

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265**

Public Meeting held June 26, 2003

Commissioners Present:

Terrance J. Fitzpatrick, Chairman  
Robert K. Bloom, Vice Chairman  
Aaron Wilson, Jr.  
Glen R. Thomas, Statement attached  
Kim Pizzingrilli

Petition of Verizon Pennsylvania Inc. for a  
Determination That its Provision of Business  
Telecommunications Services to Customers  
Generating Less Than \$10,000 in Annual Total  
Billed Revenue is a Competitive Service Under  
Chapter 30 of the Public Utility Code

P-00021973

**OPINION AND ORDER**

**BY THE COMMISSION:**

## **I. Matter Before the Commission**

Before the Commission for consideration and disposition are the Exceptions of Verizon Pennsylvania Inc. (Verizon PA) to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Wayne L. Weismandel, issued January 30, 2003, relative to the above-captioned proceeding. AT&T Communications of Pennsylvania, Inc. (AT&T), MCI WorldCom Network (MCI), the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA) and the Commission's Office of Trial Staff (OTS) filed individual Reply Exceptions. CTSI, LLC (CTSI) and Penn Telecom, Incorporated (Penn Telecom) filed Joint Reply Exceptions.

## II. History of the Proceeding<sup>1</sup>

On July 1, 2002, Verizon PA filed its Petition seeking a Commission determination that its provision of business telecommunications services to customers generating less than \$10,000 in annual total billed revenue (TBR) is a competitive service under Chapter 30 of the Public Utility Code (Code). 66 Pa. C.S. § 3005.

The following Parties filed timely Answers and/or Petitions to Intervene: AT&T; Allegiance Telecom of Pennsylvania, Inc. (subsequently withdrawn by letter dated October 25, 2002); ATX Telecommunications Services, LTD (ATX); Central Atlantic Payphone Association (subsequently withdrawn on September 24, 2002); and CTSI. The OCA, the OSBA, and the OTS filed Notices of Appearance. By Orders dated August 5 and 12, 2002, ALJ Weismandel granted the Petitions to Intervene.

On September 4, 2002, Choice One Communications of Pennsylvania, Inc. (Choice One) submitted a late-filed Petition to Intervene and Answer. On September 13, 2002, MCI submitted a late-filed Petition to Intervene. By Orders dated September 5 and 19, 2002, the ALJ granted the late-filed Petitions to Intervene of Choice One and MCI, respectively.

On October 31, 2002 and November 1, 2002, the OTS and the OCA, respectively, filed separate *Motions To Classify As Non-Proprietary Selected Information Provided by Verizon PA*. ALJ Weismandel granted both Motions by separate Orders.

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<sup>1</sup> A more detailed recitation of the history of this proceeding is contained at pages 1 through 8 of the Recommended Decision.

Evidentiary hearings were held November 4 and 5, 2002. The evidence in this proceeding includes the transcribed testimony of nine witnesses, nineteen statements (with accompanying appendices and/or exhibits) and seventeen exhibits. By Order dated November 22, 2002, ALJ Weismandel denied the OSBA's Motion for Admission of Evidence filed November 6, 2002. Main and Reply Briefs were filed by Verizon PA, AT&T, CTSI/Penn Telecom (jointly), MCI, the OCA, the OSBA and the OTS.

In his January 30, 2003 Recommended Decision, ALJ Weismandel recommended that Verizon PA's Petition be denied in its entirety. As noted above, on February 19, 2003, Verizon PA filed Exceptions to the ALJ's Recommended Decision. Timely Reply Exceptions were filed by AT&T, CTSI/Penn Telecom (jointly), MCI, the OCA, the OSBA and the OTS.

### **III. Discussion**

#### **A. Background**

The Commission is authorized under 66 Pa. C.S. § 3005 to determine whether a telecommunications service or other service or business activity offered by a local exchange company is a competitive service. In making such a determination, the Commission must make findings which should include: (1) evidence of ease of market entry, including the existence and impact of cross-subsidization, rights-of-way, pole attachments and unavoided costs; (2) presence and viability of other competitors, including market shares; (3) the ability of competitors to offer those services or other activities at competitive prices, terms and conditions; (4) the availability of like or substitute services or other activities in the relevant geographic area; (5) the effect, if any, on protected services; (6) the overall impact of the proposed regulatory changes on the continued availability of existing services; (7) whether the consumers of the service would receive an identifiable benefit from the provision of the service or other activity on a competitive basis; (8) the degree of regulation necessary to prevent abuses or discrimination in the provision of the service or other activity; and (9) any other relevant factors which are in the public interest. 66 Pa. C.S. § 3005(a)(1).

As the requesting Party, Verizon PA has the burden of proving that a telecommunications service or other service or business activity offered is competitive. 66 Pa. C.S. § 3005(a)(2).

