Kennard Law Offices LLC

Attorneys At Law

116 Pine Street, 5th Floor, Harrisburg PA 17101

Tel: (717) 635-2320 Fax: 238-2390 Email: njk@kennard-law.com

Norman J. Kennard

Direct Dial: (717) 635-7273

April 27, 2007

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265

Re: Proposed Modifications to the Application Form for Approval of Authority to Offer, Render, Furnish or Supply Telecommunications Services to the Public in the Commonwealth of Pennsylvania; Docket No. M-00960799; **REPLY COMMENTS OF THE PENNSYLVANIA TELEPHONE ASSOCIATION TO COMMISSION TENTATIVE ORDER**

Dear Secretary McNulty:

Enclosed for filing with the Commission are the original and ten (10) copies of the Pennsylvania Telephone Association's Reply Comments in the above-captioned matter.

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

Very truly yours,

Norman J. Kennard
Counsel to the Pennsylvania Telephone Association

NJK/ajt
Enclosure

cc: Certificate of Service
Tony Rametta, Bureau of Fixed Utility Services
Robert Marinko, Office of Special Assistants
Louise Fink Smith, Law Bureau
David Freet

CERTIFICATE OF SERVICE

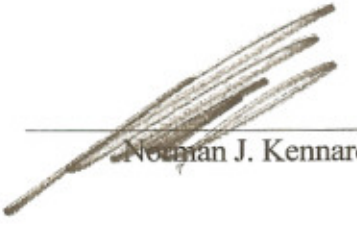
I hereby certify that I have this day served a true copy of the foregoing document upon the participants, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by participant).

Service by First Class Mail:

Pamela C. Polacek
McNees Wallace & Nurick
P.O. Box 1166
100 Pine Street
Harrisburg, PA 17108-1166

Timothy W. Baldwin, ENP
Deputy Director
Lancaster County-Wide Communications
P.O. Box 487
Manheim, PA 17545-0487

Kathleen S. O'Neill
Carl Wilner
Telecommunications and Media
Enforcement Section
Antitrust Division
United States Department of Justice
1402 H. Street, N.W. Suite 3000
Washington, D.C. 20530



Norman J. Kennard

Dated this 27th day of April, 2007.

BEFORE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Proposed Modifications to the Application Form for Approval of Authority to Offer, Render, Furnish or Supply Telecommunications Services to the Public in the Commonwealth of Pennsylvania	:	**Docket No. M-00960799**

REPLY COMMENTS OF THE PENNSYLVANIA TELEPHONE ASSOCIATION TO COMMISSION TENTATIVE ORDER

Dated: April 27, 2007

I. INTRODUCTION

The Pennsylvania Telephone Association ("PTA"), on behalf of its member rural local exchange companies ("RLEC"), files this reply to the comments submitted to the Pennsylvania Utility Commission ("Commission") by the Broadband Cable Association of Pennsylvania ("BCAP") and the United States Department of Justice ("DOJ"). Comments were also filed by the National Emergency Number Association, Keystone State Chapter ("NENA"). The PTA does not take issue with the statements made by NENA.

II. PTA REPLY COMMENTS

A. Rural Companies and the TCA-96

In enacting the Telecommunications Act of 1996 ("TCA-96"), Congress was very careful to recognize the differences between the very large regional Bell operating companies ("RBOCs") and the smaller rural carriers. While promoting local competition, TCA-96 retained and codified the policy of maintaining affordable and universal local service in rural service territories and granted RLECs and their rural customers protection from competitive harm.[1]

The 8th Circuit Court of Appeals, in a decision reversing the FCC's local interconnection rules affecting the rural exemption, recognized Congressional concerns over competitive entry in the rural market. The Court found that while a goal of TCA-96 was to promote competition, Congress also clearly and specifically sought to **protect** rural telephone companies, and consequently their rural subscribers, from harm. As the Court stated:

---

[1] *See* Sections 254(b) and 251(f) of TCA-96, 47 U.S.C. §§ 254(b) and 251(f).

