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April 10, 2008

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

VIA HAND DELIVERY

**RE: Rulemaking to Amend Chapter 63 Regulations so as to Streamline Procedures for Commission Transfer of Control and Affiliate Filings for Telecommunications Carriers; Docket No. L-00070188**


Dear Secretary McNulty:

On April 9, 2008, the Broadband Cable Association of Pennsylvania filed Comments in the above-reference proceeding. Due to a reproduction error, Appendix A was inadvertently omitted from the copies of the Comments that were filed with the Secretary's Bureau. The original and fifteen (15) copies of the Comments with both Appendix A and Appendix B are enclosed. These copies should replace the copies that were filed on April 9, 2008. We regret any inconvenience our oversight may have caused.

If you have any questions regarding this matter, please feel free to contact us at your convenience.

Very truly yours,

McNEES WALLACE & NURICK LLC

By   
Pamela C. Polacek

Counsel to the Broadband Cable  
Association of Pennsylvania

PCP/km

Enclosures

c: Joseph K. Witmer, Esq., Asst. Counsel, Law Bureau (via hand delivery)

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INDEPENDENT REGULATORY  
REVIEW COMMISSION

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Rulemaking to Amend Chapter 63 :  
Regulations so as to Streamline :  
Procedures for Commission Transfer :  
of Control and Affiliate Filings :  
for Telecommunications Carriers :

Docket No. L-00070188

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COMMENTS OF THE BROADBAND CABLE ASSOCIATION  
OF PENNSYLVANIA

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At Public Meeting held on September 27, 2007, the Pennsylvania Public Utility Commission ("PUC" or "Commission") adopted a Proposed Rulemaking Order in the above-captioned docket, requesting public comment on proposed modifications to Chapter 63 of the Commission's regulations meant to streamline transfer of control and affiliate filings by telecommunications carriers.<sup>1</sup> The Proposed Rulemaking Order was entered by the Commission on October 19, 2007, and published in the *Pennsylvania Bulletin* on February 9, 2008.<sup>2</sup> Pursuant to the directives in the Proposed Rulemaking Order, the Broadband Cable Association of Pennsylvania ("BCAP") hereby submits these Comments.

I. INTRODUCTION

BCAP is a trade association of Pennsylvania's cable television operators and related businesses who collectively provide cable service to approximately 3.6 million homes in Pennsylvania.<sup>3</sup> BCAP has been an advocate for many years in proceedings and investigations before

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<sup>1</sup> Proposed Rulemaking Order re Amending 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 (Order entered Oct. 19, 2007). The proposed regulations apply to acquisitions, diminutions of control, mergers, stock sales or transactions, and transfers of assets or control of a telecommunications public utility, requiring a certificate of public convenience. For convenience, BCAP will refer to all such transactions generally as "transfer of control" applications.

<sup>2</sup> 38 Pa. Bull. 758 (Feb. 9, 2008).

<sup>3</sup> BCAP was formerly known as the Pennsylvania Cable and Telecommunications Association and the Pennsylvania Cable Television Association.

this Commission regarding issues affecting the potential entry by cable operators into PUC-regulated telecommunications service markets. For example, BCAP participated in the original proceeding to implement Chapter 30 of the Public Utility Code for Verizon Pennsylvania, Inc. ("Verizon"), which was then known as Bell Atlantic-Pennsylvania, Inc.<sup>4</sup> BCAP has also participated in numerous Verizon-specific and generic proceedings to implement Chapter 30 and the Telecommunications Act of 1996 ("TA-96"),<sup>5</sup> in the "Global Proceeding" that resolved multiple issues related to competitive telecommunications services in Pennsylvania,<sup>6</sup> and in proceedings related to the ability of specific individual BCAP members to obtain Competitive Local Exchange Carriers ("CLEC") authority and interconnection to provide traditional switched-circuit local telecommunication services in Pennsylvania, especially in rural Incumbent Local Exchange Carrier ("ILEC") service territories.<sup>7</sup> BCAP also encouraged the PUC to promote innovative strategies to facilitate the roll-out of digital voice services by confirming that carriers, such as Sprint Communications LP, are entitled to CLEC certification and interconnection to provide wholesale or "gateway" CLEC services to cable operators (and others) that possess networks facilities and connections with end use customers to offer digital voice services.<sup>8</sup> In addition, BCAP participated in several recent ILEC transfer of control

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<sup>4</sup> Bell Atlantic-Pennsylvania, Inc.'s Petition and Plan for Alternative Form of Regulation Under Chapter 30, Docket No. P-00930715.

<sup>5</sup> See, e.g., Application of MFS Intelenet of Pennsylvania, et al., Docket Nos. A-310203F0002, A-310213F0002, A-310236F0002 and A-310258F0002 ("MFS"); Pennsylvania Public Utility Commission, et al., v. Bell Atlantic-Pennsylvania, Inc., Docket No. R-00943008, (Bell Atlantic Promotional Offerings Proceeding); Pennsylvania Public Utility Commission, et al., v. Bell Atlantic-Pennsylvania, Inc., Docket Nos. R-00963550, et al., and R-00963556 (Bell Atlantic Rate Rebalancing under Chapter 30); Formal Investigation to Examine and Establish Updated Universal Service Principles and Policies for Telecommunications Services in the Commonwealth, Docket No. I-00940035; Petition of Bell Atlantic Pennsylvania, Inc. for a Determination that Provision of Business Telecommunications Services is a Competitive Service Under Chapter 30 of the Public Utility Code, Docket No. P-00971307.

<sup>6</sup> Joint Petition of Nextlink Pennsylvania, Inc., et al., for Adoption of Partial Settlement Resolving Pending Telecommunications Issues, Docket No. P-00991648 and Joint Petition of Bell Atlantic Pennsylvania, Inc., et al., for Resolution of Global Telecommunications Proceedings, Docket No. P-00991649 (Global Proceeding).

<sup>7</sup> See Petition of Citizens Telephone Company of Kecksburg to Intervene and Suspend Interconnection Requirements of the Telecommunications Act of 1996 Under Sections 251(f)(2) and 253(b); Docket No. P-0097118.

proceedings to advocate for an environment conducive to facilities-based entry by competitive providers of communications services.<sup>9</sup>

The BCAP member companies have individualized strategies related to the provision of advanced and voice services to their subscribers. Several BCAP members own or are affiliated with Commission certificated CLECs, while others provide non-jurisdictional voice and other services, such as video programming and high-speed data service options. BCAP submits these Comments to articulate the concerns of its members regarding the proposed changes to the review process for acquisitions, diminutions in control, mergers, stock sales or transfers, and transfers of assets for telecommunications public utilities.

Currently, the Commission reviews transfer of control applications using the same standards and processes for the review of similar transactions for all other classes of PUC-regulated public utilities under 66 Pa. C.S. §§ 1102 and 1103. This "full review" process currently takes the Commission an average of six to nine months to complete. The proposed regulations shorten this process, depending on whether a transaction is classified as "general," which reduces the review period to 60 days after publication in the *Pennsylvania Bulletin*, or "pro forma," which reduces the review period to 30 days. In addition, the proposed regulations retain the discretion for the

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(continued footnote)

<sup>8</sup> See Application of Sprint Communications Company L.P. for Approval of Right to Offer, Render, Furnish or Supply Telecommunication 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; Docket No. A-310183F0002AMA et al.

<sup>9</sup> See Joint Application of Commonwealth Telephone Company, CTSI, LLC and CTE Telecom, LLC d/b/a Commonwealth Long Distance Company for all Approvals Under the Public Utility Code for the Acquisition by Citizens Communications Company of All Stock of the Joint Applicants' Corporate Parent, Commonwealth Telephone Enterprises, Inc.; Docket Nos. A-31800F0010, A-311095F005, and A-311225F003; See also 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. A312550F0002, A-310074F0004.

Commission to subject some of these transactions to the traditional "full review" procedures; however, the proposed regulations make the full review process an exception rather than the rule.<sup>10</sup>

BCAP supports the efforts of the Commission to streamline the process of reviewing transfer of control and affiliate filings for CLECs in Pennsylvania. As the Commission previously recognized in its review of AT&T's facilities-based CLEC application to enter various rural territories, CLECs, by definition, must succeed based on possessing sufficient capital and an adequate business plan.<sup>11</sup> To the extent a transfer of control, corporate reorganization, merger, acquisition or affiliate transaction is necessary to enhance a CLEC's ability to compete in Pennsylvania, then the PUC's approval for that business decision should be provided promptly and without undue delay, as envisioned in the proposed regulations.

Proposed transactions involving ILECs, however, raise additional issues that require application of the standard procedures and process under Sections 1102 and 1103 under many circumstances. As explained more fully herein, an ILEC's ability to impede competitive entry requires the use of the traditional procedures applied to all other regulated utilities, especially when any party files a protest on these grounds. BCAP respectfully submits a full review of protested ILEC transactions is necessary to comply with Pennsylvania law and to promote the pro-competitive goals of Chapter 30.

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<sup>10</sup> The Proposed Rulemaking Order and regulations refer to a transaction that is subject to the traditional review process as an "other than general rule" transaction. For clarity, BCAP suggests that the Commission adopt a label such as "full review transactions" to describe this class of transactions. In these Comments, BCAP uses the term "full review transaction" to describe the transactions of telecommunications public utilities that are not subject to either the *pro forma* or general rule transaction procedures.

<sup>11</sup> Application of AT&T Communications of Pennsylvania, Inc. and TCG Pittsburgh to Amend their Certificates of Public Convenience to Begin to Offer, Render, Furnish or Supply Facilities-Based Competitive Local Exchange Telecommunications Services in the Service Territories of AllTel Pennsylvania, Inc., Armstrong Telephone Company-Pennsylvania, The Bentleyville Telephone Company, Citizens Telephone Company of Kecksburg, Hickory Telephone Company, Marianna and Scenery Hill Telephone Company, North Pittsburgh Telephone Company, and Yukon Waltz Telephone Company; Docket Nos. A-310125F002 & A-310213F0002, slip op. at 18 (Apr. 10, 2001).

In addition, BCAP suggests certain technical and legal amendments to the proposed regulations to reflect the following:

- (1) Using the term "full review transactions" to describe transactions that are addressed through the traditional process and discussing the treatment of full review transactions;
- (2) Confirming that providers of information services and other federally-regulated telecommunications services, which are not subject to the Commission's jurisdiction, are not subject to the transfer of control regulations;
- (3) Clarifying the notice and timing requirements for publication and review of transactions; and,
- (4) Reflecting the use of the 30-day *pro forma* process only where "(1) the transaction is seamless to the customer and does not involved any change in conditions of service or rates, and (2) the transaction does not reduce an applicant's ownership by more than 10%"<sup>12</sup>.

BCAP attaches a redlined version of the regulations reflecting the specific suggested changes in Appendix A of these Comments. Finally, BCAP responds to the additional questions set forth in the Proposed Rulemaking Order for which the Commission has requested comment by the parties.

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<sup>12</sup> Proposed Rulemaking Order at 9 (emphasis added).

## II. COMMENTS

### A. BCAP Supports The Commission's Initiatives to Reduce Regulatory Burdens on CLECs.

Under the Public Utility Code, the Commission has the express duty to promote competitive entry into the local exchange markets throughout the Commonwealth.<sup>13</sup> More than ten years after the enactment of the TA-96 at the federal level and the original Chapter 30 at the state level, Pennsylvania is just now beginning to see the type and level of competitive entry that many envisioned. Despite these strides, ILECs continue to serve the vast majority of the landline local phone service customers in the Commonwealth. In fact, in some rural areas of the Commonwealth, alternatives to landline local phone service do not exist.

Reducing the regulatory burdens on CLECs and providing enhanced regulatory certainty regarding the process and timelines for approving requests of all types will help to enhance the attractiveness of Pennsylvania as a business environment for competitive service providers in both regulated and unregulated industries. BCAP is anxiously awaiting the Commission's decision regarding the initiative to adopt a more expedited and appropriate process to review CLEC applications, which has been under consideration by the Commission for over one year.<sup>14</sup> Clarifying the review process for transfers of control and other transactions after the CLEC application is granted is a logical extension of the Commission's efforts at that docket. BCAP supports the Commission's initiatives to reduce all regulatory burdens on CLECs, and encourages further efforts in this regard with respect to additional issues.

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<sup>13</sup> 66 Pa. C.S. § 3011(8).

