HISTORY OF THE PROCEEDING

Bell Atlantic-Pennsylvania, Inc. ("BA-PA") filed this Petition for a Determination that Provision of Business Telecommunications Services is a Competitive Service Under Chapter 30 of the Public Utility Code on December 16, 1997. Several parties filed answers and motions to intervene, including the Office of Consumer Advocate ("OCA"), the Office of Small Business Advocate ("OSBA"), the Office of Trial Staff ("OTS"), AT&T Communications of Pennsylvania, Inc. ("AT&T"), MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively "MCI"), Teleport Communications Group ("TCG"), Sprint Communications Company L.P. ("Sprint"), ATX Telecommunications Services, Ltd. ("ATX"), the Central Atlantic Payphone Association ("CAPA"), Commonwealth Telecom Services, Inc. ("CTSI"), the Pennsylvania Cable & Telecommunications Association ("PCTA"), the Internet Service Providers ("ISP"), Connectiv Communications, Inc., and Sprint Communications Company L.P.

AT&T filed a motion to dismiss BA-PA's petition on January 5, 1998 due to the broad nature of BA-PA's petition. On January 5, 1998, CAPA filed a partial motion to dismiss the section of BA-PA's Petition which requested competitive classification of Payphone Network Services. BA-PA filed an answer to both motions to dismiss on January 15, 1998.

A prehearing conference was held in this case on February 5, 1998. During the conference, I denied AT&T's and CAPA's motions to dismiss. Also, a schedule was established based on a 270 day time frame.[1]

On February 11, 1998, BA-PA filed its written direct testimony.

On February 12, 1998, BA-PA filed a petition for Commission review and answer to a material question in an attempt to have the Commission require that the case be heard within 180 days rather than 270 days. On February 19, 1998, several parties filed responses opposing BA-PA's petition, including MCI, AT&T, CAPA and OCA. On March 30, 1998, the Commission issued an Order finding that 180 day time limit in 66 Pa.C.S. §3005(a) for concluding a Petition is directory and not mandatory. Accordingly, the Commission ordered that the parties proceed in accordance with the schedule set forth in my Second Prehearing Order of February 20, 1998.

On March 3, 1998, BA-PA applied to me for subpoenas to either take depositions or for the production of documents to be served on all non-party Competitive Local Exchange Companies ("CLECs"). The purpose of the subpoenas was to permit BA-PA to obtain evidence regarding the presence and

[1] The schedule and decision regarding the motions to dismiss were included in my Second Prehearing Order of February 20, 1998.

viability of other competitors (for business telecommunications services), including market shares, the availability of like or substitute services, the relevant geographic area, and the ability of other entities to offer services or activities at competitive prices, terms and conditions. (Application at ¶¶ 3-4). Through a series of three orders, I approved BA-PA's request for subpoenas, with the exception of 11 names withdrawn by BA-PA and one or more CLECs which provided BA-PA with information without the subpoena.

All other parties filed their direct testimony on March 27, 1998. BA-PA filed rebuttal testimony on May 6, 1998. Other parties filed surrebuttal testimony or outlines of oral surrebuttal testimony between May 15 and May 20, 1998. BA-PA filed outlines of oral surrejoinder testimony on May 26, 1998.

Public input hearings were held in Williamsport on March 16, 1998 and in Scranton on March 17, 1998. Thirteen individuals representing businesses, schools, local agencies or associations testified regarding BA-PA's Petition.

Hearings were held on May 27-29 and June 1-2. Overall, twenty witnesses were presented by several parties, including five witnesses for Bell Atlantic, four witnesses each for MCI and AT&T, two witnesses for TCG, and one witness

each for OTS, OSBA, OCA, CAPA, and CTSI. The hearings resulted in a transcript of 1,708 pages of oral testimony; 83 exhibits, including statements of written testimony were admitted into the record.

DISCUSSION

I. Introduction.

By this petition, BA-PA seeks to have the Commission declare competitive all telecommunications services provided to businesses throughout BA-PA's service territory. This would have the effect of eliminating most regulatory oversight of 84 separate services that are identified in BA-PA St. 1, Appendix B. Under BA-PA's view of the case, if this petition is granted, with respect to each of these services, BA-PA will be allowed to raise or lower rates as it desires. BA-PA may also impose new terms and conditions on the use of these services, or may discontinue offering these services. (Tr. 429-431, 462). BA-PA proposes to meet the imputation test of Chapter 30 by aggregating the revenues for all of these services. That is, a proposed rate for a deregulated BA-PA business service would pass the imputation test as long as the revenues for all business services exceed the revenues that BA-PA would realize from the sale of the associated basic service functions to its competitors. Thus, BA-PA would be free to offer some services at below cost as long as others

were priced above cost. According to BA-PA, even a price of zero on a specific service would not flunk this test. (Tr. 339).

When I first saw BA-PA's petition in this case, I was surprised. It seemed to describe a telecommunications market with which I am completely unfamiliar after hearing many cases, over the past two and one-half years, that specifically relate to telecommunications deregulation and competition. I could not begin to imagine how BA-PA planned to establish that all business telecommunications services are competitive throughout its entire service territory. I expressed that opinion to the parties during the prehearing conference. (Tr. 15-16).

Having now presided over this case from the prehearing conference through briefing, I conclude that BA-PA has not come close to establishing the major fact that it must establish to prevail here, namely, that there is effective competition for business services throughout BA-PA's service territory such that BA-PA would be unable to sustain price increases for its services. BA-PA's presentation on the issue of competitive presence does not withstand even the most cursory review. For this reason, I recommend denying this petition.

I also urged BA-PA to present evidence in support of partial relief (i.e., a grant of competitive status limited to certain services, customers, or geographic areas). (Tr. 17-18). BA-PA has not made such a presentation. As will be discussed further, BA-PA is now asking for partial relief based on certain record evidence, if full relief is not granted. For reasons that I will discuss, I also recommend that partial relief not be granted here.

Because I believe that BA-PA has failed to establish the primary fact that it needs to establish, I will not discuss in minute detail every argument made by the parties. I will, however, attempt to touch on more important issues that may be revisited in other cases in the future.

One other point is worth mentioning here. BA-PA's petition has one attractive feature. It presents an opportunity to bring about politically unpopular, but economically necessary, rate rebalancing under the guise of promoting competition. While this result may have something to recommend it, conditions in Pennsylvania are such that granting the petition now is likely to result in almost immediate rate rebalancing, but very little competition (which might serve to restrain rural rates) any time soon.

II. The Statutory Criteria.

This proceeding is governed by 66 Pa.C.S. §3005, which provides:

> **(a) Identification of competitive service.--**The commission is authorized to determine, after notice and hearing, whether a telecommunications service or other service or business activity offered by a local exchange company is a competitive service. A local exchange telecommunications company may petition the commission for a determination of whether a telecommunications service or other service or business activity offered is competitive, either in conjunction with a petition to be regulated under an alternative form of regulation or at any time after the granting of the petition. . . . In making the determination, the commission shall consider all relevant evidence submitted to it including evidence presented by providers of competitive services. In a proceeding to determine whether a telecommunications service or other service or business activity offered is a competitive service, the following shall apply:
>
> (1) The commission shall make findings which, at a minimum, shall include evidence of ease of market entry, including the existence and impact of cross-subsidization, rights-of-way, pole attachments and unavoided costs; presence and viability of other competitors, including market shares; the ability of competitors to offer those services or other activities at competitive prices, terms and conditions; the availability of like or substitute services or other activities in the relevant geographic area; the effect, if any, on protected services; the overall impact of the proposed regulatory changes on the continued availability of existing services; whether the consumers of the service would receive

an identifiable benefit from the provision of the service or other activity on a competitive basis; the degree of regulation necessary to prevent abuses or discrimination in the provision of the service or other activity and any other relevant factors which are in the public interest. . . .

(2) The burden of proving that a telecommunications service or other service or business activity offered is competitive rests on the party seeking to have the service classified as competitive.
. . . .

(e) Additional Determinations.--The commission shall determine whether local exchange telecommunications companies are complying with the following provisions:

(1) 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 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.

(2) The price which a local exchange telecommunications company charges for a competitive service shall not be less than the rates charged to others for any basic service functions used by the local exchange telecommunications company or its affiliates to provide the competitive service. Revenues from the rates for access services reflected in the price of competitive services shall be included in the total revenues produced by the noncompetitive services.