> By limiting the phrase unduly economically burdensome to exclude economic burdens ordinarily associated with competitive entry, **the FCC has impermissibly weakened the broad protection Congress granted to small and rural telephone companies. We have found no indication that Congress intended such a cramped reading of the phrase.** If Congress had wanted the state commissions to consider only that economic burden which is in excess of the burden ordinarily imposed on a small or rural ILEC by a competitor=s requested efficient entry, it could easily have said so. Instead, its chosen language looks to the whole of the economic burden the request imposes, not just a discrete part.[2]

Stated differently, certificating a carrier as a CLEC in RLEC territories simply for the sake of promoting competition does not comport with Congress' reasoned distinctions between rural and non-rural entry.

Since that time, in order to comply with the statutory construct of TCA-96, which distinctly dealt with rural competition differently than competition in RBOCs' territories, the FCC has resolved many issues initially for the RBOCs, while simultaneously taking a different and far more cautious approach with the smaller rural carriers. For example, with respect to the issue of access reform, the FCC has taken two completely divergent paths for rural carriers as opposed to RBOCs. In the FCC's 1997 *Access Charge Reform Order,*[3] the FCC focused first on the access charges of the RBOC price cap LECs by by aligning rate structure more closely with costs. In its next step for access reform, the FCC again focused first on the access charges of the RBOCs, such as Verizon, by adopting the CALLS Plan.[4]

---

[2] *Iowa Utilities Board, et al. v. Federal Communications Commission*, 219 F.3d 744, 761 (8th Cir. 2000) (voiding 47 C.F.R. §51.405(c)), *aff'd in part, rev'd in part, and remanded on other grounds* in *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646 (U.S. 2002) ("*Iowa Utilities Board II*")(emphasis added). Issues addressed by the Supreme Court did not impact RLECs or the 8th Circuit's holding.

[3] CC Docket No. 96-262, First Report and Order, 1997 (*Access Charge Reform Order*).

[4] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Eleventh Report and Order, 15 FCC Rcd 12962 released May 31, 2000 (*Interstate Access Support Order*), aff'd in part, rev'd in part, and remanded in part, *Texas Office of Public Util. Counsel et al. v. FCC*, No. 0060434 (5th Cir. September 10, 2001).

In recognition of the need for a more comprehensive and distinctly different review of the issues of access charge and universal service reform for the remainingrural carriers, however, the FCC had placed rural reforms on a separate track. In one of its earliest actions, the FCC constituted the Rural Task Force, which was charged with the duty of studying the differences between the provision of telecommunications services in rural and non-rural areas.[5] In its May 23, 2001 *Rural Task Force Order*,[6] the FCC endorsed use of a *modified embedded cost mechanism* for rural carriers, as opposed to a forward-looking cost mechanism required for price cap carriers, to determine rural carrier support. The FCC also made clear its intention to develop "a long-term plan that better targets support to carriers serving high-cost areas, *while at the same time recognizing the significant differences among rural carriers, and between rural and non-rural carriers.*"[7]

The PTA fully recognizes that facilities-based competition is in the public interest, but believes that for competition to be fair and balanced and to provide the greatest benefit to end users, such competition must be offered on a level playing field. While it is obvious that the effects of competition inherently will be some economic harm to the RLECs, harm that the 8th Circuit Court of Appeals recognized cannot be ignored, the PTA only objects to the economic harm that is disproportionately placed on its membership through certification

---

[5] *Universal Service First Report and Order*, 12 FCC Rcd 8917 at ¶ 253. In one of its earliest releases, the Rural Task Force concluded that rural carriers generally have higher operating and equipment costs due to lower subscriber density, smaller exchanges and limited economies of scale. Significantly, rural carriers rely more heavily on revenues from access charges and universal service support in order to provide ubiquitous and affordable local service. *See e.g.* Rural Task Force White Paper 2, *"The Rural Difference."*

[6] *Fourteenth Report and Order and Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking, Multi-Association Group (MAG) plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Report and Order, 16 FCC Rcd 11244 (May 23, 2001) (*Rural Task Force Order*).

