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INDEPENDENT REGULATORY

May 11, 2009

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

**VIA HAND DELIVERY**

**RE: Provision of Bundled Service Package Plans at a Single Monthly Rate by Local Exchange Carriers; Docket No. L-00060179**

Dear Secretary McNulty:

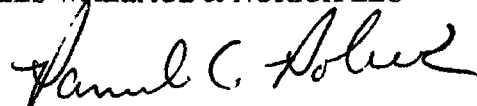
Enclosed for filing with the Commission are an original and three (3) copies of the Petition for Reconsideration and Clarification of the Broadband Cable Association of Pennsylvania ("BCAP") in the above-referenced proceeding.

As reflected on the attached Certificate of Service, all parties to this proceeding are being duly served. Please date stamp the extra copy of this transmittal letter and kindly return it to us for our filing purposes. Thank you for your attention to this matter.

Very truly yours,

McNEES WALLACE & NURICK LLC

By



Pamela C. Polacek  
Counsel to the Broadband Cable  
Association of Pennsylvania

PCP/km

- c: Chairman James H. Cawley (via Hand Delivery)
- Vice Chairman Tyrone Christy (via Hand Delivery)
- Commissioner Kim Pizzingrilli (via Hand Delivery)
- Commissioner Robert F. Powelson (via Hand Delivery)
- Commissioner Wayne E. Gardner (via Hand Delivery)
- Bohdan Pankiw, Esq., Chief Counsel (via Hand Delivery)
- Elizabeth Lion Januzzi, Esq., Law Bureau (via Hand Delivery)
- Holly Frymoyer, Telecommunications Policy & Evaluation Supervisor (via Hand Delivery)
- Cheryl Walker Davis, Esq., Office of Special Assistants (via Hand Delivery)
- Certificate of Service

**CERTIFICATE OF SERVICE**

I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of Section 1 54 (relating to service by a participant).

**VIA E-MAIL AND FIRST CLASS MAIL**

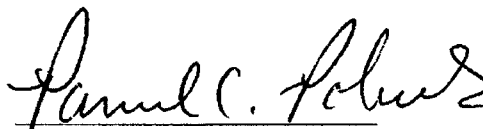
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of Pennsylvania

Dated this 11<sup>th</sup> day of May, 2009, in Harrisburg, Pennsylvania.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Rulemaking Re: Provision of Basic Service :  
in Bundled Service Package Plans by Local : Docket No. L-00060179  
Exchange Carriers :

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**PETITION FOR RECONSIDERATION OF THE  
BROADBAND CABLE ASSOCIATION OF PENNSYLVANIA**

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Pursuant to Section 703(g) of the Pennsylvania Public Utility Code, 66 Pa C.S. § 703(g), and Section 5.572 of the Pennsylvania Public Utility Commission's ("PUC" or "Commission") regulations, 52 Pa. Code § 5.572, the Broadband Cable Association of Pennsylvania ("BCAP") files this Petition for Reconsideration ("Petition") of the Order of the Commission entered March 27, 2009, in the above-referenced proceeding ("March 27 Order").<sup>1</sup>

1. The Commission enumerated its standard for reconsidering orders in Duick v. Pennsylvania Gas and Water Co., 56 Pa. P.U.C. 553, 559 (1982). In pertinent part, the Commission stated that a "petition for reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part," and that the Commission "expect[s] to see raised in such petitions . . . new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission." Id.

2. BCAP submits that each argument or consideration set forth in this Petition is either new and novel or was overlooked or not addressed by the Commission in rendering the March 27 Order. Therefore, the standards of Duick have been satisfied, and BCAP respectfully requests

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<sup>1</sup> This Petition for Reconsideration is being filed in accordance with the April 24, 2009, Secretarial Letter which extended the time period for filing a petition for reconsideration and/or clarification in this proceeding until May 11, 2009. This extension was granted because BCAP did not receive service of the March 27 Order.

that the Commission exercise its discretion to grant this Petition for Reconsideration, rescind the March 27 Order and issue a new or amended order incorporating the changes discussed herein.

