



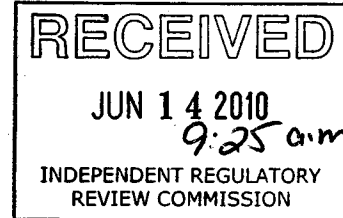
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June 14, 2010



VIA HAND DELIVERY

The Honorable Arthur Coccodrilli, Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

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:

The Broadband Cable Association of Pennsylvania ("BCAP") provides these Comments in support of the Pennsylvania Public Utility Commission's ("PUC" or "Commission") Final Rulemaking Order to Amend Chapter 63 Regulations Regarding Abbreviated Procedures for Review of Transfer of Control and Affiliate Filings for Telecommunications Carriers at Docket No. L-00070188. BCAP was an active participant in the rulemaking and working group process conducted by the Commission to develop the modifications to the regulations that are before the Independent Regulatory Review Commission ("IRRC"). BCAP requests that IRRC approve the Commission's Final Form Regulations.

The Commission's development of the Final Form Regulations was guided by more than two years of input from all interested parties, as well as its experience in reviewing various transfer of control filings submitted by telecommunications carriers. Through the Final Form Regulations, the Commission has crafted a reasonable compromise that applies to all regulated carriers (both Incumbent Local Exchange Carriers ("ILECs") and Competitive Local Exchange Carriers ("CLECs")) and ensures that interested parties have a reasonable and legitimate opportunity to review proposed transactions to confirm whether the City of York standard is fulfilled. In fact, the CLEC that initiated this rulemaking process, Level 3 Communications, LLC ("Level 3"), has confirmed that the Final Regulations "are reasonable and should be approved by IRRC."¹

¹ Level 3 Comments May 19, 2010, p. 2.

On June 4, 2010, the Pennsylvania Telephone Association ("PTA") submitted Comments to IRRC suggesting that the Final Form Regulations are biased against ILECs and that parties are "abusing" the opportunity to file protests against proposed transactions. As the Commission's determination here confirms, however, PTA's criticisms are wholly unfounded. The ILEC transactions impacted by the Final Form Regulations are not simple, distant events; rather, these transactions can have a profound and lasting impact on Pennsylvania. The Commission's final determination in the Embarq/CenturyTel proceeding demonstrates the advantages of maintaining the current process for protested transfer of control applications. Specifically, through the discovery and litigation process that applies to protested applications, BCAP identified multiple issues where the treatment of requests by competitive carriers differed between the two merging companies, with the CenturyTel processes being extremely antiquated and restrictive. For example, CenturyTel placed an unreasonable limit on the number of orders that could be processed in a single day on a nationwide basis for each competitor. Embarq did not have a similar limitation. The anti-competitive impact of a limit such as this is self-evident.

In the Embarq/CenturyTel proceeding, the PUC legitimately recognized that allowing the Joint Applicants to apply this type of limitation on order processing after the merger would be detrimental to the public interest in Pennsylvania because it undermines consumers' access to competitive alternatives. The Commission ultimately addressed this issue by requiring the Joint Applicants to maintain wholesale service levels in Pennsylvania and cited the order processing limit as one of the specific actions that was covered by that requirement.² In the same case, the Commission also examined directory listings, the interfaces used by Embarq and CenturyTel to deal with competitive carriers and other issues. On the competitor ordering interfaces, the Commission specifically required the merger partners to adopt the more "user friendly" system used by Embarq. These specific examples of how wholesale performance could degrade as a result of a merger were not identified until discovery could be conducted on the Joint Applicants to determine their integration plans.

Without the discovery and litigation process, the Commission would have no knowledge of differences in practices of the two merging carriers and would have no context to evaluate whether to condition approval of the transaction on the maintenance of wholesale services at the same levels that exist prior to the transaction. In other recent transactions, the types of anticompetitive practices have varied; however, in each situation where BCAP has filed a protest to an ILEC transaction, it is because BCAP members are either experiencing unreasonable delays or obstacles to enter the current market, or know that the practices employed by a merging party would create unnecessary obstacles if imported to Pennsylvania. If the promotion of competitive supply of telecommunications services in all areas of the state remains one of the Commonwealth's goals, then the Commission must evaluate the impact of a proposed transaction on competitors when determining whether the City of York test is met. In doing so, the Commission follows the Pennsylvania Supreme Court's direction that analyzing a

² See 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 at 11, 57-58 (Opinion and Order entered May 28, 2009).

transaction's impact on competition is an integral aspect of the public benefits analysis. Specifically, the Court stated:

In line with the DOJ and FCC assessments, competitive impact is a substantial component of a rational net public benefits evaluation in the merger context. That the ultimate determination may be that the impact is modest, minimal, or non-existent does not negate the necessity of undertaking the examination in the first instance or remove the factor from the weighing and balancing process. Significantly, in terms of the net public benefits arising out of corporate consolidation, anticompetitive effects may offset or negate advantages and result in a denial of regulatory approval. Indeed, it is for this very reason that large merger transactions are so highly regulated.³

Parties have a legitimate interest in reviewing ILEC order processing number transfer (or porting) standards and other competitive issues as part of a merger or transfer of control application because ILECs maintain monopoly control over a critical input for competitors to enter their territory. Specifically, ILECs have control over the number porting process to switch a customer from the ILEC to a competitor. If this process is delayed or performed inadequately, it discourages customers from seeking competitive alternatives. Ironically, despite the movement in other industries to standardize the customer acquisition and transfer process in Pennsylvania, ILECs do not follow a standard process and may, when integrating systems after a merger, change the current process that applies in their Pennsylvania territories. CenturyTel's limitation on the number of orders that can be processed for each competitor in a single day on a nationwide basis is one example of this, but other issues may arise in other territories. Although the precise issue may vary from territory to territory, the Commission must be vigilant in detecting and correcting practices that may impede competition as part of its efforts to promote Pennsylvania's policy objectives, and as part of its determination of whether a proposed transaction meets the City of York standard. PTA's attempt to short circuit this process or claim that BCAP (or other parties) are being "abusive" of the process by raising these issues should be soundly rejected.

