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May 9, 2008

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street - Filing Room (2 North)
Harrisburg, PA 17120

Re: Petition of Level 3 Communications, LLC to Amend the Public Utility Commission Regulations to Streamline Transfer of Control and Affiliate Filing Requirements for Competitive Carriers; Docket No. P-00062222

Rulemaking to Amend Chapter 63 Regulations so as to Streamline Procedures for Commission Review of Transfer of Control and Affiliate Filings for Telecommunications Carriers; Docket No. L-0070188

Dear Secretary McNulty:

Enclosed for filing please find an original and fifteen (15) copies of the Pennsylvania Telephone Association Replies to Comments in the above-captioned matter.

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

Sincerely,

THOMAS, LONG, NIESEN & KENNARD

COPY

By Regina L. Matz
Regina L. Matz

RJM:tlt
enclosures
cc: Joseph K. Witmer, Assistant Counsel (via hand delivery, w/disk)

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INDEPENDENT REGULATORY
REVIEW COMMISSION

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Level 3 Communications, LLC to Amend the Public Utility Commission Regulations to Streamline Transfer of Control and Affiliate Filing Requirements for Competitive Carriers	:	**Docket No. P-00062222**
Rulemaking to Amend Chapter 63 Regulations so as to Streamline Procedures for Commission Review of Transfer of Control and Affiliate Filings for Telecommunications Carriers	:	**Docket No. L-0070188**

PENNSYLVANIA TELEPHONE ASSOCIATION REPLIES TO COMMENTS

I. INTRODUCTION

On April 9, 2008, entities representing a broad cross-section of communications, cable, data, infrastructure, and consumer interests filed comments in the above captioned proceeding. Specifically, comments responding to the Commission's initiative to streamline procedures for telecommunications transfer of control applications were filed by Verizon Pennsylvania, Inc., Verizon North Inc. and MCImetro Access Transmission Services LLC ("Verizon"), Windstream Pennsylvania, LLC and Windstream Communications, Inc. ("Windstream"), the Pennsylvania Telephone Association ("PTA"), the Broadband Cable Association of Pennsylvania ("BCAP"), the Office of Consumer Advocate ("OCA"), Level 3 Communications, LLC and its affiliates WilTel Communications LLC, Broadwing Communications LLC, TelCove Operations LLC,

ICG Telecom Group Inc., Progress Telecom LLC and Looking Glass Networks Inc. ("Level 3"), and Neutral Tandem-Pennsylvania, LLC ("Neutral Tandem").

The PTA appreciates the opportunity to file these comments in response to issues raised by these parties in this proposed rulemaking. The PTA believes the Commission recognizes the important crossroads these industry and consumer interests have reached in the rapidly and constantly changing world of content delivery. The PTA also believes this Commission rightly recognizes that with such change comes the need to continuously review the regulatory landscape to ensure that backwards-looking traditional regulation does not stand in the way of forward-moving progress.

II. SUMMARY OF COMMENTS

All commentators, except the OCA and BCAP, were generally supportive of the Commission's initiative.

Neutral Tandem, a provider of independent tandem services to all forms of carriers, generally agreed with the proposed regulations, taking issue only with the proposal's failure to require carriers to disclose information about regulatory compliance and violations of federal or state law currently pending and incurred within three years prior to the filing of the application. Verizon, Windstream, Level 3 and PTA all supported the Commission's proposed regulations, while each provided individual perspectives on broader issues as well as proposed technical changes.

Verizon supported the Commission's goals to shorten the typical review times associated with Chapter 11 merger or acquisition applications, and also supported the "three-tiered

procedure" albeit without any "automatic" provisions that would mandate traditional review.[1] Verizon also recommended changes to "reduce the overall complexity of the regulations, remove some repetitive provisions, and clarify certain areas of ambiguity."[2] More substantively, Verizon proposed revision to the regulatory language that would require applicants to provide a description of the general and specific affirmative public benefit to the state and its consumers, finding such a standard exceeded the requirements of the *City of York*[3] as recently clarified by the Pennsylvania Supreme Court in *Popowsky*.[4] Verizon also suggested the Commission convene a collaborative for interested participants to refine the wording of the proposed regulations.[5]