***A. The Commission Should Reconsider and Amend the March 27 Order Because the Commission Overlooked the Modification of the Definition of "Basic Service" in its Regulations That is Necessary to Conform with the Changes Implemented to Chapter 30 by Act 183.***

3. As the Commission recognizes in the March 27 Order, "[u]nder the basic tenets of statutory construction, 'when the words of a statute are clear and free from all ambiguity, the letter of the law is not disregarded under the pretext of pursuing its spirit.'" March 27 Order at 8. Despite this recognition, the Commission reads Chapter 30 in a way to conclude "that defined protected service, and the basic service it includes, continues to be protected service, whether included in a bundled package of services by ILECs or CLECs, unless and until the Commission reclassifies the service pursuant to a Section 3016(a)(1) proceeding." March 27 Order at 13-14. The Commission does this through its authority to provide consumer protections for what it calls "basic protected telephone service." See generally March 27 Order. This conclusion, as well as the current definition of "basic service" in Section 64.2, are at odds with the changes to the Public Utility Code implemented in 2004 by Act 183. See 66 Pa. C.S. § 3011 et seq. Specifically, the current definition of "basic service" in the Commission's regulations is inconsistent with Chapter 30 because it is not limited to Incumbent Local Exchange Carriers ("ILECs"). Accordingly, the March 27 Order and its conclusion to apply the proposed regulations to Competitive Local Exchange Carriers ("CLECs") based on the conclusion that a CLEC provides "protected services" must be reconsidered.

4. Section 3012 of the Public Utility Code defines "protected service" as:

The following telecommunications services provided by a local exchange telecommunications company unless the commission has determined the service to be competitive:

- (1) Service provided to residential consumers or business consumers that is necessary to complete a local exchange call;
- (2) Touch-tone service;
- (3) Switched access service;
- (4) Special access service;
- (5) Ordering, installation, restoration and disconnection of these services.

66 Pa. C.S. § 3012 (emphasis added). This definition is nearly identical to the definition of "protected telephone service" that was contained in Section 3002 of the original Chapter 30 statute, which stated:

"Protected telephone service." The term includes the following telecommunications services provided by a local exchange telecommunications company, unless the commission determines, after notice and a hearing, that the service is competitive:

- (1) Telecommunications service provided to business or residential consumers that is necessary for completing a local exchange call.
- (2) Touch-tone service.
- (3) Switched-access service.
- (4) Special-access service.
- (5) Ordering, installation, restoration and disconnection of these services.

66 Pa. C.S. § 3002 (repealed and replaced by Act 183, 66 Pa. C.S. § 3011 et seq.) (emphasis added).

5. When the General Assembly revised Chapter 30 through Act 183, it implemented a modification to the definition of "local exchange telecommunications company," which is the type of carrier that, by definition, provides "protected services" (under Act 183) or "protected telephone services" (under the original Chapter 30). Specifically, the original definition of "local exchange telecommunications company" stated: "a carrier authorized by the commission to

provide local telecommunications services" (66 Pa. C.S. § 3002 (repealed and replaced by Act 183, 66 Pa. C.S. § 3011 et seq.)), while the current definition states:

An incumbent carrier authorized by the commission to provide local exchange telecommunications services. The term includes a rural telecommunications carrier and a nonrural telecommunications carrier.

66 Pa. C.S. § 3012 (emphasis added). Further, Act 183 added a new term to Chapter 30, "[a]lternative service provider" to define an "entity that provides telecommunications services in competition with a local exchange telecommunications company." Id.

6. The Commission's regulations in Chapter 64 do not use the statutory terms "local exchange telecommunications carrier," "alternative service provider" or "protected services." See generally 52 Pa. Code § 64.2 (definitions). Rather, in place of distinguishing "local exchange telecommunications carriers" and "alternate service providers," Chapter 64 uses the term "Local Exchange Carrier" or "LEC," which is defined as "[a] public utility which provides basic service either exclusively or in addition to toll service." Id.

7. Additionally, in place of the statutory term "protected service," Chapter 64 uses "basic service," which is defined as:

The transmission of messages or communications by telephone between points within a local calling area as established in the tariff of an LEC, including installation service, providing and restoring access lines, touch tone service and handling of unpaid checks as addressed in § 64.11 (relating to method of payment). The term includes charges for 911 service, telecommunications relay service and subscriber line service, but does not include premise visits for installation of new service.