[7] *Id.* at 11249 ¶ 8 (emphasis added). On November 8, 2001, the FCC issued its Second Report and Order at CC Docket Nos. 01-304, 00-256 (MAG Plan), 96-45 (USF), 98-77 (Access Charge Reform) and 98-166 (Authorized ROR), in what is referred to as the *MAG Order*. The *MAG Order* represented the FCC's most recent attempt to address universal service and access charge reform issues for RLECs. Access reform, intercarrier compensation and universal service issues were all eventually merged into the FCC's pending Intercarrier Compensation Reform docket.

of applicants that seek all the benefits that come with certification while assuming none of the obligations that come with the provision of local exchange service and which results through the lack of a level playing field.

BCAP comments that "facilities-based entry requires a commitment to capitalize and support the CLEC entrant in order to have a business plan capable of success."[8] The PTA does not disagree with this statement. Where the CLEC is truly facilities-based and investing capital in the rural areas in order to provide competitive local service, the RLEC companies either have not protested the application (where that business plan is discernible from the face of the application) or have discontinued their protests after adequate supporting information was made available.

If the CLEC has no intention of provisioning facilities sufficient to provide local exchange service in the RLECs' service territories, and has solely as its business plan the goal, upon certification, to force the RLECs to haul traffic to points far removed from the local calling area, it is the PTA companies' position that this is neither facilities-based competition, nor even local competition. Such a scheme is not in the public interest and is not sanctioned under federal or state law. And under both, the RLECs have the right and must have a meaningful opportunity to object.

If a CLEC wishes to be granted the rights due a true facilities-based carrier within an RLEC's territory, then that CLEC must fulfill the responsibilities of a facilities-based CLEC by actually investing in local facilities - and offering communications services within the local calling area. For competition to truly provide the greatest public benefit it must be offered through public policy that requires a level playing field and not disparate obligations, different regulatory requirements or even merely different expectations placed

[8] BCAP Comments at 10.

upon would-be competitors.[9] If the Commission's grant of authority to entities claiming to be CLECs does not assure a level playing field, the public interest (including residents and businesses in the Commonwealth) is not served and compliance with the statutory mandates of TCA-96 as they impact rural carriers falls short and the RLECs are unlawfully penalized and prejudicied.

B. Facilities-Based Statewide Authority

Facilities-based carriers should be required to define their service territory on the basis of their own facilities, and not be granted blanket rights throughout the entire Commonwealth of Pennsylvania or based upon the facilities of the incumbent LEC, as some of the commenters have suggested. A true facilities-based carrier cannot show that it is technically fit or financially capable of providing its proposed services **throughout** an area larger than the scope of its physical facilities.[10]

Having insisted, during the General Assembly's recent consideration of telephone company entry into the video service market that no state-wide franchising should be allowed, it cannot be without a sense of pure irony that the cable association and its members now trumpet the value of competition and advocate state-wide certification of cable companies that desire to enter the telephone market.

The cable companies, their affiliates and partners seek to provide service in an area that coincides with the cabled areas of the company providing video service. Therefore,

---

[9]This includes, franchise maps, financial statements, affiliation interest agreement, customer service requirements, reporting obligations, etc.

[10]*Application of Helicon Telephone Pennsylvania, LLC, for authority to provide local exchange telecommunication services in the service territory of Bentleyville Telephone Company*, 2000 WL 347435 at * 3 (Pa. PUC) (in which the Commission found the applicant unfit technically because the applicant did not present any specifics regarding its service proposal or plan of operation and "[v]ague references . . . [do] not permit us to discharge our duty to find fitness.")

although the actual, intended service territory would be non-coincidental with the ILEC's territory (unless the application is in an RLEC's territory that is very small), and the cable company would be unable to show that it is physically capable of serving the entire applied-for area. A cable company operates no facilities outside the area of its cable "footprint" and would be incapable of describing technically how it could serve beyond that area or demonstrate the financial capability to do so.

