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COMMONWEALTH OF PENNSYLVANIA

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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
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-00070188

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INDEPENDENT REGULATORY REVIEW COMMISSION

Dear Secretary McNulty:

I am delivering for filing the original plus fifteen copies of the Reply Comments, on behalf of the Office of Small Business Advocate, on the Proposed Rulemaking.

Copies of the comments in MS Word format have been served on joswitmer@state.pa.us via electronic mail. If you have any questions, please contact me.

Sincerely,

William R. Lloyd, Jr.
Small Business Advocate
Attorney ID No. 16452

Enclosures

cc: joswitmer@state.pa.us

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
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REPLY COMMENTS OF THE
OFFICE OF SMALL BUSINESS ADVOCATE
ON THE PROPOSED RULEMAKING

Procedural History

On May 31, 2006, Level 3 Communications, LLC ("Level 3") filed a petition ("Level 3 Petition") at Docket No. P-00062222, asking the Pennsylvania Public Utility Commission ("Commission") to initiate a rulemaking to streamline the process by which competitive local exchange carriers ("CLECs") may effectuate transfers of control and affiliate transactions.

Both Verizon Pennsylvania Inc. ("Verizon") and the Pennsylvania Telephone Association ("PTA") filed responses which urged the Commission to apply any streamlining of the process to incumbent local exchange carriers ("ILECs") as well as to CLECs.

By Proposed Rulemaking Order entered October 19, 2007, the Commission initiated the process of considering changes in regulations along the lines requested by the Level 3 Petition and the responses thereto. Ordering Paragraph No. 7 invited interested parties to file comments within 60 days of publication in the *Pennsylvania Bulletin*. The proposed regulations were published in the February 9, 2008, *Pennsylvania Bulletin*, 38 Pa.B. 758.

On April 4, 2008, the Office of Small Business Advocate ("OSBA") submitted comments in response to the Commission's invitation. On April 9, 2008, the following parties submitted comments: Office of Consumer Advocate ("OCA"); Broadband Cable Association of Pennsylvania ("BCAP"); Neutral Tandem-Pennsylvania, LLC ("Neutral Tandem"); Level 3 Communications, LLC ("Level 3"); Windstream Pennsylvania, LLC and Windstream Communications Inc. (collectively "Windstream"); Verizon Pennsylvania Inc., Verizon North Inc, and MCImetro Access Transmission Services LLC (collectively, "Verizon"); and Pennsylvania Telephone Association ("PTA").

By Ordering Paragraph 7, the Commission invited parties to submit reply comments within 30 days of the deadline for submitting initial comments. The OSBA submits these reply comments in response to the Commission's invitation.

Replies to Specific Parties

OCA

The OSBA is in general agreement with the OCA's comments which question the need to streamline and expedite review of proposed transactions involving incumbent local exchange carriers ("ILECs").

In addition, the OSBA specifically endorses the OCA's recommendation that a streamlined process (if one is ultimately approved) should not apply to abandonment of service. OCA Comments, at 35. When Norvergence ceased providing service several years ago, numerous business customers complained to the OSBA about the precipitous nature of the abandonment and their difficulty in finding replacement service on a timely basis. To the extent possible, a CLEC should follow the procedures prescribed by the Commission to transition customers to other carriers. Streamlining and expediting abandonment could make it more difficult for business customers to find an alternative provider without suffering a gap in service.

BCAP

The OSBA specifically endorses BCAP's proposal to use the label "full review transaction" whenever the regulations refer to a transaction which will be subjected to traditional review rather than subjected to review under the General Rule, *i.e.*, 60-day review, or to review as a *pro forma* transaction, *i.e.*, 30-day review. BCAP Comments, at 4, fn. 10. Using the label "full review transaction" would simplify the structuring of the regulations and, at least, would make it easier to identify the provisions applicable to transactions presumed to require traditional review. For example, referring to a General Rule transaction which has been reclassified to traditional review "as other than a *pro forma* transaction" is confusing and unnecessarily "wordy."

Level 3

One of the OSBA's initial comments was that a proposed transaction should be subjected to traditional review if the transaction both involves a local exchange carrier ("LEC") with a substantial market share and is opposed. OSBA Comments, at 2-3. In its initial comments, Level 3 points out that basing the degree of review on a LEC's market share would require the Commission to define the relevant market. Level 3 Comments, at 12-13. Admittedly, defining the relevant market could require "a case to decide if there should be a case," which is a result the OSBA has criticized. OSBA Comments, at 3. However, without making such a threshold determination of the relevant market, the Commission would be abdicating its responsibility to determine whether the proposed transaction would have a significant negative impact on competition. Therefore, the only apparent way to avoid threshold litigation to determine the market share would be for the Commission to adopt the OCA's recommendation to withdraw the proposed rulemaking. OCA Comments, at 36.

PTA

In defense of the proposed rulemaking, the PTA argues that the Commission should rely on competition, rather than regulation, as the primary tool to restrain rates charged by telecommunications public utilities. PTA Comments, at 4-5. However, the PTA then methodically attacks the provisions of the proposed rulemaking that are aimed at assuring the preservation of competition.

