

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 66 Pa. C.S. §§ 3005(b) and 3005(g)(2). That order also directed that the matter of imputation¹ 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.

Sections 3005(b) and 3005(g)(2) of the Public Utility Code, 66 Pa. C.S. §§ 3005(b) and 3005(g)(2), 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 their 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

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.

its June 28, 1994 Final Order at Docket No. P-00930715 disposing of the Bell Atlantic - Pennsylvania, Inc. (now known as Verizon Pennsylvania Inc.) Petition for Alternative Regulation filed pursuant to 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 limited to Bell-specific competitive safeguards.⁶ The competitive safeguards approved by the Commission were submitted by BA-PA

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.

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”).

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 LECs 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 via 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 Verizon Pennsylvania, Inc. (formerly Bell Atlantic-Pennsylvania, Inc) (“Verizon-PA”)⁸, AT&T Communications of Pennsylvania, Inc. (“AT&T), The United

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.

⁸ After the issuance of the Global Order, BA-PA changed its name to Verizon Pennsylvania Inc. when its parent company, Bell Atlantic Corporation, acquired GTE Corporation last year and formed Verizon Corporation (“Verizon”). For the sake of consistency, we shall use “Verizon-PA” throughout the remainder of this Order to refer to BA-PA and its successor company, Verizon Pennsylvania Inc.

Telephone Company of Pennsylvania and Sprint Communications Company, LP (“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 Verizon-PA, AT&T, Sprint, PTA, and the Office of Trial Staff (“OTS”). These comments are discussed in the “Comments and Responses Document” attached to this Order as Appendix A.

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.⁹ Among the issues raised in that consolidated proceeding that are relevant to the instant rulemaking proceeding are the following: 1) what network elements Verizon-PA must unbundle and provide to competitors, 2) how intraLATA toll imputation should be calculated for Verizon-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 Verizon-PA’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 (“Global Order”) at P-00991648 and P-00991649. In addition to addressing these, and other significant, telecommunications issues, the Global Order also ordered

⁹ 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).

Verizon-PA to structurally separate its retail and wholesale operations in Pennsylvania and directed the opening of a separate proceeding to implement structural separation.¹⁰

D. First Proposed Rulemaking Order and April 11, 2001 Order in Structural Separation Proceeding

Following the issuance of the Global Order, the Commission entered a Proposed Rulemaking Order in the instant proceeding on November 30, 1999. This proposed rulemaking contained a set of regulations in the form of a generic “Code of Conduct” that would be applicable to all ILECs to prevent unfair competition and cross-subsidization in any local exchange market within Pennsylvania. The proposed regulations were modeled after a similar “Code of Conduct” adopted for Verizon-PA in the Global Order, and were supplemental to the competitive safeguards embodied in the structural separation of Verizon-PA’s retail and wholesale operations directed in the Global Order.

Subsequently, the Commission twice extended the date for filing comments to the proposed rulemaking because of the uncertainty surrounding the pending appeals relating to the Global Order and the relevance their resolution may bear on the proposed rulemaking. Following the Commonwealth Court’s decision affirming the Global Order, the Commission directed by Secretarial Letter dated January 3, 2001, that comments be filed by February 23, 2001. Comments were thereafter filed by Verizon-PA and Verizon North Inc., AT&T, the PTA, Sprint, OCA, and several other interested parties, including several legislative members, on or about February 23, 2001. These comments are discussed in the “Comments and Responses Document” attached to this Order as Appendix A.

¹⁰ On October 25, 2000, the Pennsylvania Commonwealth Court, in a unanimous *en banc* decision, upheld the Commission’s Global Order.

In summary, most of the commenting parties agreed there should be a Code of Conduct, but there were many disagreements on what provisions should be included in the rulemaking. Several of the parties, Sprint, PTA, and ALLTEL Pennsylvania, Inc., argued that functional separation should not be imposed on ILECs with less than 1,000,000 access lines without due process rights being accorded to the ILEC. Others, such as AT&T and Verizon-PA, suggested modifications or additions to the proposed rulemaking. Finally, the Association for Local Telecommunications Services, Covad Communications Company, ACSI Local Switched Services, Inc. d/b/a e.spire, and Rhythms Links Inc. (collectively “ACER”) submitted a set of comprehensive Code of Conduct provisions with its comments. These provisions attempt to more fully address the discriminatory and competitive concerns that are the focus of our rulemaking in this proceeding.