<sup>14</sup> See Proposed Modifications to the Application for Approval of Authority to Offer, Render, Furnish or Supply Telecommunications Services to the Public in the Commonwealth of Pennsylvania; Docket M-00960799, 37 Pa. Bull. 486 (Jan. 27, 2007).

**B. The PUC is Not Required to Apply Identical Procedures to the Review of ILEC and CLEC Transactions, and Should, as a Matter of Law and Policy, Differentiate in Its Review of Certain ILEC Transactions.**

When proposing this rulemaking, Level 3 requested that the Commission streamline its administrative process for CLECs to obtain approval of transfers of control and affiliate transactions. Specifically, Level 3 sought to revise the Commission's current review process that "impose[s] unnecessary and burdensome requirements on non-dominant, competitive carriers."<sup>15</sup> Level 3 contended that the public interest in a competitive environment does not require strict scrutiny of nondominant carriers' transactions.<sup>16</sup> BCAP agrees.

In response to Level 3, Verizon and the Pennsylvania Telephone Association ("PTA") argued that any revision to the regulatory procedures governing transfers of control and affiliate transactions should apply equally to ILECs and CLECs.<sup>17</sup> Verizon and PTA justified this position by arguing that Chapter 30 favors equivalent regulatory treatment for CLECs and ILECs,<sup>18</sup> that the Federal Communication Commission ("FCC") order *Streamlining Measures for Section 214 Authorizations* ("Streamlined Order")<sup>19</sup> does not prohibit ILEC use of streamlined procedures, and that ILECs face competition from wireless services, VOIP providers, cable companies and satellite services.

After acknowledging that disagreement exists between the three parties that commented in the Level 3 proceeding (i.e., Level 3, PTA and Verizon) regarding the intent of Chapter 30, the impact of FCC's Streamlined Order, and the meaning and measurement of competition, the Commission declares, without further explanation:

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<sup>15</sup> Proposed Rulemaking Order at 3.

<sup>16</sup> Id.

<sup>17</sup> Id. at 4.

<sup>18</sup> Citing 66 Pa. C.S. § 3011(13).

<sup>19</sup> See Streamlining Measures for Section 214 Authorizations, CC Docket No. 01-150 (March 21, 2002).



The proposed regulation in Annex A reflects our tentative agreement with the Level 3 Petition proposing a shortened but uniform period of time governing transfers of control and affiliate filing requirements. Unlike the Level 3 Petition, however, we also agree with Verizon and PTA that the requirements should apply equally to incumbent and competitive carriers.<sup>20</sup>

BCAP respectfully urges the Commission to reverse its tentative conclusion that the requirements in proposed Annex A should apply equally to ILECs and CLECs. Nothing in Chapter 30, the FCC Streamlined Order, or the resolution of recent merger applications filed by ILECs requires this result. In fact, the results in recent merger proceedings have demonstrated that retaining the full review process when a CLEC, potential CLEC or other party representing competitive interests files a protest to a transaction can result in market-opening agreements that promote the competitive goals of Pennsylvania. As explained below, a valid basis exists to apply different standards and different timelines to transfer and affiliate filings by CLECs and ILECs.

**1. Chapter 30 Does Not Require Equal Treatment for ILECs and CLECs.**

As explained above, persuaded by Verizon and PTA's arguments, the Commission has tentatively concluded that the proposed regulations in Annex A will apply equally to incumbent and competitive carriers. However, the PTA's interpretation that "Chapter 30 warrants a streamlined approval process for all carriers given 66 Pa C.S. § 3011(13)'s goal of reducing regulation on incumbent carriers' similar to that imposed on competitive carriers"<sup>21</sup> is overreaching and contrary to the plain meaning of Section 3011(13).

The rules of statutory interpretation require that a statute not be analyzed in isolation; rather, a statute must be read in combination with other applicable provisions. Specifically, 1 Pa C.S. § 1921 provides "the object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to

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<sup>20</sup> Proposed Rulemaking Order at 7.

<sup>21</sup> Proposed Rulemaking Order at 4.

give effect to all its provisions."<sup>22</sup> In addition, Section 1921 continues, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."<sup>23</sup>

Chapter 30 retains the option for the Commission to adopt different requirements for ILECs and CLECs. Specifically, Section 3011(13) states:

The General Assembly finds and declares that it is the policy of this Commonwealth to [r]ecognize 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.<sup>24</sup>

The unambiguous language of Section 3011(13) clearly articulates the General Assembly's intent to "recognize" that regulatory obligations imposed on ILECs "should be reduced to levels more consistent with" those imposed on CLECs.<sup>25</sup> Had the General Assembly intended for ILECs and CLECs to be treated equally and desired this result, it could have articulated this position in Chapter 30. By not doing so, the General Assembly did not unequivocally require ILECs and CLECs to be treated equally in all respects.

Thus, the Commission retains the discretion (and, arguably, the mandate) to apply different regulatory requirements to ILECs and CLECs where law and public policy dictate. As set forth in Section II.B.3 herein, given the burgeoning status of competitive entry in Pennsylvania and the acknowledged role of competitive entry in the *City of York* affirmative public benefits test, valid legal and policy reasons exist to apply different treatment to ILEC transactions in some circumstances, especially for rural ILECs. BCAP sets forth its specific proposals in Section II.C, *infra*.

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<sup>22</sup> 1 Pa. C.S. § 1921(a).

<sup>23</sup> *Id.* § 1921(b).

<sup>24</sup> 66 Pa. C.S. § 3011(13).

<sup>25</sup> *Id.* (emphasis added).

**2. FCC's Streamlined Regulation Order Does Not Support Equal Treatment for ILECs and CLECs in all Circumstances.**

When tentatively deciding that the proposed regulations would equally apply to both ILECs and CLECs, the Commission accepts Verizon's arguments that the FCC Streamlined Order does not prohibit dominant carriers from using the Streamlined Process. While Verizon is correct that the FCC does not prohibit dominant carriers from using the Streamlined Process, Verizon has overstated the "standardization" actually contained in the FCC Streamlined Order. The FCC includes various conditions on the availability of the Streamlined Process that equate to distinctions between dominant and non-dominant transactions and which, when translated to the context of Pennsylvania transactions, support reasonable distinctions between the treatment of proposed CLEC and ILEC transactions.

As the Proposed Rulemaking Order acknowledges, the FCC directly addressed a request to limit its Streamlined Process only to non-dominant carriers. The FCC rejected that request; however, its reasons for doing so clearly indicate a ready inclination to reclassify streamlined transactions when a carrier is dominant in a particular market:

Some commentators argue that dominant carriers should not be eligible for streamlined processing under any circumstances. We disagree. Excluding dominant carriers as a class from the benefits of streamlined treatment would be unnecessarily overbroad. For example, the Commission has found that [Bell Operating Companies or BOCs] are non-dominant in their provision of domestic out-of-region interstate interexchange services, and has further found that a BOC's section 272 interLATA affiliate is non-dominant in the provision of domestic in-region interstate interLATA services. The relevance to our public interest analysis of a transfer application, of a carrier's classification as dominant, will depend on a number of factors, including the types and locations of the services provided by the other party to the transaction. Significantly, the Commission retains the ability to reject or remove from streamlined treatment any application filed by a dominant carrier that implicates our public interest concerns. Accordingly, we find no reason to create an eligibility rule that excludes dominant carriers entirely from the benefits of streamlined processing of their applications.<sup>26</sup>

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<sup>26</sup> Streamlined Order at P 35.

In addition, the FCC specifically recognized that its duty to promote competition in the local exchange markets would warrant removal of applications from the streamlined procedure:

[W]e agree with WorldCom's contention that the Commission should ensure that important public interest concerns, such as the control of [sic] exercise of market power and the promotion of competition in the local exchange markets, are adequately protected by any new streamlined rules. Therefore, the Commission may remove such applications from streamlined processing when it finds, or when comments raise, significant public interest concerns requiring further Commission inquiry and resolution.<sup>27</sup>

In contrast to the broad geographic scope of the markets that the FCC could be reviewing in the context of a Section 214 application, the PUC's jurisdiction is more narrow. Instead of considering the national market, the Commission considers the Pennsylvania market where a carrier serves. At present, despite the advances made by competitive providers, all Pennsylvania ILECs continue to maintain a dominant market share for local exchange service in their territories. Furthermore, these ILECs have control over monopoly facilities (interconnection and the porting of numbers) that could be used to impede competition. For any service to be considered a viable competitive alternative to the ILEC local exchange service, competitive customers must be able to call customers on the Public Switched Telephone Network ("PSTN") and to retain their current telephone numbers when they switch to an alternate carrier. ILECs have monopoly control over these activities. As a result, a presumption that an ILEC transaction should be excluded from Pennsylvania's streamlined procedures, especially if a protest is filed by an entity representing competitive interests, is wholly consistent with the FCC's Streamlined Process.

In fact, while the FCC determined that it would be overbroad to exclude all dominant carriers from the benefits of the Streamlined Process,<sup>28</sup> it did not deter the FCC from limiting the application

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<sup>27</sup> Id. at P 44.

<sup>28</sup> Id. at P 35.

of its streamlined procedures based on a carrier's designation as a dominant or non-dominant provider. For example, the FCC applies streamlined procedures when:

- (1) Both applicants are non-facilities-based carriers;
- (2) The transferee is not a telecommunications provider;
- (3) The proposed transaction involves only the transfer of local exchange assets of an ILEC by means other than an acquisition of corporate control;
- (4) Neither of the applicants is dominant with respect to any service;
- (5) The applicants are a dominant carrier and a non-dominant carrier that provides services exclusively outside the geographic area where the dominant carrier is dominant; or
- (6) The applicants are incumbent independent LECs that have, in combination, fewer than two percent of the nation's subscriber lines installed in the aggregate nationwide and no overlapping or adjacent service areas.<sup>29</sup>

Clearly, an applicant's status as a dominant or non-dominant carrier is relevant to the FCC's use of the streamlined process. Similarly, an applicant's status as an ILEC or a CLEC should be relevant to the PUC's use of its proposed streamlined process.

Notably, however, the PUC must depart from the FCC's guidance regarding the treatment of ILECs with fewer than two percent of the nation's subscriber lines. The presumptive differential treatment of ILECs based on the number of subscriber lines in comparison to the national total would be inappropriate for Pennsylvania. As the Commission's Proposed Rulemaking Order recognizes, Verizon is the only ILEC in Pennsylvania that would not qualify for streamlined treatment if the same criteria is adopted in Pennsylvania.<sup>30</sup> Currently, the Pennsylvania non-Verizon ILECs face very limited (and in some instances, no) competitive entry. CLECs are only beginning to clear the substantial regulatory hurdles and other roadblocks to enter the territories of Pennsylvania's rural ILECs. Transfer of control proceedings represent an important opportunity for competitors and

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<sup>29</sup> *Id.* at P 28.

<sup>30</sup> Proposed Rulemaking Order at 33.

potential competitors to obtain market-opening commitments from the non-Verizon ILECs. The non-Verizon/Rural ILECs should be treated like non-rural ILECs in the final regulations.

**3. Although Competitive Alternatives Are Being Introduced in some ILEC Service Territories, the Extent of Entry is Not Sufficient to Conclude that ILECs in Pennsylvania do not Possess Market Power in their Relevant Markets.**

Under the proposed general and *pro forma* transactions, reclassification of a transaction to the traditional review period can only occur in four limited circumstances. These circumstances are: (1) if a statutory advocate files a formal protest, (2) if the filing involves a major acquisition or merger between firms with substantial market shares, (3) if the filing raises novel or important issues, or (4) if the Commission determines that reclassification is necessary to protect the public interest.<sup>31</sup> Additionally, the Commission "reserves the discretion to reclassify transactions in those circumstances where the more extensive review period has competitive impact."<sup>32</sup>

BCAP respectfully submits that most, if not all, ILECs in Pennsylvania will claim that any merger or acquisition is not "major" and that they do not have a "substantial market share" because ILECs face purported competition from wireless providers, CLECs, and cable operators. For example, in this proceeding, PTA and Verizon argue "that a streamlined procedure should be applied to all carriers given the proliferation of wireless service, cable company plans to provide communications services, and satellite competition."<sup>33</sup> As the Commission is well aware, however, these alternatives to regulated telephone service are just beginning to develop, and in most, if not all ILEC territories, the ILEC continues to serve the vast majority of the customers. In other words, for ILECs, most transactions will be "a major acquisition or merger between firms with substantial market shares." As a result, a presumption of classification as a full review transaction is warranted.