In our *Global Order*,<sup>2</sup> we addressed Verizon PA's (formerly Bell Atlantic-Pennsylvania, Inc.) request<sup>3</sup> that the Commission declare the provision of telecommunications services to business customers to be competitive pursuant to Chapter 30 of the Code, 66 Pa. C.S. §§ 3001-3009. After due consideration of the full record in Docket No. P-00971307 and finding that a grant of Verizon PA's request, as revised by the Commission, was consistent with the mandate of Chapter 30, we outlined the following blueprint for competitive designation of telecommunications service provided by Verizon PA to business customers:

(1) Upon entry of this Order, BA-PA's (retail) business services will be declared competitive per 66 Pa. C.S. §3005 for customers generating \$80,000 or more in annual total billed revenue (TBR) where Local Number Portability (LNP) is available. BA-PA TBR is billed revenue from all tariffed services.

(2) Business services will remain available to all business customers at current rates under Commission-approved tariffs until December 31, 2003.

(3) Customers generating less than the \$80,000 threshold will be governed by existing business tariffs. For business customers generating between \$40,000 and \$80,000 in annual TBR, BA-PA may offer Individual Case Basis (ICB) contracts where: (a) the customer already subscribes to local exchange service from a CLEC; or (b) the customer actually has received a bona fide bid with stated terms and conditions for local exchange services from a CLEC. One (1) year after LNP is available statewide in BA-PA's service territory, BA-PA may offer ICB contracts for customers

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<sup>2</sup> *Re: Nextlink Pennsylvania, Inc.*, 93 PA PUC 172, 196 PUR4th. 172(1999), *aff'd. sub nom., Bell Atlantic-Pennsylvania, Inc. v. PA Public Utility Comm'n*, 763 A.2d 440 (Pa. Cmwlth. 2000), *reargument den.* (Jan. 5, 2001), *appeal on other grounds pending*, 1 EAP 2002(PA).

<sup>3</sup> *See Petition of Bell Atlantic-PA, Inc. For a Determination of Whether the Provision of Business Telecommunications Services is Competitive Under Chapter 30 of the Public Utility Code*, Docket No. P-00971307.

generating between \$10,000 and \$40,000 in annual TBR under the same conditions as listed in the prior sentence. However, in no case can the ICB offering be below BA-PA's cost. BA-PA will file with the Commission under proprietary seal all ICB proposals at the same time as the proposal is presented to the customer. BA-PA will file with the Commission all ICB contracts under proprietary seal.

(4) Any multi-year contract with a business customer executed within one (1) year of FCC section 271 approval is subject to commission review and revision under federal law and 66 Pa. C.S. §508, as applicable, if there is an allegation that the contract constitutes an anticompetitive action. Thereafter, the Commission shall exercise the powers granted to it by federal law and section 508 as it deems appropriate.

(5) If BA-PA waives, or offers to waive, termination liability in any contract in return for re-signing its customer, BA-PA must also waive such liability for a ninety (90)-day period to permit that customer to switch to a competitive carrier. BA-PA must also send the customer a Miranda Warning-type letter describing the waiver provisions of a settlement, as proposed in the Joint Petitions for Settlement. Receipt of the letter triggers the ninety (90)-day cooling-off period, during which the BA-PA contract in question may be canceled without incurring any termination liability.

(6) Competitive business services are subject to imputation on a total services/total business activity basis (*i.e.* Centrex, toll, special access, all business services, etc.).

(7) After providing written notice to the Commission, BA-PA will reduce the \$80,000 threshold for business services declared competitive based upon the following schedule:

- (a) For customers generating \$40,000 or more in TBR, one year after LNP is available throughout BA-PA's service territory; and

- (b) For customers generating \$10,000 or more in TBR, two years after LNP is available throughout BA-PA's service territory.

*Global Order*, 93 Pa. PUC at 281 (footnotes omitted).

## **B. ALJ's Recommendation**

In his Recommended Decision, ALJ Weismandel made thirty-nine Findings of Facts and twenty-nine Conclusions of Law. (R.D. at 8-13 and 25-30, respectively). Initially, the ALJ addressed two preliminary issues raised in the proceeding: (1) the relevant business market for purposes of applying the statutory factors, and (2) the relevant geographic area for purposes of examining the availability of like or substitute services. He noted that several parties (AT&T, CTSI/Penn Telecom, MCI, OCA, OSBA and OTS) took the position that only businesses generating less than \$10,000 in annual TBR should be considered the relevant business market for purposes of Verizon PA's Petition.

Conversely, Verizon PA argued that the relevant business market was the entire group of business customers, regardless of annual TBR, in its entire service territory. ALJ Weismandel rejected Verizon PA's position and held that the Commission in its *Global Order* established four separate and distinct business markets: (1) business customers generating \$80,000 or more in annual TBR; (2) business customers generating \$40,000 or more in annual TBR; (3) business customers generating \$10,000 or more in annual TBR; and (4) business customers generating less than \$10,000 in annual TBR. He noted that in the *Global Order*, the Commission pre-approved the competitive designations for services to all businesses except for those businesses generating less than \$10,000 in annual TBR. (R.D. at 19).

The ALJ concluded that the only reason that this instant "proceeding must occur is so that the Commission can make the statutorily required determinations with

respect to the business market composed of business customers generating less than \$10,000 in annual TBR that it did not make in the proceedings culminating in the *Global Order*.” (R.D. at 20).