By letter dated March 22, 2001, to the Chairman of the Independent Regulatory Review Commission, however, the Commission thereafter withdrew the proposed rulemaking by operation of the sine die rule contained in 71 P.S. § 745.5. Moreover, on this same date at Public Meeting, the Commission approved a motion in its separate structural separation proceeding at M-00001353, offering Verizon-PA a functional, rather than a structural, separation of its retail and wholesale operations and a structural separation of its advanced data services. In return for this change, Verizon-PA had to agree to several market-opening conditions and to termination of all litigation challenging the Global Order. One of these conditions was that the instant rulemaking proceeding would be reopened for the purpose of issuing a Second Proposed Rulemaking Order addressing the appropriate generic Code of Conduct to be promulgated pursuant to 66 Pa. C.S. §§ 3005(b) and (g)(2). Verizon-PA also had to agree that it would comply with this Code of Conduct.

On April 11, 2001, the Commission entered an order in the structural separation proceeding incorporating the terms of this March 22, 2001 motion.¹¹ Specifically, the order directed that the record in the instant competitive safeguards rulemaking proceeding was to be reopened and that the record from the underlying structural separation proceeding was to be incorporated into the instant proceeding to aid in the development of a new proposed rulemaking. In addition, the order directed the Law Bureau to review the Code of Conduct provisions proposed by ACER in the structural separation proceeding (which were the same as ACER proposed in its February comments in the instant proceeding) as to their appropriateness for inclusion in the proposed rulemaking.¹² On April 20, 2001, Verizon-PA notified the Commission that it was accepting the conditions offered in the April 11, 2001 Order in exchange for the Commission removing its earlier structural separation directive contained in the Global Order.¹³

E. Discussion

These proposed regulations require ILECs with more than one million access lines to maintain a functionally separate wholesale organization for providing certain services to competitive local exchange carriers (“CLECs”), and impose a general code of conduct, applicable to all LECs, in order to prevent unfair competition and ensure nondiscriminatory access to an ILEC’s services and facilities by competitors as mandated by Chapter 30 of the Public Utility Code. These proposed regulations reflect our consideration of all of the comments filed to date in this proceeding. They also reflect our consideration of the record developed in the structural

¹¹ Re: Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations, Dkt. No. M-00001353 (Order entered April 11, 2001) (“Functional/Structural Separation Order”).

¹² Functional/Structural Separation Order at ordering paragraph nos. 4-6.

¹³ The Commission subsequently issued a clarification order of its Functional/Structural Separation Order. Re: Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations, Dkt. No. M-00001353 (Order entered May 24, 2001 (“FSS Clarification Order”).

separation proceeding at Docket No. M-00001353. We appreciate and thank all the commenting parties who provided worthwhile suggestions to aid the Commission in the development of its proposed regulations.

1. Functional Separation of Retail and Wholesale Operations

Consistent with the Functional/Structural Separation Order entered April 11, 2001 at Docket No. M-00001353, this proposed rulemaking provides for the state's largest ILECs (those with one million or more access lines¹⁴) to maintain a functionally separate wholesale organization to provide pre-ordering, ordering and the processing and transmission of instructions to field forces for the provisioning of services, network elements, or facilities to CLECs necessary to provide competitive and noncompetitive telecommunications services to consumers. We find that the recommended approach will enable the Commission to monitor and prevent discriminatory conduct through the use of accounting rules and other business record keeping. Moreover, in adopting this more limited functional separation approach, the Commission believes that the imposition of "full" functional separation, which involves the reorganization and separation of all employees and facilities of the affected ILEC along wholesale/retail lines, is unnecessary. There are several reasons why we conclude that full functional separation is unnecessary.

