § 63.144(4). The proposed language in this section provides a very important safeguard against cross-subsidization between an ILEC's wholesale and retail

operations. However, this safeguard must be supported by the appropriately designed cost allocation parameters and factors that govern the sharing of resources between the ILEC's wholesale unit and its other operations. Otherwise, this important safeguard may be unduly undermined.

Proposed 52 Pa. Code § 63.144(5). The proposed language in this section needs to incorporate Rule No. 3 of the Code of Conduct in the *Global Order* that is applicable to the operations of Verizon-Pa. Rule No. 3 specifies that the "incumbent local exchange company shall simultaneously make available to any competitor any market information not in the public domain that is supplied to any competitive local exchange affiliate or division." In this manner, the retail unit of an ILEC cannot gain undue competitive advantages over its competitors because of the retail unit's relationship with the wholesale operations of the same ILEC.

3. Proposed 52 Pa. Code § 63.145 – Remedies

The Commission should incorporate in the proposed language of this section remedies for the anticompetitive conduct of ILECs such as Verizon-Pa. and Verizon-North that are already provided for under applicable provisions of Chapter 30 of the Public Utility Code. Thus, the Commission should not be precluded from re-examining the issue of structural separation for the operations of VZ-Pa. and VZ-North under the existing statutory authority of 66 Pa. C.S. § 3005(d), or the reclassification of competitive services to non-competitive services under under 66 Pa. C.S. § 3005(d).

4. Enforcement

It is apparent that the Commission will need to undertake a more active policing role upon the adoption of its proposed rulemaking in a final form. The continuous, vigorous and

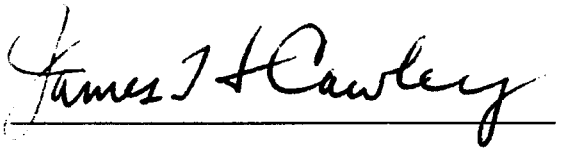
[13] 196 PUR4th 322.

timely enforcement of the Commission's proposed rulemaking in its final form may necessitate the appropriate prioritization and realignment of the Commission's inherently limited staff resources. XO recognizes that the regulatory oversight and enforcement tasks and obligations identified for the Commission and its staff in the proposed rulemaking will require substantial effort. However, this effort must be rationally undertaken so that the continuous development of sustainable and robust competition in the telecommunications services market of the Commonwealth and its benefits for end-user consumers can be adequately safeguarded.

III. CONCLUSION

The Commission's proposed rulemaking needs to be modified and strengthened in order to consistently and coherently implement the procompetitive initiatives that this Commission established through its landmark *Global Order* and its *Functional/Structural Separation Order*. The adoption of this proposed rulemaking in its final form will also require that the Commission undertake the arduous task of vigorously enforcing the relevant rules. This may necessitate the appropriate realignment and prioritization of the Commission's limited staff resources.

Respectfully submitted,



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DATED: May 20, 2002

Certificate of Service

I hereby certify that on this day, a true and correct copy of the foregoing document was served by means of United States mail, first class, postage prepaid, upon the following:

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May 20, 2002

VIA HAND DELIVERY

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Rulemaking Re: Generic Competitive Safeguards
Docket No. L-00990141

Dear Secretary McNulty:

Enclosed for filing on behalf of Sprint Communications Company, L.P. and The United Telephone Company of Pennsylvania (collectively "Sprint") are an original and fifteen (15) copies of its Joint Comments in the above-referenced matter.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Sue Benedek

ZEB/jh
enclosures
cc: All Parties on the enclosed Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Proposed Rulemaking Regarding Competitive Safeguards Under 66 Pa. C.S. §§3005(b) and 3005(g)(2)	))))	Docket No. L-00990141

JOINT COMMENTS OF
THE UNITED TELEPHONE COMPANY OF PENNSYLVANIA
AND
SPRINT COMMUNICATIONS COMPANY, L.P.

Pursuant to the Pennsylvania Public Utility Commission's ("Commission's") Proposed Rulemaking Order entered January 29, 2002, and as published in the *Pennsylvania Bulletin*,[1] The United Telephone Company of Pennsylvania and Sprint Communications Company, L.P. (collectively "Sprint") respectfully submit these Joint Comments to the promulgation of generic competitive safeguard regulations.

Sprint commends the measures undertaken by the Commission in promulgating these regulations. But for a few limited exceptions, the proposed regulations fairly balance the interests of Pennsylvania's dominant incumbent carriers (Verizon and GTE), other incumbents and competitive carriers. Sprint supports the proposed accounting and audit procedures for large ILECs at proposed Section 63.143. In particular, Sprint supports the use of a 1 million-access line threshold for application of a functional structural separation requirement. Sprint's Joint Comments solely relate to the proposed definitions and the Code of Conduct.[2]

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1 32 *Pa.B.* 1986.
2 §63.144.

