

PROPOSED RULEMAKING

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 53]

[L-00940095]

Updating and Revising Existing Filing Requirement

The Pennsylvania Public Utility Commission (Commission) on September 30, 1999, adopted a proposed rulemaking order amending existing regulations to lessen the regulatory burdens on all jurisdictional telecommunications providers thereby promoting competition. The contact persons are Carl Hisiro, Law Bureau, (717) 783-2812, and Gary Wagner, Bureau of Fixed Utility Services, (717) 783-6175.

Executive Summary

In 1994, the Commission entered an order that initiated a rulemaking proceeding to revise and streamline existing filing requirements for all telecommunications providers so as to lessen their regulatory burden and promote competition. Since then, many significant events have occurred to effectuate the deregulation of the telecommunications industry and the promotion of competition in its stead, including the enactment of the Federal Telecommunications Act of 1996 (47 U.S.C.A. §§ 251—276 TA-96) (TA-96).

The rulemaking went through three advance notices published in the *Pennsylvania Bulletin*, and the Commission received comments from a number of parties. This rulemaking was then subsequently included in the proceeding to consider global resolution of telecommunications issues at P-00991648 and P-00991649. In the global proceeding, all participating incumbent and competitive local exchange carriers and interexchange carriers supported the same set of proposed regulations that are now being proposed in this rulemaking.

The proposed regulations streamline filing requirements by reducing the review period from 60 days to either 30, 10, or 1 day, depending generally on whether the filing is made by an incumbent or competitive local exchange carrier and on whether the proposed rates represent increases or decreases from existing rates. The proposed regulations also streamline filing requirements for intraLATA toll rates, bundled service packages, and promotional offerings.

Public Meeting held
September 30, 1999

Commissioners Present: John M. Quain, Chairperson; Robert K. Bloom, Vice Chairperson; David W. Rolka; Nora Mead Brownell; and Aaron Wilson, Jr.

Proposed Rulemaking Order and Final Interim Guidelines

By the Commission:

This docket was created in 1994 to review existing Commission regulations and to amend the regulations so as to lessen the regulatory burdens on all jurisdictional telecommunications providers, thereby promoting competition, to the extent consistent with the public interest and the doctrine of regulatory parity. Since then, many

significant events have occurred to effectuate the deregulation of the telecommunications industry and the promotion of competition in its stead. The most significant of these events was the enactment of the TA-96.

A. PROCEDURAL HISTORY

1. Advance Notice of Proposed Rulemaking Order

On October 18, 1994, this Commission entered an Order at Docket No. L-00940095 to initiate a rulemaking proceeding for the telecommunications industry to revise and streamline existing filing requirements in § 53.53 (relating to information to be furnished with proposed general rate increase filings in excess of \$1 million) for general rate increases in excess of \$1 million. Comments from interested parties were solicited and staff convened two technical conferences.

Since the time of this earlier order, the telecommunications industry has been undergoing dramatic change throughout the country and within this Commonwealth. The TA-96 was enacted into law on February 8, 1996. The TA-96's primary goal is to promote competition in virtually all segments of the broadly defined communications industry, including local and long-distance telephone services.

This Commission has proceeded to implement various directives of the TA-96, including the adoption of more flexible "market entry" procedures for telecommunications carriers under our jurisdiction. We have also adjudicated various proceedings related to numerous issues of competition and interconnection in the local exchange services markets. In addition, we have issued orders in other proceedings that address the implementation of the TA-96. *See, e.g., In re Implementation of the Telecommunications Act of 1996*, Docket No. M-00960799 (Order entered June 3, 1996; Order on Reconsideration entered September 9, 1996).

Even prior to enactment of the TA-96, this Commission was taking concrete steps to introduce local exchange competition in this Commonwealth. For example, on October 4, 1995, we certified the first four competitive local exchange carriers (CLECs) in *Application of MFS Intelenet of Pennsylvania, Inc., et al.*, Docket Nos. A-310203F0002, et al. (Order entered October 4, 1995).

With the passage of the TA-96 and the entry of the CLECs in this Commonwealth's market for CLECs, it became clear that other portions of the Commission's regulatory oversight mechanisms beyond rate increases in excess of \$1 million needed to be revisited as well. For instance, while CLEC tariff filings are typically addressed by this Commission in a routine fashion, certain problems periodically arise in evaluating the filings. In addition, CLEC tariff filings have often become the subject of formal complaints by incumbent local exchange carriers (ILECs). *See, e.g., Pa. P.U.C. v. Eastern TeleLogic Corp.*, Docket No. R-00973881 (Order entered March 27, 1997); *Bell Atlantic-Pennsylvania, Inc. v. TCG Pennsylvania*, Docket No. C-00967719 (Order entered February 28, 1997). Notwithstanding our use of the alternative dispute resolution process in §§ 69.391—69.395, these cases are time and resource consuming, suggesting the need for revised and streamlined regulations.

2. Second Advance Notice of Proposed Rulemaking Order

By motion at the June 12, 1997, public meeting, the rulemaking in the above-captioned docket at L-00940095

was expanded to include the filing requirements in § 53.52 (relating to applicability; public utilities other than canal, turnpike, tunnel, bridge and wharf companies) for all other tariff changes that are proposed by local exchange telecommunications service providers. Thereafter, this Commission entered an Order on August 1, 1997, issuing the second advance notice of proposed rulemaking. The purpose of this notice was to provide the CLECs, ILECs and all other interested parties an opportunity to provide comments, including proposed language, on the issue of what filing requirements should govern tariff changes under section 1308(a) and (b) of the Public Utility Code, 66 Pa. Code § 1308(a) and (b), and to assist the Commission in designing requirements that appropriately address the issue of "regulatory parity."¹

In particular, this Commission requested comments on the following issues: tariff filing support documentation, cost support documentation, CLEC services and rates, local exchange carrier intraLATA toll rates, tariff filings for service "packages" and supporting documentation, and promotional offering tariff filings. We also ordered that, upon receipt of comments by interested parties, one or more informal technical conferences be convened by Staff to discuss further the issues raised by the rulemaking.

