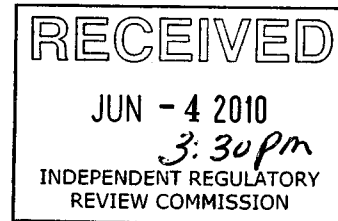




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2673.

June 4, 2010

Via Hand Delivery

Hon. Arthur Coccodrilli, Chairman
Pennsylvania Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

In re: PUC Final Regulation #57-260, "Abbreviated Procedures for Review of Transfer of Control and Affiliate Filings for Telecommunications Carriers" (IRRC #2673)

Dear Chairman Coccodrilli:

Enclosed for filing please find one copy of the Comments of the Pennsylvania Telephone Association in the above-referenced matter.

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

Very truly yours,

THOMAS, LONG, NIESEN & KENNARD

By:


Norman J. Kennard

cc: George D. Bedwick, IRRC Vice Chairman
Silvan B. Lutkewitte, III, IRRC Commissioner
John F. Mizner, IRRC Commissioner
S. David Fineman, IRRC Commissioner
Kim Kaufman, IRRC Executive Director
Joseph K. Witmer, Esquire, PA PUC

Senate Consumer Affairs and Professional Licensure Committee Members:

Hon. Lisa M. Boscola
Hon. Robert M. Tomlinson

House Consumer Affairs Committee Members:

Hon. Robert W. Godshall
Hon. Joseph Preston, Jr.

**BEFORE THE
INDEPENDENT REGULATORY REVIEW COMMISSION**

**PUC Final Regulation #57-260, "Abbreviated
Procedures for Review of Transfer of Control
and Affiliate Filings for Telecommunications
Carriers" : IRRC #2673**

**COMMENTS OF
THE PENNSYLVANIA TELEPHONE ASSOCIATION**

INTRODUCTION

The Pennsylvania Telephone Association (“PTA”)¹ acknowledges and appreciates the various changes made by the Pennsylvania Public Utility Commission (“PUC”) in the Final Rulemaking Order² including the decision to allow the current “20% rule” for change of control applications to remain in effect. However, there is no reform offered to the abusive “protest” process. This is of grave concern to the PTA member companies.

Change of control cases represent the sale of parent (or grandparent) company stock or a spin-off of properties to another entity, most frequently another company owning other telecommunications property in the Commonwealth or operating local telephone companies elsewhere. There should be little controversy associated with these proceedings, since these consolidations and spin-offs are sometimes necessary to improve the scale and scope or focus of the rural telephone industry. The number of these transactions over the last five years is proof of

¹ The PTA is the state’s oldest trade organization for the local exchange carrier industry. The PTA represents more than 30 telecommunications companies that provide a full array of services over wire line networks. PTA members support the concept of universal service and are leaders in the deployment of advanced telecommunications capabilities.

² *Rulemaking to Amend Chapter 63 Regulations so as to Streamline Procedures for Commission Review of Transfer of Control and Affiliate Filings for Telecommunications Carriers*, Docket No. L-00070188 and *Petition of Level 3 Communications, LLC, To Amend the Public Utility Commission Regulations to Streamline Transfer of Control and Affiliate Filing Requirements for Competitive Carriers*, Docket No. P-00062222, Final Rulemaking Order entered April 29, 2010.

the importance of maintaining a viable presence in rural Pennsylvania in the face of competition from such giants as Comcast, Time Warner Cable, Verizon Wireless and AT&T Wireless.

The applicable statutory standard in a change of control case is whether approval of the proposed transaction is “necessary and proper for the service, accommodation, convenience and safety of the public.”³ Moreover, under case law, the transaction must “affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way.”⁴

Examples of substantial affirmative benefits that the PUC has accepted as satisfying the standard in *City of York* include: statements that economies of scale will occur in administrative, employee, executive and insurance areas; greater bargaining position for obtaining capital; improved labor market conditions; corporate structure and size more likely to attract investors; improved service, simplified relationships with other businesses and government agencies; and improved administration of tariffs and simplification of regulatory matters.⁵ The PUC has found “company strengthening” impacts of a proposed merger to constitute affirmative public benefits to support granting merger approval.⁶ The affirmative benefit standard is a broad standard that

³ 66 Pa. C.S. § 1103.

