

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Proposed Modifications to the Application :
Form for Approval of Authority to Offer, :
Render, Furnish or Supply Telecommunications : Docket No. M-00960799
Services to the Public in the Commonwealth :
of Pennsylvania :

**REPLY COMMENTS OF THE BROADBAND
CABLE ASSOCIATION OF PENNSYLVANIA**

I. INTRODUCTION

At Public Meeting on December 21, 2006, the Pennsylvania Public Utility Commission ("PUC" or "Commission") adopted a Tentative Order requesting public comment on potential modifications to the standard application form for authority to render telecommunication services to the public in the Commonwealth of Pennsylvania. The Tentative Order was published in the *Pennsylvania Bulletin* on January 27, 2007,¹ and on March 28, 2007, the Broadband Cable Association of Pennsylvania ("BCAP") submitted its Comments on the application procedures pursuant to the directives in Ordering Paragraph 2. The United States Department of Justice ("DOJ"), the Pennsylvania Telephone Association ("PTA"), Sprint Communications Company L.P. ("Sprint") and the National Emergency Number Association ("NENA") also filed timely Comments regarding these procedures.

In accordance with the Commission's procedural schedule, BCAP hereby submits these Reply Comments in response to certain issues addressed by these other parties. Although these Reply Comments are limited in scope to those matters raised by other parties, BCAP stands by the positions asserted in its original Comments in this case, and maintains that all recommendations contained therein should be adopted by the Commission.

¹ 37 Pa. Bull. 486 (January 27, 2007).

II. REPLY COMMENTS

A. **Consistent with the Comments of the Department of Justice, Competition and the Public Interest Dictate the Necessity for Modifying the CLEC Rural Application to Provide for an Expedited, State-Wide Process that Includes Provisional Operating Authority.**

The DOJ submitted comments expressing concern that the Commission's current application process may be hindering competitive entry, especially into territories of rural Incumbent Local Exchange Carriers ("ILECs"). BCAP generally agrees with DOJ regarding the need for modifications to the CLEC certification process. Specifically, BCAP agrees that the application for Competitive Local Exchange Carrier ("CLEC") authority in rural territories should follow the same procedures as those in non-rural territories, and supports DOJ's conclusion that the current process unnecessarily provides ILECs with opportunities to delay or impede the entry of competition in their territories. BCAP agrees that CLECs applying for authority to operate in rural territories should be granted the same provisional authority that exists for CLEC applicants in non-rural areas. BCAP maintains that appropriate modifications to the CLEC certification process will promote competition and reduce the regulatory burden of the Commission.²

In its Comments, PTA argues that the Commission should retain its current CLEC application process and "continue to guard against any blanket policy" providing applicant CLECs the authority to offer competitive services during the PUC's consideration of their CLEC applications.³ PTA asserts that the Commission should be mindful of "furthering true competition" over "private benefit to a corporation."⁴ Despite its disdain for private benefits to competitive corporations, PTA's statement belies the very public benefit that girds the need for a

² BCAP's Comments contain additional modifications to further expedite the entry process that also should be adopted. See BCAP Comments at 33-35.

³ PTA Comments at 4.

⁴ Id. at 4-5.

change in the application process, i.e., the current customer demand for the introduction of competitive services from multiple service providers. PTA ironically urges the Commission to deprive customers of the very public benefits that the Telecommunications Act of 1996 ("TA-96") and Chapter 30 of the Public Utility Code were enacted to promote, with not readily apparent benefit to any entity except the private ILEC corporation. This request must be soundly rejected.

The heart of the "true competition" the Commission is responsible for protecting and maintaining is the presence of choice, created by the entry of advanced competitive services. This form of competition, particularly from facilities-based CLECs, has become the favored form of competition in the Commonwealth.⁵ The rapid changes in both the telecommunications industry and in customer demand for new services therefore necessitate a change in the current application procedures, rather than an adherence to the status quo as advocated by PTA. These changes are necessary to ensure that no competitive entrant is unnecessarily delayed or thwarted from being able to introduce services to meet customer needs.