Windstream also supported the goal of the Commission's regulations, but sought a more abbreviated and defined process for those applications automatically reserved for unmodified traditional review under the Commission's proposed regulations. In lieu of the proposed "three-tiered" procedure, Windstream proposed the Commission more aggressively seek to streamline Chapter 11 applications by creating a two-track system with defined time limits. Windstream suggested the Commission modify the proposed regulations to "avoid an approach that codifies automatic triggers and favors instead an abbreviated approval process that provides a controlled exception to the 60-day general review process only where the circumstances truly require it."[6] Windstream recognized, as did the Commission, that the telecommunications market has undergone extensive change since 1994. Thus today's market realities require that all business

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[1] Verizon at 2, 8.
[2] Verizon at 5.
[3] City of York v. PA PUC, 295 A.2d 825 (Pa. 1972) ("City of York").
[4] *Popowsky v. PA PUC*, 937 A.2d 1040 (Pa. 2007) ("*Popowsky*"). In *Popowsky*, the Supreme Court affirmed the Commission's approval of the Verizon/MCI merger. In so doing, the Court reversed an order of Commonwealth Court, which had interpreted *City of York* as requiring the Commission to secure legally binding consumer benefits in order to find a Chapter 11 application provided an "affirmative public benefit" and thus was "necessary or proper for the service, accommodation, convenience, or safety of the public." *See* Verizon at 6-7.
[5] Verizon at 10.

entities have the ability to enhance their efficiencies and access the capital markets in a timely fashion in order to grow their business' scope and scale and remain competitive.[7]

To accommodate the Commission's need to conduct a public interest review where necessary, Windstream proposed that rather than provide for automatic reversions to the traditional review process, the Commission should instead provide for the option of "extending the general review period for an additional 30 days ... in order to bring much needed regulatory parity and certainty to the process while preserving the Commission's authority to more extensively examine an application."[8] Windstream modeled its proposal after procedures currently applicable to other similarly-regulated industries charged with the public interest – health care and banking – which are able to secure required state regulatory approval over change in control transactions within strict 60 to 90 day time limitations.[9]

Level 3 also generally supported the Commission's proposed regulations "and the fundamental policy change they represent."[10] Level 3 proposed several specific modifications aimed largely at providing technical or other refinements or clarifying the Commission's intent. One substantive revision proposed by Level 3 was with respect to the Commission's provision to reclassify a transaction "[i]f the filing involves a major acquisition or merger between telecommunications firms with substantial market shares."[11] Level 3 believes the language "substantial market shares" and "major acquisition" are too vaguely defined and ambiguous, and it is unclear whether just one or both parties to the transaction would have to meet that standard to reclassify the transaction. As an example, Level 3 suggests that if it were to purchase a major

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[6] Windstream at 9.
[7] Windstream at 4, 7-10.
[8] Windstream at 3, 6.
[9] Windstream at 11-14.
[10] Level 3 at 2.

eastern Pennsylvania cable company, then that purchase may be viewed as a major transaction even though "the regulated telecommunications services might be relatively small when looked at on a Pennsylvania only basis."[12] While Level 3 suggests the rule is not necessary, it proposes that if the Commission wishes to retain it, it should read as follows: "The filing involves an acquisition or merger involving a telecommunications firm with substantial market share."[13] Level 3 also warned against any provision in the proposed regulations, such as filings by other parties, being allowed to be used to resolve business or other disputes parties may have with the applicant but which have nothing to do with the filing.[14]

BCAP objects to streamlined relief for all providers repeating a theme of reducing all regulatory burdens on the CLECs, and none upon the ILECs.[15] BCAP summarizes its history of participating in all matters "affecting the potential entry by cable operators into *PUC-regulated telecommunications service markets*"[16] and reflects on the various ways in which its cable members provide "*non-jurisdictional voice and other services*[.]"[17] BCAP avers that ILECs continue to dominate landline local phone service, and in "some rural areas of the Commonwealth alternatives to landline local phone service do not exist."[18] BCAP also contends that nothing in Chapter 30, the FCC's *Streamlined Order*, or the resolution of recent ILEC merger applications warrants identical or even similar treatment for ILEC and CLEC change of control applications. BCAP further contends that in fact competitor intervention in ILEC mergers

[11] Level 3 at 12.
[12] Level 3 at 12.
[13] Level 3 at 13.
[14] Level 3 at 3.
[15] BCAP at 6.
[16] BCAP at 2 (emphasis added).
[17] BCAP at 3 (emphasis added).
[18] BCAP at 6.