On or about September 30, 1997, the Commission received initial comments from Bell Atlantic-Pennsylvania, Inc. (BA-PA); AT&T Communications of Pennsylvania, Inc. (AT&T); MCI Metro Access Transmission Services, Inc. (MCI Metro); Sprint Communications Company L.P. (Sprint) and the United Telephone Company of Pennsylvania (United); the Pennsylvania Telephone Association (PTA); and the Telecommunications Resellers Association (TRA). In addition, informal technical conferences were held on October 6, and November 5, 1997, between interested parties and the Commission's Staff.

The October 6, 1997, Informal Technical Conference was attended by BA-PA, AT&T, MCI Metro and MCI Telecommunications Corporation (MCI), Teleport Communications Group (TCG), Sprint, United, the Office of Consumer Advocate (OCA), and the Office of Trial Staff (OTS). During the October 6 conference, a number of issues were discussed relating to the potential revision of Commission regulations governing the tariff filings of CLECs and ILECs under §§ 53.52 and 53.53, and the interested parties made summary presentations of their written comments.

The purpose of the November 5, 1997, Informal Technical Conference was to follow up certain issues raised at the earlier conference. This second conference was attended by BA-PA, AT&T, MCI, Sprint, TCG, PTA, GTE North Incorporated and OTS. To help focus the discussion at this second conference, Commission staff sent a letter on November 3, 1997, setting forth a number of issues to be addressed revolving around the concept of "market power," as well as its connection with the principle of "regulatory parity" as applied to CLECs and ILECs. This second technical conference generated significant debate on these issues among the parties in attendance and resulted in the Commission staff asking for additional written comments by November 18, 1997, which date was subsequently extended to December 8, 1997. Written comments were thereafter filed on these market power

issues on or about December 8, 1997, by BA-PA, MCI, Sprint, PTA, and OTS, and on December 15, 1997, by TCG.

The major commenting parties in December 1997 to the current proposed rulemaking were BA-PA and MCI/MCI Metro. Their comments, as well as the comments of other interested parties, are discussed in the "Comments and Responses Document" attached to this Order as Appendix A. In summary, all of the parties filing comments at that time, except BA-PA and PTA, recommended that the Commission recognize the current market dominance of the ILECs by not applying the concept of "regulatory parity." Instead, they argued for asymmetrical regulation (that is, regulating dominant and nondominant carriers differently) so as to facilitate the transition to a competitive local exchange market where ILECs no longer possess market power. BA-PA and PTA, on the other hand, urged the Commission to apply the "regulatory parity" principle in deciding what filing requirements should continue to be imposed.

3. Third Advance Notice of Proposed Rulemaking Order and Proposed Interim Guidelines

Following this initial comment period, the Commission considered staff recommendations for certain substantive changes in the existing tariff regulations for telecommunication utilities and the adoption of proposed interim guidelines that would incorporate the proposed regulatory changes and remain in effect until a final rulemaking order was approved through the formal regulatory process.

By motion adopted at the April 9, 1998, public meeting, a separate docket folder was opened so that the proposed interim guidelines could be reviewed and an opportunity to be heard provided to all interested parties. Specifically, we directed that one or more technical conferences should be conducted on-the-record, affording the parties the opportunity to discuss all aspects of the filing standards incorporated in the proposed interim guidelines. Further, the motion provided that any comment period must provide for reply comments. The motion also required the process to be expedited, with a final Staff recommendation on the interim guidelines to be presented to the Commission for consideration within 6 months of the motion. In addition, at this same public meeting, we issued the third advance notice of proposed rulemaking order in Docket No. L-00940095.²

Subsequently, on or about May 27, 1998, the Commission received comments on the proposed Interim Guidelines from BA-PA, AT&T, MCI, TCG, Sprint and United, PTA, GTE North Incorporated and GTE Communications Corporation (collectively, GTE), and joint comments from Commonwealth Telecommunications Services, Inc.; Focal Communications Corporation of Pennsylvania; Hyperion Telecommunications of Pennsylvania, Inc.; RCN Telecommunications Services of Pennsylvania, Inc.; and ATX Telecommunications Services, Ltd. (collectively, the "Joint Commentators"). In addition, reply comments were filed on or about June 11, 1998, by BA-PA, PTA, MCI, TCG, GTE, TRA, Sprint and United, the Joint Commentators and the OTS. An on-the-record technical conference was held on June 26, 1998, with Chief Administrative Law Judge Robert Christianson presiding and six parties offering witnesses.³ Following the technical conference,

² The Third Advance Notice of Proposed Rulemaking Order was entered on May 12, 1998, with a corrected version being entered one day later on May 13, 1998.

³ The following parties and their witnesses who offered testimony at the technical conference were: (1) BA-PA: Catherine Eichenlaub, Director—Line of Business Regulatory Support for Bell Atlantic—Network Services, Inc.; (2) TCG: Chris Nurse, Manager of Regulatory and External Affairs of the Eastern Region; (3) MCI: Don Laub, Senior

¹ The principle of "regulatory parity" simply means that all regulations applicable to a particular industry such as the local exchange telecommunications industry are applied equally regardless of the market power that may exist with any individual company within that industry.

final comments to the Interim Guidelines were submitted on or about July 15, 1998, by BA-PA, MCI, TCG, Sprint and United and PTA. Finally, on or about July 21, 1998, separate comments were provided to the same interim guideline proposals that were also being offered as a proposed rulemaking pursuant to the corrected third advance Notice of Proposed Rulemaking Order by BA-PA, GTE, MCI, TCG, Sprint/United and PTA.⁴

In the May 27, 1998 and July 15, 1998 comments, AT&T, MCI, Sprint and United, TCG, GTE, the Joint Commentators and OTS supported the adoption of interim guidelines to remove some of the regulatory burdens currently faced by CLECs as a good first step to making the telecommunications market in this Commonwealth more competitive. Most of these parties argued, however, that the Commission did not go far enough in its streamlining efforts and offered suggestions for further streamlining.