First, and most importantly, full functional separation is an intrusive remedy designed to fix a problem that has not been shown to exist. Less than six months ago, the Commission concluded in Verizon-PA's section 271 proceeding under TA-96 that Verizon-PA's local telecommunications market had been irreversibly opened to

¹⁴ In determining whether an ILEC has met the 1,000,000 access-line threshold, the proposed rulemaking has defined "ILEC" as broadly as possible to include any of the company's "affiliates, subsidiaries, divisions, or other corporate sub-units that provide local exchange service." Thus, for example, if an ILEC merges or acquires another ILEC and creates a separate subsidiary to house the acquired company's local exchange business, the access lines acquired by the ILEC would be counted with its pre-existing access lines to determine if the 1,000,000 access-line threshold has been met. In addition, if the threshold is met, then the competitive safeguard regulation in question would apply to all affiliates or subsidiaries created by the transaction, even if the particular affiliate or subsidiary has less than 1,000,000 access lines. Applying this definition of ILEC to Bell Atlantic's recent acquisition of GTE Corporation, for instance, results in the competitive safeguard regulation applicable only to ILECs with more than 1,000,000 access lines being applicable to both Verizon-PA [the old BA-PA] and Verizon North Inc. [the old GTE North]. Both entities are subsidiaries of Verizon.

competition.¹⁵ Specifically, the Commission concluded that Verizon-PA was providing wholesale services to CLECs in a nondiscriminatory fashion. The Federal Communications Commission agreed and granted Verizon-PA's application to provide long-distance service under section 271 of TA-96.¹⁶ This action followed a third-party test of Verizon-PA's operations support systems ("OSS") by our third-party consultant, KPMG Consulting, which concluded that Verizon-PA had remedied any major problems with the OSS.

Secondly, as part of the section 271 approval process, Verizon-PA agreed to withdraw court appeals from the Commission's earlier adoption of a performance assurance plan ("PAP").¹⁷ The PAP contains detailed standards for Verizon-PA's wholesale services to CLECs, and also contains self-executing penalties for Verizon-PA's failure to meet these standards. Verizon-PA could pay roughly up to \$183 million per year for failure to meet the performance standards in the PAP.¹⁸ These standards and penalties are in addition to the Commission's normal enforcement processes and penalties. Finally, full functional separation is likely to

¹⁵ Re: Application of Verizon Pennsylvania, Inc., et al. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the Commonwealth of Pennsylvania, CC Docket No. 01-138 (Consultative Report of the Pennsylvania Public Utility Commission, filed June 25, 2001).

¹⁶ Re: Application of Verizon Pennsylvania, Inc., et al. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the Commonwealth of Pennsylvania, CC Docket No. 01-138 (Memorandum Opinion and Order, rel. Sept. 19, 2001).

¹⁷ Letter dated June 7, 2001, from Julia Conover, Vice President and General Counsel, Verizon Pennsylvania Inc., to James J. McNulty, Secretary, Pennsylvania Public Utility Commission.

¹⁸ Re: Performance Measures Remedies, Docket No. M-00011468, at 32 (Recommended Decision, entered Sept. 28, 2001).

result in significant additional costs and duplication of resources, while the benefits to competition are speculative.

The proposed regulation sets forth the required business record keeping rules necessary to implement this form of functional separation. The proposed regulation will also permit the sharing of common resources, so long as the costs thereof are properly allocated between the ILEC's wholesale operating unit and the ILEC's other relevant operations. As such, the Commission does not anticipate that the imposition of a functionally separate wholesale organization will require any significant changes to the manner in which the ILEC must conduct its business, other than to maintain separate business records that account for tariffed and non-tariffed transactions between the wholesale operating unit and the rest of the ILEC's operations. The ILEC was and will continue to be under an obligation to provide non-discriminatory wholesale services to CLECs when measured against the wholesale services it provides to its own retail operations.

Finally, we find it unnecessary to include any language in the proposed rulemaking relating to the Commission's ability to order further safeguards not expressly delineated herein to protect against unfair competition and to ensure nondiscriminatory access to the ILEC's services and facilities. The Commission clearly has the ability and authority to adopt new safeguards as the need arises. For example, if functional separation, as proposed herein, does not create the level playing field that is the focus of Chapter 30's competitive provisions, then the Commission has the authority to require the ILEC to provide the affected competitive service through a separate corporate affiliate. 66 Pa. C.S. § 3005(h).