"can result in *market-opening agreements* that promote the competitive goals of Pennsylvania."[19] In response to PTA's contention that Act 183 (§3011(13)) requires regulatory parity, BCAP avers the goal of "parity" is overreaching, since Act 183 only "recognizes" that ILEC regulatory burdens "should" be "consistent with" CLECs, and not "equal."[20] BCAP posits the Commission should distinguish between CLECs and ILECs, especially rural ILECs ("RLECs").

While concluding that "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[,]"[21] BCAP nonetheless asserts that with regard to RLECs, the Commission should be *inconsistent* with the *Streamlined Order*, opining that "the PUC must *depart* from the FCC's guidance regarding the treatment of ILECs with fewer than 2 percent of the nation's subscriber lines."[22] In a "spirit of compromise,"[23] recognizing ILECs' needs for "expeditious review of certain *pro forma* and non-controversial transactions[,]"[24] BCAP asserts that when it files a protest, this should act as an *automatic trigger* for formal administrative review, including hearings, without "any further discretionary consideration by staff[,]"[25] particularly to protect BCAP's rights to due process and a meaningful opportunity to be heard.[26]

Much like BCAP, the OCA strenuously opposes any regulatory relief for any transaction involving an ILEC. OCA cites ILECs' provider of last resort obligations as Eligible Telecommunications Carriers ("ETCs") under TCA-96 and their broadband deployment

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[19] BCAP at 8 (emphasis added).
[20] BCAP at 9.
[21] BCAP at 11 (emphasis added).
[22] BCAP at 12 (emphasis added).
[23] BCAP at 15, 17.
[24] BCAP at 17.
[25] BCAP at 18.
[26] BCAP at 19-21.

obligations under Act 183 as reasons why streamlined review of any ILEC transaction is improper.[27] OCA contends there is "little question but that ILECs have a substantial share of the local service market," and therefore should always be subject to traditional review.[28]

OCA also contends that Section 1103 of the Public Utility Code requires a Commission order, and therefore any procedure that *deems* an application approved upon the expiration of a set number of days is per se illegal.[29] Without a Commission *order*, OCA contends the Commission cannot satisfy its obligations under administrative agency law to support its adjudication with necessary findings of fact.[30] Citing broad principles of administrative due process, OCA also contends that a truncated process that does not guarantee customers notice *before* Commission approval denies the public meaningful notice and opportunity to be heard.[31] While OCA appreciates the automatic trigger from general to traditional review afforded its protest under the proposed regulations, OCA contends that all protests should be treated equally, and any protest should trigger reclassification to traditional review since the OCA's interests are not always congruent with the interests of other parties.[32] OCA also concludes that the proposed regulations are too vague and afford applicants too much discretion in determining initially under which process the application would be filed.[33]

OCA recommends the Commission withdraw the proposed regulations in their entirety. As a compromise, OCA recommends any streamlined effort be aimed at competitive carriers only,[34] however, even this "compromise" is rife with restrictions.[35]

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[27] OCA at 6-7, 14-15.
[28] OCA at 15.
[29] OCA at 9-12.
[30] OCA at 25.
[31] OCA at 16.
[32] OCA at 22-23.
[33] OCA at 26-28.
[34] OCA at 29-33.

III. PTA's REPLIES

In these replies, PTA does not respond to all comments.[36] For the most part, PTA believes that the technical changes proposed by most commentators help clarify the scope of the regulations to better express the intent behind the Commission's proposals and achieve the goal of streamlined review. PTA does take this opportunity to address the broader principle of the propriety of regulatory relief for ILECs and, thus, focuses primarily on the comments of BCAP and OCA, which would wholly exclude ILECs from any regulatory relief proposed by the Commission. With respect to these comments, PTA replies in particular to three issues: (1) The highly competitive market for local exchange services in RLEC territories; (2) The lack of both factual and legal support to deny ILECs regulatory parity in the proposed regulations; and (3) The nature of process due in Chapter 11 application proceedings.

