PROPOSED RULEMAKING

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA.CODE CH. 63]

[L-00990141, M-00960799]

Competitive Safeguards for Telecommunications Utilities

The Pennsylvania Public Utility Commission (Commission) on November 18, 1999, adopted a proposed rulemaking order establishing competitive safeguards directed at incumbent LECs and encouraging and promoting competition in the provision of telecommunications products and services throughout Pennsylvania and forbearing from the imposition of further imputation requirements on LECs other than Bell Atlantic-Pennsylvania, Inc. The contact persons are Carl Hisiro, Law Bureau, (717) 783-2812, and Gary Wagner, Bureau of Fixed Utility Services, (717) 783-6175.

Executive Summary

Under 66 Pa.C.S. § 3005(b) and (g)(2) (relating to competitive services), the Commission is required to establish regulations to prevent unfair competition, discriminatory access and the subsidization of competitive services through revenues earned from noncompetitive services. On March 23, 1999, the Commission issued an Advance Notice of Proposed Rulemaking to solicit comments from jurisdictional telecommunication utilities and other interested parties regarding the development of generic competitive safeguards under Chapter 30 of the Public Utility Code. That order also directed that the matter of imputation with regard to the provision of intraLATA services by incumbent local exchange carriers be consolidated with the rulemaking proceeding.

The proposed regulations establish competitive safeguards in furtherance of Chapter 30's mandate to encourage and promote competition in the provision of telecommunications products and services throughout Pennsylvania. The proposed rulemaking order also concludes that no additional rulemaking is required at this time on the issue of imputation for the delivery of intraLATA services by incumbent local exchange carriers other than Bell Atlantic-Pennsylvania, Inc., which is subject to an imputation requirement by order in a separate proceeding.

Commissioners present: John M. Quain, Chairperson; Robert K. Bloom, Vice Chairperson; Nora Mead Brownell; Aaron Wilson, Jr.; Terrance J. Fitzpatrick

Public Meeting held
November 18, 1999

Proposed Rulemaking Order

By the Commission:

This proposed rulemaking establishes competitive safeguards in furtherance of the provisions of Chapter 30 of the Public Utility Code, 66 Pa.C.S. §§ 3001—3009 (code), and Chapter 30's mandate to encourage and promote competition in the provision of telecommunications products and services throughout this Commonwealth. This Order also concludes that no additional rulemaking is required at this time on the issue of imputation for the delivery of intraLATA services by incumbent local exchange carriers other than Bell Atlantic-Pennsylvania, Inc.

A. *Background and Procedural History*

At the Public Meeting of March 18, 1999, the Commission entered an order directing that an Advance Notice of Proposed Rulemaking be issued to solicit comments regarding the development of generic competitive safeguards under sections 3005(b) and 3005(g)(2) of the code. That order also directed that the matter of imputation[1] with regard to the provision of intraLATA service by local exchange carriers (LECs) be consolidated with the rulemaking proceeding. The Advance Notice was published April 10, 1999, at 29 Pa.B. 1895, and comments and reply comments on these issues were thereafter received from a number of interested parties.

Section 3005(b) and (g)(2) of the Code, require the Commission to establish regulations to protect competition by preventing the subsidization of competitive services through revenues earned from noncompetitive services. Specifically, section 3005(b) requires regulations aimed at preventing unfair competition and ensuring that LECs provide reasonable nondiscriminatory access to its services and facilities by competitors. Section 3005(g)(2) requires regulations governing the allocation of costs for telephone services to prevent subsidization or support for competitive services with revenues earned or expenses incurred in conjunction with noncompetitive services.

The issue of competitive safeguards,[2] including the establishment of Competitive Safeguards Regulations,[3] was initially addressed by this Commission in its June 28, 1994 Final Order at Docket No. P-00930715 disposing of the Bell Atlantic-Pennsylvania, Inc. (BA-PA) Petition for Alternative Regulation filed under 66 Pa.C.S. §§ 3001—3009 (hereinafter referred to as Chapter 30).[4] The Bell Chapter 30 Order, however, referred the issue of establishing Competitive Safeguard Regulations to the Office of Administrative Law Judge (OALJ), and instructed the OALJ to use the Commission's Alternative Dispute Resolution (ADR) process to address and resolve several issues.[5]

The issues referred to the OALJ in that order were cost allocation, unbundling, and imputation associated with competitive safeguards. We also directed that a separate proceeding be established to promulgate generic regulations applicable for all LECs filing for alternative rate regulation under Chapter 30. Consistent with these instructions, the OALJ opened a Competitive Safeguards Proceeding at M-00940587.