52 Pa. Code § 64.2.

8. When analyzing the definition of "protected service" in the March 27 Order, the PUC admits that "protected service" in Chapter 30 encompasses the definition of "basic service" in the

PUC's regulations: "[u]nder this section, the statute expressly states that basic service is 'protected service' and specifically requires that it remain so unless the Commission determines it to be competitive." March 27 Order at 11. BCAP agrees with this conclusion, however, as illustrated above, current PUC regulations defining "basic service" are inconsistent with Chapter 30 because "protected service," as statutorily defined, is service provided by a local exchange telecommunications company, which is an incumbent carrier (i.e., ILEC) and not an alternative service provider (i.e., CLEC). See 66 Pa. C.S. § 3012 (emphasis added). Concluding that CLECs can provide both "protected service" and "basic service" effectively ignores the General Assembly's change to the definition of "local exchange telecommunications carrier" that was made through Act 183, and also ignores the plain meaning of the statute. Accordingly, the current definition of "basic service," which the Commission interprets to apply to all LECs (ILECs and CLECs) is not consistent with the modifications in Chapter 30 and must be revised accordingly.

9. In fact, the Commission's conclusion that a CLEC could reclassify a service as "non basic" under Section 3016(a)(1) provides further support for the conclusion that CLECs do not provide basic service at any time. Specifically, Section 3016(a)(1) states:

A local exchange telecommunications company may petition the commission for a determination of whether a protected or retail noncompetitive service or other business activity in its service territory or a particular geographic area, exchange or group of exchanges or density cell within its service territory is competitive based on the demonstrated availability of like or substitute services or other business activities provided or offered by alternative service providers. The commission, after notice and hearing, shall enter an order granting or denying the petition within 60 days of the filing date or within 150 days of the filing date where a protest is timely filed, or the petition shall be deemed granted.

66 Pa. C.S. § 3016(a)(1). In addition to using the term "local exchange telecommunications company," which is defined as an incumbent carrier (i.e., ILEC), Section 3016(a)(1) specifically references the availability of like or substitute services from alternative service providers (i.e., CLECs) as a basis for an ILEC to request reclassification of protected (e.g., basic) service as competitive. Id. Accordingly, alternative service providers do not need the Section 3016(a)(1) reclassification process because all of their voice services are already competitive vis-à-vis the ILEC's services, and are recognized as such in the statute.

10. Clearly, in Act 183, the General Assembly recognized that services offered by alternative service providers are "regulated" by market forces because a consumer can make a choice of whether to subscribe to the competitive offering. The provisions that apply to "all telecommunications carriers," which includes alternative service providers, are very narrow. See 66 Pa. C.S. § 3019(b), (d), (f) and (i). Construing this limited authority as allowing the detailed regulation of CLEC service bundles set forth in the proposed regulations<sup>2</sup> to apply simply because the bundle includes the ability of residential or business consumers to complete a local exchange call eviscerates the legal and policy distinction between incumbents and competing alternative service providers in Act 183.

11. It is not necessary to extend to CLECs by regulation the provisions in Act 183 regarding the ability to offer bundled packages or to request the classification of a service "competitive"

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<sup>2</sup> The proposed regulations specify the service terms and conditions for competitive CLEC bundles, including billing format, disclosure notices, payment priority when partial payments are submitted and the requirement to convert the customer to "basic service" prior to initiating service suspension or termination. Although Section 3019(b)(2) preserves the Commission's authority to address termination of service, there are existing Commission regulations at Sections 64.61-63, 64.71-75 and 64.101-109 that also address service termination, which the proposed regulations envision will apply if the customer does not pay the basic service charges on the bill. See 52 Pa C.S. § 64.71(c)(proposed). Although BCAP questions whether all of the existing suspension and termination regulations should apply to alternative service providers who do not, by definition, provide protected services, clearly Act 183 did not intend to create an additional layer of requirements for alternative service providers that would apply before the actual suspension and termination regulations themselves (if those regulations remain applicable to competitive alternative service providers under Chapter 30).



because those provisions were intended to apply only to ILECs. See March 27 Order at 5. Common sense indicates that the General Assembly did not intend to provide more pricing and service freedom to incumbent carriers than the freedom enjoyed by alternative service providers as a natural result of alternative service providers' position in the market as competitors to the ILECs. It is more reasonable to conclude that, when passing the final version of Act 183, the General Assembly recognized that the freedom to offer bundled packages of any configuration already exists for alternative service providers, which by definition offer competitive services, and that specific authorization to do so is not needed for alternative service providers (i.e., CLECs). This interpretation is more consistent with the declaration of policy for Act 183, which indicates that it is the policy of the Commonwealth to "recognize that the regulatory obligations imposed upon the incumbent local exchange telecommunications companies should be reduced to levels more consistent with those imposed upon competing alternative service providers." 66 Pa. C.S. § 3011(13). Of course, the General Assembly also made an important limitation on that policy with respect to protected services, which only incumbent carriers have an obligation to provide.