Thus, before any other issues may be addressed, it is first necessary to determine if the record supports findings favorable to BA-PA for each of the following criteria:

> 1. 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; and,
>
> 8. The degree of regulation necessary to prevent abuses or discrimination in the provision of the service or other activity and any other relevant factors which are in the public interest.

III. Burden of Proof.

Pursuant to 66 Pa.C.S. §3005(a)(2), BA-PA, as the petitioner seeking a competitive declaration for all of its

business telecommunications services, has the burden of proving the competitiveness of these services. BA-PA argues in its reply brief that although BA-PA bears the burden of proof of competitiveness, once the party with the burden of proof has introduced evidence which would support a finding in its favor, the burden of going forward swings to its opponents, citing Pa. Pub. Util. Com. v. Citizens Util. Water Co., 169 P.U.R. 4th 552 (1996). While BA-PA's comment is true as far as it goes, it stops short of acknowledging, as it must, that while the burden of going forward shifts, the burden of proof does not. It always remains on the party whose duty it is to establish a particular fact. Replogle v. Pennsylvania Electric Co., 54 Pa. PUC 528, 530 (1980).

In fact, to shift the burden of going forward, the party with the burden of proof must present a prima facie case in support of its claims. When a prima facie case has been established, the burden of going forward shifts. A prima facie case, however, is insufficient to win if the opponent produces evidence which is coequal to that produced by the party with the burden of proof. Replogle, 54 Pa. PUC at 530.

The Supreme Court has also determined that the party with the burden of proof must do more than just establish a prima facie case. The party with the burden of proof must meet that burden with evidence which proves its cause of

action of such weight as to preclude all reasonable inferences to the contrary. In the case of a claim of overbilling by a utility customer, the Supreme Court stated:

> Whereas a litigant establishes a prima facie case by producing enough evidence to support a cause of action, the burden of proof is met when the elements of that cause of action are proven with substantial evidence which enables the party asserting the cause of action to prevail, precluding all reasonable inferences to the contrary. [Citations omitted.]

Burleson v. Pa. P.U.C., 501 Pa. 433, 437, 461 A.2d 1234, 1236 (1983).

Thus, BA-PA bears the burden of establishing facts necessary to support the required findings by substantial evidence.

IV. BA-PA's Case.

BA-PA's argument is support of its petition is set forth succinctly at pages 1 through 4 of its main brief:

> Chapter 30 of the Public Utility Code permits competitive classification "of a telecommunications service or business activity" where there is sufficient evidence of: the ease of market entry, the presence and viability of competitors (including market shares), the ability of those competitors to offer the service or activity at competitive prices, terms and conditions, and the availability of like or substitute services or activities are available throughout the relevant geographic area. The business telecommunications market in Pennsylvania today meets all these criteria – in fact, the growth of competition in this market is explosive and continues to accelerate. ` Bell Atlantic - Pennsylvania, Inc.'s ("BA-PA") petition should therefore be granted.
>
> Chapter 30 removed the legal barriers to entry into the local exchange market, and, by expeditiously implementing the local competition provisions of the federal Telecommunications Act, the Commission has removed the last significant economic barriers to entry. As a result, the pace of competition for all telecommunications services -- but particularly in the provision of business telecommunications services -- has accelerated dramatically in terms of competitors' geographic presence and rate of market share growth.
>
> Virtually all (94%) business access lines in BA-PA's service territory are served by a wire center where at least one local competitor is present. Three quarters (76%) are served by wire centers where a facilities-based competitor is located. Thus, BA-PA's competitors are present throughout the geographic area

where business customers are found. The rapid growth of competition is also reflected in the increases in the minutes of use BA-PA has exchanged with CLECs, and the resold lines, unbundled loops, and ported numbers BA-PA has provided to CLECs. In fact, ***every quantitative measure of competitive activity presented in this case shows dramatic, double-digit growth*** since this Petition was filed late in 1997. BA-PA's competitors are thriving by pursuing a strategy of offering comprehensive packages of telecommunications services to business customers. This permits them to make the most of two advantages they have over BA-PA. First, they can offer pricing plans that are tailored to customers' needs—discounts based on aggregate revenue or "free" local calling, for example. Second, they can enhance their offerings by including services BA-PA is not permitted to offer, such as interLATA and wireless services.

Large, medium, and even smaller-sized business customers (those who spend $10,000 annually on local exchange, intraLATA toll, and special services) have access to competitive "one-stop-shopping" alternatives *throughout* BA-PA's service territory, and have for many years. But the competitive activity is not limited to these customers. Competitors are providing competitive telecommunications packages to smaller businesses as well. **[PROPRIETARY MATERIAL REMOVED]**

The presence of competitors in nearly every wire center serving business customers, their viability as demonstrated by the robust growth in their market shares, their access to unbundled network elements, their ability to purchase BA-PA services at a discount for resale to aggregated customers, the competitiveness of their service packages, and customers' increasing demand for "one-stop-shopping"

and tailored discounts, taken together, ensure that competition will constrain BA-PA's ability to raise prices for business telecommunications service above market levels

Despite the foregoing evidence of competition, the existence (if not the sufficiency) of which is largely undisputed, BA-PA's competitors allege that a variety of conditions constitute insurmountable “barriers to entry” which prevent CLECs from competing effectively with BA-PA. However, none of these purported “barriers” amount to anything more than inconveniences or the result of what can only be described as disingenuous regulatory posturing. Moreover, the competitors’ protests that the obstacles to entry are insurmountable cannot be reconciled with the explosive growth in the market shares of competitors like **[PROPRIETARY MATERIAL REMOVED]** in just five months.

In addition to demonstrating that the provision of business telecommunications service qualifies for competitive classification, BA-PA has shown that its provision of business services complies with the competitive safeguards and other requirements of Chapter 30. The only serious dispute relates to the level at which the imputation analysis should be performed. Both BA-PA's and AT&T’s economic experts agreed, however, that imputation should be applied at the same market level that the competitive analysis occurs—here, all business telecommunications service provided throughout BA-PA's service territory. Imposing imputation at a more disaggregate or geographically-partitioned level will increase distortions inherent in Chapter 30’s imputation standard, reduce BA-PA's ability to compete on the basis of price, and thus deprive business customers of the full benefits of competition.

> The record convincingly demonstrates that competition in the business telecommunications market is fully entrenched in Pennsylvania, at all customer sizes and all geographic areas. Granting BA-PA's Petition would further unleash the competitive pressure necessary to ensure that the full benefits of competition are available to all business customers. BA-PA's Petition should therefore be granted. (Footnotes omitted; emphasis in the original.)

The major premise of BA-PA's argument is that certain statistics show that there is viable competition for all kinds of business telecommunications services throughout all of its service territory in Pennsylvania, and that therefore the statutory criteria are met (i.e., because there is competition, there must be competitors, there must be ease of market entry for all services, the competitors must be able to offer these services at competitive prices, terms and conditions, etc.). As we shall see, however, BA-PA's statistics tell much less than the whole story about the state of local telephone competition.

V. The Relevant Market.

BA-PA argues that the "relevant market" for the purpose of evaluating its petition is all business services throughout its entire service territory. All other parties oppose such a broad market definition. Aside from bare claims that telephone customers frequently want to buy "bundled

service," that some of these "bundles" are substitutable for others, and that there are large customers with locations across Pennsylvania that would like to purchase telecommunications services for all their locations in one package, BA-PA has produced no credible evidence to support its proposed market definition. BA-PA has produced no evidence that any one of its competitors (or, for that matter, all of them combined) can offer the entire range of services for which it seeks competitive designation. It has offered no evidence to show the extent or nature of competition that it faces in particular geographic areas. It has offered no evidence to show how specific services available from its competitors may be substituted for BA-PA's services. (Tr. 327). It has offered no evidence of the specific needs of different classes of telecommunications customers.

While I am not unsympathetic to BA-PA's desire to be able to bid on large contracts with multi-location customers who have diverse telecommunications needs, and while I might be convinced by an appropriate showing that BA-PA could be accorded more flexibility with respect to such contracts, BA-PA's petition goes well beyond providing it with flexibility for such customers. All of BA-PA's opponents argue that each of BA-PA's 84 services should be considered separately. While I do not necessarily agree that each service must be

considered on its own, the fact that BA-PA has not attempted to show that particular services are competitive makes such a granular review impossible.

