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May 9, 2008

VIA HAND DELIVERY

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

COPY

**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**

RECEIVED
2008 MAY 16 PM 12:11
INDEPENDENT REGULATORY
REVIEW COMMISSION

Dear Secretary McNulty:

Enclosed are the original and fifteen (15) copies of the Reply Comments of the Broadband Cable Association of Pennsylvania to the Tentative Order of the Commission in the above-referenced proceeding.

Copies of the Comments are being served on the parties indicated on the attached Certificate of Service. Please date-stamp the extra copy of the Reply Comments and this letter, and return them with our messenger for our files. If you have any questions, please contact us at your convenience.

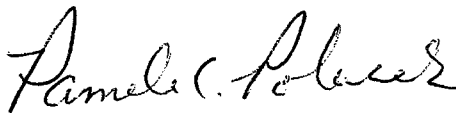
Very truly yours,

McNEES WALLACE & NURICK LLC

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MAY - 9 2008

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

By 
Pamela C. Polacek

Counsel to the Broadband Cable
Association of Pennsylvania

SLK/km

Enclosures

c: Joseph K. Witmer, Esq., Asst. Counsel, Law Bureau (via Hand Delivery)
Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

MAY - 9 2008

Docket No. L-00070188
PENNSYLVANIA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

REPLY COMMENTS OF THE BROADBAND
CABLE ASSOCIATION OF PENNSYLVANIA

I. INTRODUCTION

At Public Meeting 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. The Proposed Rulemaking Order was published in the *Pennsylvania Bulletin* on February 9, 2008,¹ and on April 9, 2008, the Broadband Cable Association of Pennsylvania ("BCAP") submitted its Comments on the Proposed Rulemaking Order. In addition to BCAP, the Office of Consumer Advocate ("OCA"); Office of Small Business Advocate ("OSBA"); Neutral Tandem-Pennsylvania, LLC ("Neutral Tandem"); Windstream Pennsylvania, LLC and Windstream Communications, Inc. (collectively, "Windstream"); Level 3 Communications, LLC ("Level 3"); Pennsylvania Telephone Association ("PTA"); and, Verizon Pennsylvania, Inc., Verizon North Inc., and MCImetro Access Transition Services LLC (collectively, "Verizon") also filed timely Comments regarding the proposed regulations.

In accordance with the Commission's procedural schedule, BCAP hereby submits these Reply Comments in response to certain issues addressed by these other parties. Although these

¹ 38 Pa. Bull. 758 (Feb. 9, 2008).

Reply Comments are limited in scope to certain matters raised by other parties, BCAP continues to support the positions asserted in its original Comments in this case, and maintains that the Commission should adopt all recommendations contained therein.

II. REPLY COMMENTS

A. The Commission Should Not Prohibit Streamlined Review of Applications Containing Proprietary Information or Protective Orders.

In its Comments, in addition to recommending that the Commission abandon this rulemaking in its entirety, the OCA proposes criteria that would result in a limited category of competitive carriers being eligible to use the streamlined process for review and approval of transactions. One of the OCA's proposed limitations on the availability of streamlined review is that a carrier cannot request for any information in the application to be treated as proprietary. Applications including proprietary information or requesting a protective order would not be eligible for streamlined review.²

Although BCAP agrees with the OCA that any Commission-approved streamlined process should, at minimum, be available to competitive carriers, BCAP disagrees with the position that any application containing proprietary information must be barred from streamlined review. Many smaller Competitive Local Exchange Carriers ("CLECs") are privately-held companies. In contrast to larger, publicly-traded CLECs, these smaller carriers do not release financial data to the general public. If the Commission accepts the OCA's recommendation, it would preclude most non-public CLECs from taking advantage of the streamlined procedure. Privately-held CLECs should not be required to disclose confidential business data in order to take advantage of streamlining.

² See OCA Comments at 32.

B. The Commission Should Reject the Incumbent Local Exchange Carrier's Arguments that Overstate the Current Level of Competition Among Telephone Providers.