For example, the PTA criticizes the failure of intervenors to do more in pleadings than simply make allegations of concerns about the proposed transaction. PTA

Comments, at 6. However, the PTA blithely ignores the fact that many merger applications (including those filed by utilities in fields other than telecommunications) contain little more than vague promises of unspecified public benefits and praise for the virtues of the utility proposing to make the acquisition. It is only through the discovery process that an intervenor can begin to evaluate the pros and cons of the transaction. Unfortunately, the PTA's proposals (to water down the supporting material filed with the application but also to require more specificity in the pleadings) would accomplish what may be the PTA's real objective: the elimination of effective review of potential market concentration.

The PTA also criticizes intervenors for seeking concessions for their constituencies. PTA Comments, at 5. By that comment, the PTC seeks to divert the Commission's attention from the fact that telecommunications mergers and acquisitions are intended to maximize the profits of the participants. When such transactions would result in the dilution or destruction of competition, the alleged benefits from often unspecified "new services" are likely to be more than offset by a long-run increase in rates. It is the responsibility of the statutory advocates to seek to mitigate this adverse effect on rates.

Windstream

Windstream recommends that the proposed rulemaking be amended to eliminate traditional review entirely. Windstream Comments, at 10. As support for this recommendation, Windstream points out that federal agencies such as the Federal Communications Commission, the Department of Justice, and the Federal Trade

Commission evaluate a proposed merger or acquisition for any negative impact on competition. Therefore, according to Windstream, there is no need for the Commission to duplicate that effort. Windstream Comments, at 8-9. In addition, Windstream contends that it is unfair to subject telecommunications public utilities to more intensive review than is applied to intermodal competitors such as wireless, cable, and VOIP. Windstream Comments, at 1-2.

The OSBA disagrees with Windstream on several grounds.

First, the OSBA endorses the OCA's argument that ILECs are essentially providers of last resort, the reasonableness of whose rates and service needs to be maintained for those ratepayers who do not have access to alternatives or who opt for "plain old telephone service" without the bells and whistles packaged into the offers by intermodal competitors. OCA Comments, at 6-7.

Second, the Commission is obligated to evaluate the impact of a telecommunications merger or acquisition on competition in the Commonwealth as part of determining whether that transaction is likely to provide net affirmative public benefits. Although the Commission may reach a conclusion which is consistent with the conclusions of one or more federal agencies, that does not relieve the Commission of having to assess the competitive impact on the basis of Pennsylvania-specific evidence. *Popowsky v. Pennsylvania Public Utility Commission*, 937 A. 2d 1040, 1060-1061 (Pa. 2007).

Third, Windstream proposes to delete numerous provisions of the proposed regulations which specifically address market power. In view of the Commission's obligation to evaluate the impact of a transaction on competition, watering down the

market power-related information included in the filing will require intervenors to rely more heavily on discovery and will, as a result, *slow down* the review process.

Verizon

Verizon argues that *City of York v. Pennsylvania Public Utility Commission*, 449 Pa. 136, 295 A.2d 825 (Pa. 1972), requires that a proposed merger provide benefits to the "public" rather than to "consumers." Verizon Comments, at 6-7. However, *City of York* "requires consideration of rates 'at least in a general fashion,' or the 'probable general effect of the merger upon rates' . . . as a component of a net benefits assessment." *Popowsky*, 937 A.2d at 1056. Therefore, contrary to Verizon's argument, the impact of the transaction on "consumers" is an essential element in determining whether there will be net benefits to the "public."

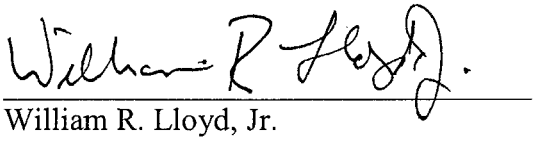
Verizon also objects to the presumption in favor of traditional regulation if one of the statutory advocates files a protest. In Verizon's view, the imposition of traditional regulation should depend on the specificity of the advocate's pleadings. Verizon Comments, at 8. However, as noted above in response to the PTA, the ability of any intervenor to file specific pleadings depends upon the extent to which the applicant provides detailed information as part of its filing. Unfortunately, at the same time it is insisting on more specific pleading by intervenors, Verizon is also proposing to delete provisions of the proposed regulations which specifically address market power. In other words, Verizon is seeking to hold intervenors to a higher standard with regard to protests but to deprive those intervenors of the information they would need in order to meet that standard.

In addition, Verizon contends that *City of York* applies to mergers but not necessarily to other transactions which require a certificate of public convenience. Verizon Comments, at 7. Unfortunately, Verizon does not identify the specific types of transactions to which it believes that *City of York* may not apply. Admittedly, *City of York* did involve a merger, but the Supreme Court's holding is equally applicable to an acquisition. Section 1102(a)(3) of the Public Utility Code, 66 Pa. C.S. §1102(a)(3), which imposes the certificate of public convenience requirement, makes no distinction based on whether property is acquired by the "sale or transfer of stock," a "consolidation," a "merger," a "sale," or a "lease."

Conclusion

In view of the foregoing, the OSBA joins the OCA in urging the Commission to withdraw the proposed rulemaking. If the Commission is unwilling to withdraw the proposed rulemaking, the OSBA respectfully requests that the Commission revise the proposed regulations in accordance with the OSBA's initial and reply comments before publishing the regulations in final form.

Respectfully submitted,



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