Both BA-PA and PTA, however, continued to assert that the Commission should be guided by the doctrine of "regulatory parity" in developing its tariff filing streamlining rules. BA-PA Comments of May 27, 1998, at 9-11; PTA Comments of May 27, 1998, at 1-2. The PTA urged against the adoption of "blanket" solutions" in determining which carriers have market power. PTA Comments of May 27, 1998, at 2. The PTA's concern was that the originally proposed Interim Guidelines created "a bias which assumes only ILECs can . . . possess market power." PTA Reply Comments of June 11, 1998, at 1.

4. *Proceeding To Consider Global Resolution of Telecommunications Issues*

Following receipt of the filed comments to the proposed interim guidelines but before we were ready to enter an order, the two instant dockets were incorporated into the Commission's *Global Telecommunications Settlement Conference*, Docket No. M-00981185, and stayed. This latter docket was opened at the Commission's public meeting of September 3, 1998, for the purpose of trying to forge a global settlement which would amicably resolve various significant and complicated telecommunications proceedings, including the instant dockets, then pending before us.

Unfortunately, the sought-after global settlement could not be reached by all the parties by the Commission-imposed deadline of March 29, 1999, and we thereafter closed the *Global Telecommunications Settlement Conference* proceeding. In the same order closing this proceeding, we agreed to consider two competing petitions that seek to resolve virtually the same telecommunications issues that were attempted to be addressed at Docket No. M-00981185. *Joint Petition of Nextlink Pennsylvania, Inc., et al. for Adoption of Partial Settlement Resolving Pending Telecommunications Issues*, Docket No. P-00991648; and *Joint Petition of Bell Atlantic-Pennsylvania, Inc., et al. for Global Resolution of Telecommunications Proceedings*, Docket No. P-00991649 (Order entered April 2, 1999)(hereinafter jointly referred to as "*Joint Petitions for Global Resolution*"). The two joint petitions were both filed on March 18, 1999. The Joint Petition at Docket No. P-00991648 was filed by Nextlink Pennsylvania, Inc. (Nextlink); State Senators Vincent J. Fumo, Roger A. Madigan, and Mary Jo White; the Pennsylvania Cable and Telecommunications Association; and six other

CLECs.⁵ The Joint Petition at Docket No. P-00991649 was filed by BA-PA; Conectiv Communications, Inc.; Network Access Solutions; and the Rural Telephone Company Coalition.

Both proposed settlements contain virtually identical language for streamlining and revising the existing tariff filing requirements for telecommunication utilities, and both are closely modeled after the proposed interim guidelines that the Commission released at its April 9, 1998 Public Meeting for public comment. The only difference between the two proposals is that the Nextlink proposal does not include the requirements contained in § 53.59(c) and (d) (relating to cost support requirements and effective filing dates for tariff filings on noncompetitive services) of the BA-PA proposal that all consumers subject to rate increases shall receive individual notice of these rate increases, and that the company must serve these rate filings on the OCA, OTS and the Office of Small Business Advocate (OSBA) in person. Written testimony supporting these two proposals was submitted by BA-PA, Sprint and United and AT&T. In addition, in their Prehearing Statement of Position submitted in the *Joint Petitions for Global Resolution*, the Consumer Parties, which includes the OCA, OSBA and OTS, stated that they have no objection to the proposed filing requirements contained in the two proposals, including the additional above-referenced requirements offered by BA-PA.

By motion adopted at the August 26, 1999, public meeting, the Interim Guidelines contained in the BA-PA proposal were adopted by this Commission.

B. DISCUSSION

We find significant the fact that in this proceeding, initially opened in 1994, ILECs, CLECs and IXC's are now supporting virtually the same set of proposed regulations that are modeled closely after the Interim Guidelines we submitted for comment last year. These proposed regulations will help promote the competition that is now expected in the telecommunications industry. Given this apparent unanimity of support from the telecommunications industry, we have incorporated in the instant proposed regulations the changes reflected in the Nextlink and BA-PA proposals, including the additional BA-PA notice and in-person service requirements noted above. Our proposed regulations, as so amended, are contained in Annex A attached to this Order.

The proposed regulations in § 53.58(a) and (c) (relating to offering of competitive services) provide that whenever a telecommunications service is determined to be "competitive" under Chapter 30 of the Public Utility Code, whether by a filing by an ILEC or a CLEC, all competing providers in the relevant market offering this same service will receive the deregulated status contemplated in 66 Pa.C.S. § 3005, and, in effect, be treated the same. Also, cognizant of the PTA's concern that any rulemaking should avoid creating a bias that only ILECs can possess market power, we propose in § 53.58(e) (relating to offering of competitive services) that a reclassification of a "competitive service" to a "noncompetitive service" can be made as to an ILEC or a CLEC under section 3005(d) of the Public Utility Code. The proposed regulations also contain a list of factors that the Commission will consider when reviewing whether a specific service should be reclassified as noncompetitive.⁶

Policy Analyst for State Regulatory and Government Affairs, Mid-Atlantic Region; (4) GTE: John Dudley, Assistant Vice President-Regulatory & Governmental Affairs; (5) Sprint and United: John Short, Director Regulatory Affairs; and (6) PTA: James Kail, Chief Financial Officer with the Bentleyville Telephone Company.