OTS argues that at least business local exchange service ("BLES") should be considered separately because it is a "protected service" under 66 Pa.C.S. §3002, and because BLES is a stand-alone service that accounts for approximately **[PROPRIETARY MATERIAL REMOVED]** of BA-PA's business telecommunications service revenue. (OTS M.B. at 11). I agree with these points, and also note that local exchange service is the cornerstone service for any provider of telecommunications services. It is unlikely that any provider of any local telecommunications service will render any optional or toll services (except for interLATA toll, which BA-PA cannot now render), unless it is first rendering local exchange service. Notwithstanding BA-PA's listing of 84 services, deregulation of BLES clearly is at the heart of this case. For these reasons, I conclude that local exchange service should be the focus of this discussion.

VI. Presence and Viability of Competitors.

When it filed its initial testimony, BA-PA made no effort to quantify the extent of competition that it faces at particular points within its service territory. Instead it relied on broad claims that there are numerous companies offering services to businesses, that many CLECs have been certificated, and more are awaiting certification, that there is a considerable amount of advertising by competitors, that competitors' market shares had experienced rapid growth in the recent past, and that competitors were installing fiber optic cables in large quantities, as well as switches. (See generally, BA-PA St. 1). While all of these factors are interesting, and perhaps entitled to some weight, they are not substitutes for data regarding the extent to which competitors are actually rendering service to different kinds of business customers in different areas of BA-PA's service territory.

Rather than addressing the statutory criterion of "market share," BA-PA has focused on the "growth" of its competitors' market shares. BA-PA's reliance on "growth" of market shares, as opposed to actual market shares, is comically transparent. Because BA-PA's competitors are starting out with market shares at or near zero, any growth will look huge simply because the starting number is small. Even BA-PA's "policy witness" agreed that a high rate of

growth can simply reflect the fact that the starting market share was small. (Tr. 375).

BA-PA also conveniently neglects to state its own market share. For example, the data provided by BA-PA in Appendix I to its main brief concerning the number lines served by competitors shows that competitors are serving approximately **[PROPRIETARY MATERIAL REMOVED]** lines.[2] However, BA-PA itself served **[PROPRIETARY MATERIAL REMOVED]** as of the beginning of this year. (OCA St. 1.0 at 21-22). Thus, BA-PA's competitors, despite their significant growth over the past two years or so, control about four percent of the business lines, as compared to BA-PA's 96 percent. Not one of BA-PA's competitors serves more than a de minimis amount of the BLES market.

Similarly, the traffic exchange data that BA-PA cites as allegedly demonstrating a high level of competition in the market looks impressive only if not compared to BA-PA's own traffic. BA-PA claims that it exchanged more than 1.3 billion minutes of billed traffic with CLECs during 1997. (BA-Pa St. 1.0 at 23). However, 1996 ARMIS data showed that BA-PA itself carried approximately 88 billion dial equipment minutes of local traffic. Thus, even without the growth in BA-

[2] The validity of at least some of this data has to be questioned because one of the carriers counted is WinStar Wireless. It is not clear that it renders wireline service at all.

PA's own traffic that undoubtedly occurred in 1997 over the previous year, the 1.3 billion minutes that BA-PA claims to have exchanged with CLECs is less than 1 1/2 percent of its own local traffic. (AT&T Stmt. 1.0 at 27-28).

Another statistic that BA-PA offered in support of its petition is a claim that "48 percent of the measurable expenditures made by Pennsylvania businesses on intrastate (interLATA, intraLATA and local) wireline and wireless business telecommunications services in BA-PA's serving area are for services provided by BA-PA competitors." (Emphasis supplied). (BA-PA St. 3.0 at 18). This is an impressive statistic, until you think about it for a second or so. Wireless service is not at issue here. InterLATA toll is not at issue here. IntraLATA toll has been subject to competition for longer than local service, and was subject to presubscription almost one year ago. This number says absolutely nothing about BA-PA's share of the revenues from BLES, which, as the OTS argues, is at the heart of this case.

The same witness who sponsored the 48 percent revenue figure also sponsored some two studies that purport to support BA-PA's claims. I will not dwell in depth on these. In my view they are no more credible as indicia of actual competition throughout BA-PA's service territory than are BA-PA's market share "growth" statistics. For example, in the

second study, the participants were asked if they thought that BA-PA should be allowed to offer discounted pricing packages. It is no surprise, and of little evidentiary value to this proceeding, that almost 98 percent answered "yes" to that question; the only surprise is that a few survey participants answered "no." In general, I agree with the comments of parties such as OSBA (M.B. at 13-15) and MCI (M.B. at 11-13) regarding the invalidity of these studies.

One other comment needs to be made here. As discussed in the history of this case, BA-PA sought and received 60 to 70 subpoenas to obtain from non-party CLECs information regarding their operations in Pennsylvania. Despite this discovery, BA-PA has offered no more quantitative evidence regarding its competitors than it has cited in its main brief. BA-PA implies, at page 13 of its main brief, that it was less than successful in pursuing such information. To my knowledge, only one company, NEXTLINK, objected to the subpoenas. NEXTLINK eventually furnished at least some information, as evidenced by BA-PA's main brief. The lack of information offered by BA-PA on this critical issue, rather than evidencing lack of cooperation, evidences lack of competition. Moreover, if BA-PA did not have enough time to pursue sanctions against non-responding companies, or to analyze the information received, it has only itself to blame,

because it has insisted on an accelerated schedule to this case while waiting until after it filed its direct testimony to even seek the subpoenas that it used to obtain competitor information.

The evidence submitted by BA-PA initially on this issue is woefully inadequate to establish that there is competition for its business services throughout its service territory. In its direct testimony, the OTS attempted to quantify the level of competition in each of BA-PA's wire centers. After OTS filed its direct testimony, BA-PA filed a study of its own that attempted to discredit the OTS study. These two studies, which have more to say about the level of competition throughout BA-PA's service territory, will be discussed below.

A. Methods of Competition.

Before discussing in detail the existence of competition throughout BA-PA's service territory, it is necessary to explore the kinds of competitors that BA-PA can face in any given market.

There are four basic ways that a competitor can take a customer from BA-PA:

1. The competitor can simply purchase BA-PA's service at the mandated discount for resale;

2. The competitor can lease from BA-PA the customer's loop and switch (the unbundled element platform, or the "UNE-P");

3. The competitor can lease from BA-PA the unbundled element ("UNE") loop;

4. The competitor can provide service over its own facilities, or by the use of special access, thereby precluding the need for either BA-PA's loop or its switch;

Each of these methods of competition has certain ramifications which require additional explanation. One ramification that I will not explore is the complaint of several parties that BA-PA's resale and UNE rates are too high. While this may be the case, the Commission has found those rates to be reasonable. I conclude that I must accept as valid the Commission's rulings on those rates for the purpose of this proceeding, because there was not sufficient

time in the course of this case to explore in detail the reasonableness of those rates.

1. Resale.

Resale, because it requires no facilities, also requires no capital investment. It thus has the broadest possible application. On the other hand, it carries certain disadvantages. A "competitor" is unable to differentiate its offering from BA-PA's on quality, is unable to introduce innovative services, and cannot assert price pressure on BA-PA, since BA-PA dominates the reseller's cost structure. (TCG St. 1.0 at 7). In fact, for all customers in the aggregate, BA-PA makes more on resold service than a reseller makes. (Tr. 352). Moreover, if this petition is granted, BA-PA would essentially be free to change its retail prices at will, with only minimal informational notice to the Commission. Under those circumstances a competitor seeking to resell BA-PA's service could not be certain from day to day of its actual costs of providing that service to end users, since the underlying discounted costs that it paid to BA-PA would fluctuate as BA-PA changed its retail rates. (AT&T St. 1.0 at 23). This fact leads to some interesting results.

On the one hand, BA-PA could force a reseller out of business simply by lowering its retail rate; while the amount that the reseller would have to pay BA-PA for the service would decline, the reseller would also have to lower its rate to remain competitive with BA-PA. This would reduce the

amount that the reseller had left to cover its own costs. On the other hand, the presence of a reseller does little to prevent BA-PA from raising its rates, at least those that are below cost. In a geographic area where there are no facilities based carriers and where rates are below costs, BA-PA can raise its rates to the level of its costs, before those rates will attract facilities based carriers, and the presence of resellers will not stop that from happening. (Tr. 1280-1281). BA-PA's rate for dial tone line service for multi-line business service in Density Cell 4 does not cover the cost of the service. (Tr. 421-422). Density Cell 4 covers the least dense geographic areas in BA-PA's service territory. (Tr. 489). Clearly, if BA-PA's petition is granted, the presence of resellers is unlikely to restrain rates at least in the rural areas, and resellers may not present viable competition for BA-PA in the long run.