2. 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). Pursuant to section 3002, “basic service functions” are defined as those basic components of the LEC’s network that are “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 pursuant to 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. Verizon-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. Global Order at 67-68; Competitive Safeguards Order at 158.

3. 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 Global Order, we held, with respect to service level imputation, that Verizon-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 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 Verizon-PA.

In addressing this issue now, we agree with the PTA that there is no evidence that interexchange carriers (“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.¹⁹ Finally, we know of no evidence to refute AT&T’s own witness that predatory pricing is extremely unlikely to occur;²⁰ 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 Pennsylvania.

¹⁹ Sprint, for example, has implemented a “Sprint Simple Seven” plan that offers intrastate, intraLATA long distance to residential and business customers at a flat rate of 7 cents per minute and the payment of a monthly service charge. The other national IXCs, AT&T and MCI, have similar long distance plans in effect.

²⁰ 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.

4. Unfair Competition and Cross Subsidization Issues

We are proposing today a set of regulations in the form of a generic “Code of Conduct” in section 63.144 of Annex A that will be applicable to all LECs to prevent unfair competition and cross-subsidization in any local exchange market within Pennsylvania.²¹ We believe these proposed regulations, in providing a comprehensive set of competitive safeguard rules pursuant to 66 Pa. C.S. § 3005(b), are necessary to prevent unfair competition, discrimination, cross subsidies, and other market power abuses by LECs 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 Verizon-PA in the Global Order and other provisions are modeled after the ACER Code of Conduct offered in the structural separation proceeding. In addition, as with the competitive safeguard regulations adopted for the Pennsylvania electric industry,²² the instant regulations are directed not only at ILECs as the entities with market power, but at CLECs as well in specific circumstances to prevent unfair methods of competition.

In this regard, we cannot fully accept Verizon-PA’s position that any regulation should be equally imposed on all LECs and not just incumbents pursuant to the doctrine of regulatory parity. The Commission also recognizes 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

²¹ In issuing these proposed regulations, the Commission recognizes that it has adjudicated many of the same issues herein in other proceedings. The Commission does not intend to disturb those earlier rulings, such as its findings and holding in the Competitive Safeguards Order, through these regulations, but instead the proposed rulemaking is intended to build upon that foundation.

²² 52 Pa. Code §§ 54.121-54.122. We also note that the proposed regulations herein are modeled in part from Code of Conduct provisions adopted for the electric industry.

control of bottleneck facilities, set prices above competitive levels, or engage in unlawful predatory pricing to eliminate competition.

We recently took this same approach in adopting 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 Proceeding”).²³ 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. However, in those instances where the proposed standard of conduct does not rely on the LEC having market power to be effective, the standard is drafted so that it is equally applicable to ILECs and CLECs.

In developing our proposed competitive safeguard regulations, we have not prescribed rules that will restrict joint marketing activities because we are not convinced that such a restriction is necessary to foster competition in the local exchange markets. Additionally, we reject Verizon-PA’s request that informational tariffs for competitive services should be eliminated, as this issue was part of our rulemaking proceeding relating to streamlining tariff filing requirements.²⁴ We also

²³ This rulemaking was finalized by order entered June 2, 2000, at the same docket.

²⁴ In the final regulations adopted in the Streamlined Tariff Filing Proceeding, CLECs and ILECs offering competitive services must continue to file informational tariffs and price lists. 52 Pa. Code § 53.58(d). We should note that in the Streamlined Tariff Filing Proceeding, Verizon-PA supported the proposed regulations, including the provision relating to the filing of informational tariffs for competitive services.

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.