⁴ The July 21, 1998 comments of MCI, TCG, Sprint/United and PTA simply incorporated by reference their earlier comments in this proceeding.

⁵ The six CLECs are RCN Telecommunications Services of Pennsylvania, Inc.; Hyperion Telecommunications, Inc.; ATX Telecommunications Services, Ltd.; CTSI, Inc.; MCI WorldCom, the newly merged parent of MCI Metro and MCI; and AT&T.

⁶ This list of factors is similar to the list of factors contained in § 63.106 that the Commission uses to determine whether to reclassify interexchange services defined as either a competitive or noncompetitive service.

Moreover, until there is a formal finding by this Commission that a particular service is "competitive," the tariff filing regulations should be streamlined so that a CLEC will be relieved from any obligation to provide cost support documentation whenever the rate is at or below the rate charged by the ILEC for the same service.⁷ As proposed in § 53.59(a) (relating to cost requirements and effective filing dates for tariff filings of noncompetitive services), cost support documentation will not be necessary from a CLEC and its tariff filing will be effective on 1-day's notice where its rates are the same as or lower than previously-approved ILEC rates, because it can be presumed that, without market power, the CLEC's rates are "just and reasonable."

Where the CLEC's rates are higher than the ILEC's rates or where the CLEC's rates are for new services, the proposed regulations in § 53.59(c) oblige the CLEC to provide certain additional summary documentation for the affected services. Moreover, the Commission in § 53.59(d) retains the ability to request relevant documentary support, including cost support documentation, from CLECs for their tariff filings relating to new services and for proposed rate changes where their rates are higher than the ILEC's and there is a concern consumers may be harmed by the higher rates. Consistent with the BA-PA proposal, CLEC tariff filings for new services or higher rates will become effective 30 days from the date when all consumers subject to the rate increase shall have received individual notice of the increase, and will be required to be served in person upon the OCA, OSBA and OTS. The 30-day period may be extended for an additional 30 days by the Commission upon notice to the OCA, OSBA, OTS and the CLEC.⁸

We recognize that the proposed regulations, if finally adopted, provide a certain degree of regulatory flexibility that had been previously denied through one of our past decisions in this area.⁹ This change, however, reflects a re-interpretation of Chapter 30 in conjunction with our mandate to implement the TA-96. Both Chapter 30 and TA-96 are intended to promote the provision of telecommunications services in a competitive environment. Indeed, in Chapter 30 the General Assembly made the legislative finding and declared that it is the Commonwealth's policy to:

(7) Promote and encourage the provision of competitive services by a variety of service providers on equal terms throughout all geographic areas of this Commonwealth.

(8) Encourage the competitive supply of any service in any region where there is market demand.

⁷ In adopting this asymmetrical approach to streamlining our tariff filing requirements, the Commission accepts the recommendation of most of the parties in this proceeding 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. In determining when regulatory parity should apply in the future wherever the proposed regulations contain asymmetrical terms, the Commission will utilize the same criteria contained in section 3005(a)(1) of the Public Utility Code for determining whether or not a telecommunications service should be declared "competitive." In reaching this determination, however, the Commission does not agree with the view espoused by some of the commentators that we must define "market power" and hold separate evidentiary hearings to determine which carriers have market power if we adopt an asymmetrical regulatory approach. We believe the "competitive classification" procedures contained in Chapter 30 of the Public Utility Code are sufficient for this purpose.

⁸ The proposed regulations in § 53.59(e) also contain parallel provisions for rate changes by an ILEC, except that rate reductions will become effective on a 10-day notice (instead of a 1-day's notice) if the Commission fails to take any action. We also note at this point that in order to keep the tariff filing provisions relating to CLECs together, we have moved and renumbered § 53.59(c)-(e) of the BA-PA proposal as § 53.59(e), (c) and (d), respectively, in our proposed regulations.

⁹ In *re Petition of TCG Pittsburgh for a Determination of Whether Certain Services are Competitive Under Chapter 30 of the Public Utility Code*, Docket No. P-00950998 (Order entered March 29, 1996) (in denying TCG's petition seeking competitive designation for its Centrex service and High Capacity private line services, Commission stated that Chapter 30 requirements applied equally to new entrants as well as ILECs).

66 Pa.C.S. § 3001(7) and (8).

In the instant Order, we are advocating the adoption of the principle that the services which have been classified as competitive for an ILEC or CLEC under Chapter 30 can also be offered by other CLECs or an ILEC, as the case may be, as competitive services without a prior competitive determination and classification by this Commission for each CLEC or ILEC on a case-by-case basis. The offering of such services by a CLEC or ILEC on a competitive basis will be limited to the areas the CLEC or ILEC has been certified to serve and to the service territory of the respective ILEC or CLEC that has obtained the competitive classification for these services under a Chapter 30 proceeding.

We believe that the adoption of the above principle through the proposed regulations is consistent with the policies espoused by Chapter 30 and the TA-96. The proposed regulations formulate a flexible approach for the regulation of ILEC and CLEC operations within this Commonwealth to promote competition within the telecommunications industry.

Moreover, we do not believe that the proposed regulations contradict the statutory requirements of Chapter 30. Indeed, notwithstanding our prior holding in *In re Petition of TCG Pittsburgh*, the absence of an alternative or streamlined regulation plan for a new entrant CLEC does not in any way damage the public interest. In reality, CLEC operations are not currently regulated on the basis of a rate base/rate-of-return method. More often than not, the upper bounds of CLEC service prices are defined by the prices for the corresponding ILEC services. The lower bounds of CLEC service prices are largely defined by the interconnection rates and/or wholesale resale rates that exist in the relevant agreements between CLECs and ILECs.¹⁰ Thus, the filing of a Chapter 30 alternative or streamlined regulation plan by a CLEC would simply formalize existing regulatory parameters, albeit at a rather high administrative cost for the CLEC concerned and for this Commission.