Following the publication of a Notice of Investigation Into Competitive Safeguards, the Commission received comments and reply comments from a number of interested parties. On August 6, 1996, we entered a final order in the Competitive Safeguards proceeding that was lim-

[1] "Imputation" is a term of art. The term generally refers to those requirements necessary to ensure that an incumbent local exchange carrier (ILEC) incorporates in its cost-of-service calculations the same access charges on itself as it imposes on other competitors for the delivery of any service function that both the ILEC and its competitors need to deliver a service.

[2] The term "Competitive Safeguards" is a generic term referring to the multiple protections needed to foster competition in any specific industry that was previously regulated.

[3] The term "Competitive Safeguard Regulations" refers to the regulations required by sections 3005(b) and 3005(g)(2) of the Public Utility Code.

[4] *In Re Bell Atlantic-Pennsylvania, Inc.'s Petition and Plan for Alternative Form of Regulation Under Chapter 30*, Dkt. No. P-00930715 (Order entered June 28, 1994) (Bell Chapter 30 Order).

[5] *Id.* at 113-14.

ited to Bell-specific competitive safeguards.[6] The competitive safeguards approved by the Commission were submitted by BA-PA as part of its Chapter 30 competitive services deregulation plan, as modified by the Competitive Safeguards Order.

On September 9, 1996, in a separate proceeding, we entered an order regarding implementation of the Federal Telecommunications Act of 1996 (TA-96).[7] The TA-96 Implementation Order addressed intraLATA services by BA-PA, but did not resolve the question of imputation for the delivery of intraLATA services by ILECs other than BA-PA.

B. *Rulemaking Issues and Associated Comments*

As already noted, we opened the instant rulemaking at the March 18, 1999 Public Meeting by issuance of an Advance Notice of Proposed Rulemaking. The purpose of this Notice was to provide all LECs and other interested parties an opportunity to provide comments and reply comments on the need for developing generic competitive safeguards. We specifically asked for comments on cost allocation, unbundling, imputation, and on any other issues the parties thought would be appropriate in developing Competitive Safeguard Regulations under Chapter 30. We also invited parties to submit proposed regulatory language for consideration.

On or about May 25, 1999, the Commission received initial comments from BA-PA, AT&T Communications of Pennsylvania, Inc. (AT&T), The United Telephone Company of Pennsylvania and Sprint Communications Company, L.P. (Sprint), GTE North Incorporated (GTE), the Pennsylvania Telephone Association (PTA), and the Telecommunications Resellers Association (TRA). Reply comments were thereafter filed on or about June 24, 1999, by BA-PA, AT&T, Sprint, PTA, and the Office of Trial Staff (OTS).

According to BA-PA, any regulations promulgated by the Commission should be governed by three overriding principles: 1) any regulation should be competitively neutral and should be equally imposed on all LECs and not just incumbents, that is, the doctrine of regulatory parity should be preserved as between ILECs and competitive local exchange carriers (CLECs); 2) the regulations must safeguard competition, not protect competitors; and 3) the regulations should not burden competitive services offered by LECs with any more additional obligations than is necessary to promote competition. BA-PA Comments at 2-4.

Applying these principles to the issues raised in our March 23, 1999 Order at this docket, BA-PA argues that the unbundling requirement, as interpreted in the August 6, 1996 Competitive Safeguards Order, which requires BA-PA to unbundle each network function that it uses to provide a competitive service, regardless of whether competitors actually need access to the function in order to provide competing services, is unnecessarily burdensome. *Id.* at 5-6; BA-PA Reply Comments at 6-8. BA-PA argues, instead, that the Commission should adopt the same standard recently imposed by the United States Supreme Court in *AT&T Corp. v. Iowa Utils. Bd.*, ___ U.S. ___, 119 S. Ct. 721 (1999), on the unbundling requirement contained in section 251(c)(3) of TA-96. This standard would require a LEC to provide the unbundled network element to competitors only where "necessary to provide competing services to consumers." BA-PA Comments at 7. *See also* BA-PA Reply Comments at 7-8. Otherwise, BA-PA asserts, unrestricted unbundling would discourage investment and innovation in local network facilities by new entrants and would undermine those competitors that have deployed their own networks from competing effectively against those competitors that simply lease the same facilities from the ILEC at total-element-long-run-incremental-cost (TELRIC) prices. BA-PA Reply Comments at 8-10.