Finally, we agree with Verizon-PA and Verizon North Inc. on two specific issues raised in the companies' February 2001 comments. First, we agree that a total prohibition of certain advertising claims, such as claims of superiority, may violate the First Amendment. The United States Supreme Court has held that states may not place an absolute bar on certain types of potentially misleading information if it may be presented in a way that is not deceptive. Bates v. State Bar of Arizona, 433 U.S. 350 (1977); see also In re RMJ, 455 U.S. 191 (1982). The Court stated the preferred remedy is not a complete prohibition but a requirement of disclaimers or explanation to assure that the consumer is not misled. Bates, 433 U.S. at 384. We have, therefore, added the phrase, "unless the statement can be factually substantiated" to the advertising restrictions contained in section 63.144(3)(ii) & (iii) of the proposed Code of Conduct.²⁵

The second issue relates to whether the proposed Code of Conduct, when it becomes final, should supercede and replace any other Codes of Conduct, such as the Code of Conduct adopted in the Global Order for Verizon-PA, in effect for any LEC in Pennsylvania. We agree that having two or more Codes of Conduct in existence may be confusing and make compliance and enforcement more difficult. The proposed Code of Conduct that is contained in section 63.144 of Annex A,

²⁵ Proposed advertising bans on superiority claims by professional licensing boards have attracted the attention of the Federal Trade Commission and the Pennsylvania Office of Attorney General in the past. Both agencies have routinely opposed complete bans on superiority claims on First Amendment grounds. In 1985, the Pennsylvania Office of Attorney General advocated the use of disclaimers or other qualifying language that protects truthful advertising claims of superiority to the State Dental Council and Examining Board, which board adopted this recommendation at 49 Pa. Code § 33.203(a)(3).

therefore, should supercede and replace any existing Codes of Conduct when it becomes final.

As this is a proposed rulemaking, we invite all interested parties to comment on whether they believe that these proposed competitive safeguard regulations go far enough to protect competition. In the absence of proof that the quality of Verizon-PA's (as the state's only ILEC with more than one million access lines) wholesale services has deteriorated; however, we believe the focus of the comments should be on the Code of Conduct provisions rather than the form of functional separation this Commission should impose on the state's largest ILECs.

Accordingly, under sections 501, 1501, 3005(b) and 3005(g)(2) of the Public Utility Code, 66 Pa. C.S. §§ 501, 1501, 3005(b), and 3005(g)(2); sections 201 and 202 of the Act of July 31, 1968, P. L. 769 No. 240, 45 P.S. §§ 1201-1202, 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, attached hereto; **THEREFORE,**

IT IS ORDERED:

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

2. That 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. That 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. That 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. That 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. Reply comments will be due 15 days from the last date of the 30-day comment period.

6. That 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). 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. That 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.

BY THE COMMISSION,

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: November 30, 2001

ORDER ENTERED: January 29, 2002

ANNEX A

TITLE 52. PUBLIC UTILITIES PART I. PUBLIC UTILITY COMMISSION SUBPART C. FIXED SERVICE UTILITIES CHAPTER 63. TELEPHONE SERVICE

Subchapter K. COMPETITIVE SAFEGUARDS

§ 63.141. Statement of purpose and policy.

This subchapter establishes competitive safeguards to assure the provision of adequate and nondiscriminatory access by incumbent local exchange carriers to competitive local exchange carriers for all services and facilities incumbent local exchange carriers are obligated to provide competitive local exchange carriers under any applicable Federal or State law, to prevent the unlawful cross subsidization or support for competitive services from noncompetitive services by incumbent local exchange carriers, and to prevent local exchange carriers from engaging in unfair competition. 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. The Code of Conduct contained in section 63.144 below supercedes and replaces any other Codes of Conduct applicable to any local exchange carrier.

§ 63.142. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

Competitive local exchange carrier (CLEC) -- A telecommunications company that has been certificated by the Commission as a competitive local exchange carrier under the Commission's procedures implementing the federal Telecommunications Act of 1996, or under the relevant provisions at 66 Pa. C.S. § 3009(a) (relating to additional powers and duties) and its successors and assigns. The term shall include any of the competitive local exchange carrier's affiliates, subsidiaries, divisions, or other corporate sub-units that provide local exchange service.

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

Incumbent local exchange carrier (ILEC) -- A telecommunications company deemed to be an incumbent local exchange carrier pursuant to section 251(h) of the federal Telecommunications Act of 1996, 47 U.S.C. § 251(h), and its successors and assigns. The term shall include any of the incumbent local exchange carrier's affiliates, subsidiaries, divisions, or other corporate sub-units that provide local exchange service.

