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**INDEPENDENT REGULATORY REVIEW COMMISSION**  
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

July 3, 2002

Honorable Glen Thomas, Chairman  
Pennsylvania Public Utility Commission  
Keystone Building  
400 North Street  
3<sup>rd</sup> Floor, North Wing  
Harrisburg, PA 17105

Re: Regulation #57-224 (IRRC #2266)  
Pennsylvania Public Utility Commission  
Generic Competitive Safeguards

Dear Chairman Thomas:

Enclosed are the Commission's Comments which list objections and suggestions for consideration when you prepare the final version of this regulation. These Comments are not a formal approval or disapproval; however, they specify the regulatory criteria which have not been met.

The Comments will soon be available on our website at [www.irrc.state.pa.us](http://www.irrc.state.pa.us). If you would like to discuss them, please contact my office at 783-5417.

Sincerely,

Robert E. Nyce  
Executive Director  
wbg  
Enclosure

cc: Honorable Dennis M. O'Brien, Majority Chairman, House Consumer Affairs Committee  
Honorable Joseph Preston, Jr., Democratic Chairman, House Consumer Affairs Committee  
Honorable Clarence D. Bell, Chairman, Senate Consumer Protection and Professional  
Licensure Committee  
Honorable Lisa M. Boscola, Minority Chairman, Senate Consumer Protection and Professional  
Licensure Committee

# **Comments of the Independent Regulatory Review Commission**

on

## **Pennsylvania Public Utility Commission Regulation No. 57-224**

### **Generic Competitive Safeguards**

**July 3, 2002**

We submit for your consideration the following objections and recommendations regarding this regulation. Each objection or recommendation includes a reference to the criteria in the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) which have not been met. The Pennsylvania Public Utility Commission (PUC) must respond to these Comments when it submits the final-form regulation. If the final-form regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.

#### **1. Section 63.141. Statement of purpose and policy. - Clarity.**

Subsection (c) states that the code of conduct in this proposed regulation “supersedes and replaces any other codes of conduct applicable to any LEC.” This provision is vague because it implies that there are multiple codes of conduct currently in place, but does not identify them. Based on discussions with PUC staff, however, we understand that the Interim Code of Conduct adopted in the Global Order for Verizon-PA is the only code of conduct currently in effect. The final-form regulation and the accompanying order should specifically identify the code of conduct that will be superseded by this rulemaking.

#### **2. Section 63.142. Definitions. - Consistency with statute; Clarity.**

##### *Competitive service*

This term is defined as “a service or business activity offered by an *incumbent or CLEC*....” (Emphasis added.) In order to be consistent with other references to incumbent local exchange carriers in this regulation, the acronym “ILEC” should replace the word “incumbent” in this definition.

##### *Telecommunications service*

The proposed definition includes the words “signaling” and “data” which are not included in the statutory definition (66 Pa. C. S. A. § 3002). The PUC should either use the statutory definition of “Telecommunications service” or explain why it is necessary to include the words “signaling” and “data” within the definition in the final-form regulation. If these words remain within the definition, then they should be defined in the final-form regulation and the PUC should explain its jurisdiction over signaling and data transmission.

##### *Wholesale functions and Retail services*

The proposed regulation utilizes these terms, but does not define them. Clarity would be improved if these terms were defined in the final-form regulation.

**3. Section 63.143. Accounting and audit procedures for large ILECs. - Need; Fiscal impact; Reasonableness; Clarity.**

*Paragraph (2)*

This paragraph requires the wholesale operating unit of the incumbent local exchange carrier (ILEC) to "keep separate accounting and business records." We have two concerns which were also raised by Representative Dennis M. O'Brien, Chairman of the House Consumer Affairs Committee and Representative Joseph Preston, Jr., Democratic Chairman of the House Consumer Affairs Committee.

First, the regulation does not specify what documents the ILEC is required to maintain. Verizon estimates that its implementation costs could range from \$10,000 to \$100,000,000, depending on how the PUC interprets the record keeping requirements. Without specific record keeping requirements in the regulation, compliance costs cannot be determined.