I. DEFINITIONS

These proposed regulations are promulgated pursuant to Chapter 30 and the development of generic competitive safeguards under Sections 3005(b) and 3005(g)(2).[3] The proposed regulations at Section 63.142 include definitions for eight (8) terms/phrases.[4]

Three of the proposed definitions are already defined in Chapter 30: (1) competitive service; (2) noncompetitive service; and (3) telecommunications service. The proposed definitions for competitive and noncompetitive services largely track with the statutory definitions provided by the Pennsylvania General Assembly, but include distinctions as between "CLECs" and incumbents.[5] However, the definition of "telecommunications service" employed in the proposed regulations for Chapter 30 competitive safeguards greatly departs from the definition used by the General Assembly in Chapter 30. Chapter 30's definition of "telecommunications service" and

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[3] 66 Pa. C.S. §§ 3005(b), 3005(g)(2). See, *Proposed Rulemaking Order*, entered January 29, 2002, at 2.

[4] The proposed definitions are: (1) CLEC – Competitive local exchange carrier; (2) Competitive service; (3) ILEC – Incumbent local exchange carrier; (4) LEC – Local exchange carrier; (5) Market price; (6) Noncompetitive service; (7) Subscription activities; and (8) Telecommunications service.

[5] For example, the statutory definitions of "competitive service" in Chapter 30 and the Commission's proposed generic safeguard regulations pursuant to Chapter 30 can be compared as follows:

CHAPTER 30	PROPOSED REGULATIONS
Competitive Service. A service or business activity determined to be competitive under this chapter or any telecommunications service determined by the commission to be competitive under this chapter.	*Competitive service* – A service or business activity offered by an incumbent or CLEC that has been classified as competitive by the Commission under the relevant provisions of 66 Pa. C.S. § 3005 (relating to competitive services).

the definition contained in the proposed regulation are compared as follows:

CHAPTER 30	PROPOSED REGULATIONS
Telecommunications Service. A utility service, involving the transmission of messages, which is subject to this title.	*Telecommunications service* – A utility service, involving the transmission of signaling, data and messages, which is subject to the Commission's jurisdiction.

The general power to make regulations is not unlimited. Regulations will be set aside if going beyond the purpose of a statue or if the regulations do not bear a rational relationship to that purpose.[6]

In this instance, the proposed regulations establish generic Chapter 30 safeguards that expand the statutory definition of telecommunications service to "signaling" and "data" messages when the General Assembly did not see fit to include these qualifiers in Chapter 30. As a result, the definition of "telecommunications service" in the proposed generic safeguards regulation creates uncertainty and conflict as to application and interpretation, unlawfully expands the Commission's jurisdiction, and bears no rational relationship to purpose of Chapter 30.

Accordingly, Sprint recommends that the definition for telecommunications service as employed in proposed Section 63.142 must be modified to remove the terms "signaling" and "data".

II. NONDISCRIMINATION

Section 63.144(1)(ii) remains a somewhat confusing provision. Sprint

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[6] Pennsylvania Bankers Association v. Secretary of Banking, 481 Pa. 332, 342, 392 A.2d 1319, 1324 (1978).

recommends language modifications to Section 63.144(1)(ii) to clarify terms and requirements. Section 63.144(1) (ii) provides as follows:

> (ii) An ILEC may 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 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.

Sprint's comments are limited to the first sentence in above-noted quote. Sprint has no objection to the requirement that "An ILEC may 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." This statement is a complete concept and should be reflected as such.

As to the remainder of the first sentence in Section 63.144(1)(ii), confusion exists as to the phrase "direct and indirect commitment". This phrase does not describe a readily known or imaginable activity. A commitment can be communicated orally or via a written medium. Thus, Sprint recommends that this phrase should be rewritten as a "written or oral commitment".

In addition, the proposed regulations prohibit ILECs only from conditioning the sale, lease or use of any noncompetitive service on a commitment not to deal with any CLEC. That same prohibition relative to the LEC should apply to all LECs – *i.e.*, the LEC is prohibited from conditioning the sale, lease or use of any noncompetitive service on a commitment not to deal with either ILECs and CLECs, which are collectively referred to in the proposed regulations as LECs. Sprint recommends creating a second

sentence to prohibit LEC's from conditioning the sale, lease or use of noncompetitive services on any "written and oral commitment" not to deal with any "other LEC". Finally, the fairness and parity require that the last sentence in Section 63.144(1)(ii) should be revised to refer to LECs, rather than ILECs only.

In sum, Sprint submits the following revised Section 63.144(1)(ii), in lieu of the proposed Section 63.144(ii):

> An ILEC may 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. In addition, a LEC may not condition the sale, lease or use of any noncompetitive service on a written or oral commitment not to deal with any other LEC. Nothing in this paragraph prohibits a LEC from bundling noncompetitive services with other noncompetitive services or with competitive services so long as the LEC continues to offer any noncompetitive service contained in the bundle on an individual basis.

III. CORPORATE ADVERTISING AND MARKETING

Proposed Section 63.144(3) unlawfully seeks to restrict corporate advertising and marketing, goes beyond the parameters of the Commission's jurisdiction under the Public Utility Code, and bears no rational relationship to Chapter 30 safeguards. Sprint submits that Section 63.144(3), inclusive of all subparts, must be deleted in its entirety.[7]

Proposed Section 63.144(3), Corporate Advertising and Marketing, provides as follows:

> (i) An LEC may not engage in false or deceptive advertising with respect to the offering of any telecommunications service in this Commonwealth.
>
> (ii) An LEC may 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.