As to imputation, BA-PA recommends that any "competitive safeguards regulations only require LECs to impute the rates for 'necessary' BSFs [basic service functions], plus the total service long run incremental cost [TSLRIC] of non-necessary facilities, into the price charged for competitive services." BA-PA Comments at 8. Further, BA-PA asserts that imputation should be performed at the "service-market level," rather than at the individual customer level, so as to promote "one-stop shopping" for telecommunications services that is now in demand by business customers. In making this argument, BA-PA dismisses out-of-hand the proposition that more severe imputation rules are necessary to avoid "price squeezes" by ILECs, asserting that the federal antitrust laws are already in place to address this type of problem if it should occur, and noting through AT&T's own expert that "predatory behavior . . . is extremely unlikely to occur." BA-PA Reply Comments at 5.

Finally, BA-PA recommends that informational tariffs for competitive services should be eliminated and that requiring cost and revenue allocation studies imposes needless costs on services that are competitive in nature. BA-PA Comments at 10-12. On the informational tariff issue, BA-PA argues that competition may be thwarted if LECs are required to post their prices for all to see, "since competitors would have the advantage of knowing the LEC's prices when setting its [sic] own." *Id.* at 10.

AT&T contends, on the other hand, that imputation should be applied on a disaggregated basis, apply to all ILECs, and include all BSFs that the ILEC uses to provide services. AT&T Comments at 4-13; AT&T Reply Comments at 4-8. AT&T asserts that section 3005 of the Public Utility Code requires that "*each* telecommunications service must pass an imputation test." AT&T Comments at 5 (emphasis in original). Otherwise, applying imputation on an aggregated basis would allow an ILEC to price individual services below the rates for the BSFs that the ILEC uses to provide the same service, which in turn would allow the ILEC to price discriminate by charging less where competition was robust and charging more where there was little or no competition. *Id.* AT&T then cites to several earlier Commission orders as precedent for its position. *Id.* at 6-7.

AT&T further argues that we should reject BA-PA's argument that imputation should only apply to those BSFs that are deemed "necessary" for the provision of a competitor's service. In making this argument, AT&T asserts that the Commission need not and should not rely on the United States Supreme Court's recent decision in *AT&T Corp. v. Iowa Utils. Bd.*, ___ U.S. ___, 119 S. Ct. 721 (1999), as this position is inconsistent with the plain language of Chapter 30. *Id.* at 8-9; AT&T Reply Comments at 4-6. That language, it contends, requires ILECs to unbundle all of the BSFs the ILEC uses to provide the competitive service under the same price, terms, and

[6] *Investigation Pursuant to Section 3005 of the Public Utility Code to Establish Standards for Competitive Services*, Dkt. No. M-00940587 (Order entered August 6, 1996) (Competitive Safeguards Order).

[7] *Implementation of the Telecommunications Act of 1996*, Dkt. No. M-00960799 (Order on Reconsideration entered September 9, 1996) (TA-96 Implementation Order). This Order modified in certain respects an earlier order entered on June 3, 1996, to implement TA-96. The June 3, 1996 Order found, *inter alia*, that all noncompetitive intraLATA toll services provided by any LEC should be subject to an imputation requirement. The September 9, 1996 Order suspended the imputation requirement as applied to all LECs other than BA-PA.

conditions at which the BSFs are used in the ILEC's services, without regard to whether those BSFs are necessary or essential. AT&T Comments at 13-15; AT&T Reply Comments at 5-6.

AT&T also argues that BA-PA's suggestion that any competitive safeguards should apply equally to ILECs and CLECs under the doctrine of "regulatory parity" should be rejected because new entrants do not possess the type of market power that would warrant application of any such safeguards to them. AT&T Reply Comments at 3-4. Finally, AT&T recommends that the notice an ILEC uses to request classification of a service as "competitive" under section 3005 should be expanded to include the various factors that are required to show that the service is truly competitive. AT&T Comments at 17-19.