During the hearings, a BA-PA witness, Harry Shooshan, opined that it would be impossible for BA-PA to raise rural rates while lowering urban rates because CLECs would be able to aggregate traffic for purposes of reselling a BA-PA individual case basis contract. (Tr. 1085). Thus, according to Mr. Shooshan, a CLEC could undercut a BA-PA price increase to small business customers in Density Cell 4 by aggregating the traffic of those customers for purposes of

obtaining for resale at a wholesale discount a BA-PA customer specific contract offered to a large customer with locations in different density cells. (Tr. 1131-1133). In response to an inquiry that I made (Tr. 1153-1154), after the hearings were held, BA-PA stated that, as a condition for relief in this proceeding, it would be willing to file, under proprietary protection, redacted copies of customer specific contracts so that they are available to prospective resellers who may want to resell the contracts to "similarly-situated customers with the same cost and other characteristics." BA-PA also reserves the right to demonstrate, under the standard set forth in Section 252 of the Telecommunications Act, that its avoided costs for these individual contracts differ from its avoided costs generally, and to use these avoided costs to develop a different wholesale rate discount for these customer-specific contracts.[3] Because BA-PA's offer came after the hearings were held, there is no record concerning the qualifiers in the offer (i.e., "similarly situated," "with the same cost and other characteristics," and different avoided costs). While I do not conclude that these are

[3] Letter dated June 9, 1998 from J. Conover, V.P. & General Counsel, Bell Atlantic - Pennsylvania, Inc., to Hon. M. Schnierle, Administrative Law Judge, Pennsylvania Public Utility Commission. Since the resale provisions of the Act apply to all local exchange carries, BA-PA would expect that other carriers would also be required to file summaries or redacted [copies] of customer contracts and that BA-PA would have the ability to resell those

unreasonable conditions, there is simply no evidence to show how they might operate in practice. Thus, it is impossible to predict with certainty that such resale opportunities would restrain price increases in rural areas. At minimum, considering that the cost of service in rural areas tends to be higher than in urban areas, it is likely that BA-PA would resist an attempt to resell a customer specific contract from, say, Density Cell 1, in Density Cell 4, because the cost characteristics are different. Without a record on this point, I cannot recommend that the Commission rely on this theory and BA-PA's offer to find that there is competition throughout BA-PA's service territory.

As a practical matter, as a percentage of the entire market, there is a negligible amount of resale occurring today in BA-PA's service territory. More than two years after the passage of the Telecommunications Act of 1996, CLECs are reselling services to only approximately 1% of BA-PA's business customers. (OCA St. 1S at 37).

2. UNE-P.

It is helpful to describe how UNEs may be used to bypass an incumbent local exchange carriers's ("ILEC")

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contracts to similarly situated customers. AT&T has already committed to make such contracts available to BA-PA. *Id.*

network.[4] Two UNEs that are essential to local service are the loop (the line to the customer's phone) and the switching element used to serve the customer. A CLEC can lease a customer's loop and connect it to its own switch; in this case, the customer's traffic, including toll, no longer goes through the ILEC's switch. A CLEC, besides leasing the loop, can also lease that portion of an ILEC's switch that is used by the customer. If a CLEC leases the switch, it pays the ILEC for the switch, as well as for the loop. When leased together, the combined UNEs are often called the platform, or "UNE-P." I will use this terminology throughout this decision. UNE-P is not the same as resale because it allows the CLEC to offer services that the ILEC itself does not offer. (AT&T ST. 1 at 22). Also, under the Telecommunications Act, it is priced differently. (Tr. 528-530).

When the Federal Communications Commission (FCC) first issued regulations pertaining to UNEs, it required ILECs to offer the loop and switch as the UNE-P. Later, the Eighth Circuit Court of Appeals invalidated that portion of the FCC regulations that required ILECs to offer the UNE-P. Iowa Utilities Board v. Federal Communications Commission, 120 F.3d

[4] For an extended explanation of the meaning and use of UNEs, the reader is referred to the various decisions in the MFS Phase II and MFS Phase III proceedings at A-310205F0002.

753, 813 (8th Cir., 1997), as amended on Partial Grant of Rehearing October 14, 1997.

At this time, there are no customers being served in BA-PA's service territory by the UNE-P method. As far as BA-PA is aware, no CLEC is purchasing unbundled switching or unbundled local transport from BA-PA. (Tr. 322). For this reason, I conclude that the UNE-P is not a viable means of competing with BA-PA at this time. Although I need not further discuss UNE-P because it is not now being used to render service, I will mention a few points that were discussed on the record, as this may assist the Commission, the ALJ, and the parties in the upcoming proceeding on UNE rates (if the customary naming convention is followed, this will be called "MFS Phase IV", at docket number A-310203F0002).

BA-PA is interpreting the Eighth Circuit decision as follows. Ordinarily, a customer's loop is connected to the switch through a distribution frame. If a CLEC wants to serve the customer by the UNE-P, instead of allowing the existing connection to remain in place, BA-PA requires the CLEC to lease from BA-PA collocation space. BA-PA will then provide wires from the distribution frame to the collocation space, and additional wires from the collocation space to the switch. The CLEC will then "recombine" the elements itself in the

collocation space. In offices where BA-PA has space available for physical collocation, the CLEC will actually enter the collocation cage to make the physical connection. (AT&T St. 4 at 12-14; Tr. 747-749).

In offices where there is no space available for physical collocation, CLEC personnel are not allowed to enter the office to make the connection. To remedy this situation, while keeping within the letter of the Eighth Circuit decision, BA-PA has proposed a solution apparently inspired by Rube Goldberg. Namely, the virtual collocation space will be occupied by a robotic connection frame. After BA-PA has connected the loop and the switch to the robotic frame, the CLEC will use a computer to remotely operate the robot mechanism and the robot will make the final connection, thereby enabling at least superficial compliance with the Eighth Circuit decision, while also keeping with the rule that precludes the CLEC from actually entering BA-PA's office to work on virtually collocated equipment. (Tr. 539-541, 751-753).

During the hearings, an AT&T witness proposed, for the first time, an alternative solution to BA-PA's, to allow the CLEC to recombine the loop and switch without going through the expense and complexity of collocation. This would involve allowing the CLEC to remotely access software control

of the switch, as BA-PA itself does when it turns on a customer's service or makes changes to that service. (Tr. 572-574). This solution was not explored in depth because it was injected into the proceeding too near the end of the hearings.

Before commenting on the legal and technical aspects of the UNE-P, it is also useful to explore the economic aspects. The CLECs claim that the UNE-P is overpriced, and that BA-PA's collocation requirements make it financially impractical to render service using UNE-P. (AT&T M.B. at 21-34). BA-PA responds that the UNE-P is just a way of letting the CLECs purchase service for resale at a better price. (BA-PA R.B. at 30-32). The reality is neither, but involves the relationship between costs and retail rates of the ILECs, like BA-PA. As explained in more detail at pages 18-22 and 56-57 of my recent decision in Generic Investigation of Intrastate Access Charge Reform, I-00960066 (issued June 30, 1998), while purchasers of UNEs will not have to pay access charges, that is not true of CLECs who provide service by reselling an ILEC's service. Resellers, unlike the purchasers of UNEs, are not paying for access when they purchase local service for resale. BA-PA, and other ILECs, clearly do not like the idea of UNEs, especially the UNE-P, and for good reason. If an ILEC is required to provide a UNE loop or the UNE-P, it loses

that customer's access revenues. On the other hand, ILECs are not as hostile to providing service for resale at a wholesale discount off their retail rates; when providing service for resale, the ILEC continues to collect access charges. Obviously, if access charges decrease and basic service rates increase, the retail rates for basic service will approach the UNE rates, making UNEs more attractive as a way to serve customers. At the same time, because access charges, and thus revenues, will decline significantly, the ILECs' animosity toward UNEs, and the UNE-P in particular, should also decline.

It seems to me that the Eighth Circuit decision is an unfortunate attempt to impose a legal solution on an economic problem (the imbalance of rates and costs). Similarly, BA-PA's collocation requirements for UNE-P are a misguided engineering solution to the same problem. Frankly, from a purely technical standpoint, it makes no sense to require collocation cages (in the case of physical collocation) or robotic connection frames (in the case of virtual collocation) to solve an economic problem. Moreover, BA-PA's approach to this not only imposes unnecessary costs on the CLECs seeking to use UNE-P to serve customers, it also wastes collocation space for no good reason.[5] On the other

[5] AT&T resorts to rather lurid language in describing BA-PA's collocation requirement, describing it as "ripping the network apart." (Tr. 583). While this kind of language is overly dramatic, and, consequently not very helpful,

hand, given the current rate structure, it should not be surprising that BA-PA is trying to protect its access charge revenue stream.