⁴ *City of York v. Pa. P.U.C.*, 295 A.2d 825 (Pa. Supreme 1972).

⁵ *City of York*, 295 A.2d at 828-29; *See also*, and *Re PG Energy*, 1999 WL 1036580 (Pa. P.U.C.) (September 15, 1999) (substantial affirmative benefits included: more stable and financially robust company, economies through consolidation of certain public company functions and purchasing practices, enhanced ability to raise and attract capital, diversification of risk associated with smaller service area’s weather and economic conditions).

⁶ *Joint Application of Frontier Communications of Breezewood, Inc., Frontier Communications of Canton, Inc., Frontier Communications of Lakewood, Inc., Frontier Communications of Oswayo Rover, Inc., Frontier Communications of Pennsylvania, Inc. Frontier Communications of America, Inc., For All approvals Under the Public Utility Code To Complete the Merger with and Transfer of all of the Utilities’ Stock of the Corporate Parent, Frontier Subsidiary Telco, Inc. by Citizens Communications Co.*; Docket Nos. A-310400F; A-310550F; A-311750F; A-312600F; A-311250F; and A-310153F; *Joint Application of SBC Communications, Inc., and AT&T Corp. Together with its Certificated Pennsylvania Subsidiaries for Approval of Merger*, Docket No. A-311163F006, Opinion and Order entered October 6, 2005.

does not require specific quantification of synergy savings.⁷ In affirming the PA PUC's decision in the Verizon/MCI merger, the Pennsylvania Supreme Court noted that rate conditions were not required because of "the recent and revolutionary changes affecting the telecommunications industry."⁸

THE FINAL REGULATIONS

The PA PUC's procedures for change of control desperately require reform. The Final Regulations are actually a step back from even the modest reform proposed by the PA PUC in the initially proposed regulations.

The Final Regulations will now subject every protested application to full litigation with no time frame imposed. In the case of a "general rule" transaction, the filing of a "formal protest or complaint shall... subject the transaction to traditional rule review." § 63.324 (f)(i). The same is true of a "pro forma" transaction: "if a formal protest or complaint to the transaction is filed, the challenge shall be reviewed as part of a traditional rule review proceeding." § 63.325 (b).

The "traditional rule" is the current practice, which the PA PUC describes as "the existing unlimited time span for an application." There is no time limit for conclusion. The matter is automatically assigned to an administrative law judge for full evidentiary hearings. See Appendix B. There are full briefs and exceptions in a very intensive process. While the PUC

⁷ *Re SBC Communications, Inc.*, 2005 WL 2901682 at 14 (Pa. P.U.C.) (October 6, 2005); *Re Verizon Communications, Inc.*, 2006 WL 995853 at 11. There are many examples of asset acquisition or merger cases in which the Commission did not require quantification of affirmative benefits. *See, e.g., Application of Newtown Artesian Water Co. and Indian Rock Water Co.*, 76 Pa. P.U.C. 260 (1992); and *Re PG Energy*, 1999 WL 1036580 (Pa. P.U.C.) (September 15, 1999); *Re PG Energy, supra*. Indeed, the subjects of quantification of savings and pass-through of those savings to customers are more appropriately addressed in rate proceedings subsequent to application approval proceedings. *See Application of Newtown Artesian Water Co.*, *supra*; *Re PG Energy, supra*.

⁸ *Popowsky v. Pa. Public Utility Comm'n*, 594 Pa. 583, 614 937 A.2d 1040 1058-1059 (2007).

seems to indicate that it might, as it did once before,⁹ dismiss a protest that fails to raise a “material fact,” there is no commitment to do so.

CHANGE OF CONTROL APPLICATIONS

In a change of control case, competent management of the existing company is being replaced by the equally competent and experienced management of the acquiring entity. As each of these companies explains when it files with the PA PUC, the economies of scale and scope are critical in a competitive marketplace.¹⁰ There is no change in any regulatorily significant aspect of the company’s operations, including as to rates or service. The transaction is usually a simple parent-level stock sale.