As the DOJ correctly noted, the Commission's current CLEC certification process for entry into rural territories creates opportunities for abuse by allowing ILECs to delay entry of competitive providers.⁶ PTA assures the Commission that its member companies "have been careful to file and litigate protests only where legitimate questions are raised," and cites two instances of protests that were affirmed by the presiding Administrative Law Judges ("ALJs") as

⁵ See Application of AT&T Communications of Pennsylvania, Inc., and TCG Pittsburgh to Amend their Certificates of Public Convenience to Begin to Offer, Render, Furnish or Supply Facilities-Based Competitive Local Exchange Telecommunications Services in the Service Territories of ALLTEL Pennsylvania, Inc., Armstrong Telephone Company-Pennsylvania, The Bentleyville Telephone Company, Citizens Telephone Company of Kecksburg, Hickory Telephone Company, Marianna and Scenery Hill Telephone Company, North Pittsburgh Telephone Company, and Yukon Waltz Telephone Company, Docket Nos. A-310125F0002 & A-310213F0002, Order entered April 10, 2001, p. 18 (stating, "As noted in *Vanguard* and *Armstrong*, '[f]acilities-based service is competition in its truest sense and is clearly a part of what Congress envisioned in [TA-96].'")

⁶ See DOJ Comments at 3.

evidence of this claim.⁷ Actual experience, and the final PUC decisions in these application proceedings, paints a very different picture than the one asserted by PTA.⁸

Over the course of the decade since the enactment of the TA-96 and the creation of the current CLEC application, rural ILECs have repeatedly used the protest process to delay or hinder entry of CLECs in the pursuit of competitive goals. PTA admits in its Comments that the protests filed by its members often are filed for no other purpose than to gather information.⁹ Thus, it appears that where ILECs lack sufficient independent data to support an attack on the fitness of CLEC applicants, they are more than willing to embark on fishing expeditions of protest, discovery, and formal hearings in the hope of uncovering financial or operational deficiencies. In the meantime, as both DOJ and PTA note,¹⁰ the ILECs successfully pursue settlements that require the CLECs to relinquish significant competitive opportunities as a concession to approval, rather than conditions designed to resolve concerns regarding the fitness of the applicant.¹¹ In these situations where conditions are placed on the CLEC in exchange for the ILEC's agreement to withdraw its original protest, it can hardly be said that the ILEC protests are filed for any purpose other than preservation of competitive advantage.

More significantly, the Commission can independently undertake the fitness review without "assistance" from the ILECs. BCAP supports DOJ's suggestion that the Commission should adopt the same screening process for protests in rural areas as it does in non-rural area

⁷ PTA Comments at 6.

⁸ In both of the instances cited by PTA, the Commission approved final CLEC authority over the protests of the PTA members, and discussion during the course of the litigation focused primarily on matters not pertaining to the fitness of the CLEC applicants. See Application of Sprint Communications Company L.P. to Amend its Certificate of Public Convenience to Begin to Offer, Render, Furnish, and Supply Competitive Local Exchange Telephone Services to the Public in the Commonwealth of Pennsylvania, Docket No. A-310183F0002AMA, Order entered December 1, 2006; and Application of Core Communications, Inc. for Approval to Offer, Render, Furnish or Supply Telecommunications Services to the Public in the Commonwealth of Pennsylvania, Docket No. A-310922F0002AMA, Order entered December 4, 2006 ("Core Application").

⁹ See *id.* at 7.

¹⁰ See *id.* ("All other CLEC applications, of which the PTA is aware [], at least in the last five years[,] have settled before the Commission."); see also DOJ Comments at 9-10 (listing recent settlements between CLECs and rural ILECs).

¹¹ See DOJ Comments at 9-10 for examples of competitive opportunities relinquished by CLECs.