Sprint supports the Commission's efforts to adopt competitive safeguards that are generic in nature, but emphasizes that the safeguards must be uniform and consistently applied to all non-Bell ILECs. Sprint's Reply Comments at 1. In this regard, Sprint supports AT&T's position that the proposed regulations should be directed at ILECs only. However, Sprint disagrees with AT&T's position that imputation should be applied on a disaggregated, service-by-service basis. *Id.* at 2. Instead, it asserts, consistent with BA-PA's position, that intraLATA toll imputation should be on an aggregated, total service basis. *Id.* Sprint also recommends that there should be a 3-year transition period to an imputation standard for those non-BA-PA ILECs that do not meet such a standard today. *Id.* at 3.

On other issues, Sprint supports requiring the unbundling of any competitive services that involve the transmission of messages (as opposed to such services as billing and collection where its asserts unbundling should not be required), and argues that competitive services priced above TSLRIC cannot, by definition, involve unlawful cross-subsidization. Sprint Comments at 3-4. Finally, Sprint contends that new regulations are unnecessary under section 3005(b) as the language in the statute itself is sufficient for establishing the proper guidelines for Commission analysis of competitive services under that section of Chapter 30. *Id.* at 4.

The PTA asserts that LEC-only imputation that is not applicable to interexchange carriers (IXCs) is one-sided and places the LECs at a serious competitive disadvantage. PTA Comments at 4; PTA Reply Comments at 2-3. This is because many IXCs are setting their toll pricing on a national level using flat rates that have no relationship to the access rates of any particular LEC. Further, the PTA asserts ILECs at least can only provide intraLATA toll services, whereas IXCs can offer customers a complete package of toll services. Additionally, the PTA states that there is no concrete evidence that IXCs are unable to compete with the LECs in the intraLATA toll market, as demonstrated by the fact that IXCs have gained about a 30% market share since the introduction of competition in the intraLATA toll market in 1997. PTA Comments at 6-8.

On the issue of cross-subsidization and cost allocation, the PTA argues that cross-subsidies are equally possible with large, international IXCs as they are with ILECs. *Id.* at 8. In any event, PTA contends that the issue is mooted by the Chapter 30 process, which requires that Chapter 30 plans contain price cap provisions or provisions that require prices for competitive services cover their long run incremental cost. PTA Reply Comments at 4. The PTA also agrees with Sprint that creating competitive safeguard regulations beyond the language already contained within Chapter 30 appears to be both redundant and unnecessary; that instead the regulations should simply mirror the language already contained in sections 3005(e) and (g). PTA Comments at 9-12. Finally, the PTA strongly disagrees with AT&T's attempt to expand the notice requirements to include the extensive evidentiary material that must be considered under section 3005(a)(1), claiming that such expansion will violate the plain language requirements usually mandated in customer notices. PTA Reply Comments at 5.

The TRA supports the adoption of competitive safeguard regulations as a necessary tool to protect and promote competition by preventing LECs from engaging in unfair competition. TRA Comments at 7-9. The TRA then focuses its substantive remarks on accounting and non-accounting safeguards that are particularly focused on BA-PA but are generally directed at other ILECs as well. *Id.* at 9-15. The TRA recommends accounting safeguards that focus upon cost allocation and affiliate transaction rules designed to protect ratepayers from subsidizing the competitive services offered by ILECs. In this regard, the TRA suggests consideration of the accounting rules used by the Federal Communications Commission (FCC) in Parts 32 and 64 of its regulations as a model for what is needed in this Commonwealth. In particular, the TRA urges regulations that would require the ILEC to conduct itself at arm's length with its affiliates, to reduce any agreements to writing and make them available for public inspection, and to agree to appropriate regulatory oversight through the use of audits. *Id.* at 12.

As to non-accounting safeguards, the TRA recommends at least functional separation between the ILEC and its affiliates with the affiliate or subsidiary being required to maintain its own books and records. *Id.* at 13. The TRA also suggests that the safeguards should prohibit the ILEC and its affiliates "from using in common any leased or owned physical property on which network facilities are located" or the sharing of computer software capacity. *Id.* 13-14. Finally, the TRA contends that ILECs should be required to provide unaffiliated entities the same goods or services that it provides itself or its affiliates at the same rates, terms, and conditions, and that disclosure of these transactions should be mandated. *Id.* at 14.