12. It is understandable that Commission regulations which predate Act 183 and use different terms than the statute may not be in accord with revised Chapter 30; however, where conflicts exist (such as reconciling the definition of "protected service" and the definition of "basic service"), the PUC needs to harmonize its regulations with Chapter 30. See Leslie R. Ransom v. Pennsylvania-American Water Co., No. C-903045, 1991 WL 502072 at \*5 (statutory construction requires resolution of conflicts between regulations and statutes by giving effect to clear and unambiguous statutory language); see also Pennsylvania Pub. Util. Comm'n v. Peoples Natural Gas Co., 78 Pa. PUC 377, 393 (1993).

13. The proper solution to this conflict is to revise the Commission's regulations to reflect the changes the General Assembly implemented regarding the Commission's limited oversight of alternative service providers; the solution is not concluding that because the Commission has traditionally used the term "LEC" to apply to both incumbents and competitive carriers, the Commission can unilaterally expand its jurisdiction over protected services to include similar services provided as part of a CLEC's bundled service package. See Peoples Natural Gas Co. v. Pennsylvania Pub. Util. Comm'n, 664 A.2d 664, 666 (Pa. Cmwlth., 1995) (PUC can only exercise powers expressly granted to it by statute or that are necessarily implied from its express powers).

14. BCAP recognizes that, since the enactment of Act 183, the Commission has not yet initiated a comprehensive review of its regulations to analyze how the regulations must be changed to conform with the current Chapter 30. Accordingly, the Commission may need more in depth review or, at minimum, an independent analysis of all of its regulations to see whether they conform with the revised Chapter 30. As an interim measure, the Commission must reconsider the March 27 Order to confirm that regulations pertaining to "basic service" provided within a bundled package do not apply to CLECs based on the clear statutory language in Act 183.

***B. The Commission Overlooked the Revised Definition of Protected Service as Services Offered Only by Incumbent Local Exchange Telecommunication Companies When Concluding that the Plain Language of the Voice-over-Internet-Protocol Freedom Act Does Not Prohibit Application of the Proposed Regulations to Bundled Service Packages Offered by Competitive Carriers Using IP-Enabled Networks.***

15. As set forth above, the Commission lacks jurisdiction over the rates, terms and conditions of CLEC bundled packages; however, to the extent any ambiguity exists with regard to the PUC's ability to apply the bundled service regulations to CLEC packages, then the Voice-over-

Internet Protocol Freedom Act of 2008 clearly removes Commission oversight if a CLEC is using an IP-enabled network or VoIP service. See Voice-over-Internet Protocol Freedom Act, 73 P.S. § 2251.1 et seq. (hereinafter "VoIP Freedom Act" or "Act").

16. The VoIP Freedom Act defines "Internet protocol-enabled service" or "IP-enabled service" as:

Except as provided in the definition herein of "Voice-over-Internet protocol service," a service, capability, functionality or application provided using Internet protocol or any successor protocol that enables an end user to send or receive a communication in Internet protocol format or any successor format, regardless of whether the communication is voice, data or video.

73 P.S. § 2251.2. As indicated above, the Act also pertains to VoIP service, which is defined as:

- (1) enabl[ing] real-time, two-way voice communications that originate or terminate from the user's location in Internet protocol or any successor protocol;
- (2) us[ing] a broadband connection from the user's location; and
- (3) permit[ting] users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

Id.

17. As BCAP has previously commented, legislative and regulatory changes such as the VoIP Freedom Act confirm the policy of Pennsylvania to assume a "hands-off" regulatory approach for voice services offered by competitive entrants, especially when those services are offered over IP-enabled or VoIP networks. See BCAP Supplemental Comments at 2. Specifically, the prohibition of regulation of VoIP and IP-enabled service is articulated in Section 4 of the Act, which states:

Except as set forth in Sections 5 and 6, notwithstanding any other provisions of law, no department, agency, commission or political subdivision of the Commonwealth may enact or enforce, either directly or indirectly, any law, rule, regulation, standard, order or other provision having the force or effect of law that regulates, or

has the effect of regulating, the rates, terms and conditions of VoIP service or IP-enabled service.