CLEC applications.¹² Far from simply being a "rubber stamp" or "abdication of responsibility," as PTA claims,¹³ such a state-wide procedure will reduce the Commission's regulatory burden, eliminate competitively-based protests, and ensure that competitive entry is neither hindered nor delayed. The conduct of some PTA members demonstrates a propensity to exploit whatever procedural and protest opportunities the Commission provides to their competitive advantage.¹⁴ The Commission has the opportunity to prevent future abuse by extending the state-wide provisional authority process currently available to CLECs applying for certification in non-rural areas to CLEC applicants seeking to serve in rural ILEC territories.

The current CLEC application process, with its protections for rural ILECs, is clearly no longer necessary. The Commission has protected rural ILECs from competitive entry for over a decade, based on an original presumption of differing regulatory classifications of ILECs. The TA-96 provided rural ILECs a temporary suspension of the obligation to facilitate rural entry of competitive services, ostensibly in the interest of providing time for the ILECs to adapt to the changing technological and financial conditions of the market.¹⁵ Since that time, as customer demand for innovative services has blossomed, the Commission has specifically authorized entry by facilities-based CLECs in all territories,¹⁶ rendering the rural ILEC suspension moot. Based on these policy and legal developments over the last ten years, it is no longer necessary to differentiate the review process in rural and non-rural territories.

¹² See *id.* at 11.

¹³ See PTA Comments at 5.

¹⁴ For example, as noted in the March 1, 2007 10-K filing made at the Securities and Exchange Commission by Commonwealth Telephone Company's parent corporation, Commonwealth Telephone Enterprises, Inc., the Antitrust Division of DOJ issued a civil investigative demand regarding whether Commonwealth Telephone's conduct had restricted competition in local telecommunications services. See Commonwealth Telephone Enterprises, Inc.'s March 1, 2007, Form 10-K Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2006, SEC File No. 0-11053, at 14, available at <http://www.sec.gov/Archives/edgar/data/310433/000119312507043628/d10k.htm>.

¹⁵ Telecommunications Act of 1996 ("TA-96"), § 251.

¹⁶ See Core Application at 36.

B. The Commission Cannot Require Compliance with the Public Safety Emergency Telephone Act as a Prerequisite to Approval of a CLEC Application or as a Condition for Continuing to Operate as a Public Utility.

In its Comments, NENA proposes to add certain conditions to the CLEC application related to the provision of emergency 911 service. Specifically, NENA requests that the Commission require, as part of the application, an express commitment from CLEC applicants to adhere to the terms of the application and to notify affected Public Safety Answering Points ("PSAPs")—and only affected PSAPs—upon entry, termination of service, or upon a transfer of control.¹⁷ Additionally, despite PSAPs receiving monthly access line counts to PSAPs when a CLEC remits 911 surcharges, NENA requests an express requirement in the application that a CLEC must provide access line counts to affected PSAPs.¹⁸ NENA cites the Public Safety Emergency Telephone Act as authority for its recommendation that the Commission should make a CLEC's certification and continued authority to provide service after approval dependent upon the CLEC's compliance with the Public Safety Emergency Telephone Act ("PSETA" or "Act").¹⁹

BCAP commends NENA for its efforts to ensure the efficiency and reliability of Pennsylvania emergency 911 systems, and unequivocally agrees with NENA's goal of seeking a "zero-percent failure tolerance regarding the ability to trace a dropped or disconnected [911] call."²⁰ When a communications service is marketed to the public as ensuring the ability to make emergency calls to 911, then public safety mandates for the consumers' expectations to be met. NENA presents concerns of the highest public interest; however, the PUC is not the appropriate

¹⁷ See generally, NENA Comments at 4, 6-8.

¹⁸ Id. at 10.

¹⁹ Act of 1990, P.L. 340, No. 78, as amended by Act of 1992, P.L. 1373 No. 170 and codified at 35 P.S. § 7011, et seq.