More expedited treatment is needed in Pennsylvania for several reasons, including employee uncertainty and frustration; customer uncertainty; the delay of new services; substantive work that could commence more rapidly on the smooth transition of billing and operating systems, and adverse effect on the companies’ stock price and attraction of capital. Once a sale is announced, all persons affected, employees, customers and shareholders, have lingering questions that cannot be resolved until the transaction is closed and new management becomes legally effective.

⁹ Per *Chester Water Authority*, 868 A.2d 384 (Pa. 2005), Commission need not hold evidentiary hearings under Section 1103(b), 66 Pa. C.S. § 1103(b), if there are no material factual issues in dispute.

¹⁰ The Commission has recognized and endorsed these benefits: “A financially stronger firm will benefit the public in several respects. The events of the recent past demonstrate the importance of financial strength for allowing a firm to survive turbulent economic times and provide quality utility service to consumers during an economic downturn. In addition, Embarq’s Pennsylvania ratepayers will benefit because the combined companies will be better able to invest in infrastructure and bring new products and services to market. Finding of Fact 59. Moreover, a financially stronger firm will benefit all Pennsylvania telecommunications consumers because the combined companies will be better positioned than Embarq, standing alone, to compete in today’s telecommunications marketplace.” *Joint Application of The United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania and Embarq Communications, Inc. for approval of the Indirect Transfer of Control to CenturyTel, Inc.*, Docket No. A-2008-2076038 (“*Embarq/Century Telephone Merger*”), Opinion and Order entered May 28, 2009 at 22-23

The filing of protests by the statutory advocates and competitors is a booming cottage industry. Upon publication of a merger application in the *Pennsylvania Bulletin*, numerous parties protest the application, all advancing a broad array of individual interests. In addition to the three statutory advocates – the Office of Consumer Advocate, the Office of Small Business Advocate, and the Office of Trial Staff – regular participants include competitors, interconnecting carriers, trade unions, low-income advocates, large customers, and others.

The protesting parties typically seek to extract some gain from their participation, regardless of whether the issues they raise relate to the transaction or even fall within the PUC’s jurisdiction. Thus, merger proceedings have become a forum in which interest groups pressure the applicant and PA PUC to award special benefits to their constituencies in the form of “merger concessions,” consisting of commitments to provide, for example, artificially low regulated prices (even freezes), employment guarantees, further broadband acceleration, favorable network interconnection terms, and competitive concessions, to name a few.

THE NEED FOR REFORM

Reduced and streamlined oversight is appropriate, even necessary for the ILECs. The telephone industry is no longer a monopoly, and the PUC is not the exclusive, or even dominant, influence over rates and services. The diversity and availability of fungible alternatives means that rates and revenues are not set on a “cost plus” basis anymore. The disciplines of a competitive marketplace much more effectively and thoroughly control the local exchange telephone industry than is the case for other utility industries, such as electric and natural gas distribution, water, and sewer, which continue to be exclusive service providers. Despite these seismic industry changes, nothing is proposed to change under the Final Regulations.

As noted in the PTA’s April 9, 2008 comments, many states, but not all, are more prompt in the review and approval of merger transactions involving telephone companies. No approval processes whatsoever for a parent level change of control is the rule in at least fourteen other states.¹¹ Other states with an approval process also have a “shot clock.”¹² The FCC’s § 214 process is 30-60 days.

Here, in Pennsylvania, there have been seven larger company merger/acquisition filings made by PTA members in the last approximately three years that have followed the “traditional process.” Despite the commercial urgency of mergers and acquisitions, the approval process has been interminable as the protestants jockey for negotiating advantage over the applicants. Settled cases consume six months or more (142 to 224 days), with litigated cases taking longer.¹³ The more recent cases before the PUC have followed this same pattern; Embarq/Century Telephone (187 days) and Denver & Ephrata/Windstream (167 days).