A. The Market for Local Exchange Services in RLEC Territories Is Highly Competitive

BCAP and the OCA oppose the ILECs' receipt of any regulatory relief. BCAP's comments are patently aimed at continuing heavy-handed regulation over any ILEC transaction, while preserving fully its members' "non-jurisdictional" status in order to continue to exact concessions from ILECs that have nothing to do with the underlying application's transaction (the *"market-opening"* opportunities BCAP repeatedly references).[37]

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[35] For example, competitive carriers that are affiliates of ILECs would be excluded, as would applications involving any ILEC or ILEC assets. OCA at 30. Applications that include proprietary information and are accompanied by a petition for protective order, or which seek ancillary relief, also would be excluded. OCA at 32.

[36] Windstream joins in these PTA replies, and is not filing separately.

[37] In addition to preserving full regulation of ILEC transactions, BCAP's comments ensure that the Commission not attempt *any* effort to exert regulatory oversight over BCAP's members. BCAP requests confirmation that information and federally-regulated telecommunications services will *not* be subject to the Commission's new regulations. As BCAP concludes, in the current state of the law, the Commission "lacks regulatory jurisdiction over (continuation)

For the most part, BCAP's approach to this rulemaking is to whine about the need for regulatory vigilance to block the predatory rural telephone companies. BCAP's tired rhetoric about telephone company domination and the fragile nascence of cable company services, however, ceased being true at least four years ago. Now that one of BCAP's members, Comcast, is the fourth largest voice service provider in the country, the accuracy of this "woe-is-the-new telephone entrant" wail has long since waned.

Moreover, telephone service is only a single aspect of the cable company strategy to keep and expand market share. There is no acknowledgement of the cable industry's success in blocking legislative reform of cable TV entry last year. Nor do the comments acknowledge the success in avoiding regulation of "VoIP" based telephony. BCAP seeks only to assure that the telephone company regulatory system remains as complex and impenetrable as possible while cable remains fully hands-off.

BCAP's rhetoric starts with the unsupported claim that "some" rural areas have no competitively available substitutes for phone service, without ever identifying the location or scope of the areas to which it is referring.[38] BCAP appears comfortable relying upon this hypothetical reference to what can only be, at most, a *de minimis* remaining area of the Commonwealth of Pennsylvania and a shrinking exception to drive its heavy-handed, bureaucratic rules for ILECs only. BCAP next extrapolates this unfounded claim to assert, later in its Comments, that all ILECs continue to maintain dominant market share and control of

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cable, internet, and wireless services" and all references in the proposed regulations to "telecommunications and information services" should be removed. BCAP at 23.

[38] BCAP at 6.

"monopoly facilities."[39] BCAP appears confident that this style of inaccurate characterization and *ad hominim* attack is sufficient to obtain regulatory favoritism.

The truth is that Pennsylvania has two side-by-side wireline systems, both of which are capable of providing various services, some regulated, some not. Indeed, the cable system is better able to provide the coveted triple play of services, now that technological issues of cable telephony have been resolved. Both have relative advantages and disadvantages, but neither network relies upon the other, except to exchange traffic and customers. There is no ownership by either of "monopoly" facilities essential to the other, since both are independent networks.

Many of the essential facilities to competition are well outside the state regulatory arena and certainly have nothing to do with the RLECs. These include the cable companies' next push to develop the "quadruple play" by adding wireless. On May 7, 2008, Sprint and strategic investors including Comcast, Time-Warner, Clearwire, Google, and Intel announced a WiMax joint venture worth $3.2 billion.[40] There is no basis for BCAP to complain that the RLECs continue to require traditional Chapter 11 regulation over change in control applications because without regulation the RLECs deny *"market opening"* opportunities to its members.

The advance of cable voice services in the last three to four years has been nothing short of astounding. The cable giant Comcast added 639,000 digital voice customers to hit the 5.1 million subscriber mark at the end of the first quarter 2008 (that total was also well ahead of estimates). Comcast also reported:

> Phone revenue increased 65% to $587 million in the first quarter of 2008 from $356 million in 2007. Reflecting the addition of 2.6 million CDV [Comcast

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[39] BCAP at 11.

[40] "Big Tech Firms to Invest in Wireless, Sprint, Comcast, Google, Time Warner and Intel Join Forces in New Broadband Joint Venture," Amol Sharma and Vishesh Kumar, *Wall Street Journal* May 7, 2008; page B1; http://online.wsj.com/article/SB121010437224271501.html?mod=technology_main_whats_news (accessed May 7, 2008).