²⁰ NENA Comments at 7.

entity, nor is this CLEC application proceeding the proper, or most effective, means for resolving these issues.

According to the PSETA, the Commission lacks the authority to grant the relief that NENA proposes. Under the Act, regulatory and enforcement authority is specifically delegated to the Pennsylvania Emergency Management Agency ("PEMA"). Section 7013 of the Pennsylvania Statutes specifically provides that PEMA alone has the power and authority to "adopt rules and regulations" and to "promulgate, adopt, publish and use guidelines for implementation" of the PSETA.²¹ Furthermore, PEMA is vested with the sole authority to "prescribe ... such applications and forms as may be necessary to carry out the provisions of the act" and to "take all actions necessary to implement, administer and enforce the provisions of the act."²² PEMA is the entity invested by the General Assembly with enforcement authority, not the PUC.

As the PUC is aware, the Act does include a role for the Commission, but this role is extremely limited. Specifically, the PUC's powers and duties under the PSETA are restricted to reviewing, approving, and modifying the contribution rates requested by the counties.²³ If the General Assembly had intended for the Commission's role to extend to the issues raised by NENA, the General Assembly would have explicitly included this authority in the PSETA or the Public Utility Code.²⁴

²¹ 35 P.S. § 7011(a)(1).

²² Id. at § 7011(a)(11) and (12) (emphasis added).

²³ 35 P.S. § 7011(c).

²⁴ Section 1921(a) of Pennsylvania's Statutory Constructive Act states that "[e]very statute shall be construed, if possible, to give effect to all of its provisions." 19 Pa. C.S. §1921(a). It is well established that where, as here, the General Assembly includes specific language in one section of the statute and excludes it from another, the language should not be implied where excluded. See Popowsky v. Pennsylvania Public Utility Commission, 706 A.2d 1197, 1203 (Pa. Commw. Ct. 1997) (citing Cherry v. Pennsylvania Higher Education Assistance Agency, 620 A.2d 687, 690-91 (Pa. Commw. Ct. 1994)). Furthermore, the Commonwealth Court has held that "a change of language in different sections of a statute is prima facie evidence of a change of intent." Shawnee Development, Inc. v. Commonwealth, 799 A.2d 882, 888 (Pa. Commw. Ct. 2002). By ascribing enforcement authority to PEMA in PSETA, the General Assembly necessarily intended to limit the Commission's role to the specific item enumerated in the Act (i.e., review of contribution rates).

Under PSETA, the individual counties within the Commonwealth have the responsibility to "make arrangements with each telephone company providing local exchange telephone service within the county's jurisdiction to provide 911 service," to "send a copy of the proposed county plan to the appropriate telephone company," to "annually request from each telephone service provider who shall provide a list of the local telephone exchanges," and to "notify [PEMA] and all adjacent counties of all local telephone exchanges which provide telephone service to residents within the county."²⁵ Nowhere does the Act appear to impose these responsibilities on individual telecommunications carriers, as NENA proposes the Commission do through this proceeding. More importantly, PSETA does not authorize the PUC to serve as the forum for adjudication of Counties' disputes with telephone service providers (except with respect to contribution rates).

The Commission simply lacks the authority under PSETA to impose and enforce the conditions proposed by NENA. The General Assembly specifically endowed PEMA with the regulatory and enforcement authority to administer the Act, and carefully established a limited, rate-related, role for the PUC. That role does not include the ability to leverage an entity's status as a public utility or CLEC against demands for compliance with the PSETA. If the Commission were to act as NENA requests, it would impermissibly assume an enforcement role specifically reserved to another agency. Enforcement of the PSETA is certainly available. It is just not available from the PUC. NENA's comments should be disregarded.

²⁵ 35 P.S. § 7014(a)(2),(3),(6), and (7).

III. CONCLUSION

WHEREFORE, BCAP respectfully requests that the Commission reject the proposals submitted by PTA and NENA, and adopt the CLEC application modifications as presented by BCAP.

Respectfully submitted

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