GTE takes the position that additional competitive safeguards at this time are not necessary. GTE concludes that existing FCC regulations provide sufficient competitive safeguards to prevent unfair competition. Similarly, according to GTE, imputation need not be addressed now because (1) there is no evidence that IXCs have been adversely affected by any pricing conduct on the part of ILECs, and (2) imputation is directly linked to universal service and access reform and those issues must first be resolved. GTE Comments at 1-4.

Finally, OTS in its reply comments disagrees with the PTA that imputation for non-BA-PA ILECs is not a necessary competitive safeguard, and disagrees with BA-PA that imputation should be performed at a service-market level. OTS Reply Comments at 1-3. The OTS argues that imputation at a service-market level "fails to protect against anticompetitive pricing arrangements because it would permit BA-PA to price individual toll services below the BSFs for that service, but to offset that by pricing other toll services at higher levels." *Id.* at 3. The OTS also argues that the Commission should not provide ILECs with the responsibility for determining whether to include rates for a competitive service in an informational tariff; that discretion must rest solely within the Commission. *Id.* at 3-4.

C. *Proceeding to Consider Global Resolution of Telecommunications Issues*

At the Public Meeting following our decision in this proceeding to issue an Advance Notice of Proposed Rulemaking, we agreed to consolidate two competing petitions that attempted to resolve various significant and complicated telecommunications proceedings then pending before us.[8] Among the issues raised in that consolidated proceeding that are relevant to the instant rulemaking proceeding are the following: 1) what network elements BA-PA must unbundle and provide to competitors, 2) how intraLATA toll imputation should be calculated for BA-PA, and 3) what standards of conduct should be included in a Code of Conduct to prevent unfair competition and to ensure nondiscriminatory access to a LEC's services and facilities by competitors.

We resolved the consolidated proceeding, including the above three issues, by motion adopted at the August 26, 1999 Public Meeting, which motion was subsequently incorporated into an order entered September 30, 1999 (Consolidated Global Order). We, consequently, will look to the Consolidated Global Order, in addition to comments received to date in response to our Advance Notice, for guidance in developing proposed generic regulations in this proceeding.

D. *Discussion*

The instant Order proposing generic competitive safeguard regulations aimed at preventing unfair competition and ensuring nondiscriminatory access to an ILEC's services and facilities by competitors under Chapter 30 of the Public Utility Code is a direct result of consideration of the above-described comments. We appreciate and thank all the commenting parties who provided worthwhile suggestions to aid the Commission in the development of its proposed regulations.

1. *Unbundling of Basic Service Functions*

Chapter 30 is clear on its face that LECs must:

> . . . unbundle each basic service function on which the competitive service depends and shall make the basic service functions separately available to any customer under nondiscriminatory tariffed terms and conditions, including price, that are identical to those used by the local exchange telecommunications company and its affiliates in providing the competitive service.

66 Pa.C.S. § 3005(e)(1). Under section 3002, each "basic service function" is defined as that basic component of the LEC's network that is "necessary to provide a telecommunications service and which represent the smallest feasible level of unbundling capable of being tariffed and offered as a service." Thus, whenever a LEC obtains competitive classification of any of its local services under Chapter 30, the LEC must unbundle the "basic service functions" used to provide that local service.

As the statutory language is clear on this point, there is no further need to create a regulation mandating this result. BA-PA's attempt, therefore, to impose the same "necessary and impair" standard that is imposed by TA-96 for unbundling network elements must be rejected in applying Chapter 30's own unbundling requirement. This conclusion is also consistent with this Commission's prior pronouncements on this issue. Consolidated Global Order at 67-68; Competitive Safeguards Order at 158.

2. *Imputation for IntraLATA Toll Services*

Similarly, we are satisfied that no additional rulemaking is required at this time on the issue of imputation. In the recent Consolidated Global Order, we held, with respect to service level imputation, that BA-PA's total toll revenues must exceed total imputed switched access and carrier charges on an aggregated toll services level. Consolidated Global Order at 240-42. The Consolidated Global Order, which closed the docket at M-00960799, as well as our earlier TA-96 Implementation Order, however, did not address the question of imputation for the delivery of intraLATA services by ILECs other than BA-PA.