> Digital Voice] subscribers in the last twelve months, revenue from CDV service more than doubled to $573 million in the first quarter of 2008 compared to the same period of the prior year.[41]

Finding cable companies "better situated than expected to ward off competition," the *Wall Street Journal* concluded last week that "Philadelphia-based Comcast and its peers have more than offset the losses (in television subscribers) by poaching broadband and phone customers from the traditional telephone companies."[42]

Comcast is not alone. The cable segment of the VoIP industry is conservatively expected to double in the next 5 years:

US Cable VoIP Subscribers and Cable Internet Subscribers, 2007-2012 (millions)

	2007	2008	2009	2010	2011	2012
Cable VoIP	14.1	18.3	21.7	24.5	26.5	28.0
Cable Internet	36.0	39.7	42.9	45.0	46.5	47.7
Cable VoIP % of cable Internet	39.2%	46.1%	50.6%	54.4%	57.0%	58.7%

Source: eMarketer, April 2008

093443 www.eMarketer.com[43]

By 2012, IBISWorld, a well-known market research firm, expects revenue growth of 90.2%, bringing total revenue to $4.88 billion. At that time, the U.S. will have some 25.4 million paying VoIP subscribers, IBISWorld predicts.[44]

The potential in Pennsylvania is large. Cable companies are capable of providing both entertainment content and broadband services past 96% of homes in Pennsylvania.[45] And that potential is being realized today. Windstream has lost 40% of its customers to the incumbent cable company in one of its largest exchanges. In the summer of 2006, when the incumbent cable companies, Armstrong and Comcast, launched voice services in the Consolidated Pennsylvania

[41] http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=1138015&highlight=
[42] "Comcast's Phone, Web Gains Salve TV Woes," Shira Ovide, *The Wall Street Journal*, May 2, 2008, page B 4.
[43] http://www.emarketer.com/Article.aspx?id=1006173&src=article_head_sitesearch
[44] http://www.ibisworld.com/industry/retail.aspx?indid=1269&chid=1

(formerly North Pittsburgh) territory, line losses spiked severely, leaving the company at year end with 10.1% fewer lines served than in the beginning of 2006. Between December 31, 2005, and June 30, 2007, Consolidated's lines served tumbled from 70,409 to 60,663.

This is only part of the competitive equation, which includes a host of services that covers the technological gamut. In its March 2008 Local Telephone Competition Report, the FCC estimates that *as of June 2007, wireless customers in Pennsylvania outnumbered wireline customers by almost 4 million.* Even taking into account the potential for overlap between wireline and wireless services, these numbers demonstrate the intense pressure ILECs face from wireless substitution. Moreover, since 2001, ILECs in the Commonwealth have experienced a loss of approximately 2 million customers (LECs now serving approximately 6 million lines), after decades of line growth. Since 2001, CLECs in Pennsylvania have accounted for 20% of all end-user access lines in Pennsylvania.[46] From 2001 through the year ended 2007, Embarq Pennsylvania has lost 21.7% of its access lines in Pennsylvania.

The robust competition that currently exists in the telecommunications market will continue to expand exponentially as the communications revolution gains momentum with mega-companies like Yahoo, Google, and Microsoft entering various aspects of the market and drive not just innovation, but also the allocation of limited and capital dollars. The *Wall Street Journal* reported just last month that the FCC is investigating the prospect of "a new generation of wireless computer devices" that would utilize "the empty 'white space' spectrum associated with television broadcasts . . . . because of its strong backing by Microsoft and Google."[47] These mega-corporations believe that utilized white space "could help create 'Wi-Fi on steroids,' with

[45] Television and Cable Factbook, Cable Volume, 2005.
[46] FCC March 2008 Local Telephone Competition Report.

faster connections speeds running over longer distances than are possible now in the hot spots common in homes and coffee shops."[48] Now BCAP member Comcast is part of a $3.2 billion dollar venture to do just that.

Simply stated, the competitive market today is not the market OCA and BCAP describe. Competition from non-traditional, unregulated alternative providers exceeds even industry analysts' expectations. The Commission is correct to place all providers on equal footing with respect to corporate changes aimed squarely at enhancing competing providers' abilities to compete in the marketplace. BCAP's members are well-positioned against their ILEC counterparts and neither need nor deserve a "regulatory edge." The Commission should reject BCAP's comments aimed at preserving cable companies' unregulated status while preserving the full rigor of historical regulatory strictures over ILECs.