Turning to the next preliminary issue, the ALJ again disagreed with Verizon PA’s position that the relevant geographic area comprises the utility’s entire service territory, on an all-inclusive basis. Rather, ALJ Weismandel concluded that the relevant geographic area for examining the availability of like or substitute service should include Verizon PA’s entire service territory on an exchange-by-exchange basis. (R.D. at 20).

Having made these preliminary rulings, the ALJ recommended that Verizon PA’s Petition be denied for failure to meet its burden of proof. Specifically, the ALJ found evidentiary deficiencies with Attachment 2 to Verizon PA’s Petition as well as with the Rural Business Customer Survey and Business Customer Market Share Survey offered by Verizon PA during the proceeding. He noted that while Attachment 2 referenced the presence of competitive service providers on an exchange-by-exchange basis for each of Verizon PA’s 339 exchanges, Attachment 2 only identifies 12 of the 95 services for which Verizon PA seeks competitive designation. In addition, the ALJ reasoned that not only did Verizon PA fail to provide favorable evidence with respect to the other 83 services, but there is no indication that the listed twelve business services are being provided to the relevant business market. (R.D. at 22).

Similarly, the ALJ ruled that the two surveys offered by Verizon PA did not provide sufficient evidence needed to sustain its burden of proof in this proceeding. He determined that neither survey covered all 95 business services for which it sought competitive classification. (R.D. at 23).

Lastly, the ALJ stated that Verizon PA failed to present probative, credible evidence as to each of the nine statutorily required findings the Commission must make under Section 3005(a)(1) of the Code, 66 Pa.C.S. § 3005(a)(1), before rendering a declaration of competitive service. The ALJ reasoned that Verizon PA was required, but failed, to demonstrate the presence and viability of other competitors. As such, ALJ Weismandel concluded that Verizon PA's Petition should be denied in its entirety for failure by Verizon PA to meet its burden of proof with respect to the requirements set forth in 66 Pa. C.S. § 3005.

### **C. Exceptions**

As a preliminary matter, we are reminded that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings. *Univ. of Pa. v. Pa. PUC*, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984). Any Exception or argument that is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

Verizon PA filed five Exceptions (VZ Exc.) to the ALJ's recommendation. We shall address Verizon PA's Exceptions seriatim.

#### **1. Definition of Relevant Market**

Verizon PA objects to the ALJ's conclusion that the relevant market for purposes of its Petition should be confined to those businesses generating less than \$10,000 in annual TBR. Specifically, Verizon PA argues that the ALJ's conclusion that the Global Order created four separate and distinct business markets for purposes of determining whether to designate a service as competitive, is erroneous. In alleging that the ALJ adopted a far-reaching interpretation of the *Global Order*, Verizon PA argues that the ALJ disregarded all of its evidence that the entire statewide market for business

services is competitive. (VZ Exc. at 8-9). In Verizon PA's view, the ALJ's recommendation is "particularly egregious" because he rejected evidence that it believes conclusively demonstrated that substantial competition exists for all business services in every Verizon PA exchange. (VZ Exc. at 10-11). Verizon PA maintains that it, as well as the OCA and the CLECs, presented evidence that such a narrow definition of the relevant business market is misplaced. According to Verizon PA, the CLECs, in their discovery responses, acknowledged the lack of any distinction among business customers. (VZ Exc. at 9, referencing VZ Cross Exhibits 1 and 6). Verizon PA further asserts that the ALJ's characterization of the relevant "less than \$10,000" business market is contrary to factual evidence showing the existence of a unitary business market. (VZ Exc. at 11-12, referencing Direct Testimony of Dr. Howard A. Shelanski).

The CLECs and Statutory Advocates disagree with Verizon PA's position and maintain that the ALJ's conclusion is sound and should be upheld. (AT&T R.Exc. at 4-16; CTSI/Penn Telecom R.Exc. at 4-11; OCA R.Exc. at 4-10; OSBA R.Exc. at 3-7; and OTS R.Exc. at 3-7). With regard to Verizon PA's claim that the relevant business market should not be confined to business customers generating less than \$10,000 in annual TBR, the OSBA responds that those markets for business customers generating more than \$10,000 in annual TBR have already been declared competitive under the *Global Order* and to include those markets in this proceeding would just be an acknowledgment of what has already been done in the *Global Order*. (OSBA R.Exc. at 4).

In our *Global Order*, we established a timeline and the criteria under which business services between varying ranges of annual TBR would be declared competitive pursuant to 66 Pa. C.S. § 3005.<sup>4</sup> Based on our action in the *Global Order*, the only

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<sup>4</sup> *Global Order*, 93 Pa. PUC at 281-82.

remaining business segment that remains under regulation concerns the market for business customers generating less than \$10,000 in annual TBR. It is only appropriate that this subset of services should have been the focus of this proceeding. This is not to say that Verizon PA's entire business market as a whole has no relevance in attempting to determine the final outcome of this proceeding; however, absent evidence regarding the less than \$10,000 in annual TBR market, Verizon PA cannot meet its burden of proof under the statute.