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<sup>31</sup> Proposed 52 Pa. Code §§ 63.324(j) and 63.325(j).

<sup>32</sup> Proposed Rulemaking Order at 6.

<sup>33</sup> Proposed Rulemaking Order at 4.

The regulations propose to use the Herfindal-Hirschman Index ("HHI") to measure market share. As a result, in each case where a party challenges an ILEC's request to use the general rule or *pro forma* transaction procedures, the Commission will be forced to make a decision regarding two critical and controversial aspects of the HHI test: (1) the appropriate geographic market; and (2) whether the wireless, CLEC, VoIP, digital voice and other services that are actually available in that particular market are substantially similar to be counted in the calculation of market share. These disputes will not be easily resolved, especially in the absence of testimony by antitrust experts and a hearing at which the parties can cross-examine witnesses. As the FCC recognized in rejecting calls to establish specific geographic and market power definitions applicable to the FCC's Streamlined Process: "We find that applicants would use these measurements as advocacy tools rather than factual thresholds, and the resources and time required to confirm or rebut the accuracy of such data would defeat our goal of providing relatively simple and clear guidelines for streamlining."<sup>34</sup> BCAP respectfully submits that using the HHI test will lead to similar disputes, and that the PUC's and the parties' resources are better spent addressing whether the proposed transaction meets the *City of York* standard rather than an ILEC's HHI score.

An HHI analysis is not necessary to determine that the current state of competitive entry in Pennsylvania is insufficient to warrant a conclusion that ILECs lack market power in their relevant markets and could impede competitive entry. ILECs continue to have control over very important services and facilities that are necessary for competitive carriers to roll-out services. In addition, with the exception of Verizon and Verizon North, where streamlined procedures for entry apply, other ILECs in Pennsylvania have the ability to protest any application by a CLEC to enter their territory, even if that application is for facilities-based entry. As the Commission is aware, this protest opportunity has, in the past, been used to delay entry by competitors, including delays as long

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<sup>34</sup> FCC Streamlined Order at P 37.

as 18 months.<sup>35</sup> Some ILECs would not even begin interconnection discussions until their protests were rejected and the CLEC was awarded its authorization. BCAP has detailed in its Comments and Reply Comments at Docket No. L-0096-799 why the CLEC application process must be modified to stop this anti-competitive behavior by certain ILECs. Under these circumstances, the Commission is justified to categorically exclude ILECs from using the proposed streamlined procedures; however, in the spirit of compromise, BCAP suggests in Section II.C, *infra*, a process that allows ILECs to be eligible for streamlined processing in appropriate circumstances, while still ensuring that competitive issues can be considered in the context of ruling on proposed transactions.

In this regard, BCAP must correct an apparent misconception by the Commission regarding the resolution by the Department of Justice ("DOJ") of the investigation into the actions of Commonwealth Telephone Company ("CTCo"), which is discussed and cited on pages 19-20 of the Proposed Rulemaking Order. Contrary to the Commission's impression, the important outcome of the DOJ's investigation was a commitment by CTCo to refrain from using its protest opportunity under the CLEC application procedures to limit competitive entry by facilities-based providers into its territory. As the Commission may recall, prior to the DOJ investigation, CTCo entered into a series of settlements with CLECs that limited their entry to only portions of the CTCo territory, and also subjected Sprint Communications LP to an 18 month litigation over Sprint's request for a CLEC certification to act as a gateway provider in CTCo's territory.<sup>36</sup> BCAP, in the context of its participation in the request by Citizens Communications to purchase CTCo, was able to obtain their

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<sup>35</sup> 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.*

<sup>36</sup> See, e.g. Application of Service Electric Telephone Company, LLC (formerly Service Electric Telephone, Inc.), Docket No. A-310651F0002; See also 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, Docket No. A-310183F0002AMA, *et al.*



agreement that they would not protest applications by digital voice providers or entities partnering with digital voice providers to enter or expand their entry into the CTCo and Frontier territories. A copy of the settlement agreement, which was subsequently confirmed by CTCo to be non-confidential, is attached to these Comments as Appendix B.

BCAP's intervention in the Commonwealth transfer of control proceeding was initially rejected by the presiding Administrative Law Judge, but was reinstated by the Commission on exceptions. The Commission's basis for that decision is particularly relevant to the Commission's determination of whether a protest by a competitor or potential competitor should remove a proposed transaction from streamlining, which BCAP has proposed as the only situation where an ILEC transaction would be treated differently from a CLEC transaction:

Consistent with the standards in City of York v. Pa. PUC, 449 Pa. 136, 295 A.2d 825 (1972), we would further agree with BCAP, that recent Commission precedent has acknowledged that the competitive effect on existing and potential competition of a merger and/or acquisition is appropriate in assessing the affirmative public benefits of the transaction. See Joint Application of Verizon Communications, Inc. and MCI, Inc. for Approval of Agreement and Plan of Merger. Docket No. A-310580F0009, et al (Order entered January 11, 2006).

Based on the foregoing, participation by an association of cable operators who are not competing and who may, in the immediate future, compete with Joint Applicants, is consistent with the intent of our regulation. We conclude that that BCAP has shown an interest of 'such nature that intervention is necessary or appropriate to the administration of the statute [TA-96 and the Public Utility Code] under which the proceeding is brought.' 52 Pa Code Section 5.72.<sup>37</sup>

Because the Commission concluded that creating an environment conducive to competitive entry was relevant to the *City of York* analysis, BCAP appropriately obtained a condition on the transaction that accomplished just that goal. This was not a "misuse" of the process, but a fulfillment of an aspect of the *City of York* inquiry that the PUC itself endorsed in granting BCAP's intervention request. The Commission should be careful to "ensure that important public interest concerns, such

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<sup>37</sup> Commonwealth Order, at \*8.

as the control [or] exercise of market power and the promotion of competition in the local exchange markets, are adequately protected by any new streamlined rules," just like the FCC did in adopting its streamlined process. Preserving the ability of a CLEC to participate fully in transfer of control proceedings for ILECs is consistent with this objective and the Commission's prior determination in the Commonwealth Order.

**C. An Appropriate Streamlined Process Can Apply to Transfer of Control Applications by Both CLECs and ILECs if the Regulations State that any ILEC Transaction that Is Subject to a Protest by Any Party is Reclassified as a Full Review Transaction.**

As previously articulated, Chapter 30 of the Public Utility Code does not require the use of identical procedures for the processing all transfer of control applications by CLECs and ILECs. Rather, the PUC retains discretion to make appropriate distinctions between the regulatory treatment of CLECs and ILECs. Furthermore, the FCC's Streamlined Procedures retain substantial discretion to remove a transaction from the streamlined process if there are concerns regarding market power or the impact on the federal law and policy encouraging competition in the local exchange markets.

**1. An Appropriate Compromise is to Allow ILEC Transactions to be Filed Under the Streamlined Procedures, but to Reclassify those Transactions to Full Review if a Protest is Filed by Any Party.**

BCAP is not unsympathetic to the desire of ILECs to obtain reasonably expeditious review of certain *pro forma* and non-controversial transactions; however, an ILEC's desire for business expediency should not trump the Commission's duty to review proposed transactions and ensure that the *City of York* test is met. The Commission can ensure an appropriate balance between these two, potentially divergent, goals by modifying the proposed regulations to confirm that a transaction that an ILEC files as an alleged *pro forma* transaction or a general rule transaction will be reclassified as a full review transaction subject to the traditional review processes whenever any party files a protest to an ILEC transaction alleging an adverse impact on the competitive market.

As proposed in this rulemaking, general comments will not constitute a formal protest, and therefore will not automatically reclassify a transaction. Similarly, even if a pleading is a formal protest, it will not necessarily reclassify a transaction to result in an adjudicatory proceeding and traditional review. This is a substantial departure from current Commission practice that submission of a formal protest ordinarily will automatically trigger formal administrative review.

Under the proposed general and *pro forma* transactions, reclassification of a transaction to the traditional review period can only occur in four limited circumstances. These circumstances are: (1) if a statutory advocate files a formal protest, (2) if the filing involves a major acquisition or merger between firms with substantial market shares, (3) if the filing raises novel or important issues, or (4) if the Commission determines that reclassification is necessary to protect the public interest.<sup>38</sup> Additionally, the Commission "reserves the discretion to reclassify transactions in those circumstances where the more extensive review period has competitive impact."<sup>39</sup>

The Commission's Proposed Rulemaking Order recognizes competitive market impact on other entities as a segment of the types of issues where reclassification could be necessary "to protect the public interest." This intention can be more clearly conveyed by ensuring that any protest filed to a proposed ILEC transaction mandates reclassification, without further discretionary consideration by staff. The Governor and General Assembly have already indicated in Chapter 30 that the promotion of competitive entry is in the public interest. The Commission's determination in the CTCo transfer of control proceeding confirmed this. In addition, the automatic reclassification will provide needed regulatory certainty to ILECs and the parties, so that the important review of the transaction can proceed upon the filing of the protest, rather than waiting to determine whether staff will view the reclassification as "necessary to protect the public interest."

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<sup>38</sup> Proposed 52 Pa. Code §§ 63.324(j) and 63.325(j).

<sup>39</sup> Proposed Rulemaking Order at 6.

While the Commission has indicated that it prefers to maintain a presumption that transfers of control will be reviewed as general rule or *pro forma* transactions,<sup>40</sup> BCAP submits that a valid basis exists to subject contested ILEC transactions to a complete evidentiary and adjudicatory process when competitors or potential competitive entrants file formal protests regarding a proposed transaction.<sup>41</sup> Specifically, BCAP submits that, without this change, the proposed regulations for ILEC transactions: (a) deny parties' due process by failing to provide proper notice and opportunity to be heard; and (b) do not provide the PUC with necessary time and information to ascertain whether a transaction satisfies the standards articulated in *City of York*.

**2. The Proposed Regulations for ILEC Transactions Deny Parties' Due Process by Failing to Provide Non-statutory Parties with Proper Notice and Opportunity to be Heard.**

As an administrative agency of this Commonwealth, the PUC is bound by the due process requirements of both the Pennsylvania and United States Constitutions.<sup>42</sup> The Commonwealth Court previously addressed the parameters of due process requirements regarding administrative agencies' adjudications:

This court reviewed the precedents of the Pennsylvania Supreme Court relating to the requirements of due process of law in the context of administrative proceedings and derived from them a fundamental principle that when agency action is adjudicatory in nature and involves substantial property interests, due process of law requires that those whose interests are affected receive notice of the agency action and an opportunity to challenge that action, generally at a hearing and generally before the administrative action takes place.<sup>43</sup>

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<sup>40</sup> Id.

<sup>41</sup> Obviously, the ILEC would retain its procedural rights under the Commission's regulations to challenge a protest for lack of standing or similar issues. See e.g. 52 Pa. Code § 101 (preliminary objections).

<sup>42</sup> School District of Philadelphia v. Pennsylvania Milk Marketing Board, 683 A.2d 972, 978 (Pa. Commw. 1996).

<sup>43</sup> Lehigh Valley Power Comm. v. Pennsylvania Pub. Util. Comm'n, 563 A.2d 557, 562 (1989).

A hearing or trial procedure before an administrative agency is necessary to resolve disputed questions of fact, but may not be required to decide questions of law, policy or discretion.<sup>44</sup> Although the Commission may, by rule, adopt procedures for evidence to be submitted in written form, "[e]very party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts."<sup>45</sup>

As written, the Commission's proposed regulations deny BCAP and other intervening parties (except statutory advocates) the opportunity to be heard. By not mandating that formal protests regarding ILEC transactions will reclassify transactions and institute adjudicatory proceedings, the proposed regulations deny interested competitors and potential competitive entrants a meaningful opportunity to address various issues. The Commission recognized in its CTCo Order that a competitor is entitled to a process before an ALJ to adjudicate a protest to an ILEC transfer of control application. The impact of a transaction's approval on the competitive retail telephone market is an issue requiring testimony by a witness (preferably through a hearing process, but at least via a procedure allowing parties to submit briefs accompanied by sworn affidavits). Parties that dispute the reasons advanced by an ILEC's verified statement should have the opportunity to explore the basis for the statement and present testimony by a witness opposing the transaction. In denying both, the proposed regulations prevent BCAP and other interested parties from obtaining a full and fair hearing on these factual issues.