We believe that the proposed regulations are competitively neutral between potentially competing carriers. If an ILEC (or a specific CLEC) has attained competitive service classification for its services under its respective Chapter 30 plan and associated subsequent Chapter 30 petitions, then CLECs (or the applicable ILEC) should be free to compete in the relevant services markets. A competitive inequity would ensue if CLECs would have to file their own Chapter 30 plans to classify as competitive the same services that have already been classified as competitive for ILECs with Chapter 30 plans in place. This competitive inequity would manifest itself not only in the 9-month statutory period that is usually required for the disposition of a Chapter 30 petition and plan, but also because a CLEC would be attempting at the same time to establish itself as a viable competitive supplier of services in the local exchange markets that are the traditional domain of ILECs.

Further, the proposed regulations do not modify our prior directives regarding the interconnection obligations of certain ILECs under TA-96. *See generally 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*, Docket Nos. P-00971177, et al. (Orders entered July 10, 1997, and

¹⁰ There are CLECs which offer services in certain niche markets and charge rates that are higher than the corresponding ILEC services. The tariff filing regulations for these CLECs are addressed in a separate part of this Order and in § 53.59(c) and (d) of Annex A.

November 24, 1997). In addition, we believe that our approach contains substantial benefits in terms of administrative efficiency both for this Commission and for the regulated telecommunications industry. Through the directives that we are proposing here, we will avoid the adjudication of numerous Chapter 30 proceedings that are not likely to result in any substantial benefits for the broader public interest. This approach will result in immediate benefits for end-user consumers since it will facilitate the development of competition in the local exchange telecommunications services markets.

As stated above, the proposed regulations will no longer require the filing of cost support information for CLEC tariff filings where the CLEC proposes to offer noncompetitive services at or below the rates and charges of the corresponding services offered by the ILEC. Further, in these cases, the CLEC's tariff filings will become effective on 1-day's notice.

The proposed regulations will still require, however, the filing of certain information by CLECs that propose tariff changes with rates that exceed those for the corresponding ILEC services, and in certain cases would allow us to require cost support documentation. Our interest in requiring this information is centered on protecting end-user consumers. It has come to our attention that certain CLECs certified to operate in this Commonwealth are offering their services to targeted end-user customers with poor credit histories at rates that are higher than those charged by ILECs and other CLECs for the same services. See generally *Application of Blue Ribbon Rentals II, Inc., d/b/a Talk One America*, Docket No. A-310442 (Corrected Order entered August 4, 1997). However, such "high-risk" residential end-user customers who may be unable to ordinarily obtain basic telephone service because of their past credit histories may also be economically disadvantaged. Thus, although we have permitted this type of CLEC to enter freely this Commonwealth's markets, we believe that its tariff charges should be subjected to an additional degree of scrutiny in order to afford the necessary protection for its "high-risk" end-user customers. We believe that the additional documentation requirements that we hereby impose will serve this purpose.

Turning to the concern expressed originally by two commentators that CLEC services and rates should cover the costs of providing the tariffed service so as to prevent cross-subsidization, we find that this argument is not legally supportable. Below-cost pricing of services and cross-subsidization are only anticompetitive problems when engaged in by an entity that has market power.¹¹ See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) ("[t]hat below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured"). In fact, the antitrust laws view price cutting, even "below-cost" selling for a short period of time, by a new entrant or other competitor as a procompetitive act designed to make the consuming public aware of the entity and increase its market share. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("cutting prices in order to increase business often is the very essence of competition"). In short, price cutting

¹¹ This concept is at least implicitly recognized in Chapter 30's section 3005(g)(2), where it declares that local exchange carriers "may not use revenues earned or expenses incurred in conjunction with noncompetitive services to subsidize or support any competitive services." By its very terms, the statute does not prohibit the use of revenues earned in conjunction with competitive services to subsidize or support other competitive services. The clear intent of this provision is to prohibit cross-subsidization only where a LEC has market power in the noncompetitive services market. Any other construction would run counter to clear antitrust precedent and may be interpreted as a barrier to entry under section 253 of the TA-96.

allows the new entrant the opportunity to get a "foothold" in a market that it may not otherwise be able to penetrate because of the entrenched players already in that market.¹²

Both the BA-PA and Nextlink proposals adopt the suggestion offered by most of the commentators that the notice requirement for noncompetitive service offerings should be reduced to 30 days or less so as to decrease the regulatory burdens placed on all local exchange carriers. These reduced notice requirements are incorporated in the proposed regulations.

As already discussed above, for filings by ILECs for noncompetitive service offerings when their rates are lower than the corresponding rates of the CLECs, a 10-day notice period is proposed.¹³ For filings by ILECs and CLECs for noncompetitive services when their rates are higher than the corresponding rates of the CLECs or ILECs, respectively, a 30-day notice period is proposed. Both the 10-day and 30-day notice periods are subject to an automatic extension of up to an additional 30 days if requested by the Commission and notice is provided to all appropriate parties. To help implement this reduced notice period, we will develop internal procedures that will streamline our own internal review and approval process of these tariff filings.¹⁴ CLEC rate filings at or below those of the corresponding ILEC will become effective on a 1-day's notice. However, adoption of these reduced notice requirements does not affect in any way this Commission's ability to investigate a given tariff after it becomes effective if we discover, through our own review or a complaint filed by a third party, a legitimate reason to open an investigation.

In regard to the last three rulemaking issues raised in our August 1, 1997, second advance notice of proposed rulemaking order—local exchange carrier intraLATA toll rates, tariff filings for service packages, and promotional offering tariff filings—the proposed regulations adopt the identical language offered in the BA-PA and Nextlink proposals.