It is worthy to note AT&T's observation, based on the limited historical data available from the record, that as of July 31, 2002, Verizon PA provided local exchange service to approximately [BEGIN PROPRIETARY] [END PROPRIETARY] business customers with annual TBR falling under the \$10,000 threshold. This is equivalent to [BEGIN PROPRIETARY] [END PROPRIETARY] of the [BEGIN PROPRIETARY] [END PROPRIETARY] business customers served by Verizon PA in Pennsylvania. Furthermore, approximately [BEGIN PROPRIETARY] [END PROPRIETARY] access lines associated with those business customers, or [BEGIN PROPRIETARY] [END PROPRIETARY] of those small business lines are located in Verizon PA's Density Cells 3 and 4, which are the most rural parts of Verizon PA's service territory. (AT&T R.Exc. at 8). Based on the significant number of customers that would be affected in the most rural parts of the state, it is imperative that closer scrutiny should be given to that subset of business customers before we deem those business services, which we note include the statutorily protected basic business local exchange service, competitive.

It is also important to note that much of the evidence presented by Verizon PA was overbroad in that it included customers that generate more than \$10,000 in annual TBR. While we disagree with the ALJ's conclusion that evidence regarding the amount of competition for business customers generally is irrelevant in determining the

level of competition for business customers under \$10,000, we are of the opinion that this type of general evidence must be buttressed with evidence that demonstrates more specifically the level of competition for business customers generating less than \$10,000 in annual TBR.

Verizon PA must prove that there is competition for the relevant business market – business customers generating less than \$10,000 in annual TBR. This competition must be sufficiently vibrant to justify deregulating Verizon PA’s rates for services to these customers. Based upon our review of the record evidence, we conclude that Verizon PA failed to provide evidence that more specifically demonstrates the level of competition for business customers generating less than \$10,000 in annual TBR. Therefore, we shall modify the ALJ’s recommendation and deny Verizon PA’s Exceptions consistent with this disposition.

## **2. Availability of Like or Substitutable Services in Each Exchange**

The ALJ adopted the interpretation of Chapter 30 advocated by AT&T, CTSI/Penn Telecom, OSBA and OTS that argued that the relevant geographic area for examining the availability of like or substitute services must be made in each of Verizon PA’s 339 local exchanges, on an exchange-by-exchange basis, rather than Verizon PA’s entire service territory on an all-inclusive basis. (R.D. at 20). Verizon PA objects to the ALJ’s finding that it failed to present sufficient evidence of the availability of like or substitutable services in its exchange-by-exchange analyses of competition. Verizon PA claims that the ALJ’s ruling on this issue is not only difficult and expensive, but contrary to the Commission’s holding in the *Global Order*. According to Verizon PA, the Commonwealth Court, in its decision affirming the *Global Order*, implicitly rejected the challenges that Verizon PA failed to make a service-by-service showing when the Court affirmed the Commission’s ruling to declare the business market competitive. (VZ Exc. at 17).

Contrary to the ALJ's conclusion that the utility was relying on supposition to show the availability of such services in both rural and non-rural exchanges, Verizon PA claims it provided exchange-by-exchange analyses showing how various CLECs are currently operating (*i.e.*, reseller, facilities-based or UNE-based), which services CLECs are currently offering, and an estimate of CLEC penetration at the exchange level. (VZ Exc. at 19). Verizon PA further disputes the ALJ's finding that it presented evidence relating to only 12 of the 95 business services for which it sought competitive classification and argues that the ALJ mistakenly only counted the names of the services listed as representative of each family or group of competitive services. (VZ Exc. at 21). Thus, Verizon PA maintains that it presented ample evidence that CLECs are providing like and substitutable services for all of its business services in all exchanges, and all of those services should be designated competitive under Chapter 30. (VZ Exc. at 21).

In response, the OSBA disagrees that the record contains evidence that all services within the listing of 95 at issue can be categorized as "anchored or derivatives of the anchor" to justify competition. The OSBA argues that Verizon PA's economic argument of multiple products in groups does not illustrate how the 95 services could be grouped to justify the point and that the groupings do not exhaust the listing of all 95 services. The OSBA notes that although Verizon PA explained that the groupings are merely examples provided and not an exhaustive list, it neither explains the extent to which the groupings of services are available from CLECs nor does it name similar services provided by CLECs. (OSBA R.Exc. at 8-9).

The OCA asserts, in its Reply Exceptions, that Verizon PA's position is overly broad and was properly rejected by the ALJ. In addition, the OCA submits that Verizon PA's claim that like or substitutable business services are available in each of the 339 exchanges Verizon PA services is largely unproven and not supported by the record evidence. (OCA R.Exc. at 13).

In its Reply Exceptions, the OTS asserts that Chapter 30 requires findings of the availability of like or substitutable service on a geographic area and exchange basis. Because Verizon PA sought a competitive declaration for business service for its entire service territory, the OTS continues, a detailed analysis on an exchange-by-exchange basis must be made since it cannot be assumed that service which is competitively available, in one or several exchanges, is competitively available in all exchanges. (OTS R.Exc. at 8-15).