UNE-P should be made available at a reasonable cost to facilitate entry in rural areas. As discussed below, facilities based competitors are unlikely to invest in switches and their own loop facilities in rural areas, simply because the number of available customers does not justify the expense. However, in the long run, society would be better served by first addressing the rate imbalance problem. This might avoid imposing counterproductive legal or technical solutions on an economic problem arising from the historic regulation of phone service. After rates have been brought more in line with costs, if BA-PA continues to resist providing UNE-P in a rational fashion, the Commission should order that it be provided without the requirement of collocation or robotic connection frames. (While BA-PA insists that the Eighth Circuit decision precludes even the state commissions from ordering an ILEC to rebundle the service, it acknowledges that the state commissions probably have the authority to decide the manner in which an ILEC must

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the fact remains that BA-PA's interpretation of the Eighth Circuit order serves no legitimate technical purpose.

allow a CLEC to rebundle UNEs. See BA-PA M.B. at 32-36, and especially note 78 on page 33).

3. Unbundled loops.

In this case, a CLEC purchases from BA-PA only the customer's unbundled loop(s). The loops are disconnected from the BA-PA switch and connected to the CLEC's own switch. This has the obvious advantage to society of increasing switch capacity in the telephone network. It also obviously allows the CLEC to offer services that are not offered by the ILEC, and reduces the CLEC's dependence on the ILEC. For these reasons, it is a superior method of competition as compared to resale or UNE-P. There are, however, certain other prices to pay.

First, it takes six to nine months to install, test, and begin to use a switch. (Tr. 530-531, 766). When a competitor purchases unbundled loops from Bell Atlantic, it must establish collocations in order to access those loops. Collocations are not cheap, and do not occur quickly. Even under the best of circumstances, establishing a fully functioning collocation will take several months, with physical collocations taking approximately 150 days. (Tr. 608-609, 790-793). The cost of each collocation space runs between $50,000 and $64,000. (Tr. 532-533, 609). Clearly, a CLEC will not install a switch unless it expects to obtain

enough traffic to justify it. Because of the smaller number of customers, it is unrealistic to expect that competition will arise in rural areas by this method.

BA-PA points to CTSI as a company that is competing for small business customers in rural areas. (BA-PA M.B. at 16-17). However, CTSI renders service using partitioned switching capacity purchased from Commonwealth Telephone, an affiliated ILEC, to provide service in competition with BA-PA. CTSI is assisted in providing service because it does not need to purchase a costly switch outright and can share a switch with an ILEC. (Tr. 1625, 1628-30). The presence of CTSI does not establish that, in general, the purchase of unbundled loops for connection to a CLEC switch is a viable method of competing for rural customers.

A BA-PA witness, Dr. Taylor, an economist, posited that a CLEC could serve an area 50 miles in radius from one switch. (Tr. 1287). He was unable to discuss in any detail technical problems which might arise when using a switch in this fashion. At least, there would be a need for fiber optic lines and the associated electronics to carry loops from remote areas back to the switch. (Tr. 1289-1290). In my view, this testimony does not establish that a CLEC can easily offer local service anywhere within 50 miles of an installed switch.

4. Service by a CLEC over its own facilities or using special access.

While UNEs are important to competition, it is also necessary to understand that UNEs are not required to provide competition for access revenues. For business customers who have sufficient telephone traffic, there are other strategies that a competitor may use to displace the ILEC as the service provider.

Perhaps the most ubiquitous form of this competition is the CLEC that constructs a fiber optic ring in an urban area and connects it to its own switch. TCG is an example of such a carrier. (TCG St. 1 at 5-6, Att. A). Customers whose locations are on such a CLEC's fiber ring ("on-net" customers) can be served directly without loops or switches from BA-PA. Nevertheless, even for these customers, the CLEC must collocate with BA-PA at one point in each LATA simply to interconnect its network with BA-PA's network. (Tr. 696-697).

Such a CLEC can also serve "off-net" customers, i.e., those located at a distance from its fiber ring, by leasing facilities from BA-PA to reach that customer. For small customers, the CLEC would lease loops from BA-PA. For larger customers, the CLEC would lease high capacity circuits,

like T-1s, from BA-PA or some other provider. In these latter cases, the CLEC would have to collocate with BA-PA in order to receive the loops or T-1 circuits. (TCG St. 1 at 7-8; Tr. 1352-1355). Obviously, this method of competition, like the use of unbundled loops, requires a CLEC to invest in a switch, and purchase at least one collocation site from BA-PA in each LATA, as well as to install a fiber ring to reach the potential customers.

A variation on this theme is the method of operation employed by CTSI. Sometimes, CTSI leases unbundled loops or high capacity circuits from BA-PA and transports them back to switches that it shares with Commonwealth Telephone. For large customers who are in BA-PA territory adjacent to Commonwealth Telephone territory, CTSI may build its own high capacity circuit to bring a customer's traffic back to the shared switch. (Tr. 1624-1627, 1638). Generally, CTSI builds its own facilities only to serve large customers, i.e. those with 20 lines or more. (Tr. 1628, 1638). If there is a small customer along a CTSI line to a large customer in BA-PA territory, CTSI will offer to serve that smaller customer if it has sufficient capacity on the line, if the electronics are not too expensive, and if the additional line to the smaller customer is short. It is simply too expensive for CTSI to build long lines to reach small, i.e., three or four line,

customers. (Tr. 1641-1642). BA-PA acknowledged the economic reality of this situation. In a rural area where there is a large customer, a CLEC may come in and install fiber facilities to serve that large customer, which may also provide a competitive alternative for small customers in the immediate vicinity. Small customers in rural areas without a large attractive customer would be unlikely to have such alternatives. (Tr. 390-392).

AT&T also has a variation on this theme, called "Digital Link" service. AT&T uses a long distance switch to provide both local and toll service to a customer. (Tr. 550). Because the long distance switch cannot provide a dial tone, a customer using Digital Link service must be able to provide its dial-tone either through its own PBX or BA-PA Centrex service. Now, there is a second limitation that AT&T is attempting to fix: certain kinds of outgoing calls, including 800 calls and 911 calls, must go through BA-PA (Tr. 550). AT&T markets Digital Link to customers that have sufficient traffic. Such a customer would be buying **[PROPRIETARY MATERIAL REMOVED]**. (Tr. 1453-1455). The main economic incentive for AT&T to offer, and customers to purchase, Digital Link service is to avoid BA-PA's toll access charges. (Tr. 1459-1460).

BA-PA attempts to portray Digital Link service as a major competitive threat, because it is available throughout BA-PA's service territory (Tr. 1453), and because AT&T has offered its dedicated access customers Digital Link local service in exchange for a commitment of only $300 per month in combined local and intraLATA toll usage per dedicated access location (BA-PA St. No. 1.1 at 21-22), thus lowering the customer's commitment for services BA-PA could provide to only $3,600 per year for single-location customers. (BA-PA M.B. at 11). BA-PA's portrayal of Digital Link does not withstand close scrutiny. An overriding consideration with this service is the need for the customer to have a PBX or Centrex service. Small customers are unlikely to purchase a PBX or subscribe to Centrex just to use Digital Link service. The proof of this pudding can be found in the fact that AT&T has the grand total of **[PROPRIETARY MATERIAL REMOVED]** customers on Digital Link service. (Tr. 1403). This is a mere 1.2% of the approximately **[PROPRIETARY MATERIAL REMOVED]** business customers served by BA-PA. (AT&T St. 1.0 at 10).

BA-PA also touts other technologies as providing competitive opportunities for local exchange providers, including cellular service and "very small aperture terminal" ("VSAT"). (BA-PA R.B. at 44). VSAT is a satellite technology that is used for credit card verifications. (Tr. 1111-1114).

Notwithstanding BA-PA's claims, there is no persuasive evidence in the record that these technologies are economically or technically viable substitutes for wireline local telephone service. While there may be some persons for whom cellular phone service is substitutable for wireline service, there is no evidence in the record of the extent to which this is the case.

B. Technical and Economic Reality.

It is now possible to consider the extent to which any of the currently used methods of competition are capable of providing effective competition for BA-PA's ubiquitous business local exchange telephone service, and the extent to which they are actually providing such competition. As previously discussed, resale is inadequate to provide competitive pressure on BA-PA's retail prices. Thus, it is necessary to consider only facilities based competition in this discussion.