In addressing this issue now, we agree with the PTA that there is no evidence that IXCs are unable to compete today with the ILECs in the intraLATA toll market. Further, we take administrative notice of the fact that the toll market is subject to increasingly intense price competition as many IXCs are setting their rates on a national level using flat rates that have no relationship with the access rates of any specific ILEC.[9] Finally, we know of no evidence to refute AT&T's own witness that predatory pricing is extremely unlikely to occur;[10] and, even if predatory pricing does occur, the Federal antitrust laws are already available to address this type of conduct. Frankly, we are wary of taking any regulatory action that may discourage the aggressive pricing of toll services by any and all competitors, including ILECs, in that market. We also note that we can always revisit this issue at a later date if there is evidence that ILECs are engaging in predatory pricing in intraLATA toll markets in this Commonwealth.

3. *Unfair Competition and Cross Subsidization Issues*

We are proposing today a set of regulations in the form of a generic "Code of Conduct" that will be applicable to all ILECs to prevent unfair competition and cross-subsidization in any local exchange market within Pennsylvania. We believe these proposed regulations, in providing a comprehensive set of competitive safeguard rules under 66 Pa.C.S. § 3005(b), are necessary to prevent discrimination, cross subsidies, and other market power abuses by ILECs in their local exchange markets and are, therefore, in the public interest.

We note that parts of the proposed regulations are modeled after similar provisions contained in the "Code of Conduct" adopted for BA-PA and attached as Appendix C in the Consolidated Global Order. In addition, as with the competitive safeguard regulations proposed for the Pennsylvania electric industry,[11] the instant regulations are directed only at the incumbent local exchange providers and their affiliates as the entities with market power that may be abused without adequate competitive safeguards in place.

In this regard, we reject BA-PA's position that any regulation should be equally imposed on all LECs and not

[8] *Joint Petition of Nextlink Pennsylvania, Inc., et al. for Adoption of Partial Settlement Resolving Pending Telecommunications Issues*, Dkt. No. P-00991648; and *Joint Petition of Bell Atlantic-Pennsylvania, Inc., et al. for Global Resolution of Telecommunications Proceedings*, Dkt. No. P-00991649 (Order entered April 2, 1999, consolidating the two proceedings).

[9] Sprint, for example, has implemented a "Sprint Simply Five" plan which offers intrastate, intraLATA long distance to residential and business customers at a flat rate of 5¢ per minute and the payment of a monthly service charge. This plan is modeled after Sprint's national "Nickel Nights" interstate long distance plan which also charges customers a flat rate of 5¢ per minute on evenings and weekends. The other national IXCs, AT&T and MCI, have similar long distance plans in effect.

[10] A survey of recent court cases that involved predatory pricing claims, for example, found that the defendant prevailed in every case because the plaintiff was unable to prove one or more elements necessary to make out a successful claim.

[11] *Notice of Proposed Rulemaking Regarding the Establishment of Competitive Safeguards for the Pennsylvania Electric Industry*, Dkt. No. L-00980132 (Proposed Rulemaking Order entered February 13, 1998). We also note that the proposed regulations are modeled in part from provisions in the regulations proposed for the electric industry.

just incumbents under the doctrine of regulatory parity. Clearly, at present, ILECs have substantial market power in the local exchange markets they serve and CLECs do not. The Commission is cognizant that at least some CLECs have name recognition and sizable financial resources. However, without market power, CLECs cannot curb the entry of new providers by their control of bottleneck facilities, set prices above competitive levels, or engage in unlawful predatory pricing to eliminate competition. ILECs, with a nearly 100% market share currently in their respective local markets, on the other hand, do have the power to engage in this type of anticompetitive conduct.[12]

We recently took this same approach in adopting proposed streamlined tariff filing regulations for the telecommunications industry, noting that " 'regulatory parity' with respect to rate regulation between ILECs and CLECs is not appropriate until the playing field for specific services or business activities becomes more competitive/level." *Rulemaking Re Updating and Revising Existing Filing Requirement Regulations 52 Pa. Code §§ 53.52—53.53—Telecommunication Utilities*, Dkt. No. L-00940095, at 13 n.7 (Proposed Rulemaking Order entered September 30, 1999) (Streamlined Tariff Filing Order). The transition to competition in the local exchange markets requires the development of sufficient competitive safeguards to ensure that new entrants will have a fair and equal opportunity to compete for customers that previously belonged solely to the incumbent provider.