B. There Is Neither Factual Nor Legal Support to Deny ILECs Regulatory Relief and Create Disparate Regulatory Treatment for ILECs Only.

BCAP's efforts to remove the only fully regulated portion of the telecommunications sector from the Commission's regulatory relief efforts are nothing short of a disingenuous attempt to create disparate regulatory results that disadvantage the ILEC industry. BCAP describes its pervasive efforts to intervene in telecommunications proceedings in Pennsylvania on behalf of its cable members offering non-jurisdictional telecommunications services. BCAP concludes, however, that while *CLEC* change in control transactions must be resolved promptly and without delay, *ILECs* should continue to require full traditional review because they have the "ability to impede competitive entry requir[ing] the use of traditional procedures applied to all

[47] "If Granny Were Real She'd Like the Idea of Wi-fi on Steroids," Lee Gomes, *The Wall Street Journal*, April, 2, 2008, page B 1.
[48] *Id.*

other regulated utilities, especially when *any party* files a protest on these grounds" and traditional review of all "protested ILEC transactions is necessary to comply with Pennsylvania law and to promote the pro-competitive goals of Chapter 30."[49]

BCAP claims (incorrectly) that the LECs have used the CLEC certification process to slow cable entry. This has never been the case. BCAP mischaracterizes ILEC actions. RLEC protests to past CLEC applications presented genuine disputes of fact and law. Certification in and of itself results in benefits to the new certificate holder. It also presents ramifications, obligations, and liabilities to the existing carrier. Consequently, protests to certification raised and litigated valid issues which helped refine not only the dynamics between the new and existing carriers, but also their attendant rights and responsibilities.

The Commission's decisions in the *Sprint Wholesale*[50] and *Core*[51] CLEC application proceedings presented notable, legitimate issues. First, the ILEC protests in both were initially affirmed by the presiding Administrative Law Judges, indicating the presence of a true case and controversy. Both cases likewise involved issues that were the subject of intensive and incomplete review by the FCC, namely, the rights of wholesale carriers in *Sprint Wholesale* and the impact and jurisdictional nature of virtually-numbered ISP-bound traffic in *Core*. More importantly, since the Commission's decisions in each of those two cases, ILEC protests to CLEC applications have essentially evaporated. Two recent CLEC applications, filed by Comcast and Level 3 in RLEC territories, were filed, published and unprotested.

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[49] BCAP at 4 (emphasis added).

[50] *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, Opinion and Order entered December 1, 2006 ("*Sprint Wholesale CLEC*").

[51] *Application of Core Communications, Inc. for Approval to Offer, Render, Furnish or Supply Telecommunications Services to the Public in the Commonwealth of Pennsylvania*; Docket No. A-310922F0002, AmA; Order Entered December 4, 2006 *("Core CLEC Application*").

And to BCAP's heavily labored point, the RLEC protests do not now justify cable engaging in the same type of regulatory gamesmanship of which the RLECs stand accused. BCAP's intervention in the Frontier/Commonwealth and Consolidated/North Pittsburgh merger cases addressed no major concerns raised in an RLEC change of control case nor did it create any significant accomplishment justifying BCAP's gadfly interventions. Indeed, in the Commonwealth Telephone proceeding of which BCAP writes much, after its intervention was granted, it withdrew the next day, BCAP simply being interested in slowing the process down.

BCAP nevertheless contends that all Pennsylvania ILECs should be excluded from streamlined relief, offering an interpretation of the FCC's *Streamlined Order* that is at odds not only with the FCC's ILEC regulatory scheme but also with applicable facts. The FCC, like the Commission in its proposed regulations,[52] preserves the ability to deviate from streamlined procedures in instances where "significant public interest concerns requiring further Commission inquiry and resolution.[53] The FCC clearly applies streamlined procedures to transactions involving rural ILECs (those with fewer than 2% of the nation's subscriber lines and with no overlapping or adjacent service areas).[54] Nonetheless, BCAP contends the Commission should void entirely the federal and state distinctions between rural and non-rural carriers in Pennsylvania, and take a more mandatory and less discretionary approach to removing an ILEC transaction from any streamlined consideration.