Local exchange carrier (LEC) -- A local telephone company that provides telecommunications service within a specified service area. Local exchange carriers encompass both ILECs and CLECs.

Market price -- Prices set at market-determined rates.

Noncompetitive service -- Any 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.

Subscription activities -- All activities conducted by an ILEC to formalize the acquisition of a customer or to maintain the provision of a customer's telecommunications services. The activities shall include all conduct relating to the provision of information to prospective customers regarding the ILEC's services and the enrollment of individuals or businesses as customers.

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

§ 63.143. Accounting and audit procedures for large ILECs.

Any ILEC with more than 1,000,000 access lines shall maintain a functionally separate wholesale organization (the "wholesale operating unit") and shall be subject to the following requirements:

(1) The wholesale operating unit of the ILEC shall consist of employees and other resources necessary to perform the following wholesale functions:

(i) Pre-ordering, ordering and the processing and transmission of instructions to field forces for the provisioning of services, network elements (as defined under 47 U.S.C. § 153(29)), or facilities to CLECs necessary to provide competitive or noncompetitive services to consumers.

(2) The wholesale operating unit of the ILEC shall have its own direct line of management and shall keep separate accounting and business records which shall be subject to review by the Commission in accordance with the provisions of 66 Pa. C.S. § 506 (relating to inspection of facilities and records). The ILEC shall keep its separate accounting and business records, and all other books, memoranda, and documents that support the entries in such separate records so as to be able to furnish readily full information as to any item included in any such record.

(3) The wholesale operating unit of the ILEC shall not engage in any marketing, sales, advertising, or subscription activities directed at retail customers.

(4) Employees or agents of the ILEC's wholesale operating unit shall not be shared with any of the ILEC's other operations. The costs associated with any shared resources shall be fully allocated and accounted for between the ILEC's wholesale operating unit and its other relevant operations based on the proportionate use of those facilities. The costs of any other employees, assets and other resources associated with performing the wholesale functions described in subsection 63.143(1)(i) above shall be allocated using appropriate allocation factors.

(5) Any employee of the ILEC wholesale operating unit may transfer to the ILEC's other operations, provided such transfer is not used as a means to circumvent the provisions of this subchapter. Any employee of the ILEC wholesale operating unit shall not provide information to the ILEC's retail operations that it would otherwise be precluded from having pursuant to the provisions of this subchapter.

(6) No employee or agent of the ILEC wholesale operating unit shall promote any retail service of the ILEC or any other LEC's retail services. All referrals made by employees or agents of the ILEC's wholesale operating unit shall identify all available providers of service on an equal and nondiscriminatory basis.

(7) The ILEC shall maintain contemporaneous records documenting all tariffed and nontariffed transactions between its wholesale operating unit and its other operations. Such records shall be available for public inspection during normal business hours.

(8) An independent compliance review may be conducted every calendar year to ascertain and verify the ILEC's compliance with the provisions of this subchapter as directed by the Commission on an as-needed basis. The ILEC will retain, subject to Commission approval, an independent consultant to conduct this compliance review. The ILEC shall select the independent consultant through a competitive bid process. To help ensure the objectivity of the results, Commission staff will monitor the ILEC's consultant selection process, the scope of the compliance review, the progress of the consultant's work, and the report preparation process. An original and ten copies of the final report as well as an electronic version will be submitted to the Commission no later than March 31, following the calendar year covered in the report. The consultant's final report, to include recommendations for change where necessary, will be made available for public inspection during normal business hours.

(9) Nothing in this section shall prohibit the ILEC from providing any competitive service through a separate corporate division or affiliate; however, the

competitive safeguards imposed by this subchapter will continue to be fully applicable to the ILEC and its division or affiliate.

§ 63.144. Code of conduct.

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

(1) *Nondiscrimination.*

(i) An ILEC shall not give itself, including any local exchange affiliate, division, or other corporate sub-unit, or any CLEC any preference or advantage over any other CLEC in the preordering, ordering, provisioning, or repair and maintenance of any goods, services, network elements (as defined under 47 U.S.C. § 153(29)), or facilities unless expressly permitted by state or federal law.