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[7] Pennsylvania Bankers Association v. Secretary of Banking, 481 Pa. 332, 342, 392 A.2d 1319, 1324 (1978).

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

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

These provisions deny protections guaranteed under the First Amendment. The phrase "unless the statement can be factually substantiated" does not cure the fundamental ill caused by the proposed restriction.

For example, the Code of Conduct adopted for jurisdictional electric companies contains virtually the same one-sentence advertising and marketing prohibition as that which is proposed in Section 63.144(3)(i).[8] However, the electric industry's Code of Conduct limits the advertising and marketing "to customers" taking retail service within the Commonwealth. Conversely, the advertising and marketing prohibitions for telephone companies broadly restrict these activities to the public regardless of the customer/utility relationship. The General Assembly vested the Commission with authority and power to regulate matters involving the relationship between public utilities and the public.[9] By failing to qualify the proposed advertising and marketing restriction in terms of that customer relationship, the restriction remains overly broad and bears no rational relationship to the Public Utility Code.[10]

In another example, subpart (3)(iv) very broadly references the phrase "any service." The broad references to "any" and "other" services concerning advertising and

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[8] 52 Pa.Code §54.122(3) ("An electric distribution company or electric generation supplier may not engage in false or deceptive advertising to customers with respect to the retail supply of electricity in this Commonwealth.")

[9] Borough of Lansdale v. Philadelphia Electric Co., 403 Pa. 647, 170 A.2d 565 (1961).

[10] For example, the provision should read: "An LEC may not engage in false or deceptive advertising *to customers* with respect to the offering of any telecommunications service in this Commonwealth."

marketing efforts do not appear in the electric industry's Code of Conduct.[11] Indeed, a literal reading of this subpart would prohibit ILECs from informing the consumer that the continuation of Caller ID, for example, is contingent upon subscribing to dial tone service. Moreover, in subpart (3)(iv), there is no qualifier that would authorize the statement if "factually substantiated".[12]

Clearly, when compared to the electric industry's Code of Conduct, such references to "any service" and "other services" in subpart (3)(iv) are overly broad and vague. As a result, subpart (3)(iv) is not rationally related to the purpose of establishing regulations pursuant to Section 3005(b) and 3005(g) of the Public Utility Code. Accordingly, even if the Commission retains some form of restriction on corporate advertising and marketing efforts, Sprint submits that Subpart (3)(iv) should be deleted in its entirety.

If these provisions pass constitutional muster, the proposed restrictions in Section 63.144(3) are unnecessary given the remaining protections of Section 63.144 and given Pennsylvania's Unfair Trade Practices and Consumer Protection Law.[13] The trade practice activities sought to be restricted in Section 63.144(3) are outside the

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[11] The only restriction to advertising and marketing in the electric code of conduct appears at 52 Pa. Code §54.122(3), as quoted above in footnote 8.

[12] It appears that subpart (3)(iv) mutated from "Competitive Safeguards" code of conduct proposal published in the *Pennsylvania Bulletin* on January 29, 2000:

> (8) An ILEC, its affiliates, divisions or operating units, may not state or imply any of the following:
>
> * * *
>
> (iii) The continuation of certain services from the ILEC are contingent upon taking the full range of service offered by the ILEC.

[13] 73 P.S. §§201-1 to 201-9.3.

Commission's jurisdiction to regulate.[14]

The Commission correctly declined to restrict joint marketing activities because the Commission was "not convinced that a restriction is necessary to foster competition in the local exchange market."[15] The Commission should do the same relative to Section 63.144(3).

IV. CONCLUSION

Sprint appreciates the opportunity to present these Joint Comments and requests that the Commission consider its recommendations as to these issues.

Respectfully submitted,

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Sprint Communications Company, L.P. and The United Telephone Company of Pennsylvania

Dated: May 20, 2002

[14] The Commission has previously, and correctly, determined that it does not have jurisdiction to enforce Pennsylvania's Unfair Trade Practices and Consumer Protection Law. Pa. P.U.C. et al. v. The Bell Telephone Co. of Pa., 71 Pa. P.U.C. 338, 341 (1989); Mid-Atlantic Power Supply Association v. PECO Energy Company, 1999 Pa. PUC LEXIS 30 (Order, May 19, 1999).

[15] *Proposed Rulemaking Order* at 16.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Proposed Rulemaking Regarding Competitive Safeguards Under 66 Pa. C.S. §§3005(b) and 3005(g)(2)	))))	Docket No. L-00990141

CERTIFICATE OF SERVICE

I hereby certify that I have on this 20th day of May, 2002, served a true and correct copy of Sprint's Joint Comments upon the persons below, via first-class mail, unless otherwise specified, in satisfaction of the requirements of 52 Pa. Code § 1.54.

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