With respect to the intraLATA toll markets, this Commission's April 29, 1997, order at Docket Nos. L-00940099 and M-00930496 affirmed our willingness to provide flexibility to ILEC tariff filings in this market once intraLATA toll "1+" dialing parity is implemented (which occurred on July 31, 1997).¹⁵ The proposed regulations adopt the same type of flexibility for ILECs that the Commission's April 29, 1997, order provides

¹² In order for price cutting to be found to be predatory, and therefore unlawful under the antitrust laws, one must show that below-cost selling occurred and that the price cutter has the ability to recoup its investment in below-cost prices after its competitors are driven from the market. *Brooke Group*, 509 U.S. at 222-24. As a matter of law, those entities with little or no market share, even if they have substantial financial resources, have been found by the courts to be too small to confer market power, thus making recoupment impossible. *Id.* at 232-43 (12% market share was found, as a matter of law, to be too small to confer market power; recoupment therefore was impossible).

We also take administrative notice that Bell Atlantic itself made a similar argument last year in relation to its petition to the FCC for TA-96 section 276 relief. *Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advance Telecommunications Services*, CCB Docket No. 98-11. In its petition, BA-PA's parent company argued for deregulatory treatment over its provision of advanced high-speed broadband services as a "new entrant" to encourage "the rapid development of," and to promote competition in, this new technology. Bell Atlantic's Petition at 4 and 17.

¹³ While below-cost pricing and cross-subsidization concerns may arise when an ILEC has the ability to lower prices in response to competitive pressures from a new-entrant CLEC, we do not believe the proposed regulations will result in any increase in this type of activity by ILECs because the regulations allow us to take additional time to review a proposed tariff if we receive a complaint that the tariff will create an anticompetitive problem. In addition, existing Commission complaint procedures, including use of applicable dispute resolution procedures, are available to address these types of concerns as well.

¹⁴ To successfully effectuate these reduced notice periods and otherwise ensure full compliance with the proposed regulations, we anticipate and expect that the industry will engage in self-policing efforts.

¹⁵ In re: *Interexchange Carrier Regulation Under Chapter 30 of the Public Utility Code*, Docket Nos. L-00940099 and M-00930496, at 10 (Final Rulemaking Order entered April 29, 1997).

interexchange carriers operating in the intra and interLATA toll markets. Specifically, the regulations propose, consistent with §§ 63.103 and 63.104 (relating to existing competitive services; and new competitive services), that both ILECs and CLECs would be permitted to file tariffs with changes in their rates and charges for existing noncompetitive toll services alone that would become effective with a 1-day notice period and a 16-day notice period for new services.

In relation to both joint/bundled service packages and promotional offerings, the proposed regulations will relieve ILECs and CLECs from any automatic obligation to provide cost support documentation for tariff filings. The Commission, however, retains authority to request relevant documentary support for tariff filings involving bundled or promotional offerings. Additionally, no filing requirements will exist for either bundled or promotional offerings consisting entirely of competitive services.¹⁶ Finally, consistent with prior Commission action and policy in approving promotional offerings, the proposed regulations prohibit the use of negative option provisions; requiring instead that a customer affirmatively respond to the company if he or she wants to continue the service beyond the original promotional period.

In conclusion, we believe that the tariff filing changes proposed in this order are critically important in promoting competition in the telecommunications industry consistent with Chapter 30 of the Public Utility Code and the TA-96. As all interested parties have already had an opportunity to provide public comment on the proposed interim guidelines incorporating these regulatory changes, we hereby adopt the proposed guidelines and offer them on an optional basis to jurisdictional utilities to provide guidance on appropriate tariff filing requirements until the proposed regulations receive final approval. We note that this approach of adopting interim guidelines until final regulations have been promulgated has previously been used by this Commission in a number of other instances to implement telephone and electric reform legislation. See, e.g., *Interim Guidelines for Standardizing Local Exchange Company Responses to Customer Contacts Alleging Unauthorized Changes to the Customer's Telecommunications Service Provider and Unauthorized Charges Added to the Customer's Bill*, Docket No. M-00981063 (Tentative Order entered June 5, 1998); *Chapter 28 Electric Generation Customer Choice and Competition Act—Customer Information—Interim Requirements*, Docket No. M-00960890F0008 (Order entered July 11, 1997); *Re: Licensing Requirements for Electric Generation Suppliers—Interim Licensing Procedures*, M-00960890F0004 (Order entered February 13, 1997).

Accordingly, under sections 501 and 1501 of the Public Utility Code, 66 Pa.C.S. §§ 501 and 1501; sections 201 and 202 of the act of July 31, 1968 (P. L. 769 No. 240) (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 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 find that the regulations governing tariff filing requirements for

¹⁶ Recognizing that telecommunications providers are expanding the types of service offerings they provide their customers, the Commission seeks comment on whether "joint or bundled service packages" for purposes of the proposed regulations should be defined to include "nonregulated services," including but not limited to Internet, cable, cellular, and electric generation services, as well as "noncompetitive and competitive services."

the telecommunications industry in §§ 53.52 and 53.53 should be modified as set forth in Annex A, attached hereto; *Therefore,*

It is Ordered that:

1. The proposed rulemaking at Docket No. L-00940095 will consider the regulations set forth in Annex A.
2. The Secretary shall submit this order, Annex A and Appendix 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, Annex A and Appendix A for review and comment to IRRC 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*.
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. The Secretary shall specify publication of the order in accordance with 45 Pa.C.S. § 727.
6. The proposed regulations attached as Annex A are hereby adopted as final interim guidelines at Docket No. L-00940095F0002 and can be used by jurisdictional utilities to provide guidance as to appropriate tariff filing requirements until final regulations are approved at Docket No. L-00940095.
7. A copy of this Order, Annex A and Appendix A shall be filed in the *Joint Petitions for Global Resolution* proceeding at Docket Nos. P-00991648 and P-00991649.
8. The contact persons for this rulemaking are Gary Wagner, Bureau of Fixed Utility Services, (717) 783-6175 (technical), and Carl S. Hisiro, Assistant Counsel, Law Bureau (717) 783-2812 (legal).
9. A copy of this order, Annex A and Appendix A shall be served upon the Pennsylvania Telephone Association, all jurisdictional telecommunication utilities, the OTS, OCA and SBA.