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<sup>44</sup> Id. at 564 (citing Lehigh Valley Power Comm. v. Pennsylvania Pub. Util. Comm'n., 563 A.2d 548 (1989)).

<sup>45</sup> 66 Pa. C.S. § 332(c).

**3. The Proposed Regulations Do Not Provide the PUC with Necessary Time and Information to Ascertain Whether a Contested Transaction Satisfies the Standards Articulated in *City of York*.**

As articulated in *City of York*,<sup>46</sup> "the proponents of a merger [must] demonstrate that the merger will affirmatively promote the 'service, accommodation, convenience, or safety of the public' in some substantial way."<sup>47</sup> In addition, consistent with the standards articulated in *City of York*, recent Pennsylvania Supreme Court precedent has acknowledged that the competitive effect on existing and potential competition of a merger and/or acquisition is appropriate in assessing the affirmative public benefits of the transaction:

[C]ompetitive 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.<sup>48</sup>

By denying competitors or potential competitive entrants a meaningful opportunity to be heard, the proposed regulations fail to meet the *City of York* standard absent the opportunity by all interested parties to participate in an investigation of the competitive effect on existing and potential competition of a merger. Accordingly, BCAP submits that the proposed regulations truncate the Commission's responsibility when analyzing the *City of York* standards with regard to "affirmative public benefits" and "competitive impact" of ILEC transactions.

**D. The Commission Should Remove "Information Services" and References to Federal Law from the Definitions of Competitive Carrier and Telecommunications Public Utility because the Commission's Jurisdiction is Limited to the Services and Entities Specified in the Public Utility Code.**

Under Chapter 30, the Commission properly exercises a level of jurisdiction over local telephone service. Section 3019 grants the Commission authority to "certify more than one

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<sup>46</sup> *City of York v. Pennsylvania Public Utility Comm'n.*, 295 A.2d 825 (Pa. 1972).

<sup>47</sup> *Id.* at 828.

telecommunications carrier to provide local exchange telecommunications service in a specific geographic location,"<sup>49</sup> and Section 3012 defines "local exchange telecommunications service", over which the Commission exercises jurisdiction, as "[t]he transmission of messages or communications that originate and terminate within a prescribed local calling area."<sup>50</sup> The proposed regulations, however, include definitions of "competitive carrier" and "telecommunications public utility" that reference "information services." In addition, both definitions include references to providers of telecommunications services as defined by federal law. Significantly, the proposed transfer of control regulations apply to "telecommunications public utilities." These references inappropriately expand the PUC's jurisdiction beyond that established by the General Assembly in the Public Utility Code and should be deleted.<sup>51</sup>

The Commission may not assert jurisdiction over any service unless expressly provided in relevant statutes or "by strong and necessary implication therefrom."<sup>52</sup> The statutory definition of "Public Utility" in Section 102 of the Pennsylvania Consolidated Statutes provides the basis for Commission jurisdiction to regulate persons or corporations "owning or operating . . . equipment or facilities for . . . [c]onveying or transmitting messages or communications . . . by telephone or telegraph . . ." <sup>53</sup>

The Commission must be cognizant of the FCC's pronouncements and on-going proceedings regarding both voice and data service offerings that may impact the Commission's jurisdictional

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(continued footnote)

<sup>48</sup> Popowsky v. Pennsylvania Public Utility Comm'n., 937 A.2d 1040 (Pa. 2007).

<sup>49</sup> 66 Pa. C.S. § 3019(a).

<sup>50</sup> 66 Pa. C.S. § 3012.

<sup>51</sup> The proposed regulations do not use the term "competitive carrier" in any place except the definitions. As a result, BCAP's redline of the regulations deletes this term in its entirety.

<sup>52</sup> City of Philadelphia v. Philadelphia Electric Co., 473 A.2d 997 (Pa. 1984); accord United Telephone Co. of Pennsylvania v. Pennsylvania Public Utility Comm'n., 676 A.2d 1244 (Pa. Commw. Ct. 1996).

<sup>53</sup> 66 Pa. C.S. § 102.

scope.<sup>54</sup> Where competitive video, data, and wireless services are concerned, Federal and State law and policy have clearly indicated that these services are outside of the regulatory jurisdiction of the PUC. For example, the FCC has determined that internet access through cable modems or wireline networks is an information service.<sup>55</sup> Similarly, the FCC continues to review the appropriate jurisdictional classification and treatment of VOIP<sup>56</sup> and wireless<sup>57</sup> services. Therefore, as it currently stands, the Commission lacks regulatory jurisdiction over cable, internet, and wireless services. Additionally, the Commission may not have jurisdiction over all federally-defined "telecommunications" services because those services are interstate and/or do not fall within the definition of "public utility" set forth in the Public Utility Code.

The applicability of the Commission's transfer of control regulations is necessarily limited to the entities over which the General Assembly has conferred jurisdiction. Those entities are specified in the definition of "public utility" set forth in the Public Utility Code. Accordingly, the regulations should reference Pennsylvania statutes to define "carrier" and "telecommunications public utility," rather than federal statutes. In addition, all references to "telecommunications and information services" under federal law should be removed from the proposed regulations, especially from these critical definitions.

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<sup>54</sup> See, e.g., In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, FCC Docket No. WC 06-55 (Opinion and Order released March 1, 2007), at 11 (stating that Section 201(b) of the Telecommunications Act of 1996 "explicitly give the FCC jurisdiction to make rules governing matter to which the 1996 act applies.")

<sup>55</sup> In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, FCC Docket Nos. GN 00-185 and CS 02-52 (Dec. Ruling and NOPR released Mar. 15, 2002); In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, FCC Docket Nos. CC 02-33, CC 01-337, CC 95-20 and 98-10, WC 04-242 and WC 05-271 (Report and Order and NOPR released Sept. 23, 2005).

<sup>56</sup> In the Matter of IP-Enabled Services, FCC Docket WC 04-36 (NOPR released Mar. 10, 2004) (IP Enabled Services NOPR).

<sup>57</sup> In the FCC's request for rehearing and reconsideration at the 11<sup>th</sup> Circuit, the FCC, echoing its reasoning in the Cable Modem Order, asked the Court to rehear and reconsider its decision in National Association of State Utility Consumer Advocates v. FCC, 457 F.3d 1238 (11th Cir. 2006).



**E. Responses to the Commission's Additional Questions.**

In the Proposed Rulemaking Order, the Commission provides several specific questions "that may warrant resolution in this rulemaking."<sup>58</sup> BCAP provides the following initial responses; however, BCAP also reserves the opportunity to respond to the proposals of other parties in Reply Comments:

**"The first issue is the FCC's distinction between 'presumptively streamlined' matters involving CLECs and 'eligible for streamlining' matters involving incumbent carriers even though both are subject to a 30-day review and approval period. In particular, the Commission seeks comment on whether the list set forth in paragraph 28 of the *Streamlined Order* should be the basis for distinguishing between 'presumptively streamlined' and 'eligible for streamlining' treatment in Pennsylvania."**

The FCC's list in paragraph 28 of the Streamlined Order is not appropriate for use in Pennsylvania. Specifically, items 3, 5 and 6 would allow ILEC transactions to evade proper review by the PUC. ILECs are dominant carriers in the relevant markets in the Commonwealth of Pennsylvania and should be recognized as such by the regulations by providing a different review process as specified in Section II.C hereof and the redlined proposed regulations attached as Exhibit A.

**"The second issue is whether there should be an opportunity to provide comments and reply comments in response to an application. The FCC permits this in its regulations. The Commission's regulations anticipate a protest period which includes an opportunity to file a general comment that would not constitute a formal protest and would not reclassify a transaction."**

BCAP supports including a comment and reply comment process; however, the public notice of the transaction should specifically alert interested parties that the filing of "comments" rather than a protest will not necessarily result in the reclassification of the transaction and that the transaction may be decided without a further opportunity to be heard if only comments are filed. The comment

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<sup>58</sup> Proposed Rulemaking Order at 33-34.

process should not be substituted for the protest or objection opportunity, including the reclassification of any ILEC transaction into a full review transaction as detailed in these Comments.

**"The third issue is Commission review and approval. The proposed general rule completes review and approval within 60 days for most transactions under sections 1102(a)(3) and 1103. General rule transactions require prior approval within a 60-day period dating from publication in the *Pennsylvania Bulletin*. *Pro forma* review is completed within 60 days, but notice is not required until 30 days before the transaction is completed. The Commission retains discretion to reclassify any transaction as well."**

Notice for all transactions should be published as expeditiously as possible after filing of the application, regardless of the proposed closing date for the transaction. All time periods for review should commence upon publication or, in the circumstances of a reclassified transaction, upon confirmation of the reclassification or the publishing of any necessary notice due to the reclassification. This will provide sufficient time to ensure that parties receive notice of a transaction and have a meaningful opportunity to be heard, and that the Commission can engage in a substantive review.

**"One way to accomplish review or reclassification is to charge staff with reviewing and addressing the transaction or making any reclassification decisions. Staff would issue a Secretarial letter on any final staff decision. A staff decision would be expressly subject to appeal mirroring the procedures set out in Section 5.44 of our regulations, even though there is no delegation of Commission authority, so that an applicant can appeal a staff action and thereby ensure final action by the Commission at Public Meeting. A second option is for staff to conduct a review and prepare a recommendation for disposition at Public Meeting regardless of if the transaction is traditional, general or *pro forma*. This requires a detailed level of oversight for many transactions that may not necessarily warrant such oversight."**

At this time, BCAP prefers the first alternative for reclassification and review. Importantly, this will provide all parties with an opportunity to be heard directly by the Commission to the extent they are dissatisfied with a determination regarding the classification of a particular transaction. This process will be more efficient than requests for reconsideration filed after the Commission's action at Public Meeting.

**"Another concern is transactions involving less than 2% of the nation's subscribers or, in Pennsylvania's case, every carrier except Verizon. The FCC's**

***Streamlined Regulation Order* subjects those transactions to abbreviated review unless the transaction involves service areas adjacent to each other. Neither Level 3, PTA, nor Verizon addressed rural carrier transactions. The Commission seeks comment on whether, and how, rural carrier transactions should be treated under the regulations."**

The Commission's regulations should not distinguish between rural and non-rural ILECs, and should subject any filing by an ILEC that is protested to the full review process. This issue is addressed in more detail in Sections II.B of these Comments.

**F. The Proposed Rules Regarding Streamlined Procedures for Review of Transfers of Control Should Reflect Various Technical Amendments to Comply with the Proposed Rulemaking Order**

Finally, BCAP respectfully submits that as written, the proposed regulations are unclear in several respects and inconsistent with statements in the Proposed Rulemaking Order. For example, the Proposed Rulemaking Order states that a transaction will be classified as *pro forma* where it has no effect on the rates, terms and conditions of service and it results in a change in control of less than 10%; however, the proposed regulations extend the application of the *pro forma* rules beyond this limited circumstance.<sup>59</sup> In addition, the definition of "Incumbent Local Exchange Carrier" should be limited to those carriers defined in the Public Utility Code as "ILECs." BCAP includes a redline with various suggested technical amendments and changes to conform with BCAP's substantive recommendations contained herein. BCAP respectfully submits that these changes, along with the clarification of the treatment of full review transactions, will advance the Commission's goals of making the application process more streamlined and understandable.

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<sup>59</sup> To the extent the Commission extends the applicability of *pro forma* transactions beyond the limited definition in the Proposed Rulemaking Order, BCAP reserves the opportunity to argue for modifications to the procedures for processing and review of *pro forma* transactions that is commensurate with the types of transactions that potentially could be processed as a *pro forma* transaction.

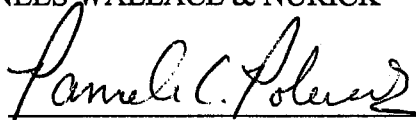
### III. CONCLUSION

Today, as the consuming public demands more voice service options, the cable industry has been responding through competitive ventures to meet market demand. With the rapidly growing pace of technological and corporate change in the telecommunications industry, the Commission must reevaluate its review process for transfers of control and affiliate filings. BCAP applauds the Commission on its willingness to streamline transfers in an order to keep up with technological change. However, the Commission must be careful to maintain a regulatory environment that does not infringe upon competitive concerns and instead favors dominant ILEC carriers. The concerns expressed in these Comments will advance the shared policy of both the Commission and the FCC, as well as the goals of a streamlined process in a way that promotes the public interest by encouraging competition.