The Incumbent Local Exchange Carrier ("ILEC") parties (i.e. Verizon, Windstream and PTA) assert that Pennsylvania's telephone industry is no longer a monopoly and, as such, any streamlined process must apply equally to ILECs and CLECs.³ Although customers in some ILEC territories also have service options such as wireless, cable and Voice Over Internet Protocol ("VoIP"), this fact alone does not demonstrate that ILEC monopolies no longer exist. As expressed in its Comments, BCAP reiterates that alternatives to regulated telephone service are just beginning to develop, and in most, if not all Pennsylvania ILEC territories, ILECs continue to serve the vast majority of customers.⁴ Moreover, in some rural areas of the state, alternatives to landline local service do not exist.

The mere existence of alternative service providers is not sufficient to establish that all ILECs lack market power. Before the Commission renders an important policy and legal conclusion such as this, further evidence is needed. If the Commission is inclined to explore the premise that ILECs do not possess market power, BCAP respectfully submits that the Commission should thoroughly study whether each ILEC making this claim faces competition in all areas of its service territory and whether each ILEC has lost a demonstrably significant percentage of its customers to those alternative providers. Such an inquiry could address Level 3's recommendation for the Commission

³ See Windstream Comments at 4 ("The telephone industry is no longer a monopoly, and the Commission is not the exclusive, or even dominant, influence over rates and services."); See also PTA Comments at 7-8 ("[A]s the Commission is well aware, the traditional review process was developed at a time when companies in the communications sector were monopolies and at a time when consumers' interests were served through the state regulators conducting granular reviews of applications for a [certificate of public convenience]. Today, markets have evolved, and the granular view that arose from monopoly regulation is no longer appropriate or necessary."); See also Verizon Comments at 3-4 ("As Level 3 correctly pointed out in its original petition, the current requirements 'were established prior to the advent of local competition, when a single local exchange carrier was the exclusive provider.' That is no longer the case today.").

⁴ BCAP Comments at 13.

to better define "substantial market share" in Proposed 52 Pa. Code § 63.324(j)(2),⁵ and thus indicate under the proposed regulations whether a particular ILEC lacks market power and could be eligible for the streamlined review process.

C. The Commission Should Reject Windstream's Argument that the Commission's Review of Incumbent Local Exchange Carrier Transactions Should Cease Because the Commission Does Not Also Review Cable Operator Transactions.

In its Comments, Windstream argues that "[w]hile wireline companies are still subjected to a lengthy review of transactions in Pennsylvania, other companies providing similarly situated services in direct competition with wireline companies, especially wireless, cable telephony, and Voice Over Internet Protocol (VoIP), benefit substantially from being exempt from these requirements."⁶ Therefore, Windstream continues, the Commission should "remove traditional market restrictions currently imposed on only one segment of the communications industry."⁷

Windstream's argument is legally and factually deficient. The Public Utility Code specifies the types of entities that the Commission has the power and duty to regulate.⁸ ILECs are squarely within that defined class and, as such, must submit applications for approval of transfer of control transactions under Section 1102 of the Public Utility Code. Wireless, cable telephony and VoIP providers are not within that defined class and, as such, are not required to file under Section 1102. The Commission should not relinquish its statutory responsibility to review ILEC transactions simply because it lacks jurisdiction over other types of entities.

In addition, this argument ignores other approvals that providers of wireless, cable telephony or VoIP services may be required to seek from local or federal authorities. For example, if a company is providing cable service in connection with its "cable telephony" offering, it is required by

⁵ See Level 3 Comments at 12.

⁶ Windstream Comments at 1-2; See also Verizon Comments at 4. ("The traditional telephone 'public utilities' that continue to be regulated by this Commission now face robust competition from alternative service providers, including wireless, cable and VoIP providers, that are not regulated by this Commission.")

⁷ Id. at 2.

federal law to have an agreement with each local government in its service territory (known as Local Franchise Authorities or "LFAs"). Windstream and other ILECs do not have agreements with each municipality, township or borough as a condition of providing telephone service. Windstream conveniently fails to acknowledge the greater burden on cable telephony providers due to the requirement to negotiate with each LFA to provide the underlying cable service. Likewise, various industry segments require merger approvals from a multitude of state and federal agencies as a matter of law. The PUC's review and approval of mergers in the telecommunications industry is specifically prescribed in statute, and to issue an outright exemption from this process is unwarranted and not in the public interest.