Two companies in all of these did not cave into the time pressure to close the transaction and agree to extraction of concessions by settlement. In the 2006 parent-level merger of Verizon and MCI Communications, which application was fully litigated, the PA PUC approved the transfer of control without the imposition of any conditions whatsoever, beyond those required

¹¹ The states with no approval process are: Alabama, Arkansas, Connecticut, Indiana, Kansas, Mississippi, Montana, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Texas and Wisconsin.

¹² Other states with a “shot clock,” include: Arizona (120 days), Colorado (45 days), Kentucky (60 days), Nevada (180 days), North Carolina (30 days), Ohio (30 days), Oklahoma (30 days), South Dakota (120 days), Utah (30 days), and Virginia (180 days). In most cases, if the state commission does not act within this time frame, then the transaction is deemed approved.

¹³ They are as follows:

<u>Companies</u>	<u>File Date/Final Order Date</u>	<u>Total Days</u>
Consolidated/NPSI (settled)	July 17, 2007 – December 5, 2007	142 Days
Citizens/CTE (settled)	Sept. 29, 2006 – Mar. 1, 2007	153 Days
Alltel/Windstream (settled)	Dec. 23, 2005 – June 12, 2006	171 Days
Sprint/Embarq (settled)	Aug. 26, 2005 – Apr. 7, 2006	224 Days
Verizon/MCI (litigated)	Mar. 7, 2005 – Jan. 11, 2006	310 Days

by the Federal Communications Commission (“FCC”) at the national level. This was affirmed by the Pennsylvania Supreme Court.¹⁴

More recently, in the Embarq/Century Telephone parent level merger approved in May of last year,¹⁵ the PUC dismissed many of the protestants’ collective demands as unnecessary, ill-advised or improper:

- **Accelerated Broadband Deployment**

There is no evidence that Embarq’s broadband deployment has been inadequate or deficient. Moreover, as stated above with regard to the proposed rate freeze, the synergy savings from this transaction will strengthen the financial position of a competitor in the telecommunications marketplace, which will, in turn, have several substantial affirmative benefits for the public. We are concerned that the cost of implementing the OCA’s proposal will undermine the benefits of the proposed transaction.¹⁶

- **Local Service Rate Freeze**

On consideration of the positions of the Parties, we will deny the Exceptions regarding the requested rate freezes. ...We do not find substantial evidence demonstrating that the requested conditions would be just and reasonable.The synergy savings from this transaction will strengthen the financial position of a competitor in the telecommunications marketplace, which will, in turn, have several substantial affirmative benefits for the public. We are concerned that the requested rate caps will undermine those benefits. ...”we are concerned that the proposed rate freeze “may prove counter-productive to the interests of the mass market in an increasingly competitive telecommunications environment.”¹⁷

- **Special Lifeline Campaign**

The record does not demonstrate that Embarq’s Lifeline program is inadequate or deficient. Moreover, the Joint Applicants have agreed to maintain Embarq’s existing standards of service in the post-merger period. We see no reason to modify the Initial Decision with regard to this proposed condition.¹⁸

In a similar vein, many of the Broadband Cable Association of Pennsylvania’s (“BCAP”) requested conditions were rejected outright as not relevant and the remainder deemed satisfied by the merger partners’ general condition confirming their “commitment to maintain substantially the service

¹⁴ *Popowsky v. Pennsylvania Pub. Util. Comm’n*, 594 Pa. 583, 611, 937 A.2d 1040, 1057 (2007).

¹⁵ *Embarq/Century Telephone Merger*, *supra*.

¹⁶ *Embarq/Century Telephone Merger*, Opinion and Order at 34-35.

¹⁷ *Id.* at 32-33.

¹⁸ *Id.* at 39.

levels that they currently provide for wholesale operations.” *Embarq/Century Telephone Merger*, Opinion and Order at 43-59.

The presiding ALJ was openly critical of the tendency of the statutory parties and BCAP to over reach, particularly on topics not affected by the merger.