BCAP complains that not only should service territories be granted on a state-wide basis, but also that the requirement of filing a description of the service territory should be eliminated. Maps are not feasible for cable operators says BCAP, because "cable operators install facilities on a franchise-by-franchise basis, with each franchise corresponding to a local government unit (e.g., municipality or borough)."[11]

This would seem to not be the problem claimed by BCAP. Regulated companies are required to describe their service territory and may do so by reference to the "counties, the cities, boroughs and townships covered by the tariff," or, alternatively "[t]elephone companies may, in lieu of the foregoing, refer to maps filed as parts of rate schedules or tariffs."[12] If cable companies can describe their service territories by reference to municipalities, then this would appear to be fully consistent with Commission regulation.

The *Core CLEC Application* decision[13] is germane to this discussion. As ALJ Weismandel found in his Initial Decision denying Core's application: "Despite the representations made in its Amended Application, evidence adduced at the hearing in this case establishes that Core is not now, and would not be in the future, a facilities-based

---

[11] BCAP Comments at 29.
[12] 52 Pa. Code § 53.21 (4).
[13] *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.")*.

CLEC as that term has been understood in Pennsylvania since enactment of the Telecommunications Act of 1996."[14] He further concluded, as a matter of law, that: "Core is not, and does not intend to be, either 'facilities-based' nor a 'local exchange carrier'."[15] While these finding were reversed by the Commission, the matter is on appeal, including the issue whether a carrier without any local facilities, any connection to a calling customer, or any nexus at all to the provision of local exchange service in an RLEC's service territory, can be declared a facilities-based local carrier.

The Commission should establish a valid definition of "facilities-based," and the provision of facilities in one territory has never been found sufficient to warrant certification statewide. The Commission's *Core CLEC Application* Order deals with Core's lack of local exchange facilities by acknowledging that "Core's business model strains this concept in that Core does not, as a general proposition, provide the last mile facility to the customer premises," but then concludes that Core's operations are not that of a reseller either.[16] By restricting its decision to a choice between two categories of CLEC, and concluding that if Core is not a reseller then it must be facilities-based, the Commission failed to address the real issue, which is should the Commission allow any entity to attain statewide CLEC status, thereby affording statewide benefits of certification, when the entity clearly has no present or likely even planned ability to be a statewide carrier, and therefore will assume no obligations and likely provide no public benefits statewide.

Section 271 of the TCA-96 defines "facilities-based competitors" as "unaffiliated competing providers of telephone exchange service to residential and business subscribers . . . exclusively over their own telephone exchange service facilities or predominantly over

[14] *Core CLEC Application*, ID at 17-18.
[15] *Core CLEC Application*, ID at Conclusion of Law No. 12.
[16] *Core CLEC Application* Order at 20-21.

their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."[17]

The Commission itself has defined a rural facilities-based CLEC as one which invests in network facilities **in the RLEC's territory**. As the ALJ in the Core application proceeding described, the Commission, in a series of orders following the enactment of TCA-96, consistently and clearly held that rural facilities-based CLEC authority required a CLEC applicant's investment in "distinctly independent facilities" **in the rural service territories** in which the CLEC authority was sought.[18]

In addressing the local network obligations of an applicant seeking rural facilities-based CLEC authority, the Commission has previously determined that "[a] competitor willing to provide alternative service over **distinctly independent networks**" ought to be able to compete with the RLECs.[19] "[I]f CLECs want to invest their own capital and **build their own networks in areas served by rural companies**, this agency will do nothing to discourage such investment."[20]

In one of the Commission's initial rural CLEC application proceedings, the PUC adhered to this standard and reaffirmed that a rural facilities-based CLEC must actually invest in an independent network within the rural service territory, stating:

> The burden is on the facilities-based CLEC to make a go of its business. ... Thus, a CLEC technically fit and financially capable of *investing in a distinctly independent system in* **rural** *Pennsylvania* is able to compete under the findings in this Opinion and Order.[21]