D. Consistent with the Comments of Verizon, BCAP Supports the Recommendation to Use Definitions from Act 183 and the Public Utility Code.

In an effort to simplify the proposed regulations, Verizon suggests deleting unnecessary definitions and substituting definitions from Act 183 and the Public Utility Code (such as "telecommunications service," "telecommunications carrier" and "public utility").⁹ In its Comments, BCAP expressed concern with specific definitions that could be viewed as expanding the Commission's jurisdiction to services that are not set forth in the Public Utility Code.¹⁰ BCAP supports Verizon's suggestion as an alternative method of addressing BCAP's jurisdictional concerns.

E. BCAP Does Not Object to Retaining Automatic Reclassification of a Transaction Upon the Filing of a Statutory Advocate Protest.

As proposed, a formal protest objecting to a transaction involving a change in conditions of service or rates by a statutory advocate will automatically reclassify either a general or *pro forma*

(continued footnote)

⁸ See 66 Pa. C.S. § 102 (defining "public utility").

⁹ See Verizon Comments at 6.

¹⁰ See BCAP Comments at 21-23.

transaction as a transaction subject to traditional review.¹¹ A number of parties (including Windstream,¹² Level 3,¹³ PTA¹⁴ and Verizon¹⁵) oppose the concept that a statutory advocate's protest should automatically reclassify a transaction to traditional review.

BCAP has no objection to allowing a statutory advocate's protest to automatically reclassify a transaction. BCAP reiterates its position that the proposed regulations should be modified to confirm that an ILEC transaction will be reclassified as a transaction subject to the traditional review process whenever any party files a protest alleging an adverse impact on the competitive market,¹⁶ so long as all the procedural rights under the Commission's regulations remain in effect to seek dismissal of the protest on appropriate grounds. Such revision would further the Commission's recognition that competitive market impact on other entities is a segment of the types of issues where reclassification could be necessary "to protect the public interest." In addition, this automatic reclassification would provide regulatory certainty to ILECs and the parties, so that 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." Finally, such revision would provide interested competitors and potential competitive entrants a meaningful opportunity to address various concerns, thus providing intervening parties an appropriate opportunity to be heard.

¹¹ See Proposed 52 Pa. Code §§ 63.324(j)(1), 63.325(j)(1); See also Proposed 52 Pa. Code §§ 63.324(f)(2)(iii), 63.325(f)(4)(iii).

¹² Windstream Comments at 5. Windstream believes that allowing a statutory advocate's protest to automatically reclassify a transaction "unnecessarily grants an inordinate amount of leverage to an intervening party which ... may result in applicants being pressured to negotiate short-term rate or other concessions simply as a means of ending a protest." Id.

¹³ Level 3 Comments at 4. Level 3 argues that an applicant should be permitted to file an answer to a statutory advocate's protest before reclassification. Id.

¹⁴ PTA Comments at 6. PTA states that no protests should "automatically derail the 'general rule' process." Id. Instead, PTA contends that the Commission should create a review process by Staff to determine whether protests contain any averments of real harm. Id. at 7.

¹⁵ Verizon Comments at 8. Verizon contends that rather than allowing a statutory advocate's protest to automatically reclassify a transaction, the Commission should resolve those issues on a case-by-case basis. Id.

¹⁶ See BCAP Comments at 17-19.

III. CONCLUSION

The Commission's consideration of this rulemaking is an important recognition that regulatory rules and procedures should be revisited from time to time to ensure that the Commission can fulfill its obligations under the Public Utility Code while also allowing competition to flourish. At this stage in the development of the telecommunications markets in Pennsylvania, the review criteria and process as outlined in BCAP's Comments and Reply Comments represents the most appropriate balancing of the interests of all stakeholders.

Respectfully submitted,

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By 

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Counsel to the Broadband Cable Association
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Dated: May 9, 2008

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of Section 1.54 (relating to service by a participant).

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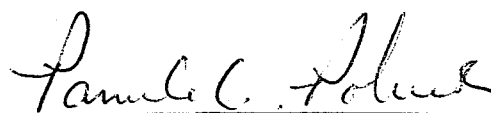
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Dated this 9th day of May, 2008, at Harrisburg, Pennsylvania