Respectfully submitted,

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Dated: April 9, 2008

ANNEX A

Title 52. Public Utilities  
Part I. Public Utility Commission  
Subpart C. Fixed Service Utilities  
Chapter 63. Telephone Service

**Subchapter O. Abbreviated filing procedures for a telecommunications public utility seeking Commission approval under sections 1102(a) and 1103 of the public utility code for an acquisition, diminution in control, merger, stock sales or transfers, transfer of assets or transfer of control of a telecommunications public utility requiring a certificate of public convenience under 66 Pa.C.S. § 1102(a)(3) or approval of a contract between public utilities and affiliates.**

**§ 63.321. Purpose.**

This regulation establishes a cost-effective review and approval periods that abbreviate the traditional time for approving transactions involving an acquisition, diminution in control, merger, stock sales or transfers, transfer of assets or transfer of control of a telecommunications public utility requiring a certificate of public convenience under 66 Pa.C.S. § 1102(a)(3) or approval of a contract between public utilities and affiliates.

**§ 63.322. Definitions.**

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

*Affiliated interest* – An entity associated with a public utility as set forth in 66 Pa.C.S. § 2101(a).

*Carrier* – An entity defined as a public utility by 66 Pa.C.S. 102 or defined as a public utility by 66 Pa.C.S. § 102 and certificated by the Commission pursuant to 66 Pa.C.S. § 1102(a).

~~*Competitive carrier* – An entity that provides information service or telecommunications service as defined by 47 U.S.C. §153, or an alternative service provider as defined by 66 Pa.C.S. § 3012 including a certificated carrier under 66 Pa.C.S. § 1102(a).~~

*Controlling interest* – An interest, held by a person or group acting in concert, which enables the beneficial holder or holders to control 10% or more of the voting interest in the telecommunications public utility or its parent, regardless of the

remoteness of the holder or holders or the transaction. A contingent right may not be included.

*Diminution of control* – A reduction in the controlling interest of 10% or more held by a person or group acting in concert, which reduces the beneficial holder or holders ability to control a telecommunications public utility through the voting interest in the telecommunications public utility or its parent, regardless of the remoteness of the holder or holders or the transaction. A contingent right may not be included.

*Dominant market power* –A carrier that has or will have a moderately concentrated or concentrated market using the Herfindal-Hirschman Index (HHI) utilized by the United States Department of Justice Antitrust Division in any service following Commission approval of a merger under 66 Pa.C.S. § 1102(a) or as otherwise alleged or documented by a party or the Commission in a proceeding seeking Commission approval under 66 Pa.C.S. 1102(a).

*Formal complaint* – The term as defined in section 1.8 of the Commission's rules of practice & procedure or hereinafter amended.

*Formal investigation* – The term as defined in section 1.8 of the Commission's rules of practice & procedure or hereinafter amended.

*Formal proceeding* – The term as defined in section 1.8 of the Commission's rules of practice & procedure or hereinafter amended.

*Herfindahl-Hirschman Index* – The commonly accepted measure of market concentration utilized by the United States Department of Justice in which market concentration is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers.

*Incumbent local exchange carrier* –A local exchange carrier as defined in 47 U.S.C. § 153(26) or a local exchange telecommunications company as defined by 66 Pa.C.S. § 3012 ~~including a certificated carrier under 66 Pa.C.S. § 1102(a).~~

*Informal complaint* – The term as defined in section 1.8 of the Commission's rules of practice & procedure or hereinafter amended.

*Informal investigation* – The term as defined in section 1.8 of the Commission's rules of practice & procedure or hereinafter amended.

*Informal proceeding* – The term as defined in section 1.8 of the Commission's rules of practice & procedure or hereinafter amended.

*Party* - The term as defined in section 1.8 of the Commission's rules of practice & procedure or hereinafter amended.

*Pennsylvania legal counsel* – The attorney of record appearing before the Commission as required by sections 1.21 and 1.22 of the Commission's rules of practice & procedure or hereinafter amended.

*Person* - The term as defined in section 1.8 of the Commission's rules of practice & procedure or hereinafter amended.

*Predominant market presence* – A utility that could or would possess market power in any service following approval of a Commission merger under 66 Pa.C.S. § 1102(a) using the non-horizontal merger guidelines of the U.S. Department of Justice Antitrust Division or as otherwise alleged or documented by a party or the Commission in a proceeding seeking Commission approval under 66 Pa.C.S. § 1102(a).

*Pro forma transaction* – A transaction that is seamless to the customer and does not result in a change in rates or conditions of service and which, taken together with all previous internal corporate restructurings, does not change the telecommunications public utility's controlling interest, or result in a diminution of control greater than 10%.

*Staff* – The term as defined in section 1.8 of the Commission's rules of practice & procedure or hereafter amended.

*Statutory Advocate* – The term as defined in section 1.8 of the Commission's rules of practice & procedure or hereafter amended.

*Telecommunications public utility* – An entity that provides ~~information service or~~ telecommunications service as defined by ~~47 U.S.C. § 153 or~~ 66 Pa.C.S. § 1023012 ~~or as a carrier.~~

*Verification* – The term as defined in section 1.8 of the Commission's rules of practice & procedure or as hereafter amended.

### **63.323. Applicability.**

This subchapter shall apply to a telecommunications public utility seeking Commission approval for an acquisition, diminution in control, merger, stock sales or transfers, transfer of assets or transfer of control of a telecommunications public utility requiring a certificate of public convenience under 66 Pa.C.S. § 1102(a)(3) or approval of a contract between public utilities and affiliates.

**§ 63.324. Requirements for a telecommunications public utility seeking Commission approval of a general rule transaction subject to 66 Pa.C.S. § 1102(a)(3) and 1103.**

(a) *General rule transactions.* The following transactions of a telecommunications public utility ~~involving a change in conditions of service or rates that~~ seeks Commission approval for acquisition, diminution in control, merger, stock sales or transfers, transfer of assets or transfer of control of a telecommunications public utility shall require notification to the Commission and eligible for approval by the Commission as a general rule transaction:

(1) A transaction resulting in the transfer of 10% or more of the assets of a carrier.

(2) A transaction resulting in the transfer of 10% or more of the direct or indirect control of a carrier.

(3) A transaction resulting in the diminution of 10% or more in the control of a carrier.

(4) A transaction requiring a certificate of public convenience issued pursuant to 66 Pa.C.S. § 1102(a).

(5) A transaction subject to evaluation under the statement of policy on transfer of control, 52 Pa. Code § 69.901.

(6) A transaction that transfers the customer base of a telecommunications public utility or carrier and involves a change in conditions of service or rates.

(7) A transaction subjected to this subchapter by decision of the Commission, including a transaction no longer classified as a *pro forma* transaction by the Commission.

(8) A transaction that involves a change of service or rates.

(b) *Reclassification and Review of a general rule transaction as a pro forma transaction.* When a telecommunications public utility seeks review and approval of a transaction as a general rule transaction and the Commission reclassifies the general rule transaction as a pro forma transaction, the transaction shall be subject to the requirements of a *pro forma* transaction set forth at Section 63.325 of the rules unless determined otherwise for good cause shown.



~~(1) — Review of a general rule transaction reclassified as a pro forma transaction.~~ The 30-day review and approval period for a general rule transaction reclassified as a *pro forma* transaction shall begin on the date that the telecommunications public utility is notified in writing that the general rule transaction is reclassified.

~~(c) — (2) Reclassification of and Review of a general rule transaction as a full review transaction reclassified as other than a pro forma transaction. When a telecommunications public utility seeks review and approval of a transaction as a general rule transaction and the Commission reclassifies the general rule transaction as a full review transaction, the transaction shall be subject to the requirements of a full review transaction set forth at Section 63.3XX of the rules unless determined otherwise for good cause shown.~~ The review and approval of a general rule transaction reclassified as a full review transaction not reclassified as a pro forma transaction shall begin on the date that the telecommunications public utility is notified in writing that the transaction is reclassified. A transaction classified under this section shall be reviewed within the time governing review and approval under Sections 1102 and 1103 of the Public Utility Code.

~~(d) — (3) Right of appeal for reclassification of a transaction.~~ When a telecommunications public utility is notified in writing by staff that a general rule transaction will be reclassified as a full review transaction, the determination shall be subject to appeal as an appeal from an action of staff. The provisions governing an appeal shall be those governing appeals from an action of staff under Section 5.44 of the rules of practice and procedure. The writing shall inform the telecommunications public utility of the right of appeal.

~~(ee) Notification requirements for general rule transactions.~~ Notification shall be filed with the Commission on the date of filing with a federal regulatory agency seeking federal approval of a general rule transaction or no later than 60 days prior to the proposed closing date of a transaction subject to this subchapter, whichever is longer. The telecommunications public utility filing the notification shall comply with the Commission's rules of practice and procedure governing applications. A telecommunications public utility shall provide an updated copy to the Commission and the statutory advocates of filings in the following circumstances:

(1) Filing with the Federal Communications Commission (FCC) of an application seeking approval of the transaction (FCC application).

(2) Filing of a notice with the United States Department of Justice (DOJ) pursuant to the Hart-Scott-Rodino Antitrust Improvements Act (HSR Filing).

(3) Filing by a telecommunications public utility of a pleading responding to a formal or informal complaint, investigation, or proceeding undertaken by the FCC or the DOJ or other state or federal regulatory agency involving the transaction.

(4) Filing required by the Commission from a telecommunications public utility in response to a notification by the Commission that simultaneous notification is appropriate to protect the public interest.

(5) Filing required by the Commission from a carrier in response to a request by any of the following:

- (i) A request by a statutory advocate.
- (ii) A request by a carrier with a certificate of public convenience obtained under Section 1102(a) for a copy.
- (iii) A request by the Commission or staff for a copy.
- (iv) A request by a person or party for a copy.

(d) *Content of notification for general rule transactions*. In addition to the information required by section 5.12 of the Commission's rules of practice and procedure, a general rule transaction shall contain the following information:

(1) The name, address, and telephone number of each party or applicant to the transaction.

(2) The government, state, or territory under the laws of which each corporate or partnership applicant to the transaction is organized.

(3) The name, title, post office address, and telephone number of the officer or contact point, including Pennsylvania legal counsel, to whom correspondence concerning the transaction is to be addressed.

(4) The name, address, citizenship, and principal place of business any person, party, or entity that directly or indirectly owns more than 10% of the equity of the applicant, and the percentage of equity owned by each of those entities (to the nearest 1%).

(5) A summary description of the transaction.

(6) A description of the geographic areas subject to the transactions and what services are provided in the geographic area;

(7) A verified statement as to how the transaction fits into one or more of the categories subject to the general rule for notification.

(8) Identification of other transactions related to the transaction.

(9) A verified statement whether the transaction warrants special consideration because either party to the transaction is facing imminent business failure.

(10) Identification of a separately filed waiver request sought in conjunction with the transaction.

(11) A verified statement showing:

(i) How the transaction will serve the public interest, convenience, and necessity.

(ii) A description of the general and specific affirmative public benefit to Pennsylvania and Pennsylvania consumers warranting approval of the transaction.

(iii) Additional information that may be necessary to address the effect of the transaction on dominant market power or predominant market presence.

(12) A verified statement affirming that the utility is in compliance with Commission obligations and filings.

(13) A verified statement affirming that customers received notice.

(14) A verified statement containing a copy of any Pennsylvania utility certificates held by the telecommunications public utility.

(15) A verified statement on the effect of the transaction on existing Pennsylvania tariffs. If applicable or in response to a request from staff, a telecommunications public utility shall provide a red-line document identifying changes in existing Pennsylvania tariffs before and after the transaction for which the telecommunications public utility seeks approval from the Commission.

(16) A verified statement on the transaction's effect on the existing affiliate interest agreements of the utility.

(17) A verified statement establishing that no state or federal regulatory agency is expected to undertake an informal or formal investigation, complaint, or proceeding relating to the transaction.

(18) A verified statement that no state or federal regulatory undertaking is appropriate regarding the transaction because the telecommunications public utility lacks dominant market power or predominant market presence.

(19) Organizational charts showing the effect on the applicant's organization before and after the transaction.

(20) A copy of the application filed at the FCC or a notice filed with the DOJ, if any.