---

[17] 47 U.S.C. §271(c)(1)(A) (emphasis added).
[18] *Core CLEC Application,* ID at 15-17.
[19] *Re: Petition of Rural and Small Incumbent Local Exchange Carriers for Commission Action pursuant to Section 251(f)(2) and 253(b) of the Telecommunications Act of 1996*, 87 Pa. PUC 383 (1997), 1997 WL 1050749 at *13-14 (Pa PUC) ("*1997 Suspension Order*")(emphasis added).
[20] *1997 Suspension Order*, Statement of Commissioner David W. Rolka at *16 (emphasis added).
[21] *Application of Armstrong Communications, Inc.*, 92 Pa. PUC 334, 338 (1999).

The PUC has applied this standard in **every** rural facilities-based CLEC application since that original case.[22]

The Commission should reaffirm this standard. A facilities-based competitor must be providing services over distinctly independent facilities, including the provisioning of its own switches and customer connections, without reliance on the incumbent's facilities for anything other than traffic exchange.

As noted by the Commission in the *Sprint Wholesale CLEC* Order, one of the underlying cable company's obligations is the provision of "universal service."[23] If the cable company's territory exceeds its capability to provide service, it must deny applications for service in derogation of its statutory obligation to provide universal service. So from the perspective of liability and customer obligations, the cable companies should want to avoid an overly expansive service territory.

It makes no sense for the service area of a facilities-based carrier to be described based upon the facilities of another carrier. Only where the CLEC is not facilities-based and is relying, instead, upon the facilities of the LEC under section 251 (c) would such a declaration be accurately descriptive.

C. Provisional Authority

In its June 3, 1996 TCA-96 Implementation Order and in the subsequent Order on Reconsideration, the Commission announced the entry procedures to be utilized by CLEC

---

[22] *See Vanguard, AT&T/TCG, and Adelphia, supra.*

[23] *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*").

applicants seeking authority within the service territories of smaller, rural telephone companies.

Specifically, the Commission stated that applications seeking authority to enter the service territory of a rural telephone company "will be subject to normal procedures under 66 Pa. C.S. Sections 1101 and 1103."[24] While the Commission has since revised the entry standards for "facilities-based" CLECs,[25] it has not changed the procedures to be employed, including the right to a hearing before the granting of authority to operate.

The use of the "normal procedure" is not a legal nicety. It is essential in many proceedings, because the streamlined procedures would award interim authority pending resolution of a protest, even where, as with Core, the very premise of the application is in dispute.

BCAP believes that protests filed "for competitive reasons" should be rejected out of hand, limiting protests that are acceptable to a protest that raises a "specific, colorable and supported fitness objection."[26] On the other hand, BCAP would only offer a fifteen day protest period from the date of the application filing,[27] while DOJ would similarly truncate time frames.[28]

There are several problems with this approach. First, the issues do not always relate to fitness. After the adjudication of a few cases in the first few years following enactment of TCA-96 in which the Commission refined the standards applicable to rural facilities-based CLEC applications, there have been only *two* litigated CLEC application cases in the last 5 years. In both instances, the issues centered upon whether the applicant was appropriately

---

[24] *Id., In re: Implementation of the Telecommunications Act of 1996*, Order on Reconsideration at 6.
[25] *See*, for example, *AT&T/TCG*; See, also, 66 Pa. C.S. §3009(a).
[26] BCAP Comments at 28.
[27] BCAP Comments at 33-34.
[28] DOJ Comments at 13-16.

certificated and were not limited to fitness. In the *Sprint Wholesale CLEC* case, the presiding ALJ granted the protest and denied Sprint's application on substantive legal grounds,[29] finding that Sprint's proposed wholesale, back office services are not local exchange services under either federal or Pennsylvania law.[30] In the litigated Core application case, the protests were upheld by ALJ Weismandel, who found that Core is not now, and would not be in the future, a facilities-based CLEC.[31] Clearly, the recent litigation of only *two* rural facilities-based CLEC applications, one of which is under appeal, does not place an undue burden on the process of rural competitive entry. Indeed, the PTA suggests that the restraint RLECs have demonstrated over the past several years demonstrate a reasonable balance between the public policy supporting competition and the rural protections Congress codified in TCA-96.