Again commenting without factual support, BCAP asserts that since "non-Verizon ILECs face very limited (and in some instances, no) competitive entry[,]" BCAP's ability to contest an RLEC transfer of control application is essential "for competitors and potential competitors to

[52] *See* proposed regulations at Sections 63.324(j) and 63.325(j).
[53] BCAP at 11, quoting the FCC *Streamline Order* at 35.
[54] FCC *Streamlined Order* at 28.

obtain *market-opening commitments*" from RLECs.[55] This position requires a marked departure from every precedent at the federal and state level in which legislators and regulators alike have recognized differences between the Regional Bell Operating Companies ("RBOCs") and the RLECs.[56]

OCA's suggestion, that because ILECs are regulated entities with provider of last resort and broadband deployment obligations they should be automatically disqualified from streamlined relief, likewise lacks factual and legal support. OCA fails to draw any connection demonstrating how the Commission's efforts to streamline ILEC application proceedings could negatively impact these ILEC statutory obligations. Simply raising the obligations does not support the conclusion, such as OCA draws, that these statutory obligations will be harmed through an expedited process for reviewing applications. First, as OCA notes, these obligations are statutory, and therefore continue by statute without regard to change in control transactions.[57] Moreover, ILECs may affirm their obligation to continue to adhere to statutory obligations as part of the application. Thus, neither statutory obligation imposed upon ILECs presents an impediment to the Commission's proposal for streamlined application relief.

On one final note, PTA appreciates the upfront and even-handed nature in which Level 3 has addressed the need for *all* business entities that participate in the competitive telecommunications market to benefit from streamlined regulatory relief. However, Level 3 raises one issue which draws distinctions between "major acquisitions" and "substantial market

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[55] BCAP at 12-13 (emphasis added).
[56] BCAP at 13.
[57] Indeed, Section 3019(b)(4) of Act 183 (66 Pa.C.S. §3019(b)(4)) specifically authorizes the Commission to condition an ILEC Section 1102(a)(3) transaction to ensure there is no reduction in the ILEC's broadband deployment obligation. However, nothing in this section requires the Commission to impose this condition as a part of a lengthy traditional review proceeding, nor does it impose upon the Commission some post-Act 183 obligation with respect to review of change in control transactions, contrary to the OCA's apparent interpretation (OCA at 2, note 4).

shares" between or among parties that provide telecommunications as only part of a diverse package. PTA believes that Level 3's proposed language to target acquisitions or mergers involving telecommunications firms with substantial market share for more intense review unduly and improperly overemphasizes the telecommunications aspect of the transaction. If competition is to be a measure, it has to be the competitive ability of the merged entity as a whole, and not just as between telecommunications firms. The notion of a Level 3 and Comcast merger not triggering reclassification, when an RLEC-to-RLEC merger conceivably could, simply because the Level 3/Comcast "telecommunications" market is smaller vis-à-vis their combined company markets than a potential RLEC-to-RLEC merger, makes little sense and creates regulatory disparity between competitors for telecommunications customers that favors non-regulated entities.

C. The Process Due Under Chapter 11.

Chapter 11 is silent on a time frame for Commission action on an application. Consequently, the issue is whether the notice and filing of a change in control application, and Commission action on it within 30, 60, or 90 days (using Windstream's proposed alternative to traditional review) provides sufficient due process. The PTA submits that it does. Contrary to OCA's implication, silence in the statute does not preclude the Commission from setting a time frame so long as interested parties have adequate notice and an opportunity to be heard on issues that affect their substantial property rights.

Dues process under Administrative Agency Law does not require a hearing in every case.[58] In administrative proceedings, due process in is a flexible standard, requiring the balancing of competing interests coupled with protections that are tailored to the particular

facts.[59] As the OCA recognized,[60] in *Chester Water Authority* the Pennsylvania Supreme Court recently affirmed that Section 1103 of the Public Utility Code does not require the Commission to hold a hearing on every application.[61] Indeed, the process set forth in Section 1103 is that which the Commission deems necessary to enable it to reach a determination.[62] As the Court concluded in *Chester Water Authority*, "Section 1103's conferral of discretion upon the Commission controls."[63]

The Commission's proposed regulations comport with recognized rights of due process for Commission application proceedings under Chapter 11. Most Chapter 11 merger or acquisition applications present *no change* to existing rates and services, and are largely, if not entirely, transparent to customers at the ILEC level. Indeed, mergers and acquisitions often propose the ability of the surviving entity to offer lower rates and greater services due to the increased ability of the merged entities to provide greater services at a more economical scope than either entity could standing alone.[64] Thus, while matters involving rate increases previously have been held to present a substantial property right in which a consumer has a legitimate interest and right to due process, the majority of applications involving a change of control does not present such issues and does not warrant the extensive process the OCA advocates.