JAMES J. MCNULTY,
Secretary

Fiscal Note: 57-209. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 53. TARIFFS FOR NONCOMMON CARRIERS

TARIFF FILING REQUIREMENTS FOR INCUMBENT LOCAL EXCHANGE CARRIERS AND COMPETITIVE LOCAL EXCHANGE CARRIERS

§ 53.57. Definitions.

The following words and terms, when used in this section and §§ 53.58—53.60, have the following meanings, unless the context clearly indicates otherwise:

CLEC—Competitive local exchange carrier—A telecommunications company that has been certificated by the Commission as a CLEC under the Commission's procedures 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 incumbent 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 101(a)(h) of the Telecommunications Act of 1996 (47 U.S.C.A. § 251(h)).

Joint or bundled service packages—

(i) Service packages that may be composed by one or more distinct categories of noncompetitive and competitive services and service options or features, inclusive of toll services, when the service packages are offered by CLECs and ILECs under a single rate or charge and a unified set of terms and conditions for service as defined in a tariff approved by the Commission.

(ii) The term does not include ILEC or CLEC tariff filings that involve simultaneous changes in rates and charges for noncompetitive services in a revenue neutral manner.

Lifeline Plan—A tariffed service offering, approved by the Commission, which provides telecommunications services to qualified low-income end-user consumers at reduced rates and charges in accordance with applicable directives and guidelines of the Commission and of the Federal Communications Commission.

New service—A service that is not substantially the same or functionally equivalent with existing competitive or noncompetitive services.

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.

Promotional service offerings—

(i) Noncompetitive services offered by CLECs and ILECs, under rates, charges, applicable discounts, terms, conditions and duration governed by an appropriate tariff approved by the Commission.

(ii) Promotional service offerings may not have a duration of longer than 6 months in any rolling 12-month period which commences as of the effective date of the filed promotion.

§ 53.58. Offering of competitive services.

(a) ILEC services that have been classified as competitive under the relevant provisions of 66 Pa.C.S. § 3005 (relating to competitive services), may also be offered by CLECs as competitive services without prior competitive determination and classification by the Commission subject to §§ 53.57, 53.59, 53.60 and this section.

(b) Under § 53.59 (relating to cost support requirements and effective filing dates for tariff filings of noncompetitive services), a CLEC is not prohibited from offering services classified as noncompetitive in an ILEC service territory when the CLEC has been certificated to offer service.

(c) When the Commission approves a CLEC petition under the relevant provisions of 66 Pa.C.S. § 3005 for classification of a noncompetitive service to a competitive service, the ILEC serving that petitioning CLEC's service territory and other certificated CLECs within the peti-

tioning CLEC's service territory may offer the service approved by the Commission as a competitive service subject to §§ 53.57, 53.59, 53.60 and this section.

(d) CLECs and ILECs offering services classified by the Commission as competitive shall file with the Commission appropriate informational tariffs and price lists.

(e) The Commission may initiate a proceeding for the potential reclassification from competitive to noncompetitive a service that is offered by either or both an ILEC and CLECs in a specific service territory under the relevant provisions of 66 Pa.C.S. § 3005(d).

(1) The Commission will decide which ILEC or CLEC has demonstrated that level of dominant market power to warrant reclassification of a competitive service to noncompetitive status.

(2) The Commission will provide an opportunity to participate in the proceeding to the ILEC and to those CLECs that offer substantially the same or functionally equivalent competitive service within the service territory of the ILEC or specific CLEC demonstrating dominant market power.

(3) The Commission will separately determine whether the substantially same or functionally equivalent service that is offered by the ILEC or by CLECs not demonstrating dominant market power in the relevant service territory will continue to be classified as a competitive service.

(4) When reviewing whether a service should be reclassified, the Commission will consider the following factors:

(i) The ease of entry by potential competitors into the market for the specific service at issue.

(ii) The presence of other existing telecommunications carriers in the market for the specific services at issue.

(iii) The ability of other telecommunications carriers to offer the service at competitive prices, terms and conditions.

(iv) The availability of like or substitute service alternatives in the relevant geographic area for the service at issue.

(v) Whether the service is provided under conditions that do not constitute unfair competition.

(vi) Whether the service, including its availability for resale under the relevant provisions of the Telecommunications Act of 1996, the act of February 8, 1996 (Pub.L. No. 104-104, 110 Stat. 56), is provided on a nondiscriminatory basis.

(vii) Other factors deemed relevant by the Commission.

§ 53.59. Cost support requirements and effective filing dates for tariff filings of noncompetitive services.

(a) *CLEC services priced below ILEC rates.* A CLEC that offers services that are substantially the same or functionally equivalent with noncompetitive services by an ILEC in the service territory of the ILEC, at rates and charges that are at or below the level of the corresponding rates and charges of the ILEC for these services, is relieved from any obligation to provide cost support for tariff filings and rate changes involving these services. These tariff filings will be effective on 1-day's notice if the following apply:

(1) The CLEC offers these services in the same service territory as the ILEC.

(2) The CLEC tariff filing does not contain any material changes in the CLEC's tariff rules, terms or conditions.

(3) The CLEC specifically states in its accompanying cover letter that the filing is being made on 1-day's notice in accordance with this subsection, and that the tariff filing does not contain material changes in the CLEC tariff rules, terms or conditions.

(4) The CLEC provides copies of the ILEC's effective tariffs designating the corresponding rates and charges of the same or functionally equivalent noncompetitive services.