To begin with, BA-PA has between 400 (OTS St. 1 at 12) and 450 (Tr. 694) wire centers in Pennsylvania. Of these, only 94 have physical or virtual collocation either physically in place or under construction. (Tr. 693). At this time, there are only 27 to 30 wire centers where CLECs have physically collocated; the balance of the wire centers are those in which there is virtual collocation, or collocation

space is under construction. (Tr. 692-696, 740-741). Thus, those forms of facilities based competition that depend on collocation are physically possible today in less than one-third of all BA-PA wire centers. As previously discussed, a facilities based competitor who uses only its own facilities to reach customers (i.e., a competitor with its own fiber ring and switch) need only collocate in one wire center per LATA. All other forms of facilities based competition require collocation in each wire center where the CLEC has customers, to take the customers' loops from BA-PA as unbundled loops or high capacity circuits, or to render service by UNE-P, under BA-PA's interpretation of the Eighth Circuit order. Also as previously discussed, even those CLECs that operate their own facilities to reach some customers, also need access to unbundled loops to reach others. As it stands today, a facilities based competitor can only extend its reach to about one-third of BA-PA's service territory, unless it is willing to extend its own wires to the remaining two thirds of all BA-PA wire centers. (Tr. 696). There is no credible evidence in the record that such a construction project is financially feasible or rational for any competitor.

The foregoing discussion demonstrates why it would not be a good idea to grant BA-PA's petition with the intention of allowing BA-PA to rebalance business rates. If

BA-PA were to impose rate increases in those areas where it faces no serious facilities based competition, resellers alone could compete with BA-PA, but would be unable to restrain price increases. Because facilities based competitors need collocation space (unless they are going to simply duplicate BA-PA's entire network--an unlikely event at best, particularly in rural areas), they will be unable to compete in most BA-PA wire centers simply because collocation is not available.

The foregoing discussion also shows why BA-PA's policy of requiring collocation for CLECs seeking to use the UNE-P is not in the public interest. In most BA-PA wire centers, collocation is not yet available, therefore, UNE-P, under BA-PA's interpretation of the Eighth Circuit order, is also unavailable. Again, this makes facilities based competition in rural areas simply impossible.

The credible evidence of record demonstrates that the collocation constraints described here have, in fact, acted to inhibit the growth of facilities based competition in BA-PA's service territory. The OTS presented a study of the location of competitive presence by wire center. That study, and the results thereof, are described adequately at pages 14 through 18 of the OTS main brief:

> For his competitive presence analysis, Mr. Kubas obtained data on the number and

location of NXX Codes assigned to competitive local exchange carriers (CLECs), the number of unbundled loops purchased by BA-PA wire center, and the extent of numbers ported by BA-PA wire center (updated through March 31, 1998). Mr. Kubas considered this data to be indicative of the presence of BLES competition, through, for example, a CLEC's purchase of unbundled network elements (UNEs). See, OTS St. No. 1, p. 11; OTS Ex. No. 1, Sched. 4 (revised); OCA Hearing Ex. No. 4.

Mr. Kubas then matched the BA-PA wire centers which had CLEC NXX Codes, unbundled loops, and/or ported numbers to the BA-PA exchanges encompassing those wire centers. As stated previously, 66 Pa. C.S. §3005(a)(1) requires competitive findings on, inter alia, "the availability of like or substitute services or other activities in the relevant geographic area." Emphasis added.

. . . .

Mr. Kubas very conservatively assumed that if either one or more BA-PA wire centers within an exchange had an NXX Code assigned to a CLEC, or had unbundled loops being provided or numbers being ported, then BLES competition was at least minimally present in that exchange. OTS St. No. 1, p. 14. However, Mr. Kubas' assumptions were extremely generous to BA-PA for the following reasons.

First of all, as indicated by Ms. Eichenlaub, the assignment of an NXX Code to a CLEC in an exchange does **not** necessarily indicate that a CLEC is providing BLES or any other business service in that exchange. Tr. 502-503. Also, there is no proof of record that the unbundled loops purchased and numbers ported actually relate to the provision of

competitive BLES or any other particular business service. See, OTS Ex. No. 1, Sched. 4 (revised) and OCA Hearing Ex. 4, which provide no breakdown by service category. Furthermore, BA-PA does not maintain information on unbundled loops or ported numbers by customer class; consequently, some of these provisioned loops and ported numbers may actually relate to residence rather than business competition in a given exchange. Tr. 1335.

Despite Mr. Kubas' extreme generosity in finding competitive presence for BLES, Mr. Kubas still found that there were 192 BA-PA exchanges (revised from 193 during the hearing on June 2, 1998)[1] where there is not even a minimal competitive presence for BLES, based upon no assignment of NXX Codes, no provisioning of unbundled loops, and no porting of numbers. OTS Ex. No. 1, Sched. 1 (revised). Also, all but six of these 192 exchanges are in Density Cell 4 (the least dense, rural areas of BA-PA's service territory), indicating again that the local exchange is a more relevant geographic area for targeting the presence of competition or lack thereof, than the entire state. OCA Hearing Ex. 5; Tr. 489, 1331.

In the remaining exchanges (other than the 192 exchanges in OTS Ex. No. 1, Sched. 1 (revised)), approximately 16,000 unbundled loops for business and residential customers combined are being provided in approximately **[PROPRIETARY MATERIAL REMOVED]** BA-PA wire centers. OCA Hearing Ex. 4. Also, approximately 12,600 numbers are being ported for business and residential customers combined in approximately **[PROPRIETARY MATERIAL REMOVED]** BA-PA wire centers. OTS Ex. No. 1, Sched. 4 (revised). BA-PA has approximately 400 wire centers in Pennsylvania. OTS St. No. 1, p. 12.

> The 16,000 unbundled loops together with the 12,600 ported numbers represent approximately **[PROPRIETARY MATERIAL REMOVED]** of BA-PA's total business, Centrex, and Public/PPV access lines, based upon data provided by BA-PA in response to an OTS interrogatory.[2] See, OTS Ex. No. 1, Sched. 5.
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> . . . .
>
> Based upon his analysis of NXX Codes assigned to CLECs, provisioned unbundled loops, and ported numbers, Mr. Kubas concluded that BA-PA is still the only provider of BLES in the 192 exchanges and the primary provider of BLES in the remainder of its territory. While criteria other than competitive presence for BLES in the relevant geographic area must be considered, the presence of competitors is viewed by OTS as so fundamental to a competitive declaration as to constitute a threshold requirement. OTS St. No. 1, p. 16. Since competitive presence for BLES is not ubiquitous in BA-PA's service territory, and since BA-PA presented its case only on an "all or nothing basis", BA-PA's Petition should not be granted with respect to BLES.

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[1] While the 192 and 193 exchange numbers were treated as **proprietary** by OTS, BA-PA disavowed this proprietary status by placing these numbers in the public record. Tr. 503; BA-PA St. No. 1.1, p. 25.

[2] This percentage is, again, extremely generous to BA-PA as its does not reflect the possibility that a CLEC combines a ported number to an unbundled loop to serve one business access line.

The OTS study demonstrates, beyond any doubt, that there is no current facilities based competition in at least one-half of all BA-PA wire centers. This comes as no surprise considering

that facilities based competition (except where the competitor installs its own entire network) is impossible without collocation, and collocation is not available in most BA-PA wire centers.

The OTS study also demonstrates that there is little facilities based competition anywhere in BA-PA's service territory. Because the OTS study does not count customers who are served by facilities based carriers who use their own facilities exclusively, it obviously underestimates the CLECs' market share. Nevertheless, even the data provided by BA-PA in Appendix I to its main brief shows that its largest facilities based competitors serve only **[PROPRIETARY MATERIAL REMOVED]** lines. However, BA-PA itself served **[PROPRIETARY MATERIAL REMOVED]** as of the beginning of this year. (OCA St. 1.0 at 21-22).