Second, the purpose of these requirements is unclear. According to the Preamble, the accounting rules and business record keeping requirements will allow the PUC "to monitor and prevent discriminatory conduct." However, the PUC has not explained and we are unable to determine how the requirements in Paragraph (2) will accomplish this goal.

We note that Paragraph (8) provides a means for the PUC to monitor the ILEC's business practices through an independent compliance review. This review can be tailored to specific concerns, such as discriminatory practices. Absent greater specificity and compelling justification for the record keeping requirements, the PUC should eliminate the requirements in Paragraph (2) and rely on its ability to audit specific areas of concern under Paragraph (8).

*Paragraph (3)*

This paragraph prohibits the wholesale operating unit from engaging in "any marketing, sales, advertising or subscription activities directed at retail customers." Since the function of the wholesale operating unit is to provide wholesale services to competitive local exchange companies (CLECs), not retail customers, it is unclear why this provision is included in the regulation. The PUC should delete this provision in the final-form regulation, or explain how it would apply to the wholesale operating unit.

*Paragraph (4)*

Under this paragraph, costs of resources associated with performance of wholesale functions "shall be allocated using *appropriate allocation factors*." (Emphasis added.) However, the regulation neither specifies the allocation factors nor prescribes the criteria for determining "appropriate" factors. The final-form regulation should specify the factors or the criteria for determining allocation factors.

*Paragraph (6)*

This paragraph prohibits employees of the wholesale operating unit from promoting the ILEC's retail services. Consistent with our comment on Paragraph (3), we question how this prohibition applies to the wholesale operating unit, since this unit provides services to CLECs, not retail customers. The PUC should delete this provision, or explain how it would apply to the wholesale operating unit.

*Paragraph (7)*

This provision requires the ILEC to "maintain contemporaneous records documenting all tariffed and nontariffed transactions between its wholesale operating unit and its other operations." In its comments, Verizon asserts that there are no tariffed transactions between its wholesale unit and

its retail unit. It is also unclear what nontariffed transactions are encompassed by this requirement. We request the PUC explain the need for and purpose of this requirement, or delete it from the final-form regulation.

*Paragraph (8)*

Under this paragraph, “an independent compliance review *may* be conducted every calendar year.” However, it is not clear under what circumstances the PUC will conduct reviews. The PUC should explain how it will determine when an “independent compliance review” is necessary and include the criteria for making this determination in the final-form regulation.

**4. Section 63.144. Code of conduct. - Reasonableness; Clarity.**

*Omission of Interim Code of Conduct Paragraph (3)*

Paragraph (3) of the Interim Code of Conduct contains the following provision:

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.

It appears that this provision was intended to prevent the ILEC from securing a competitive advantage by withholding market information from CLECs. However, this competitive safeguard is not included in the proposed regulation. CLECs have commented that without this safeguard, they will not have a level playing field on which to compete. We believe this is a valid concern.

In the Preamble, the PUC states that the code of conduct is intended to “prevent unfair competition and ensure nondiscriminatory access to an ILEC’s services and facilities by competitors....” Paragraph (3) of the Interim Code of Conduct appears to be consistent with these goals. Therefore, the PUC should include this provision in the final-form regulation, or explain why it is not in the public interest to do so.

*Paragraph (1) Nondiscrimination.*

Paragraph (1)(i) states that “an ILEC may not give itself... any preference or advantage over any other CLEC... *unless expressly permitted by State or Federal law.*” (Emphasis added.) The exception allowed under other State or Federal laws is vague and open to interpretation. We note that the comparable provision in the electric code of conduct (52 Pa. Code § 54.122(1)) does not contain this exception. In the final-form regulation, the State and Federal laws that allow an ILEC to give itself preference should be referenced, or this exception should be deleted.

Paragraph (1)(ii) states 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 or on a *direct or indirect commitment* not to deal with any CLEC.” (Emphasis added.) Clarity would be improved if the terms “direct commitment” and “indirect commitment” were defined in this section.

**5. Section 63.145. Remedies. - Clarity.**

Subsection (a) states “...under relevant provisions of 66 Pa. C. S. (relating to the Public Utility Code).” The PUC should cite the specific sections of the Public Utility Code that apply.