CTSI/Penn Telecom submit in their Joint Reply Exceptions that, contrary to Verizon PA's allegation that an exchange-by-exchange analysis is inconsistent with the language of Chapter 30, Verizon PA failed to produce the necessary evidence under Chapter 30, whereby the Pennsylvania General Assembly declared its policy to "[p]romote and encourage the provisions of competitive services by a variety of service providers on equal terms throughout all geographic areas of the Commonwealth," 66 Pa. C.S. § 3001(7); and to "[e]ncourage the competitive supply of any service in any region where there is market demand." 66 Pa. C.S. § 3001(8). (CTSI/Penn Telecom R.Exc. at 13) (emphasis in original).

In the Commission's judgment, an analysis based on groups of "business activities" throughout Verizon PA's entire service territory does little to protect the provision of service to those consumers in more than 100 of those exchanges where Verizon PA maintains more than a 90% market share. (OCA R.Exc. at 11). In this regard, the OCA's witness Dr. Ben Johnson noted in his Direct Testimony that Verizon PA's "one size fits all" approach is not adequate to the extent that market conditions differ geographically. In regard to the requirements of Chapter 30, concerning an appropriate level of disaggregation for service and geographical areas, Dr. Johnson stated the following in his testimony:

The relevant Section, 66 Pa. C.S. § 3005(a)(1), lists specific factors the Commission must consider in deciding whether a telecommunications service will be deemed competitive, but it doesn't define "services" nor does it define the specific market or markets which must be evaluated. Thus, for example while Chapter 30 requires the Commission to consider market share data, it doesn't indicate whether this data should be compiled and evaluated on a statewide basis, on a local exchange basis, or on any other specific basis. In sum, the definition of the appropriate market is left to the Commission's discretion.

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Because competitive conditions may differ across the array of more than 100 telecommunications services covered by Verizon's Petition, the failure to provide evidence concerning each individual service, or at least groups of similar services, represents a very serious gap in the Company's direct case. To the extent competitive conditions are not roughly the same for each of these different services, the broad-brush sort of data offered by Verizon could provide a very misleading impression.

(OCA St. No. 1 Revised at 12-13) (emphasis added).

We agree with Dr. Johnson's analysis regarding the markets to be evaluated. At the same time, it is important to note that the ALJ concluded that, for Verizon PA to meet its burden of proof, it must establish the availability of like or substitute services for each of the 95 business services in each of its 339 exchanges. This means Verizon PA would have the burden of proof on 32,205 items of proof (R.D. at 21). We will not adopt this type of micro-economic approach to defining the relevant geographic market under Section 3005(a)(1) of the Code.

We do not believe the General Assembly, in creating Chapter 30, intended to create such an unreasonable evidentiary standard. Section 3005(a)(1) of the Code requires a finding of "availability of like or substitute services or other activities in the

*relevant geographic area.*” (Emphasis added.) There is no statutory mandate for an exchange by exchange, service by service evidentiary standard. While we find that evidence is not required for each and every exchange, the record must support a conclusion that meaningful alternatives exist in the relevant geographic areas served by Verizon PA. Market share and competitive service availability data for different geographic areas within Verizon PA’s territory are relevant to this inquiry.

Accordingly, it is prudent to apply a more practical, reasonable evidentiary standard that allows for less than an exchange by exchange, service by service analysis. For determining the availability of like or substitute services or other activities in the relevant geographic area, we believe it is reasonable to permit Verizon PA to provide evidence that is broader in scope than a service-by-service analysis. This recognizes the reality of the market place – customers desire to purchase bundled services, and certain services anchor others. It is also relevant that competitors have the ability to provide retail services by reselling Verizon PA’s services or by leasing unbundled network elements from Verizon PA. Thus, we conclude that Verizon PA may reasonably group like or substitute services in presenting its evidence.

In addition, in terms of the relevant geographic market, Verizon PA may present market information by geographic units larger than on an exchange-by-exchange basis. Some potential means of defining the relevant geographic market include by county, by region and by U.S. Census Bureau-defined metropolitan and micropolitan statistical areas. However, the type of geographic unit chosen for the market analysis must be rationally based, consistent with the goals of the statute, reflective of the under \$10,000 TBR customer base, and based on substantial evidence.

We emphasize, however, that a party seeking competitive designation bears the burden of proof of showing the availability of like or substitute services or other activities in the relevant geographic area. Our determinations of such requests and what

constitutes the relevant geographic area as well as appropriate availability if like or substitute services or other activities will be based on a fact-specific analysis of the evidence presented in that particular proceeding.

In the instant proceeding, we also disagree with Verizon PA's assertion that its Attachment 2 adequately provides evidence of competition for each of the major categories of services in each exchange. (VZ Exc. at 20-21). Attachment 2 merely indicates the names of the resellers and includes the general categories of service. We conclude that Attachment 2 is too general for us to reach a determination as to whether the actual services or groups of services offered by the CLECs are "like or substitutable" to Verizon PA's services.