BA-PA contended that Mr. Kubas' findings as to lack of competition in 192 or 193 BA-PA exchanges are inaccurate because Mr. Kubas did not consider resale or facilities-based competition that is allegedly present in some of these exchanges. Also, BA-PA belittled Mr. Kubas' study by characterizing the 193 exchanges as containing only 10% of BA-PA's business access lines. (BA-PA St. 1.1 at 25; BA-PA St. 4.1 at 11). These arguments are meritless for the following reasons. As discussed above, while resale is a relatively

inexpensive way to compete, it is ineffective in restraining BA-PA price increases, and may not be a viable way to enter the market in an environment where the only facilities based provider, BA-PA, can change retail prices at will. Second, there is only a negligible amount of resale being provided today, casting further doubt upon its viability as a competitive threat. Third, as also discussed above, even if you count all of the lines served by the largest facilities based CLECs, BA-PA's market share exceeds 90%. Fourth, there are no collocation facilities in two-thirds of BA-PA wire centers; facilities based competition is not practical in those wire centers without collocation. Finally, 10% of BA-PA's **[PROPRIETARY MATERIAL REMOVED]** still leaves roughly **[PROPRIETARY MATERIAL REMOVED]** without any competitive presence.

In further response to Mr. Kubas, BA-PA, for the first time in rebuttal, attempted a competitor presence analysis targeted to wire centers and density cells. (BA-PA St. 4.1, Tables 1 and 2). BA-PA witness Dr. Taylor examined Mr. Kubas' 193 exchanges (later revised to 192) and concluded, as indicated in his rebuttal Table 1, that **[PROPRIETARY MATERIAL REMOVED]** of these exchanges had resale presence, **[PROPRIETARY MATERIAL REMOVED]** also had CLEC facilities or collocation presence, and **[PROPRIETARY MATERIAL REMOVED]**

additional exchanges had CLEC facilities or collocation presence but no resale, for a total of **[PROPRIETARY MATERIAL REMOVED]** exchanges with purported competitor presence out of the 193 identified by Mr. Kubas. (BA-PA St. 4.1, Table 1). Based upon Table 1, Dr. Taylor concluded that all but five percent of BA-PA's business access lines are in wire centers with a competitive presence. (BA-PA St. 4.1 at 12; Tr. 1332). Aside from the questionable nature of Dr. Taylor's methods of determining where competitors are "present" (OTS M.B. at 20-21), these arguments are meritless for the reasons set forth in the immediately preceding paragraph. Even these figures establish that, by Dr. Taylor's standards for "competitive presence," there are roughly 130 wire centers (about 25% of the total) with no competitive presence. The five percent of the access lines without a competitive presence amount to roughly **[PROPRIETARY MATERIAL REMOVED]** of BA-PA's **[PROPRIETARY MATERIAL REMOVED].** Obviously, those customers in wire centers without a competitive presence would be most likely to suffer rate increases if this petition is granted.

While there is other evidence in the record concerning competitive presence, it is not necessary to further analyze it, as it does not alter the reality that BA-PA possesses an overwhelming share of the market for business local exchange service in Pennsylvania. Nor does that

evidence alter the fact that BA-PA retains its overwhelming market share a full five years after Chapter 30 of the Public Utility Code opened the local exchange market in Pennsylvania to competition, and two and one-half years after the Telecommunications Act of 1996 further opened the market.

BA-PA contends that the Commission should overlook its large market share. It contends that a large market share can be a liability and that growth is a more important measure of the competitors' ability to thwart attempts by BA-PA to raise prices. (BA-PA R.B. at 11-14). It asks the Commission to decide in its favor because resellers could enter the market if BA-PA raised rates, even though resellers have not done so to date. (BA-PA St. 1.1 at 25). I do not find these arguments to be persuasive.

Implicit in BA-PA's argument that the Commission should overlook its large market share is the notion that competitors could rapidly enter any of its local exchange markets if BA-PA raised rates in that market. Clearly that is not the case for facilities based carriers in the two-thirds of BA-PA wire centers where there are no collocation facilities. That leaves resellers. As previously discussed, for a variety of reasons, it is not clear that resellers alone will be an effective restraint on BA-PA's ability to raise rates in the absence of regulation.

BA-PA has cited no case where an administrative agency has deregulated a dominant company with a market share in excess of 90% on the theory that there are some competitors who have gained a little market share, and who might be able to gain more if the former monopolist raised prices. As a matter of historical precedent, the FCC did not declare AT&T to be non-dominant in the toll market until 1995, approximately 8 years after the general completion of interLATA equal access, at which point AT&T's share of access minutes was just 55 percent. (AT&T St. 1.1 at 5). See In re Motion of AT&T Corp. to be reclassified as a Non-Dominant Carrier, 11 F.C.C.R. 3271 (Oct. 23, 1995); Long Distance Market Shares, Third Quarter 1997, FCC Common Carrier Bureau, Jan. 1998, at 3. I do not cite this case to suggest that 55% market share is a magic figure. The FCC's ruling merely shows that BA-PA's request, to have all business services declared competitive, while holding a market share in the BLES market in excess of 90%, borders on the ridiculous.

There is one other point that must be made about BA-PA's contention that competitive conditions are such that all of its business services may be declared competitive with no danger to either the consumers or the nascent competition. Simply put, if one buys this argument for business services, one must also accept that the residential market is

competitive, and BA-PA's service for it should also be deregulated. Obviously, the facilities based carriers and resellers who are now serving the business community are also "potential competition" for BA-PA in the residential market. Because any CLEC residential market share is undoubtedly small, the "growth" in that share must be phenomenal. Some carriers are marketing "bundled" local and toll service to residential customers, as well as Internet access. Finally, in the face of these arguments, the Commission should overlook BA-PA's own market share for residential local phone service. Plainly, all of BA-PA's arguments that the entire business market is competitive can be applied with equal force to the residential market. Yet, I cannot imagine anyone seriously contending (or believing) that the residential local telephone market is competitive. Frankly, if business service is declared competitive today, it will not be surprising to see a similar petition for residential in the near future.

For the foregoing reasons, I conclude that BA-PA has not proven that it faces effective competition for business local exchange service throughout its service territory. Because that issue is at the heart of this case, I also conclude that BA-PA has not shown that its telecommunications services to businesses throughout its service territory should

be declared competitive. Accordingly, I recommend that this petition be denied.

Because I conclude that BA-PA has not shown that it faces effective competition throughout its service territory, it is unnecessary to address the other issues raised by the parties. Nevertheless, I will address certain issues, in brief. I will also address BA-PA's request for partial relief.

VII. Ease of Market Entry.

Strictly as an empirical matter, there cannot be ease of entry. As discussed above, fully five years after the passage of Chapter 30 of the Public Utility Code, BA-PA retains over 90% of the business local telecommunications market in its service territory. If entry is easy, where are the competitors? The CLECs point to two factors: the prices set by the Commission for resale and UNEs, and problems encountered in dealing with BA-PA. As I have previously indicated, I will not discuss the pricing issues. Whether due to prices or other factors, there is precious little competition in BA-PA's service territory. Moreover, UNE prices will be reviewed in the upcoming MFS Phase IV. Problems arising from the interactions between the CLECs and BA-PA are another matter.

The CLECs enumerate several problems arising from BA-PA's Operation Support Systems ("OSS"), including preordering, ordering, maintenance, repair and billing. Having heard this litany of complaints during several cases over the past two and one-half years, and confident that the Commission itself also has heard the litany multiple times, I will not repeat it here, but refer the reader to some of the briefs for examples of the problems: CTSI brief at 5-10, MCI

main brief at 34-57. BA-PA offers several responses to those claims.

BA-PA claims that because its competitors are entering the market despite any problems with its OSS, the problems must be minimal. (BA-PA R.B. at 33, 38). Frankly, I am unsure what data BA-PA is relying upon to support this claim. As discussed, the credible market share data shows that competitive entry has been minimal.

BA-PA also argues that the complaints are exaggerated, that some of the problems are caused by the CLECs themselves, that BA-PA is solving many of the problems, and that OSS is largely irrelevant to service provided by facilities based CLECs to large volume customers. (BA-PA R.B. at 33-43). Considering that I recommend denial of this petition for other reasons, it is unnecessary to discuss each of these points in detail, but it may be useful to discuss some points to provide guidance for the future.

While the CLECs are undoubtedly responsible for some of the problems that have arisen, it appears to be the case that BA-PA is dragging its feet in this area. It has been two and one-half years since the passage of the Act, and five years since the passage of Chapter 30. I have heard complaints from CLECs about these problems during several cases over the past two years. At this late date, it is

unacceptable for BA-PA to provide the CLECs' programmers with inaccurate or insufficient information of the kind that they need to construct the CLEC side of electronic interfaces that they share with BA-PA. (MCI St. 4 at 25-26). It is equally unacceptable for BA-PA to make substantial changes to its electronic interfaces just as the CLECs are preparing to use them. (MCI St. 4.0 at 25-26). These kinds of problems suggest that BA-PA is making somewhat less than its best effort to meet this critical need. While developing these interfaces is undoubtedly a major task, it has been several years now.