(ii) An ILEC shall not condition the sale, lease, or use of any noncompetitive service on the purchase, lease or use of any other goods or services offered by the ILEC or on a direct or indirect commitment not to deal with any CLEC. Nothing in this paragraph, however, prohibits an ILEC from bundling noncompetitive services with other noncompetitive services or with competitive services so long as the ILEC continues to offer any noncompetitive service contained in the bundle on an individual basis.

(2) *Employee conduct.*

(i) No ILEC employee while engaged in the installation of equipment or the rendering of services to any end-user on behalf of a competitor shall disparage the service of the competitor or promote any service of the ILEC to the end-user.

(ii) No LEC employee while processing an order for the repair or restoration of service or engaged in the actual repair or restoration of service on behalf of a competitor shall either directly or indirectly represent to any end-user that such repair or restoration of service would have occurred sooner if the end-user had obtained service from the LEC.

(3) *Corporate advertising and marketing.*

(i) A LEC shall not engage in false or deceptive advertising with respect to the offering of any telecommunications service in this Commonwealth.

(ii) A LEC shall not state or imply that the services provided by the LEC are inherently superior when purchased from the LEC unless the statement can be factually substantiated.

(iii) A LEC shall not state or imply that the services rendered by a competitor may not be reliably rendered or is otherwise of a sub-standard nature unless the statement can be factually substantiated.

(iv) An ILEC shall not state or imply that the continuation of any service from the ILEC is contingent upon taking other services offered by the ILEC.

(4) *Cross subsidization.*

(i) An ILEC shall not use revenues earned or expenses incurred in conjunction with noncompetitive services to subsidize or support any competitive services. An ILEC shall not provide any assets, goods or services to its competitive local exchange affiliate, division, or other corporate sub-unit at a price below the ILEC's cost, market price, or

tariffed rate for said goods or services, whichever is higher, nor shall the ILEC purchase any assets, goods or services from its competitive affiliate, division, or other corporate sub-unit at a price above the market price or tariffed rate for said goods or services.

(5) Information sharing and disclosure.

(i) An ILEC's employees, including but not limited to its wholesale employees, shall use CLEC proprietary information (that is not otherwise available to the ILEC) received in the pre-ordering, ordering, provisioning, billing, maintenance, or repairing of any telecommunications services provided to the CLEC solely for the purpose of providing such services to the CLEC. ILEC employees shall not disclose such CLEC proprietary information to other employees engaged in the marketing or sales of retail telecommunications services unless the CLEC provides prior written consent to such disclosure. This provision does not restrict the use of aggregated CLEC data in a manner that does not disclose proprietary information of any particular CLEC.

(ii) Subject to customer privacy or confidentiality constraints, a LEC employee shall not disclose, directly or indirectly, any customer proprietary information to the LEC's affiliated or nonaffiliated entities unless authorized by the customer pursuant to 52 Pa. Code § 63.135 (relating to customer information).

(6) Adoption and dissemination.

(i) Every LEC shall formally adopt and implement the applicable Code of Conduct provisions as company policy or modify its existing company policy as needed in order to be consistent with the applicable Code of Conduct provisions. Every LEC

shall also disseminate the applicable Code of Conduct provisions to its employees and take appropriate steps to train and instruct its employees in their content and application.

§ 63.145. Remedies.

Any violation of the provisions of this subchapter allegedly harming a party may be adjudicated using the Commission's Interim Guidelines for Abbreviated Dispute Resolution Process, at Docket Nos. P-00991648 and P-00991649, which are published at 30 Pa.B. 3808 (July 28, 2000), or any successor Commission alternative dispute resolution process, to resolve the dispute. Any such action, however, will not preclude or limit additional available remedies or civil action, including the filing of a complaint concerning the dispute or alleged violations with the Commission under relevant provisions of the Public Utility Code. The Commission may also, where appropriate, impose penalties pursuant to 66 Pa. C.S. § 3301 (relating to civil penalties for violations) or refer violations of the Code of Conduct provisions set forth herein to the Pennsylvania Office of Attorney General, the Federal Communications Commission, or the United States Department of Justice.