Therefore, we shall modify the ALJ's recommendation and deny Verizon PA's Exceptions, in part, to the extent consistent with this disposition.

### **3. Survey Evidence**

Verizon PA excepts to the ALJ's conclusion that its survey evidence was insufficient evidence to prove that like or substitutable business services are available to business customers generating less than \$10,000 in annual TBR in all of its exchanges. In support of this contention, Verizon PA maintains that: (1) the Business Customer Market Share survey showed that, during the year ending with first quarter 2002, it had a 74% share of the local switched revenue generated by business customers spending less than \$10,000 on services per year; (2) the Rural Customer Survey showed that 21% of the business customers spending less than \$10,000 per year in its rural exchanges are using another provider for local service; (3) 59% of the business customers spending less than \$10,000 per year surveyed have been approached by competitive providers; and (4) survey respondents in 79 of the 339 exchanges included in the two surveys represented that they receive local service from a CLEC. (VZ Exc. at 23; 26). Contrary

to the ALJ's conclusion, Verizon PA claims that survey results based on each exchange and each relevant service is unnecessary and the survey results presented in this proceeding amply support its Petition. (VZ Exc. at 22-31).

As a general proposition, the CLECs and the Statutory Advocates oppose Verizon PA's position on its survey evidence and maintain that the ALJ properly determined that Verizon PA's survey evidence failed to demonstrate that like or substitutable business services are available in all of Verizon PA's exchanges. (AT&T R.Exc. at 16-23; CTSI/Penn Telecom R.Exc. at 16; OCA R.Exc. at 14-23; OSBA R.Exc. at 9-12; and OTS R. Exc. at 14-15).

The OSBA notes that the Verizon PA witness sponsoring the survey was unable to state whether the 96 rural firms were focused or distributed among the 153 exchanges that the survey encompassed. The OSBA claims there is no evidence that the least dense territories were included in the survey or the extent to which those areas were represented. The OSBA also observes that the Rural Business Customer Survey only questioned rural business customers as to whether they have local telephone service from a CLEC or were approached by a CLEC for local service. The Rural Business Customer survey was limited to local exchange telephone service and did not encompass all of the services at issue in this Petition. The OSBA contends that Verizon PA had the opportunity, but failed to survey those business customers on what types of service they were receiving, whether they were receiving services exclusively from a CLEC provider, and whether they were receiving service from a mix of providers. (OSBA R.Exc. at 10-11).

With regard to the Business Customer Market Survey, the OSBA states:

The businesses sampled in this survey covers less of VZ-PA's service territory than in the RBC [Rural Business Customer] survey. A national survey was performed of businesses with less than 500 employees, sampling over intervals of employee size segments and geographic regions. This survey sample was modified to include business customers generating annual TBR less than \$10,000 in the VZ-PA service area. The survey sampled businesses in Pennsylvania with less than 500 employees. After the initial survey, there was further interviewing to determine whether those customers had less than \$10,000 in annual TBR. There is no indication of whether this sub-sample of business customers was determined randomly and, thus whether the results of these interviews are free from bias.

(OSBA R.Exc. at 11-12) (footnotes omitted). The OSBA asserts that Verizon PA never addressed or rebutted this aspect of the survey and it is fatal to the probative value of the survey.

As previously discussed, Verizon PA has the burden of establishing the availability of like or substitute services for the business customers generating less than \$10,000 annual TBR in the relevant geographic area. 66 Pa. C.S. § 3005(1) (See R.D. at 21). However, even applying the more reasonable evidentiary standard, as discussed *infra*, Verizon PA fails to meet its burden of proof.

In our view, Verizon PA's surveys, which were directed to the relevant customer class, are insufficient to meet its burden of proof. It is impossible to tell from the surveys exactly where the customers being served by competitors are located. Therefore, there is no evidence that the least dense territories were included in the survey or the extent to which these areas were represented. The Business Customer Market Share Survey contained responses from less than half of Verizon PA's exchanges with no information regarding the distribution of those who did respond. Accordingly, Verizon

PA has not proven that meaningful competitive alternatives exist throughout its service territory.

Therefore, we shall adopt the ALJ's recommendation on this issue and deny Verizon PA's Exception.

#### **4. Evidence of Viable Competition**

In this Exception, Verizon PA argues that the ALJ erred in finding that it failed to present evidence of viable competitors as its case in chief. In support of this Exception, Verizon PA asserts that it presented credible evidence that numerous CLECs such as AT&T, Comcast and Allegiance, have been competitors for years and continue to operate in its service territories. Contrary to the ALJ's conclusion, Verizon PA asserts that the growing presence of CLECs indicates that financially viable competitors are present in the market. Verizon PA points out that it presented expert testimony showing that despite the fact that some CLECs have succumbed to over-investments, large debt burdens and unwise business expansions, the market as a whole continues to be competitive and thriving. (VZ Exc. at 33). According to Verizon PA, the ALJ failed to consider "substantial evidence that viable competitors are increasingly providing like or substitutable services for all business services in all parts of its service area." (VZ Exc. at 34-35). As such, Verizon PA submits that the ALJ's erroneous conclusion does not warrant rejection of its request.