Similarly, while it is true that OSS is less important for service provided by a facilities based CLEC to large volume customers, it is also true that certain forms of OSS are necessary even for these customers. Obviously of prime importance is that CLEC customers be included in the phone book. As described in CTSI's brief at page 7, BA-PA has omitted CLEC customers from phone directories published in February 1998 for Wyoming Valley and in May 1998 for Harrisburg. While it is possible to accept the first omission as an understandable mistake, it stretches one's credulity to think that a second mistake of this serious nature several months after the first was purely coincidental.

Lastly, it seems no coincidence that BA-PA is most responsive to these problems when it is asking for Commission approval of a petition like this one, or its request to enter the interLATA toll market. (CTSI Brief at 6).

It is obvious that the CLECs have an incentive (their desire to enter the market) to fix these problems, while BA-PA has an incentive (retention of its enormous market share) to drag its feet. It seems that the Commission must establish, monitor, and enforce specific performance standards in this area for BA-PA. Independent monitoring of these processes is necessary to sort out the charges and counter-charges between BA-PA and the CLECs. Permanent monitoring is needed to ensure that these problems, once solved, do not reoccur after BA-PA has been allowed into the interLATA market, and once all markets have been declared competitive.

VIII. Ability Of Competitors To Offer Services At Competitive Prices, Terms And Conditions.

This is another finding where empirical evidence (five years after the passage of Chapter 30 of the Public Utility Code, BA-PA retains over 90% of the business local telecommunications market in its service territory) directs an obvious answer. If competitors were able to offer all business services or other similar activities throughout BA-

PA's service territory, one would expect that they would be doing so now. That clearly is not the case today.

IX. The Availability Of Like Or Substitute Services Or Other Activities In The Relevant Geographic Area.

This issue has been covered at pages 12-14 and 33, and further elaboration is unnecessary.

X. Coin Telephone and Internet Service Providers.

The coin telephone providers (CAPA) and the Internet service providers (ISP) differ from the CLEC parties in that they are both purchasers of retail service from BA-PA and competitors of BA-PA or a BA-PA affiliate. Because I am recommending denial of BA-PA's petition, it is unnecessary to address their specific claims.

XI. The Imputation Standard.

BA-PA proposes to meet the imputation test of Chapter 30 by aggregating the revenues for all of these services. That is, a proposed rate for a deregulated BA-PA business service would pass the imputation test as long as the revenues for all business services exceed the revenues that BA-PA would realize from the sale of the associated basic service functions to its competitors. Thus, BA-PA would be free to offer some services at below cost as long as others were priced above cost. According to BA-PA, even a price of

zero on a specific service would not flunk this test. (Tr. 339).

This is similar to the proposal that BA-PA made in its Petition Of Bell Atlantic - Pennsylvania, Inc. For A Determination Of Whether IntraLATA Toll Service Is Competitive Under Chapter 30 of the Public Utility Code, Docket No. Docket No. P-00971293. My rulings here, if necessary, would be similar to, but not identical to, my rulings in my recommended decision signed March 30, 1998, in that case. In particular, I conclude that Commission precedent precludes the broad interpretation of the imputation test urged by BA-PA. In an order permitting several Bell toll calling plans to go into effect, the Commission required each of those plans to comply with an imputation safeguard. AT&T Communications of Pennsylvania, Inc., et al. v. Bell Atlantic-Pennsylvania, Inc., Docket Nos. R-00953394C002-0004, R-00953396C0002-0004, R-00953409C0001&C0004, entered July 9, 1997, at 12, 16 and 19. Also, in the Investigation to Establish Standards and Safeguards for Competitive Services, Docket No. M-00940587 (Order entered August 6, 1996), the Commission required BA-PA to perform an imputation analysis for its Centrex Extend service, despite BA-PA's claim that Centrex Extend is a "feature" and not a service. Competitive Safeguards, at 42.

Although I conclude that Commission precedent favors the interpretation urged by AT&T, MCI and OTS, I am not unsympathetic to BA-PA's view of this issue. In a fully competitive market, it would have, and would need, the freedom to price as it saw fit. I do not agree with BA-PA, however, that we are yet at that point. Given the fact that facilities based competition for BLES is non-existent in much of BA-PA's territory, adoption of BA-PA's imputation test would be an invitation to BA-PA to raise prices in areas without facilities based competition, while lowering prices in areas where it faced such competition. Again, this might not be a bad thing, if it attracted facilities based competitors to the areas where BA-PA had raised rates; however, facilities based competitors need collocation space which is not now available in two-thirds of BA-PA's wire centers.

XII. Partial Relief.

At the outset of this case, BA-PA took an all-or-nothing approach to its request for competitive designation of all business telecommunications service throughout its entire service territory. BA-PA now asks for the following partial relief in the event that the petition is not granted in full:

> ***Second,*** even if the record did not support competitive classification of BA-PA's business telecommunications service for ***all*** business customers, which it does, it is undisputed that customers generating

> (conservatively) $10,000 in annual BA-PA total billed revenues have competitive alternatives via dedicated access arrangements such as AT&T's Digital Link service ***throughout BA-PA's service territory.*** Competitors do not need BA-PA's UNEs or its OSS to reach these customers. If the Commission declines to grant BA-PA's petition in its entirety, nothing prevents it from classifying as competitive telecommunications service the services provided by BA-PA to the obviously competitive segment of the business market of customers spending or committing to spend $10,000 in annual BA-PA telecommunications revenue.[1]
>
> _____
>
> [1] The fact that BA-PA has not presented imputation results for this customer segment has no bearing on the Commission's ability to declare business telecommunications service competitive for these customers. Imputation is a forward-looking requirement, not, as the Supreme Court has recently confirmed, a precondition to competitive classification. *Popowsky v. Pennsylvania Pub. Util. Comm'n,* 706 A.2d 1197 (1997). The imputation methodology presented by BA-PA complies with the statute and would be applied to any service declared competitive by the Commission.

(BA-PA R.B. at 2). The other parties oppose BA-PA's request for partial relief on various grounds.

A full reading of the record suggests that large volume customers, particularly in the urban areas of Philadelphia and Pittsburgh, have competitive alternatives to BA-PA. This is not surprising since these areas are where facilities based carriers such as TCG have located fiber rings and switches. (TCG St. 1 at 5). This is not surprising for another reason: it is much easier and more profitable for a

CLEC to serve a customer large enough to utilize one or more high capacity lines because the CLEC does not need UNE loops from BA-PA. If a CLEC does not need UNE loops from BA-PA, this lessens (but does not eliminate) the reliance of the CLEC on BA-PA's OSS, which is one less barrier to serving the customer. (The CLEC still needs to get the customer listed in the local BA-PA phone directory; not always a trivial task, as previously discussed.) On balance, effective local phone competition seems to be much more of a reality for large customers.

The record, unfortunately, contains too little evidence to determine with any degree of confidence the type or size of customer for which competitive designation would be prudent. In its reply brief BA-PA has suggested a break-point of $10,000 in local revenue, because it calculates that AT&T offers its Digital Link service to customers who generate that little local revenue. (BA-PA R.B. at 2). Equally plausible demarcation points might be $40,000 in revenue or 24 voice grade lines (corresponding to a single T-1 high capacity line). (Tr. 390-391, 1453-1454). The problem is that the record is insufficiently developed to make a decision on this issue. (I would not necessarily accept BA-PA's proposal based loosely on AT&T's Digital Link service because that service requires a customer to have a PBX, or Centrex service.) The

record is also unclear as to the extent to which these services are actually available outside of the major metropolitan areas. Because it was BA-PA's duty to develop the record on these issues, I have no choice but to recommend denial of its request for partial relief. Frankly, had BA-PA originally presented a proposal limited to competitive designation for service to large customers, it might have been possible to try the case within a 180 day schedule, with at least a reasonable prospect for success. As it is, I cannot determine on this record where to draw the line, or what conditions to impose for partial relief.

CONCLUSION

For the reasons set forth above, I recommend that the Commission dismiss this petition.

RECOMMENDED ORDER

THEREFORE, IT IS ORDERED (subject to Commission approval):

That the Petition of Bell Atlantic - Pennsylvania, Inc. for a determination of whether the Provision of Business Telecommunications Services Is Competitive Under Chapter 30 of the Public Utility Code at Docket No. P-00971307 is denied and dismissed.

Date:_____

_____
Michael C. Schnierle
Administrative Law Judge