In sum, OCA presents a veritable laundry list of proposed conditions, but can point to nothing in the record or within the PUC’s statutory authority requiring or even supporting their imposition. As such, the OCA’s proposed conditions are rejected as unreasonable, burdensome, and unnecessary.¹⁹

BCAP’s attempt to use this proceeding as a substitute for legally mandated negotiations under Sections 251 and 252 of the Telecom Act is inappropriate.... All aspects of the existing interconnection relationships between BCAP members and Embarq PA are carefully governed by federal law and regulation, and by interconnection agreements that were negotiated at arms-length, in good faith. The rights of BCAP members or future BCAP members who seek to interconnect are likewise protected by Sections 251 and 252 of the Telecom Act. BCAP impermissibly seeks to game the system in the guise neither of recommending conditions that are not needed nor in the public interest.²⁰

Absent the full litigation that Embarq endured, however, a change of control applicant must still accept concessions that exceed what the PUC would require were the case fully litigated. The most recent change of control settlement agreements contain the very terms that

¹⁹ *Embarq/Century Telephone Merger*, ALJ Initial Decision dated April 3, 2009 at 33.

²⁰ *Id.* at 35.

the PA PUC rejects in litigation, including further broadband deployment, freeze local service rates, launch special lifeline campaigns and other special interests.²¹

The PTA's prior Comments suggested that the PA PUC should set up a process for pre-review of protests to determine whether they contain any real averments of potential harm and suggested the following guidelines for such review:

1. A recognized interest in the application
2. A specific fact-basis allegation upon which a protest can be maintained
3. A demonstrated, causal nexus of the claimed harm to the application.
4. Novel or important issues.

As also noted by the PTA, a hearing is not absolutely required in a CPC application case.²²

THE LAW BUREAU COLLABORATIVE

The Law Bureau subsequently invited all interested participants to engage in a face-to-face collaborative to this rulemaking and to investigate alternative ideas to reform the currently broken process by which the PUC acts upon changes of control proceedings. The collaborative successfully engaged the parties.

As a result of these further discussions, Level 3, Verizon and the PTA agreed to suggest a different process where the PUC considers all of the issues raised in a comment process,

²¹ *Joint Application for Transfer of Control of Denver and Ephrata Telephone and Telegraph Company, Buffalo Valley Telephone Company, The Conestoga Telephone and Telegraph Company, and D&E Systems, Inc. to Windstream Corporation*, Docket Nos. A-2009-2109528, A-2009-2109530, A-2009-2109531 and A-2009-2109532, Initial Decision dated October 1, 2009 and Order entered November 6, 2009; and *Joint Application of North Pittsburgh Telephone Company and Penn Telecom, Inc. for All Approvals of the Acquisition by Consolidated Communications Holdings, Inc. of All of the Stock of the Joint Applicants' Corporate Parent, North Pittsburgh Systems, Inc.*, Docket Nos. A-310074F0004 and A-312550F0002, Initial Decision dated November 16, 2007 and Order entered December 5, 2007.

²² *Chester Water Authority v. Pennsylvania Pub. Util. Comm'n*, 868 A.2d 384 (Pa. 2005).

addresses such issues and then determines whether any of the issues raised require hearings (“Telephone Company Proposal”).

The current process whereby any protest, irrespective of the issues raised, automatically defaults the application to litigation presumes that valid issues are raised that can only be dealt with by litigation. Once a matter is referred to litigation, a formal, highly rigid process ensues, which includes written testimony and hearings. Much time is consumed arguing over the validity of the protest itself, the relevance of issues presented, as well as discovery and the scope of testimony.

Rather than wrangle over the substance of the protest or the admission of evidence, the Telephone Company Proposal accepts comments on “all application issues” from any interested party and reply comments within five days. Parties have the opportunity to address the concerns expressed by others and respond. Comments and replies may be supported by affidavits and statements. So, at the end of Step 3, all concerns are on the table.

Next in the Telephone Company Proposal, the PUC would issue a Tentative Order disposing of merits and imposing “any conditions required by the PUC for approval of the application.” Comments to the Tentative Order may be filed within ten days.

A hearing is held only under circumstance where “rates or terms of service are proposed to be changed” or where issues are raised in comments “that must be resolved prior to closing of the transaction and for which a full evidentiary record is necessary.”