Similar to the positions articulated during the proceeding, several Parties continue to oppose Verizon PA's argument on this issue. (CTSI/Penn Telecom R. Exc. at 17-18; OCA R.Exc. at 21-23; and OTS R.Exc. at 15-17). Specifically, CTSI/ Penn Telecom explain, in its Joint Reply Exceptions, that:

First, a market open to competition is not equivalent to the presence of “viable” competition. T. 131. In the Global Order, the Commission noted with regard to Verizon-PA’s (then Bell Atlantic-Pennsylvania’s (“BA-PA”)) petition for the designation of intraLATA toll service as competitive that even though BA-PA’s intraLATA toll service is a competitive service, an acknowledgement of the valid concerns of the presiding officer in that proceeding regarding whether the service “will remain competitive in the future.” Global Order at 240. Clearly, the Commission recognized that not only the existence of competition – but the viability or sustainability that said competition – was necessary to designate a service as a competitive service. In this proceeding, even Verizon PA’s witness West conceded in this proceeding that viability invokes a “stricter test” than simple market entry that viability requires the additional factors such as customer recognition.

(CTSI/Penn Telecom R.Exc. at 17).

As such, the CLECs argue that the ALJ properly determined that Verizon PA failed to prove the existence of viable and sustainable competition regarding the provision of business telecommunications services to customers generating less than \$10,000 in annual TBR under Chapter 30. (CTSI/Penn Telecom R.Exc. at 18).

Upon review, we agree with the ALJ’s finding that Verizon PA failed to meet its burden of proof regarding the issue of competitor viability. As previously noted, one of the findings that the Commission must make in declaring that a telecommunications service can be classified as competitive under Chapter 30 is the “presence and viability of other competitors, including market shares.” 66 Pa. C.S. § 3005(a)(1). Verizon PA’s shortcomings on this issue are two-fold: (1) Verizon PA failed to identify and present evidence concerning the relevant business market to support its request, and (2) Verizon PA failed to present evidence of the presence of a viable competitive market share for business customers generating annual TBR of less than \$10,000. While Verizon PA offered the testimony of Dr. West to support its assertion that a viable

competitive market exists, this evidence fails for the simple reason that even the witness conceded that his testimony was not specific to business customers generating annual TBR less than \$10,000, *i.e.*, the relevant business market necessary to support Verizon PA's Petition. (See OSBA R.B. at 3-5; Tr. at 173-75).

Similarly, Verizon PA's claims that competition will continue to thrive despite economic and financial difficulties experienced by CLECs in Pennsylvania are equally unpersuasive. We agree with the OTS that Verizon PA's claim that the remaining CLECs will purchase failing CLECs' assets to strengthen their own network, is highly speculative and inadequate to meet Verizon PA's burden of proof in this regard. (OTS M.B. at 22-25). Verizon PA presented no direct testimony on the issue of competitor viability, but rather only attempted to offer testimony, albeit insufficient,<sup>5</sup> in response to evidence presented by other parties in this proceeding. As the requesting party, Verizon PA failed to present sufficient evidence to show the presence and continued viability of competition for the relevant business market as required by Chapter 30.

Having previously found that Verizon PA's survey evidence is flawed and insufficient to substantiate Verizon PA's claims, we cannot find that such evidence is conclusive of the presence of a viable and competitive market for business customers generating annual TBR of less than \$10,000. Accordingly, we shall deny Verizon PA's Exception on this issue.

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<sup>5</sup> The record shows ranges for competitive carrier penetration rates for the Philadelphia, Philadelphia Suburban, Pittsburgh and Pittsburgh Suburban Exchanges.

## 5. Chapter 30 Unbundling Requirements

Verizon PA objects to the ALJ's conclusion<sup>6</sup> that Verizon PA failed to establish that it met the Chapter 30 requirement that it unbundle each basic service function (BSF) on which a competitive service depends. Verizon PA disputes the ALJ's conclusion, arguing that the ALJ failed to consider evidence establishing full compliance with its Chapter 30 unbundling requirements. Verizon PA notes that the ALJ did not acknowledge its record evidence that the BSFs used to provide telecommunications services to business customers are offered in Verizon PA's Tariffs Pa. PUC-Nos. 1 (General Tariff), 216 (Services for Other Telephone Companies) and 304 (Special Access Services). (Verizon PA Exc. at 35). In addition, Verizon PA argues that the ALJ ignored rebuttal testimony that the majority of its business services can be replicated by purchasing the appropriate Unbundled Network Elements (UNEs) and services unavailable as UNEs are available for resale. (Verizon PA Exc. at 36). In light of the record evidence establishing its compliance with Chapter 30 unbundling requirements, there is no basis in fact or law, in Verizon PA's view, for the ALJ's conclusion with respect to the issue.