(b) *CLECs operating in multiple ILEC territories.* When a CLEC offers services in the service territories of more than one ILEC, and the rates and charges for these services satisfy the criteria of subsection (a), the CLEC may file separate tariff schedules when the rates and charges for these services correspond to the rates and charges of the different ILECs in their respective service territories.

(c) *CLEC services priced above ILEC rates.*

(1) CLEC tariff filings for services that are substantially the same or functionally equivalent with noncompetitive services offered by an ILEC in the same service territory of the ILEC, at rates and charges that are higher than the corresponding rates and charges of the ILEC, or for new services, will become effective as filed if the Commission does not take any action within 30 days from the date when all consumers subject to the rate increase shall have received notice to each individual customer. These rate filings shall be served in person on the date of filing upon the Office of Consumer Advocate, the Office of Small Business Advocate and the Commission's Office of Trial Staff.

(2) The Commission may extend the review period by up to an additional 30 days upon notice to the Office of Consumer Advocate, the Office of Small Business Advocate, the Commission's Office of Trial Staff and the CLEC. The CLEC shall include the following summary documentation for tariff filings involving the services:

(i) A brief statement indicating whether the CLEC offers these services solely on the basis of resale of an ILEC's retail services, through its own facilities, or a combination of both.

(ii) A brief statement indicating whether the tariff filing represents an increase or decrease in existing rates and charges.

(iii) A summary justification of the tariff filing, including an explanation of whether the proposed changes have been caused by a corresponding change in rates and charges of the resold services of the underlying ILEC.

(d) *Cost support for CLEC filings.* When new or revised CLEC rates for service are higher than those of the ILEC in that ILEC's service territory, the Commission may request relevant documentary support, including cost support and a statement of compliance with applicable guidelines. The requests can be made either before or after the rates become effective, and will only occur when it is necessary to protect consumers such as, without limitation, when the service is targeted to the economically disadvantaged or customers with poor credit histories.

(e) *ILEC rate changes.*

(1) *Rate reductions and increases.* ILEC tariff filings for noncompetitive services that represent rate reductions

from current rates and charges of that ILEC, will become effective as filed if the Commission does not take any action within a 10-day notice and review period. To obtain the 10-day notice and review period, the ILEC shall provide copies of its current tariff for the noncompetitive service for which it seeks a rate reduction. ILEC tariff filings for noncompetitive services that represent rate increases from current rates and charges of that ILEC, will become effective as filed if the Commission does not take any action within 30 days from the date when all consumers subject to the rate increase shall have received notice to each individual customer. The rate filings shall be served in person on the date of filing upon the Office of Consumer Advocate, the Office of Small Business Advocate and the Commission's Office of Trial Staff.

(2) *Extension of review period.* The Commission may extend the review period for either type of tariff filing by up to an additional 30 days upon notice to the Office of Consumer Advocate, the Office of Small Business Advocate, the Commission's Office of Trial Staff and the ILEC.

(3) *Documentary support.* Nothing in this subsection affects the type of documentary support, including cost support and a statement of compliance with all applicable guidelines, that will be necessary for an ILEC to file with the Commission for approval of tariff filings involving noncompetitive service offerings.

(f) *Executive overview.* ILECs and CLECs that file tariff filings in accordance with subsection (c) or (e) shall file an executive overview summarizing the reason for the filing. The executive overview shall include relevant information regarding the safety, adequacy, reliability and privacy considerations related to the proposed or revised service.

(g) *Lifetime Plan statement.* When a CLEC proposes increases in rates and charges for any of its basic local exchange services, the CLEC shall also state whether it has implemented a Lifeline Plan that has been approved by the Commission.

§ 53.60. Supporting documentation for promotional offerings, joint or bundled service packages, and toll services.

(a) *Promotional offerings.* CLECs and ILECs do not have an automatic obligation to provide cost support for tariff filings involving a promotional service offering so long as the promotional offering does not result in any type of price increase to customers.

(1) ILEC and CLEC tariff filings involving a promotional service offering will become effective with a 1-day's notice. ILECs and CLECs shall provide a 10-day advance notice to any resellers that purchase the promotional service offering from the ILEC or CLEC making the tariff filing.

(2) The Commission may request relevant documentary support, including cost support and a statement of compliance with applicable guidelines, for tariff filings involving promotional service offerings.

(3) No filing requirements exist for promotional offerings involving competitive services.

(4) CLECs and ILECs that file promotional offerings under this subsection shall confirm in their filing that subscribers to the promotional offerings will be required to respond affirmatively at any time the promotional service is being offered if they wish to continue the service beyond the promotional period.

(b) *Joint or bundled service packages.* CLECs and ILECs are relieved from an automatic obligation to

provide cost support for tariff filings involving the offering of joint or bundled service packages.

(1) When ILEC joint or bundled service packages include both competitive and noncompetitive services, these service packages shall meet the applicable guidelines that have been issued by the Commission in the form of regulations, orders or other directives regarding cost justification, discrimination and unfair pricing in joint or bundled service package offerings, and their component competitive and noncompetitive services.

(2) The Commission may request relevant documentary support, including cost support and a statement of compliance with applicable guidelines, for tariff filings involving joint or bundled services.

(3) No filing requirements exist for the offering of joint or bundled service packages composed entirely of competitive services.

(c) *Toll services.* CLECs and ILECs may file tariffs with changes in their rates and charges for existing noncompetitive toll services alone that can become effective with a 1-day's notice. A 16-day notice period is required for the filing of a new toll service or the specific noncompetitive services defined in 66 Pa.C.S. § 3008(a) (relating to interexchange telecommunications carrier). For tariff filings and rate changes involving noncompetitive toll services, the Commission may request relevant documentary support, including cost support and a statement of compliance with applicable guidelines.

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