73 P.S. § 2251.4.

18. Despite this prohibition, the VoIP Freedom Act also preserves Commission regulatory authority over protected services, stating:

Nothing in this act shall be construed to modify any of the following:

- 1) the authority of a Commonwealth department, agency or commission to enforce applicable federal or state statutes or regulations relating to any of the following:
  - a) The provision and administration of enhanced 911 service and nondiscriminatory 911 fees.
  - b) Telecommunications relay service fees.
  - c) Universal Service Fund Fees.
  - d) Switched network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange telecommunications company.
  - e) Rates, terms or conditions of protected services provided under tariffs which are subject to approval by the Pennsylvania Public Utility Commission.

73 P.S. § 2251.6. Accordingly, upon review of this Section in the March 27 Order, the Commission concludes, "[t]he General Assembly clearly intends that the relevant consumer protections for basic protected telephone service encompassed under Chapter 64 of the Public Utility Code be preserved." March 27 Order at 12.

19. Although the PUC is correct that "protected services" are carved out of the application of the VoIP Freedom Act, as explained in detail in Paragraph Eight of this Petition, CLECs, by definition, do not provide protected services. According to the language of 73 P.S. § 2251.6, the "protected services" subject to approval by the PUC are those articulated in Chapter 30, which only relate to ILECs. Therefore, the plain language of the VoIP Freedom Act clearly removes any PUC jurisdiction over services provided by CLECs that use IP-enabled platforms, except

with respect to applicable regulations regarding 911, telecommunications relay service fees and universal service fund fees. See 73 P.S. § 2251.6. Any attempt by the Commission to regulate services by these entities is in violation of the VoIP Act and should be disregarded.

20. One of the central aspects of the regulations established in this proceeding is to require a carrier to convert a customer to "basic service" if an entire bill for a bundled service package is not paid. As explained in BCAP's Comments, this, in essence, obligates carriers (including CLECs) to provide "basic service" as a stand-alone option. See BCAP Comments at 4. Nothing in Chapter 30 of the Public Utility Code, as revised by Act 183, grants the Commission the authority to mandate the provision of basic service by CLECs. Id. Section 3019(g) specifically states that "the commission may not fix or prescribe the rates, tolls, charges, rate structures, rate base, rate of return or earnings of competitive services or otherwise regulate competitive services except as set forth in this chapter." 66 Pa C.S. § 3019(g). In addition, mandating the provision of specific services by competitive entrants may detrimentally impact competitors' willingness to provide any voice services to customers. This result would be contrary to the pro-competitive goals of both Act 183 and the VoIP Freedom Act. See 66 Pa. C.S. § 3011(5), (8), and (9); 73 P.S. § 2251.2.

21. The VoIP Freedom Act declares:

The proliferation of new technologies and applications and a growing number of providers developing and offering innovative services using Internet protocol is due in large part to little regulation, including freedom from regulations governing traditional telephone service, that these new technologies and the companies that offer them have enjoyed in this Commonwealth. The economic benefits, including consumer choice, new jobs and significant capital investment, will be jeopardized and competition minimized by the imposition of traditional State entry and rate regulation on voice-over-Internet protocol and Internet protocol-enabled services.


73 P.S. § 2251.2(2). Applying the proposed bundled service package regulations to VoIP service offered by competitive providers will jeopardize these benefits by subjecting any service offering that contains the ability to complete a local call to the Commission's jurisdiction. This is contrary to the letter and spirit of the VoIP Freedom Act.

22. It is evident that the Commission's action in overlooking the changes to the definition of "protected services" in Act 183 led to the conclusion that the VoIP Freedom Act did not provide further support for exempting CLECs that use IP-enabled networks from the regulations established in this Rulemaking. BCAP urges the Commission to rectify this omission by reconsidering the March 27 Order by clarifying that the regulations related to the provision of protected services are specifically and exclusively applicable to services provided by local exchange telecommunications carriers (i.e., ILECs) as specified in Chapter 30.

**WHEREFORE**, the Broadband Cable Association of Pennsylvania respectfully requests that the Commission grant this Petition for Reconsideration and amend the March 27 Order consistent with the arguments contained herein.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

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