In developing our proposed competitive safeguard regulations, we have not prescribed rules restricting joint marketing between the ILEC and its retail marketing affiliates because we are not convinced that such a restriction is necessary to foster competition in the local exchange markets. This decision is based, in part, on the fact that the Commonwealth's largest ILEC, BA-PA, is already subject to a joint marketing restriction under section 272(g) of TA-96, 47 U.S.C. § 272(g), and, therefore, any further restriction by this Commission, at least as to BA-PA, is not necessary. We also reject BA-PA's request that informational tariffs for competitive services should be eliminated, as this issue is part of our rulemaking proceeding relating to streamlining tariff filing requirements.[13] Finally, we reject AT&T's request that the Commission expand the type of information required in a notice an ILEC uses to request "competitive" status classification under section 3005(a) as both unnecessary and contrary to the plain language requirements mandated in customer notices.

Accordingly, under 66 Pa.C.S. sections 501 and 1501 of the Public Utility Code, the Commonwealth Documents Law (45 P. S. §§ 1201 and 1202), and the regulations promulgated thereunder at 1 Pa. Code §§ 7.1, 7.2 and 7.5; section 204(b) of the Commonwealth Attorneys Act (71 P. S. 732.204(b)); section 745.5 of the Regulatory Review Act (71 P. S. § 745.5); and section 612 of The Administrative Code of 1929 (71 P. S. § 232), and the regulations promulgated thereunder at 4 Pa. Code §§ 7.251—7.235, we are considering adopting the proposed regulations set forth in Annex A, *Therefore*,

It Is Ordered That:

1. The proposed rulemaking at L-00990141 will consider the regulations set forth in Annex A.

2. The Secretary shall submit this order and Annex A to the Office of Attorney General for review as to form and legality and to the Governor's Budget Office for review of fiscal impact.

3. The Secretary shall submit this order and Annex A for review and comment to the Independent Regulatory Review Commission and the Legislative Standing Committees.

4. The Secretary shall certify this order and Annex A, and deposit them with the Legislative Reference Bureau to be published in the *Pennsylvania Bulletin*. The Secretary shall specify publication of the order in accordance with 45 Pa.C.S. § 727.

5. An original and 15 copies of any comments referencing the docket number of the proposed regulations be submitted within 30 days of publication in the *Pennsylvania Bulletin* to the Pennsylvania Public Utility Commission, Attn.: Secretary, P. O. Box 3265, Harrisburg, PA 17105-3265.

6. Alternate formats of this document are available to persons with disabilities and may be obtained by contacting Sherri DelBiondo, Regulatory Coordinator, Law Bureau, (717) 772-4579.

7. A copy of this order and Annex A shall be served upon the Pennsylvania Telephone Association, the Telecommunications Resellers Association, all jurisdictional telecommunication utilities, the Office of Trial Staff, the Office of Consumer Advocate, and the Small Business Advocate.

JAMES J. MCNULTY,
Secretary

Fiscal Note: 57-210. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 63. TELEPHONE SERVICE

Subchapter K. COMPETITIVE SAFEGUARDS

Sec.
63.141. Statement of purpose and policy.
63.142. Definitions.
63.143. Code of Conduct.

§ 63.141. Statement of purpose and policy.

This subchapter establishes competitive safeguards to assure the provision of reasonable nondiscriminatory access on comparable terms by ILECs to CLECs for all services and facilities necessary to provide competing telecommunications services to consumers, to prevent the unlawful cross subsidization or support for competitive services by ILECs, and to forbid unfair or deceptive practices. These competitive safeguards are intended to promote the Commonwealth's policy of establishing and maintaining an effective and vibrant competitive market for all telecommunications services.

§ 63.142. Definitions.

The following words and terms, when used in this subchapter, have the following meanings:

CLEC—Competitive local exchange carrier— A telecommunications company that has been certificated by the Commission as a CLEC under the Commission's proce-

[12] This conclusion is supported by a substantial body of case law in the antitrust field, and by the recently enacted TA-96 which prohibits any Regional Bell Operating Company (RBOC) from entering the in-region interLATA telecommunications market until there is effective competition in the RBOC's local exchange market.

[13] In our proposed regulations in that proceeding, we provide that CLECs and ILECs offering competitive services must continue to file informational tariffs and price lists. *See* Streamlined Tariff Filing Order, Annex A, § 53.58(d). We should note that in that proceeding, BA-PA supports the proposed regulations, including the provision relating to the filing of informational tariffs for competitive services.

dures implementing the Telecommunications Act of 1996, the act of February 8, 1996 (Pub. L. No. 104-104, 110 Stat. 56), or under the relevant provisions of 66 Pa.C.S. § 3009(a) (relating to additional powers and duties).