(e) *Continuing obligations for notification of general rule transactions.* When a Commission or federal proceeding related to the general rule transaction is pending, the telecommunications public utility to the transaction shall file with the Commission copies of all procedural motions, public responses to discovery, and orders or other actions addressing or terminating the proceeding. The telecommunications public utility shall supplement the notification filing with any FCC or DOJ public notice issued concerning the transaction.

(f) *Commission publication of general rule transactions.*

(1) The Secretary shall publish notice of a general rule transaction in the *Pennsylvania Bulletin* under sections 5.14(a) and (b) of the Commission's rules of practice and procedure and, as directed by the Secretary, require additional publication in a newspaper of general circulation serving the geographic territory affected by the general rule transaction unless the Commission determines otherwise for good cause shown.

(2) Any notice shall contain a 15-day general comment period and a formal protest period established under section 5.14(d) of the Commission's rules of practice & procedure, unless the Commission determines otherwise for good cause shown.

(i) A general comment addressing the general rule transaction ~~involving a change in conditions of service or rates~~ shall not constitute a formal protest under section 5.14 of the Commission's rules of practice and procedure nor reclassify the general rule transaction, unless the Commission determines otherwise for good cause shown.

(ii) A formal protest objecting to the general rule transaction ~~involving a change in conditions of service or rates~~ shall constitute a formal protest under section 5.14 of the Commission rules of practice and procedure and may reclassify the

general rule transaction, unless the Commission determines otherwise for good cause shown.

(iii) A formal protest objecting to a general rule transaction involving an ILEC change in conditions of service or rates by a statutory advocate or other party shall constitute a formal protest under section 5.14 of the Commission's rules of practice and procedure and shall reclassify a general rule transaction as a full review pro forma transaction or a transaction subject to the review and approval for transactions under Sections 1102 and 1103 of the Public Utility Code and section 63.3XX, unless the Commission determines otherwise for good cause shown.

(g) *Telecommunications public utility notice to customers.*

(1) *General rule transactions involving a change in conditions of service or rates.* A telecommunications public utility shall prepare and distribute notice to the customers of a general rule transaction involving a change in conditions of service or rates with the approval of the Commission's Bureau of Consumer Services. Notice to the customers shall occur prior to Commission approval unless circumstances make distribution prior to approval impractical or unnecessary.

(2) *Transfers of customer base subject to the general rule.*

(i) A transaction transferring a customer base involving a change in conditions of service or rates shall require additional notice to the customer base prepared with the approval of the Commission's Bureau of Consumer Services.

(ii) A general comment addressing the transfer of a customer base involving a change in conditions of service or rates shall not constitute a formal protest under section 5.14 of the Commission's rules of practice and procedure nor reclassify the general rule transaction, unless the Commission determines otherwise for good cause shown.

(iii) A formal protest objecting to transfer of a customer base involving a change in conditions of service or rates shall constitute a formal protest under section 5.14 of the Commission's rules of practice and procedure and may reclassify the general rule transaction, unless the Commission determines otherwise for good cause shown.

(iv) A formal protest objecting to a general rule transaction involving a change in conditions of service or rates by a statutory advocate shall constitute a formal protest under section 5.14 of the Commission's rules of practice and procedure and shall reclassify a general rule transaction as either as a *pro forma* transaction or a transaction subject to the review and approval for transactions under sections 1102 and 1103 of the Public Utility Code.

(h) *Commission review of transactions subject to the general rule.* The Commission retains the discretion to make inquiries and, after notice and opportunity to be heard, take action to protect the public interest, including the imposition of conditions on approval of the transaction when deemed necessary or proper under 66 Pa.C.S. § 1103 and to establish affirmative public benefit as required by Pennsylvania law.

(i) *Formal protests to a general rule transaction.* A protest filed to a transaction subject to the general rule shall comply with the Commission's rules of practice and procedure.

(j) *Reclassification of a transaction from the general rule to a full review transaction.* The Commission shall reclassify a general rule transaction to a full review transaction in the following circumstances:

(1) ~~The filing of a formal protest by a statutory advocate or the filing of a formal protest warranting reclassification for good cause shown, including competitive impact.~~

(2) The filing involves a major acquisition or merger between telecommunications firms with substantial market shares.

(3) The filing involves an acquisition, merger or other transaction that raises novel or important issues.

(4) For transactions involving ILECs, the filing of a formal protest by any party, including parties alleging competitive impact.

(45) The Commission determines that reclassification is necessary to protect the public interest.

(k) *Commission approval for a general rule transaction.* A transaction subject to this subchapter shall be deemed to be in the public interest and approved in law and fact 60 days after public notice in the *Pennsylvania Bulletin* unless the Commission determines otherwise for good cause shown.

(1) The Commission will issue a Secretarial letter or order approving a general rule transaction and issue a certificate of public convenience authorizing the transaction pursuant to sections 1102(a) and 1103 of the Public Utility Code, 66 Pa.C.S. §§ 1102(a) and 1103.

(2) The Commission or staff may extend the review and approval period, reject the filing or transaction, remove a transaction from the general transaction rule, or take other action deemed appropriate to protect the public interest.

(3) A staff action shall be in writing and inform the telecommunications public utility of the right of appeal. An appeal from an action of staff shall be governed by the procedures governing appeals from an action of staff under Section 5.44 of the Commission's rules of practice and procedure.

(1) *Limitations on general rule transactions.*

(1) *Bankruptcy proceedings.* General rule transactions related to bankruptcy remain subject to sections 1.61 and 1.62 of the Commission's rules of practice and procedure.

(2) *Scope of general rule transactions.* A general rule transaction may not operate to permit a telecommunications public utility to circumvent an obligation by doing or refraining from doing anything that a telecommunications public utility must do or cannot do.

**Section 63.325 Requirements for a telecommunications public utility seeking Commission approval of a *pro forma* transaction subject to 66 Pa.C.S. § 1102(a)(3) and 1103.**

(a) *Pro forma transactions.* The following transactions of a telecommunications public utility not involving a change in conditions of service or rates that seeks Commission approval for acquisition, diminution in control, merger, stock sales or transfers, transfer of assets or transfer of control of a telecommunications public utility shall require notification to the Commission and approval by the Commission as a *pro forma* transaction:

(1) A transaction resulting in the transfer of less than 10% of the assets of a carrier.

(2) A transaction resulting in the transfer of less than 10% of the direct or indirect control of a carrier.

(3) A transaction resulting in the diminution of less than 10% in the control of a carrier.

~~(4) A transaction requiring a certificate of public convenience issued pursuant to 66 Pa.C.S. § 1102(a).~~

~~(5) — A transaction subject to evaluation under the statement of policy on transfer of control, 52 Pa. Code § 69.901.~~

~~(6) — A transaction that transfers the customer base of a telecommunications public utility and does not involve a change in conditions of service or rates.~~

(74) A transaction subjected to this subchapter by decision of the Commission, including a general rule transaction reclassified as a *pro forma* transaction.

(b) *Reclassification of a pro forma transaction.* When a telecommunications public utility seeks review and approval of a transaction as a *pro forma* transaction and the Commission reclassifies the *pro forma* transaction as a general rule transaction or a full review transaction, the *pro forma* transaction shall be subject to the requirements of a general rule transaction set forth at Section 63.324 or the requirements of a full review transaction set forth in Section 63.3XX, unless the Commission determines otherwise for good cause shown.

(1) *Review of a pro forma transaction reclassified as a general rule transaction.* The 60-day review and approval period for a *pro forma* transaction reclassified as a general rule transaction shall begin on the later of the date that the telecommunications public utility is notified in writing that the *pro forma* transaction is reclassified or the date that notice of the transaction is published in the *Pennsylvania Bulletin*.

(2) *Review of a pro forma transaction reclassified as a full review other than a general rule transaction.* The review and approval of a *pro forma* transaction reclassified as a full review other than a general rule transaction shall begin on the date that notice of the full review transaction is published in the *Pennsylvania Bulletin* ~~the telecommunications public utility is notified in writing that the *pro forma* transaction is reclassified but not as a general rule transaction.~~ A *pro forma* transaction reclassified under this section shall be reviewed within the period governing review and approval under Section 1102 and 1103 of the Public Utility Code, and Section 63.3XX.

(3) *Right of appeal for reclassification of a pro forma transaction.* When a telecommunications public utility is notified in writing by staff that a *pro forma* transaction will be reclassified, the determination shall be subject to appeal as an appeal from an action of staff. The provisions governing an appeal shall be those governing appeals from an action of staff under Section 5.44 of the Commission's rules of practice and procedure. The writing shall inform the telecommunications public utility of the right of appeal.



(c) *Notification requirements for pro forma transactions.* Notification of a *pro forma* transaction shall be filed with the Commission on the date of filing with a federal regulatory agency seeking federal approval of a *pro forma* transaction or no later than 30 days prior to the proposed closing date of a *pro forma* transaction subject to this subchapter, whichever is longer. The utility filing the notification shall comply with the Commission's rules of practice and procedure governing applications. A telecommunications public utility shall provide an updated copy to the Commission and the statutory advocates of filings in the following circumstances:

(1) Filing with the Federal Communications Commission (FCC) of an application seeking approval of the transaction (FCC application).

(2) Filing of a notice with the United States Department of Justice (DOJ) pursuant to the Hart-Scott-Rodino Antitrust Improvements Act (HSR Filing).

(3) Filing by a telecommunications public utility of a pleading responding to a formal or informal complaint, investigation, or proceeding undertaken by the FCC or the DOJ or other state or federal regulatory agency involving the transaction.

(4) Filing required by the Commission from a telecommunications public utility in response to a notification by the Commission that simultaneous notification is appropriate to protect the public interest.

(5) Filing required by the Commission from a carrier in response to a request by any of the following:

- (i) A request by a statutory advocate.
- (ii) A request by a carrier with a certificate of public convenience obtained under Section 1102(a) for a copy.
- (iii) A request by the Commission or staff for a copy.
- (iv) A request by a person or party for a copy.

(d) *Content of notification for pro forma transactions.* In addition to the information required by section 5.12 of the Commission's rules of practice and procedure, a *pro forma* transaction shall contain the following information:

(1) The name, address, and telephone number of each party or applicant to the transaction.

(2) The government, state, or territory under the laws of which each corporate or partnership applicant to the transaction is organized.

(3) The name, title, post office address, and telephone number of the officer or contact point, including Pennsylvania legal counsel, to whom correspondence concerning the transaction is to be addressed.

(4) The name, address, citizenship, and principal place of business any person, party, or entity that directly or indirectly owns more than 10% of the equity of the applicant, and the percentage of equity owned by each of those entities (to the nearest 1%).

(5) A summary description of the transaction.

(6) A description of the geographic areas subject to the transactions and what services are provided in the geographic area;

(7) A verified statement as to how the transaction fits into one or more of the categories subject to the *pro forma* rule.

(8) Identification of other transactions related to the transaction.

(9) A verified statement whether the transaction warrants special consideration because either party to the transaction is facing imminent business failure.

(10) Identification of a separately filed waiver request sought in conjunction with the transaction.

(11) A verified statement showing:

(i) How the transaction will serve the public interest, convenience, and necessity.

(ii) A description of the general and specific affirmative public benefit to Pennsylvania and Pennsylvania consumers warranting approval of the transaction.

(iii) Additional information that may be necessary to address the effect of the transaction on dominant market power or predominant market presence.

(12) A verified statement affirming that the utility is in compliance with Commission obligations and filings.

(13) A verified statement affirming that customers received or will receive notice.

(14) A verified statement containing a copy of any Pennsylvania utility certificates held by the telecommunications public utility.

(15) A verified statement on the effect of the transaction on existing Pennsylvania tariffs. When applicable or in response to a request from staff, a telecommunications public utility shall provide a red-line document identifying changes in existing Pennsylvania tariffs before and after the transaction for which the utility seeks approval from the Commission.

(16) A verified statement on the effect of the transaction on the existing affiliate interest agreements of the utility.

(17) A verified statement establishing that no state or federal regulatory agency is expected to undertake an informal or formal investigation, complaint, or proceeding relating to the transaction.

(18) A verified statement that no state or federal regulatory undertaking is appropriate regarding the transaction because the carrier lacks dominant market power or predominant market presence.

(19) Organizational charts showing the effect on the applicant's organization before and after the transaction.

(20) A copy of the application filed at the FCC or a notice filed with the DOJ, if any.