The advantages of such an approach are numerous:

- **Due process is observed.** The opportunity to file Comments with the opportunity for hearing, if the issue raised must be resolved prior to closing the transaction, provides sufficient due process to the parties.

- **Disputes over a parties' ability to participate are avoided.** All interested persons are permitted to participate.
- **Any issue may be raised.** All application issues may be addressed in the comments.
- **Irrelevant issues can be weeded out.** If the PUC does not believe that broadband acceleration, rate freezes, special lifeline programs or other "concessions" are necessary, the parties are advised of such without resorting to litigation only to find out later that the issue is without merit.
- **Parties are encouraged to suggest alternative proposals early.** For example, as noted previously as to the *Embarq/Century Telephone Merger*, many BCAP issues were disposed of by the establishment of a general guideline. In response to BCAP's speculative concerns about what might happen, Embarq and Century Telephone proposed a general rule that existing wholesale service would not deteriorate,²³ which was adopted by the PUC. Had there been the opportunity to present a solution to the PUC at one of the two comment stages envisioned in the Level 3 Proposal, many hours of litigation process could have been avoided to reach the same result.
- **Prompt resolution by PUC.** From the regulated LECs' perspective, the current change of control process consumes too much time. Employee uncertainty and frustration; customer uncertainty; the delay of new services; and adverse effect on the companies' stock price and attraction of capital are all reasons supporting prompt resolution. The comment process set forth in the Telephone Company Proposal should result in faster resolution of many change of control cases and, as significantly, removes delay as a weapon to force concession.
- **Administrative efficiency.** The energy and resources consumed in a litigated proceeding, by the regulated LECs and the PUC, as well as the protestants, are substantial. Comments are much simpler and more efficient than litigation. Hearings should be reserved for circumstances where the PUC perceives they are needed, not as part of a strategy to extract meritless concessions.

As best the PTA can determine, the Telephone Company Proposal was not addressed in the PA PUC Order addressing the Final Regulations.

²³ The agreement by the Applicants was as follows: "For Embarq companies, the merged company will maintain substantially the service levels that Embarq has provided for wholesale operations, subject to reasonable and normal allowances for the integration of CenturyTel and Embarq systems."

GROUND FOR REJECTION

The PTA submits that the PA PUC's regulations should be rejected as not being in compliance with the Regulatory Review Act.²⁴ Particularly, the PA PUC's regulations:

- Are inconsistent with legislative intent
- Impose excessive economic and fiscal costs on the private sector
- Are not reasonable.

With regard to legislative intent specifically, the PTA notes the obvious tension between the regulations and § 3011 of Act 183 which declares, as the policy of the Commonwealth, "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."²⁵ By continuing the same regulated monopoly process that has been in place since the inception of the PA PUC, a process that adversely affects the incumbent carriers much more profoundly than any other telecommunications service provider, the regulations cannot be said to be more consistent with those imposed upon alternative service providers. Especially where those providers, notably cable companies and wireless carriers are not regulated by the PA PUC and are not required to make any application at all.

The PTA Companies have only asked, as a measure that will very likely restrain the extortive protest practice previously described, that the Commission pre-screen protests to ensure that valid issues are raised and the document is not filed in an unjustified attempt to create unfair leverage. The PA PUC's failure to even address the PTA's concerns and consider its suggested proposal is not reasonable and is grounds for rejection. The failure to do so ensures that the incumbent telephone companies will be burdened with either the excessive cost of either

²⁴ 71 P.S. § 745.5b.

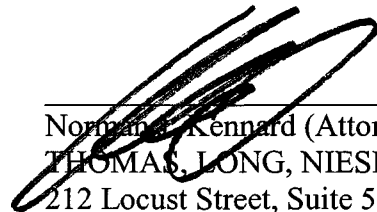
²⁵ 66 Pa. C.S. § 3011 (13).

capitulating to unreasonable merger conditions to close their transactions or the cost and delay of full litigation.

CONCLUSION

The PTA asks that the Independent Regulatory Review Commission reject the Final Regulations with directions to undertake the changes to the proposed regulations suggested in these Comments.

Respectfully submitted,



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Dated: June 4, 2010