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[58] *Gruff v. Department of State*, 913 A.2d 1008 (Pa. Cmwlth 2006); *appeal denied* 927 A.2d 626 (Pa. 2007).
[59] *Telang v. Bureau of Professional and Occupational Affairs*, 751 A.2d 1147 (Pa. 2000); *Pennsylvania Coal Mining Assn v. Insurance Dept.*, 370 A.2d 685, 692-93 (Pa. 1977) ("[n]otice should be reasonably calculated to inform interested parties of the pending action, and the information necessary to provide an opportunity to present objections.") *South Union Tp. v. Dept. of Environmental Resources*, 839 A.2d 1179 (Pa. Cmwlth 2003).
[60] OCA at 20.
[61] *Chester Water Authority v. PA PUC*, 868 A.2d 384 (Pa. 2005) ("*Chester Water Authority*").
[62] *Chester Water Authority*, 868 A.2d at 390. In *ARIPPA v. PA PUC*, 792 A.2d 636 (Pa. Cmwlth 2002), the Court affirmed as adequate process a response period of approximately 42 hours on the basis that the parties had had other opportunity to respond to a similar proposal.
[63] *Chester Water Authority*, 868 A.2d at 652.
[64] *See e.g.* the Supreme Court's rationale in *Popowsky*.

Further, while *Chester Water Authority* involved a proceeding in which there was no material factual dispute, the Supreme Court's decision affirming the Commission's approval of the Verizon/MCI merger clearly affirmed that matters of certification under Chapter 11 fall squarely within the Commission's expertise and discretion.[65] Accordingly, it is up to the Commission to define the process it believes necessary to allow it to make a determination that approval of an application is in the public interest. PTA believes the Commission's proposal to streamline regulations by setting strict time limits for action is within its discretion and satisfies the process due under Chapter 11.

As for OCA's and BCAP's proposals that any protest automatically trigger traditional review, PTA submits that such action would wholly subvert the intent of the regulations by continuing to afford any entity, no matter its interest or standing, the ability to thwart timely review of financially sensitive applications. The Commission's proposed exception to streamlined regulation would, in fact, become the rule.

OCA's contention that the Commission may not act upon a change in control application through issuance of a Secretarial Letter because Section 1103(a) requires a Commission order elevates substance over form. PTA notes initially that in addition to the option of a Secretarial Letter, the Commission has also reserved the ability to enter an *order*,[66]essentially voiding OCA's concern. PTA also submits that OCA's reading of Chapter 11 is overly restrictive given the Commission's broad discretion in acting upon Chapter 11 applications. While OCA contends that an application for approval to enter or expand an applicant's existing territory is "different than an application for transfer of control,"[67] it does not elaborate. PTA submits that, in fact, the

[65] *Popowsky*, 937 A.2d at 1054, note 17.
[66] *See* Sections 63.324(k)(1); 63.325(k)(1).
[67] OCA at 31, note 74.

opposite is true. Initial applications for authority impacting directly the nature of the provider that will come in contact with consumers and the terms and conditions of services it will offer are far more susceptible to consumer harm than change in control applications. The latter applications generally are accomplished at a corporate level, do not change utility services or rates, and have no direct impact on existing or prospective customers. Yet the OCA would require more stringent review of the latter, and almost no review of the former.

IV. CONCLUSION

PTA commends the Commission for undertaking a thorough and fair approach to improving its exercise of regulatory in a telecommunications market that is ever-changing. PTA encourages the Commission to concentrate on finessing the technical provisions of its proposed regulations, while continuing to apply the relief presented in those regulations to all carriers.

Respectfully submitted,

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Date: May 9, 2008

Before The

PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of May, 2008, served a true and correct copy of the foregoing document. upon the persons listed below by first class mail, postage prepaid:

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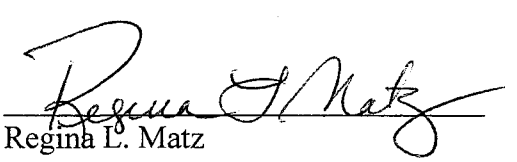

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