The second problem relates to the lack of available information. As the PTA described in its Comments:

> Protesting is often times the only avenue available for the ILEC to formally engage the entrant to determine what will be requested by the CLEC and how those operations will affect the ILEC. The Commission forms do not require sufficient detail regarding facilities, operations or services for the ILEC to know what may be required. As noted previously, in these Comments, once a CLEC certificate is obtained, a presumption of legitimacy is conferred upon the certificate holder. This presents risks to the incumbent local exchange company, which may be forced to offer operational advantages to an entity that may never, in fact, provide local exchange services.[32]

Simply stated, the prospective CLEC does not approach the incumbent to describe its operations and there is no time provided between the application filing and the due date for

---

[29] *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, Recommended Decision of ALJ Susan D. Colwell released May 25, 2006 (*"Sprint Wholesale CLEC"*).

[30] Initial Decision at Conclusions of Law Nos. 1, 2 and 6

[31] *Id.* at 17 (emphasis added).

[32] PTA Comments at 7.

the protest to develop a meaningful understanding to file "specific, colorable and supported" objections as BCAP demands. Failure to provide the incumbent an opportunity to develop such a protest is a denial of due process.

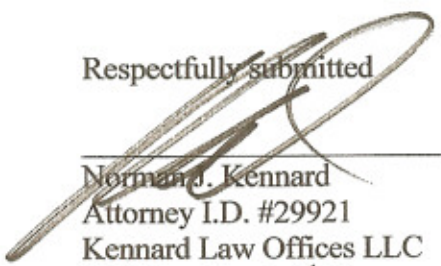
A third issue raised by a truncated protest period and the grant of provisional authority advocated by some commentators relates to the fact that applicants often fail to serve RLECs with applications, nor do they seek any form of interconnection or traffic exchange agreements prior to otherwise acting on their newly granted CLEC rights. Hence, an RLEC could find itself being requested to port numbers, for example, to a carrier that heretofore had no local presence in the RLEC's territory and that was totally unknown to the RLEC, and which has made no arrangement for the exchange of traffic with it.

III. CONCLUSION

It is a well established fact that competition provides very real benefits to end users through greater choice and lower prices and consequently is in the public interest. The Commission must guard, however, against the absolutely incorrect notion that simply because an application for a certificate labels a planned activity as "local service competition," does not mean that that the Commission must automatically approve that petition without actually examining the party's true intent and determining if such approval is in the public interest. Invocation of the word "competition" should not suspend critical analysis. This Commission, as it has demonstrated in the past, must be the final arbiter of what activities serve the public interest of the Commonwealth, not the party filing the petition.

The Pennsylvania Telephone Association thanks the Commission for the opportunity to participate in this proceeding. The PTA respectfully suggests that any determination by the Commission to lower the standard for rural entry has strong potential to deprive rural incumbent local exchange carriers of their rights under federal law. Pennsylvania's RLECs serve only about 12% of Pennsylvania's access lines. Therefore any relaxation of the current standards to provide any applicant the benefits of CLEC certification on a statewide level will not have the equivalent of statewide impact. The impact within each individual RLEC territory, however, can be monumentally harmful. For these reasons, the PTA respectfully requests that the Commission consider its foregoing reply comments within the rural/nonrural context so carefully crafted by Congress in TCA-96 and heretofore judiciously protected by federal and state regulators and courts.

Respectfully submitted



Norman J. Kennard
Attorney I.D. #29921
Kennard Law Offices LLC
116 Pine Street, 5th Floor
Harrisburg, PA 17101
(717) 635-2320
njk@kennard-law.com

Counsel to
The Pennsylvania Telephone Association

DATED: April 27, 2007