PTA also criticizes the Final Form Regulations for failing to impose a deadline for the review of applications. As IRRC is aware, however, when the legislature desires to impose a specific time frame for the review of filings submitted to the Commission, it does so in the Public Utility Code. For example, Section 1309(b) of the Public Utility Code imposes a 9-month deadline for reviewing a general rate case.⁴ Similarly, Section 1903(a) imposes a 30-day review period for a securities certificate.⁵ Section 3016(a)(1) imposes a 60-day time frame for the approval of a request by an ILEC

³ Popowsky v. PA Pub. Util. Comm'n, 594 Pa. 583, 610-611, 937 A.2d 1040, 1056-57 (Pa. 2007).

⁴ See 66 Pa. C.S. § 1309(b).

⁵ See id. at § 1903(a).

to determine whether a protected or non-competitive service or business activity should be declared competitive, with the time frame extended to 150 days if a protest is timely filed.⁶ In contrast, the sections of the Public Utility Code addressing the approval of changes in control contain no required time frame for approval.⁷ Thus, the assertion by PTA that the regulations should be rejected for failing to impose an arbitrary time frame is contrary to legislative intent to keep the review period open in order to provide the necessary time for the Commission to gather the information that it needs to ensure that the City of York test has been met. Finally, PTA's complaints regarding the length of time to review a proposed transfer of control application should be disregarded, given the actions of its members in delaying the consideration of applications by competitors seeking PUC approval to enter their service territories. For example, Commonwealth Telephone Company delayed the entry process for Sprint Communications and Blue Ridge Communications for over 18 months.⁸ This 18-month delay dwarfs the time frames for the review of protested transactions noted in PTA's Comments.

Consistent with the IRRC's suggestion, the Commission convened a working group to discuss the proposed changes to the regulations. PTA's Comments provide an explanation of the proposal that it supported during the working group to "streamline" the review process. BCAP and the Office of Consumer Advocate objected to PTA's proposed process because it deprived parties of a legitimate opportunity to adequately review and conduct discovery regarding transfer of control applications and otherwise created an unnecessary step of having the Commission "determine whether to make a determination" regarding the issues raised by parties in opposition to a filing. A 30-day time period after the filing is submitted is an insufficient amount of time to completely and adequately assess the potential implications of a transaction and to explain to the Commission the issues that may indicate that a proposed transaction is not in the public interest and does not meet the City of York test. In addition, the PTA proposal would then have parties essentially wait in a holding pattern for an additional period of time until the Commission determines whether a hearing will be held. Under the current procedure, parties can conduct discovery upon the filing of the protest to begin developing the evidentiary record that will be necessary for the Commission's review. Conversely, the PTA proposal would lengthen the review process for applications that were sent to hearings by delaying the discovery process that is needed to identify and/or confirm the information that the Commission will rely upon in assessing the actual impact of the transaction. Finally, the PUC determination of whether the issues raised by parties are proper for hearing is already addressed in the current process by an applicant's opportunity to file a Motion to Dismiss, which is ruled upon by an Administrative Law Judge. There is no reason to manufacture an entirely new (and extremely abbreviated) process when the current one is adequate.

⁶ See id. at § 3016(a)(i).

⁷ See id. at §§ 1102 and 1103.

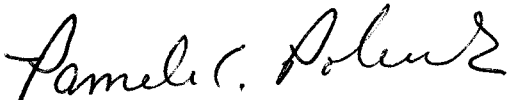
⁸ See Application of Sprint Communications Company L.P. for Approval of the Right to Offer, Render, Furnish or Supply Telecommunications Services as a Competitive Local Exchange Carrier to the Public in the Service Territories of Alltel Pennsylvania, Inc., Commonwealth Telephone Company and Palmerton Telephone Company, Order entered December 1, 2006 at Docket No. A-310183F0002AMA, et al.

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In summary, the Final Form Regulations are a reasonable and balanced solution to the request submitted by Level 3. Accordingly, BCAP urges the IRRC to approve the regulations as submitted.

Very truly yours,

McNEES WALLACE & NURICK LLC

By 
Pamela C. Polacek

Counsel to the Broadband Cable Association of Pennsylvania

PCP/km

c: Scott Schalles, IRRC Analyst (via E-mail)
Hon. Lisa M. Boscola, Senate Consumer Affairs and Professional Licensure Committee
Hon. Robert M. Tomlinson, Senate Consumer Affairs and Professional Licensure Committee
Hon. Robert W. Godshall, House Consumer Affairs Committee
Hon. Joseph Preston, Jr., House Consumer Affairs Committee
Bohdan Pankiw, Pennsylvania Public Utility Commission (via E-mail)
Joseph K. Witmer, Pennsylvania Public Utility Commission (via E-mail)