Competitive service—A service or business activity offered by an ILEC or CLEC that has been classified as competitive by the Commission under the relevant provisions of 66 Pa.C.S. § 3005 (relating to competitive services).

ILEC—Incumbent local exchange carrier—A telecommunications company deemed to be an ILEC under section 251(h) of the Telecommunications Act of 1996 (47 U.S.C.A. § 251(h)).

LEC—Local exchange carrier—A local telephone company that provides telecommunications service within a specified service area. LECs encompass both ILECs and CLECs.

Market price—Prices set at market-determined rates or at tariffed rates, when applicable.

Noncompetitive service—A protected telephone service as defined in 66 Pa.C.S. § 3002 (relating to definitions) or a service that has been determined by the Commission as not a competitive service.

Telecommunications service—A utility service, involving the transmission of signaling, data and messages, which is subject to the Commission's jurisdiction.

§ 63.143. Code of Conduct.

ILECs, unless otherwise noted, shall comply with the following requirements:

(1) An ILEC with more than 250,000 but less than 1,000,000 access lines shall maintain a functionally separate organization (the "wholesale operating unit") for the ordering and provisioning of any services or facilities to CLECs necessary to provide competing telecommunications services to consumers. The wholesale operating unit shall have its own direct line of management and keep separate books of accounts and records which shall be subject to review by the Commission under 66 Pa.C.S. § 506 (relating to inspection of facilities and records). For ILECs over 1,000,000 access lines, the Commission will determine for each such ILEC, after appropriate notice and hearing, whether this subsection will continue to apply or whether further safeguards will be necessary to protect CLECs from unfair competition and to ensure nondiscriminatory access to the ILEC's services and facilities. These other safeguards may include, for example, requiring the ILEC to structurally separate its retail and wholesale operations into separate corporate affiliates.

(2) An ILEC may not give itself (or any of its affiliates, divisions or operating units) or any CLEC any preference or advantage over any other CLEC in the ordering, provisioning or repair of any services that it is obligated to provide CLECs under any applicable Federal or State law.

(3) An ILEC's wholesale operating unit employes shall use CLEC proprietary information (that is not otherwise available to the ILEC) received in the ordering, provisioning or repairing of any telecommunications services provided to the CLEC solely for the purpose of providing the services to the CLEC. An ILEC may not disclose the CLEC proprietary information to employes engaged in the marketing or sales of retail telecommunications services unless the CLEC provides prior written consent to the disclosure.

(4) An ILEC employe, while engaged in the installation of equipment or the rendering of services on behalf of a competitor, may not disparage the service of the competitor or promote any service of the ILEC.

(5) An ILEC employe, while processing an order for the repair or restoration of service or engaged in the actual repair or restoration of service of any competitor, may not either directly or indirectly represent to any end-user that the repair or restoration of service would have occurred sooner if the end-user had obtained service from the ILEC.

(6) An ILEC may not condition the sale, lease or use of any noncompetitive telecommunications service within the jurisdiction of the Commission on either of the following:

(i) The purchase, lease or use of any other goods or services offered by the ILEC.

(ii) A direct or indirect commitment not to deal with any CLEC.

(7) An ILEC may not use revenues earned or expenses incurred in conjunction with noncompetitive services to subsidize or support any competitive services. Specifically, an ILEC may not provide goods or services to any affiliate, division or operating unit at a price below the ILEC's cost or market price for the goods or services, whichever is higher. The ILEC may not purchase goods or services from any affiliate, division or operating unit at a price above the market price for the goods or services.

(8) An ILEC, its affiliates, divisions or operating units, may not state or imply any of the following:

(i) The services provided by the ILEC are inherently superior when purchased from the ILEC.

(ii) The service rendered by a competitor may not be reliably rendered.

(iii) The continuation of certain services from the ILEC are contingent upon taking the full range of services offered by the ILEC.

(9) An ILEC shall formally adopt and implement the provisions in this section as company policy and shall take appropriate steps to train and instruct its employes in their content and application.

(10) A party allegedly harmed by a violation of any of the provisions in this section may invoke the Commission's alternative dispute resolution procedures to resolve the dispute. That action, however, does not preclude or limit additional private remedies or civil action.

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