MCI disagrees with Verizon PA's objection, arguing that the ALJ properly found that Verizon PA failed to demonstrate compliance with Chapter 30 unbundling requirements. (MCI R.Exc. at 2-6). In particular, MCI notes that Verizon PA conceded

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<sup>6</sup> Conclusion of Law No. 25 states:

Petitioner has not established that it has met the statutory requirements, under 66 Pa. C.S. § 3005(e)(1), that it unbundle each basic service function on which a competitive service depends and make those basic service functions available to competitors under nondiscriminatory tariffed terms and conditions.

in this proceeding that it may not comply with Chapter 30 unbundling requirements if there is not a federal requirement for it to provide UNEs to competitors in Pennsylvania. Specifically, MCI refers to Verizon PA's testimony that Verizon PA will only provide BSFs under Chapter 30 if the Federal Communications Commissions (FCC) maintains unbundling requirements. According to MCI, Verizon PA's requirement to unbundle its network in Pennsylvania is completely independent of any FCC requirements, and Verizon PA must comply with independent state law requirements contained in Chapter 30.

We agree with MCI. Section 3005(e)(1) of Chapter 30 provides that:

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

While Verizon PA implies in its Petition that it may determine to discontinue offering unbundled network elements if the FCC rules abolish the federal requirement to provide UNEs to competitors, we refer the company to the plain language of our *Global Order* wherein we stated, in pertinent part, that:

Chapter 30 provides another source of state law for requiring the unbundling of network elements. BA-PA has obtained competitive classification of several of its local services in accordance with Chapter 30 requirements. Chapter 30 also requires BA-PA to “unbundle each basic service function on which those competitive services depend ...”<sup>7</sup> Thus, to the extent that BA-PA receives and accepts competitive classification of its business services as part of this proceeding, it must unbundle the “basic service functions” on which the

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<sup>7</sup> 66 Pa. C.S. § 3005(e)(1).

“competitive” local service depends. Chapter 30 defines “basic service functions” as “those basic components of the local exchange carrier network which 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.” Currently, BA-PA’s Centrex, Paging, Repeat Dialing, Speed Dialing and High Capacity Special Access services have been declared competitive in Pennsylvania. Therefore, any “basic service functions” used to provide these services must be unbundled. Clearly, loops, switching and transport are part of any Centrex offering. Also, loops and transport are part of special access offering.

Consistent with these parameters, we emphasize that for any telecommunications service for which Verizon PA obtains competitive designation under Chapter 30, Verizon PA is required, independent of other federal requirements, to unbundle BSFs used to provide that local service. If Verizon PA chooses to once again seek a Commission determination that a telecommunications service is a competitive service under Chapter 30, it bears the burden of proof. Specifically, Verizon PA is required to provide in support of its request detailed evidence indicating it has unbundled the BSF for any telecommunications service for which it seeks Commission competitive declaration.

As such, we shall deny Verizon PA’s Exception and adopt the ALJ’s recommendation on this issue.

#### IV. Conclusion

We believe it is important to provide further guidance to the Parties. We note that in this proceeding, the Parties have taken an “all or nothing” approach to this case (*i.e.*, the Petition should be either granted or denied for all of the services in all of the density cells or exchanges). Given the reality that competition is more widespread in some areas than others, it may have been possible for the Commission to declare services or groups of related services competitive in some areas if the Parties had provided guidance on where to draw the geographic line. Since the Parties did not do so, any attempt by the Commission to draw a line could be considered arbitrary and unsupported by the evidence.

Therefore, we encourage the Parties that will be involved in the future litigation of similar cases to avoid the “all or nothing” approach. We believe that not adopting such an approach would be conducive to competition because those geographical areas where the Parties have raised no objections could then have certain services reclassified as competitive offerings in a more expeditious manner.

Based upon our review of the record evidence, we conclude that Verizon PA has failed to meet its burden of proof in its request to reclassify all business telecommunications services to business customers generating less than \$10,000 as competitive services under Chapter 30. (66 Pa. C.S. § 332(a)). As such, Verizon PA’s Exceptions are granted, in part, and denied, in part. The Recommended Decision of ALJ Weismandel is adopted, as modified, to the extent that it is consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Exceptions filed by Verizon Pennsylvania Inc. to the Recommended Decision of Administrative Law Judge Wayne L. Weisman are granted, in part, and denied, in part, consistent with this Opinion and Order.

2. That the Recommended Decision of Administrative Law Judge Wayne L. Weisman, issued January 30, 2003, is adopted, as modified, by this Opinion and Order.

3. That the Petition of Verizon Pennsylvania Inc. for a Determination That its Provision of Business Telecommunications Services to Customers Generating Less Than \$10,000 in Annual Total Billed Revenue is a Competitive Service Under Chapter 30 of the Public Utility Code filed in this case on July 1, 2002, by Verizon Pennsylvania Inc. is denied.

4. That the record in this proceeding be marked closed.

**BY THE COMMISSION,**

James J. McNulty  
Secretary

(SEAL)

ORDER ADOPTED: June 26, 2003

ORDER ENTERED: August 13, 2003