(e) *Continuing obligations for notification of pro forma transactions.* When a Commission or federal proceeding related to the *pro forma* transaction is pending, a telecommunications public utility seeking approval of a *pro forma* transaction shall file with the Commission copies of all procedural motions, public responses to discovery, and orders or other actions addressing or terminating the proceeding. The telecommunications public utility shall supplement the notification filing with any FCC or DOJ public notice issued concerning the transaction.

(f) *Commission publication of pro forma transactions.*

(1) The Secretary may publish notice of a *pro forma* transaction in the *Pennsylvania Bulletin*. The Secretary may post notice of the *pro forma* transaction on the Commission's website, unless the Commission determines otherwise for good cause shown.

(2) A notice posted on the Commission website may contain a general comment period established according to section 5.14(d) of the Commission's rules of practice.

(3) There shall be no formal protest period under section 5.14(d) of the Commission's rules of practice & procedure, unless the Commission determines otherwise for good cause shown.

(4) A *pro forma transaction* subject to publication in the *Pennsylvania Bulletin*, in addition to any additional publication or posting on the Commission's website, shall be subject to a general comment period and a formal protest period established under section 5.14(d) of the Commission's rules of practice & procedure, unless the Commission determines otherwise for good cause shown.

(i) A general comment addressing a *pro forma* transaction not involving a change in conditions of service or rates shall not constitute a formal protest under section 5.14 of the Commission's rules of practice and procedure nor reclassify the general rule transaction, unless the Commission determines otherwise for good cause shown.

(ii) A formal protest objecting to a *pro forma* transaction not involving a change in conditions of service or rates shall constitute a formal protest under section 5.14 of the Commission rules of practice and procedure and may reclassify the general rule transaction, unless the Commission determines otherwise for good cause shown.

(iii) A formal protest objecting to a *pro forma* transaction involving an ILEC not involving a change in conditions of service or rates by a statutory advocate or other party shall constitute a formal protest under section 5.14 of the Commission's rules of practice and procedure and shall reclassify a *pro forma* general rule transaction either as a general rule transaction or as a *full review* transaction subject to the review and approval for transactions under sections 1102 and 1103 of the Public Utility Code.

(g) *Telecommunications public utility notice to customers.*

(1) *Pro forma transactions not involving a change in conditions of service or rates.* A telecommunications carrier shall prepare and distribute notice of a *pro forma* transaction not involving a change in conditions of service or rates to the customers of a telecommunications carrier. Notice and distribution may also be required for transactions that do not reduce an applicant's control by more than 10%. Notice shall be distributed prior to Commission approval of a *pro forma* transaction unless the circumstances make distribution prior to approval impractical or unnecessary.

(2) *Notice of pro forma transfers of customer base.*

(i) A *pro forma* transaction transferring a customer base not involving a change in conditions of service or rates or not reducing an applicant's control by more than 10% shall not require additional notice to the customer base beyond the general notice in this subchapter.

(ii) A general comment addressing the transfer of a customer base not involving a change in conditions of service or rates shall not constitute a formal protest under section 5.14 of the Commission's rules of practice and procedure nor reclassify the *pro forma* transaction, unless the Commission determines otherwise for good cause shown.

(iii) A formal protest objecting to transfer of a customer base not involving a change in conditions of service or rates shall constitute a formal protest under section 5.14 of the Commission rules of practice and procedure but may not reclassify the *pro forma* transaction, unless the Commission determines otherwise for good cause shown.

(h) *Commission review of pro forma transactions.* The Commission retains the discretion to make inquiries and, after notice and opportunity to be heard, take action to protect the public interest, including the imposition of conditions on approval of the transaction when deemed necessary or proper under 66 Pa.C.S. § 1103 and to establish affirmative public benefit as required by Pennsylvania law.

(i) *Formal protests to a pro forma transaction.* A protest filed to a transaction subject to the general rule shall comply with the Commission's rules of practice and procedure.

(j) *Removal of a transaction as a pro forma transaction.* The Commission shall remove a transaction as a *pro forma* transaction and reclassify the transaction in the following circumstances:

(1) The filing of a protest by a statutory advocate ~~or the filing of a formal protest warranting reclassification for good cause shown, including competitive impact.~~

(2) The filing involves a major acquisition or merger between telecommunications firms with substantial market shares.

(3) The filing involves an acquisition, merger or other transaction that raises novel or important issues.

(4) For transactions involving ILECs, the filing of a formal protest by any party, including parties alleging competitive impact.

(45) The Commission determines that reclassification is necessary to protect the public interest.

(k) *Commission approval for a pro forma transaction.* A transaction subject to this subchapter shall be deemed to be in the public interest and approved in law and fact 30 days after ~~filing with the Commission publishing in the *Pennsylvania Bulletin* or~~ posting on the Commission's website, whichever is longer, unless the Commission determines otherwise for good cause shown.

(1) The Commission will issue a Secretarial letter or order approving a *pro forma* transaction and issue a certificate of public convenience authorizing the transaction pursuant to sections 1102(a) and 1103 of the Public Utility Code, 66 Pa.C.S. §§ 1102(a) and 1103.

(2) The Commission or staff may extend the consideration period, reject the filing or transaction, remove a transaction from the *pro forma* rule, or take other action deemed appropriate to protect the public interest.

(3) A staff action shall be in writing and inform the telecommunications public utility of the right of appeal. An appeal from an action of staff shall be governed by the procedures governing appeals from an action of staff under Section 5.44 of the Commission's rules of practice and procedure.

(1) *Limitations on pro forma transactions.*

(1) *Bankruptcy proceedings.* Pro forma changes related to bankruptcy remain subject to sections 1.61 and 1.63 of the Commission's rules of practice and procedure.

(2) *Scope on pro forma transactions.* A pro forma transaction may not operate to permit a telecommunications public utility to abandon a condition of service or rate. A *pro forma* transaction may not operate to permit a telecommunications public utility to circumvent an obligation by doing or refraining from doing anything that a telecommunications public utility must do or cannot do.

**§ 63.326. Approval of contracts between a carrier or public utility and an affiliated interest under sections 2101(a), 3019(b)(1) and 3016(f)(1).**

(a) A written or oral contract or transaction between a telecommunications utility and an affiliated interest is governed by 66 Pa.C.S. § 3019(b)(1) and 66 Pa.C.S. § 3016(f)(1). A written or oral contract between a telecommunications utility and an affiliate requires approval by the Commission and may not violate the prohibition against subsidization of competitive services by noncompetitive services.

(b) *Written contract or transaction.* The carrier or public utility shall file a copy and written summary of a written contract or transaction between a carrier or public utility and an affiliated interest with the Commission. A written contract or transaction shall remain subject to examination, audit, or other action to ensure compliance with 66 Pa.C.S. § 3016(f)(1) and other applicable sections of the Public Utility Code.

(c) *Oral contract or transaction.* The filing of a written summary of an oral contract or transaction shall be deemed compliant with this subchapter. An oral contract or transaction shall remain subject to examination, auditing, or other action to ensure compliance with 66 Pa.C.S. § 3016(f)(1) and other applicable sections of the Public Utility Code.

(d) *Retention of contract or transaction.* A public utility or carrier shall retain and make available copies or summaries of the contract or transaction and shall file the copies or summaries at the request of the Commission.

(e) *Commission discretion.* The Commission retains discretion to make inquiries, audits and other investigations and, after notice and opportunity to be heard, take action to protect the public interest.

**§ 63.3XX. Requirements for a telecommunications public utility seeking Commission approval of a full review transaction subject to 66 Pa.C.S. § 1102(a)(3) and 1103.**

(a) *Full review transactions.* The following transactions of a telecommunications public utility that seeks Commission approval for acquisition, diminution in control, merger, stock sales or transfers, transfer of assets or transfer of control shall require notification to the Commission and approval by the Commission as a full review transaction:

(1) A transaction that involves a major acquisition or merger between firms with substantial market shares.

(2) A transaction that raises novel or important issues.

(3) A transaction that is subject to a protest filed by a statutory advocate.

(4) A transaction involving an ILEC that is subject to a protest filed by any party.

(5) A transaction for which the Commission, in its sole discretion, determines that the traditional review process should be used to protect the public interest.

(6) Any other transaction that is not eligible for, or has been reclassified from, a *pro forma* or general rule transaction.

(b) Notification requirements for full review transactions . Notification shall be filed with the Commission on the date of filing with a federal regulatory agency seeking federal approval of a general rule transaction. The telecommunications public utility filing the notification shall comply with the Commission's rules of practice and procedure governing applications. A telecommunications public utility shall provide an updated copy to the Commission and the statutory advocates of filings in the following circumstances:

(1) Filing with the Federal Communications Commission (FCC) of an application seeking approval of the transaction (FCC application).

(2) Filing of a notice with the United States Department of Justice (DOJ) pursuant to the Hart-Scott-Rodino Antitrust Improvements Act (HSR Filing).

(3) Filing by a telecommunications public utility of a pleading responding to a formal or informal complaint, investigation, or proceeding undertaken by the FCC or the DOJ or other state or federal regulatory agency involving the transaction.

(4) Filing required by the Commission from a telecommunications public utility in response to a notification by the Commission that simultaneous notification is appropriate to protect the public interest.

(5) Filing required by the Commission from a carrier in response to a request by any of the following:

(i) A request by a statutory advocate.

(ii) A request by a carrier with a certificate of public convenience obtained under Section 1102(a) for a copy.

(iii) A request by the Commission or staff for a copy .

(iv) A request by a person or party for a copy.



(c) Content of notification for full review transactions . In addition to the information required by section 5.12 of the Commission's rules of practice and procedure, a full review transaction shall contain the following information:

(1) The name, address, and telephone number of each party or applicant to the transaction.

(2) The government, state, or territory under the laws of which each corporate or partnership applicant to the transaction is organized.

(3) The name, title, post office address, and telephone number of the officer or contact point, including Pennsylvania legal counsel, to whom correspondence concerning the transaction is to be addressed.

(4) The name, address, citizenship, and principal place of business any person, party, or entity that directly or indirectly owns more than 10% of the equity of the applicant, and the percentage of equity owned by each of those entities (to the nearest 1%).

(5) A summary description of the transaction.

(6) A description of the geographic areas subject to the transactions and what services are provided in the geographic area;

(7) A verified statement as to how the transaction fits into one or more of the categories subject to the general rule for notification.

(8) Identification of other transactions related to the transaction.

(9) A verified statement whether the transaction warrants special consideration because either party to the transaction is facing imminent business failure.

(10) Identification of a separately filed waiver request sought in conjunction with the transaction.

(11) A verified statement showing:

(i) How the transaction will serve the public interest, convenience, and necessity.

(ii) A description of the general and specific affirmative public benefit to Pennsylvania and Pennsylvania consumers warranting approval of the transaction.

(iii) Additional information that may be necessary to address the effect of the transaction on dominant market power or predominant market presence.

(12) A verified statement affirming that the utility is in compliance with Commission obligations and filings.

(13) A verified statement affirming that customers received notice.

(14) A verified statement containing a copy of any Pennsylvania utility certificates held by the telecommunications public utility.

(15) A verified statement on the effect of the transaction on existing Pennsylvania tariffs. If applicable or in response to a request from staff, a telecommunications public utility shall provide a red-line document identifying changes in existing Pennsylvania tariffs before and after the transaction for which the telecommunications public utility seeks approval from the Commission.

(16) A verified statement on the transaction's effect on the existing affiliate interest agreements of the utility.

(17) A verified statement establishing that no state or federal regulatory agency is expected to undertake an informal or formal investigation, complaint, or proceeding relating to the transaction.

(18) A verified statement that no state or federal regulatory undertaking is appropriate regarding the transaction because the telecommunications public utility lacks dominant market power or predominant market presence.

(19) Organizational charts showing the effect on the applicant's organization before and after the transaction.

(20) A copy of the application filed at the FCC or a notice filed with the DOJ, if any.

(d) Continuing obligations for notification of full review transactions. When a Commission or federal proceeding related to the full review transaction is pending, the telecommunications public utility to the transaction shall file with the Commission copies of all procedural motions, public responses to discovery, and orders or other actions addressing or terminating the proceeding. The telecommunications public utility shall

supplement the notification filing with any FCC or DOJ public notice issued concerning the transaction.

(e) Commission publication of full review transactions.

(1) The Secretary shall publish notice of a general rule transaction in the Pennsylvania Bulletin under sections 5.14(a) and (b) of the Commission's rules of practice and procedure and, as directed by the Secretary, require additional publication in a newspaper of general circulation serving the geographic territory affected by the full review transaction unless the Commission determines otherwise for good cause shown.

(2) Any notice shall contain a 15-day general comment period and a formal protest period established under section 5.14(d) of the Commission's rules of practice & procedure, unless the Commission determines otherwise for good cause shown.

(i) A general comment addressing the full review transaction shall not constitute a formal protest under section 5.14 of the Commission's rules of practice and procedure, unless the Commission determines otherwise for good cause shown.

(ii) A formal protest objecting to the full review transaction shall constitute a formal protest under section 5.14 of the Commission rules of practice and procedure.

(iii) A formal protest objecting to a full review transaction by a statutory advocate or other party shall be processed in accordance with the Commission's procedures normally applicable under Section 1102 and 1103.

(f) Commission review of transactions subject to the full review. The Commission retains the discretion to make inquiries and, after notice and opportunity to be heard, take action to protect the public interest, including the imposition of conditions on approval of the transaction when deemed necessary or proper under 66 Pa.C.S. § 1103 and to establish affirmative public benefit as required by Pennsylvania law.

(g) Commission approval for a full review transaction. A transaction subject to this subchapter shall be approved only if it is deemed to be in the public interest and to fulfill the requirements under Section 1102 and 1103 of the Public Utility Code.

(1) The Commission will issue an order approving a full review transaction and issue a certificate of public convenience authorizing the transaction pursuant to sections 1102(a) and 1103 of the Public Utility Code, 66 Pa.C.S. §§ 1102(a) and 1103.

(2) The Commission or staff may extend the review and approval period, reject the filing or transaction, or take other action deemed appropriate to protect the public interest.

(3) A staff action shall be in writing and inform the telecommunications public utility of the right of appeal. An appeal from an action of staff shall be governed by the procedures governing appeals from an action of staff under Section 5.44 of the Commission's rules of practice and procedure.

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**Norman J. Kennard**

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June 15, 2007

Via Hand Delivery

Pamela Polacek, Esquire  
McNees, Wallace & Nurick  
100 Pine Street  
PO Box 1166  
Harrisburg, PA 17108-1166

Re: Disclosure of Settlement Agreement

Dear Ms. Polacek:

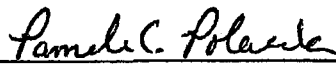
Pursuant to our recent conversation, we have agreed as follows:

Commonwealth Telephone Company d/b/a Frontier Communications Commonwealth Telephone Company ("CTCo"), Citizens Communications Company ("Citizens") and the Broadband Cable Association of Pennsylvania ("BCAP"), parties to the Settlement Agreement dated February 9, 2007 ("Agreement"), confirm that public disclosure of the terms of the Agreement by the United States Department of Justice ("DOJ"), or Citizens and CTCo, or BCAP, including disclosure by press release, public filing and/or individual cable company notification, is not opposed. BCAP, CTCo and Citizens have reached this agreement regarding disclosure of the Agreement to facilitate CTCo's settlement with DOJ.

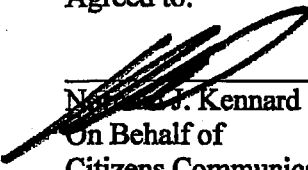
Two (2) copies of this letter are included. Please sign and return one and retain the other for your files.

Thank you for your attention to this matter.

Agreed to:

  
\_\_\_\_\_  
Pamela Polacek  
On Behalf of  
Broadband Cable Association  
of Pennsylvania

Agreed to:

  
\_\_\_\_\_  
Norman J. Kennard  
On Behalf of  
Citizens Communications Company  
and Commonwealth Telephone  
Company d/b/a Frontier  
Communications Commonwealth  
Telephone Company

cc: Hilary Glassman

## SETTLEMENT AGREEMENT

This Settlement Agreement is made as of the 9th day of February 2007, by and among Commonwealth Telephone Company ("Commonwealth"), Citizens Communications Company on behalf of its subsidiary operating incumbent local exchange companies (collectively and individually, "Citizens") and the Broadband Cable Association of Pennsylvania ("BCAP") (collectively, "the Parties").

WHEREAS, on September 29, 2006, Commonwealth and several affiliates filed an Application requesting that the Pennsylvania Public Utility Commission ("Commission") issue a certificate of public convenience approving a change in control of its corporate parent.<sup>1</sup>

WHEREAS, on October 30, 2006, BCAP filed a protest to and interventions in the Commonwealth/Citizens Merger Application, which the Joint Applicants and Citizens moved to dismiss by filing Preliminary Objections.

WHEREAS, the presiding ALJ in the Commonwealth/Citizens Merger Application issued an Initial Decision on December 14, 2006<sup>2</sup> dismissing BCAP's protest.

WHEREAS, on January 3, 2007, BCAP filed Exceptions in the nature of an appeal to the full Commission, which was granted by Commission Order adopted February 8, 2007.

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<sup>1</sup> *Joint Application of Commonwealth Telephone Company CTSI, LLC and CTE Telecom, LLC d/b/a Commonwealth Long Distance Company For All Approvals Under The Public Utility Code for the Acquisition By Citizens Communications Company of All of the Stock of the Joint Applicants' Corporate Parent, Commonwealth Telephone Enterprises, Inc., Docket Nos. A-310800F0010, A-311095F0005 and A-311225F0003 ("Commonwealth/Citizens Merger Application").*

<sup>2</sup> Due to an administrative error, the Initial Decision was reissued and re-served on January 4, 2007.

WHEREAS, Commonwealth, in the past, has filed protests in Commission dockets involving cable or associated third party company applications for certificates of public convenience to offer competitive local exchange carrier ("CLEC") services, including in the Sprint Application case<sup>3</sup> and the Blue Ridge Application case.<sup>4</sup>

WHEREAS, the Commission entered an Order on December 1, 2006 deciding the Sprint Application case and addressing the issue of retail cable voice service,<sup>5</sup> which Commonwealth did not appeal.

WHEREAS, the Parties hereto have reached a mutually agreeable settlement of BCAP's concerns in the Commonwealth/Citizens Merger Application.

In consideration of the mutual representations and covenants contained herein, the Parties hereby agree as follows:

1. Commonwealth and Citizens<sup>6</sup> will not protest or otherwise oppose any Application filed at any state utility commission for a local exchange certificate (or equivalent legal or regulatory authorization, however designated), including requests to expand a current certificated service area, by any cable company operator or affiliated entity that proposes to provide facilities-based voice services to the general public using NANPA-issued telephone numbers by provisioning its own network and customer connections which does not rely upon any Commonwealth or Citizens supplied UNE

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<sup>3</sup> *Application of Sprint Communications Company L.P. To Amend Its Certificate of Public Convenience to Begin to Offer, Render, Furnish, and Supply Competitive Local Exchange Telephone Services to the Public in the Commonwealth of Pennsylvania*, Docket No. A- 310183F0002AMA ("Sprint Application").

<sup>4</sup> *Application of Blue Ridge Digital Phone Company to Provide Telecommunications Services in the Commonwealth of Pennsylvania in the Service Territories of Alltel Telephone Company, Commonwealth Telephone Company and Palmerton Telephone Company as Facilities-Based Competitive Local Exchange Carrier and Interexchange Toll Reseller*, Docket Nos. A-310183F0002AMA, A-310183F0002AMB and A-310183F0002AMC ("Blue Ridge Application").

<sup>5</sup> Sprint Application, *supra*, Opinion and Order entered December 1, 2006.

<sup>6</sup> For purposes of this Settlement Agreement, "Commonwealth" and "Citizens" shall include all affiliates, subsidiaries, successors and other related entities of the named parties, doing business in Pennsylvania or any other state.

facilities, resold services, collocation, broadband or any other Commonwealth or Citizens facilities to enable connection to the cable voice customers ("Facilities-Based Cable Voice Provider").<sup>7</sup> Further, as long as a Facilities-Based Cable Voice Provider, an affiliated entity of a Facilities-Based Cable Voice Provider, or the third party partnering with a Facilities-Based Cable Voice Provider possesses a CLEC certificate (or equivalent legal or regulatory authorization), Commonwealth and Citizens will not pursue any legal or regulatory challenge to the authority of the group, as a whole, or any entity within the group, individually, to offer cable voice services.

2. Upon request by any Facilities-Based Cable Voice Provider, an affiliated entity of a Facilities-Based Cable Voice Provider or party that is associated with a Facilities-Based Cable Voice Provider, possessing or applying for a state CLEC certificate (or equivalent legal or regulatory authorization), Commonwealth and Citizens agree to negotiate, in good faith, and arbitrate if necessary, a facilities-based interconnection agreement or other voluntary agreement memorializing the terms and conditions under which the parties will interconnect and exchange voice traffic (and other types of traffic that may be associated with the Facilities-Based Cable Voice Provider's retail services offering to customers) as necessary to enable customers using Commonwealth's or Citizens' voice services to originate and terminate local and other traffic with customers using the Facilities-Based Cable Voice Provider. Irrespective of whether the services might be classified as "telecommunications" or "information" services (unless and until the relevant state commission or the Federal Communications

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<sup>7</sup>By way of example, but without limitation, the service proposed to be offered by Blue Ridge Digital Phone Company at Docket No. A-311397F0002AMA, AMB and AMC is one type of Facilities-Based Cable Voice Provider offering and Sprint Communications Company, LLP, qualifies as one type of third party partnering with or an affiliated entity of a Facilities-Based Cable Voice Provider.



Commission ("FCC") issues a decision governing the classification of the particular services and the required treatment by ILECs for the services), the parties shall use the requirements of Sections 251 and 252 of TA-96 to establish an interconnection agreement; however, nothing herein shall require Commonwealth or Citizens to provide unbundled network elements, total service resale or collocation. Nothing in this Agreement waives the rural exemptions and suspensions held by Commonwealth and Citizens, and nothing in this Agreement shall be construed to constitute such a blanket waiver. Arbitration not subject to the jurisdiction of the applicable state commission or the FCC shall be conducted before an American Arbitration Association arbitrator or other mutually acceptable arbitrator. Nothing herein shall prevent a Facilities-Based Cable Voice Provider from seeking access to collocation, UNEs or resale from Commonwealth or Citizens in accordance with the procedures applicable under Sections 251 and 252.

3. BCAP shall withdraw its Protest and Petition to Intervene at Docket Nos. A-310800F0010, A-311095F0005 and A-311225F0003 (Commonwealth/Citizens Merger Application) on or before Friday, February 9, 2007.

4. The Parties shall prepare and execute such other documents as are reasonably necessary to effectuate the terms of this Settlement Agreement.

5. This Settlement Agreement is made without admission against or prejudice to any factual or legal positions that any of the Parties have asserted or may have asserted in the referenced proceedings absent this Settlement Agreement.

6. This Settlement Agreement is to be construed and enforced in accordance with the laws of the Commonwealth of Pennsylvania. The parties may disclose the

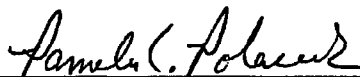
contents of this Settlement Agreement as is necessary for enforcement of its terms.

7. This Settlement Agreement constitutes the entire agreement between the Parties in connection with the Commonwealth/Citizens Merger Application and the other matters addressed in this Settlement Agreement and may only be changed by an agreement made in writing between and among all the Parties hereto.

8. This Settlement Agreement is binding upon the Parties hereto and their heirs, successors and assigns.

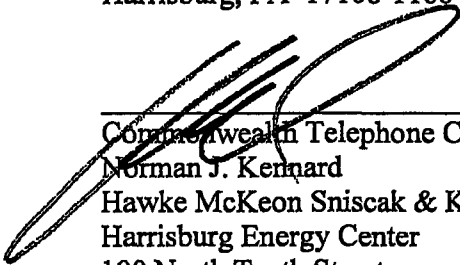
9. The Parties agree that this Settlement Agreement may be signed in any number of separate counterparts and that, once signed by all Parties, all counterparts shall be considered as if contained in a single document.

WHEREFORE, intending to be bound by the terms of this Settlement Agreement set forth herein, the Parties have set forth their signatures on the date set forth above.



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The Broadband Cable Association of Pennsylvania by its attorney  
Pamela C. Polacek  
McNees Wallace & Nurick  
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