PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105-3265

Petition of David K. Ebersole, Jr., and the Office of Consumer Advocate for a Declaratory Order	**PUBLIC MEETING: February 28, 2013** **2323362-LAW** **Docket No. P-2012-2323362**
Resolution of Audit Recommendation Resulting from the Network Modernization Plan Audit of Verizon Pennsylvania Inc.	**2056921-LAW** **Docket No. D-2008-2056921**

DISSENTING STATEMENT OF COMMISSIONER JAMES H. CAWLEY

Before us for final disposition are: (1) the Commission's final ruling regarding the Joint Petition of David K. Ebersole, Jr., and the Office of the Consumer Advocate (OCA) who seek a Declaratory Order concluding that Verizon Pennsylvania LLC (Verizon PA or Company) has not satisfied its broadband deployment commitment obligations under Section 3014(c) of the Public Utility Code, 66 Pa.C.S. § 3014(c), to provide certain end-user consumers in the Greensburg Community Service Area (CSA) No. 1125 with wireline digital subscriber line (DSL) retail broadband access service or a reasonably comparable other service under the Company's bona fide retail request (BFRR) program; and, (2) the Resolution of Audit Recommendations Resulting from the Network Modernization Plan (NMP) Audit of Verizon PA and the adoption of certain NMP reporting metrics.

I appreciate the efforts of the majority to resolve a number of difficult issues on a going-forward basis in a case of first impression. Consistent with my original Dissenting Statement when the majority reached its decision in the Tentative Order stage of this proceeding at Docket No. P-2012-2323362, I disagree with fundamental statutory interpretations and major aspects of the substantive analysis that has been or has not been performed so far in this proceeding.[1] Because the final ruling on the Joint Petition at Docket No. P-2012-2323362 and the Resolution of the Verizon PA NMP Audit Recommendations and the resulting reporting metrics at Docket No. D-2008-2056921 are interrelated, I respectfully dissent from the decision of the majority in both cases.

A. The Utilization of New Technologies Should Be Governed by Verizon PA's NMP

My original Dissenting Statement regarding the Joint Petition at Docket No. P-2012-2323362 emphasized that the Company's "actual utilization of wireless technologies — especially when those involve joint ventures with the unregulated services and operations of an ILEC's [incumbent local exchange carrier's] wireless affiliate — could have been better accomplished if Verizon PA would have formally and timely asked for a modification or clarification of its amended NMP to that end." I also stated that this "approach would have afforded the Company, other interested parties, and the Commission appropriate opportunity under statutorily imposed time constraints to provide input, deliberate, and decide these issues" in accordance with applicable statutory provisions. *See generally* 66 Pa.C.S. §§ 3013(a)&(b),

[1] *Petition of David K. Ebersole, Jr. and the Office of Consumer Advocate for a Declaratory Order*, Docket No. P-2012-2323362, Tentative Order entered December 26, 2012 (Tentative Order), Dissenting Statement of Commissioner James H. Cawley dated December 5, 2012 (Dissenting Statement).

3014(b)(6), and 3014(e).[2] I also argued that this course "would have given the Commission a more expansive and qualitatively better evidentiary record and legal analysis on which to base its decisions."[3] I also pointed out that:

> However, the tentative ruling reached by the majority is simply confined to the solicitation of additional information from Verizon PA rather than also exploring a necessary amendment or clarification of Verizon PA's existing NMP regarding the Company's deployment and operational use of wireless 4G LTE [4th generation long-term evolution] technology for fulfilling its broadband deployment obligations, including eligible BFRR [bona fide retail] requests. This is necessary because Verizon PA's Chapter 30 broadband deployment is still governed by its Commission approved amended NMP, and the present proceeding provides serious indications that the Company's amended NMP is being modified through the Verizon PA and Verizon Wireless joint venture for the deployment of 4G LTE technology. Furthermore, the Verizon PA amended NMP is governed by the various Chapter 30 statutory provisions *in pari materia* form and operates concurrently and in conjunction with the price stability mechanism incentive regulation that is applicable to the regulated intrastate operations of the Company.

Dissenting Statement, at 3.[4]

The answers that Verizon PA provided on January 10, 2013 both in response to the Tentative Order and to the directed questions of my Dissenting Statement (collectively Verizon PA Answers),[5] as well as the January 22, 2013 OCA Comments, clearly demonstrate the need for effectuating a major modification of the Company's Chapter 30 amended NMP through appropriate due process. This need arises because the Verizon PA arrangement with Verizon Wireless through a so-called "joint venture" agreement substantially and materially modifies both the Company's Commission-approved commitments and their implementation to deploy broadband access network facilities and services through its service area. Although Verizon PA has the freedom to utilize available broadband technologies and platforms and genuine joint venture arrangements to fulfill its Chapter 30 deployment commitments and obligations, modification of the Company's approved NMP is the only lawful procedure to do so.[6]

This type of review has not been undertaken in the context of the Verizon PA Greensburg BFRR at Docket No. P-2012-2323362. Instead, the final decision reached by the majority

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[2] I continue to note Verizon PA's previous reluctance to utilize this statutory process for amending or clarifying its NMP. *See generally Pennsylvania Public Utility Commission v. Verizon Pennsylvania Inc. et al.*, Docket Nos. R-2011-2244373, R-2011-2244375, Order entered June 24, 2011, *aff'd, Verizon Pennsylvania et al. v. Pa. Pub. Util. Comm'n,* No. 1353 C.D. 2011 (Pa. Cmwlth. Aug. 8, 2012), 2012 Pa. Commw. Unpub. LEXIS 581; and Docket Nos. R-2011-2244373, P-00930715F1000, R-2011-2244375, P-00001854F1000, Order entered November 14, 2011.

[3] Dissenting Statement, at 2-3.

[4] I again note that this Commission on December 5, 2012, concurrently approved Verizon PA's annual Chapter 30 price stability mechanism filing that resulted in revenue and rate increases effective in 2013. *Verizon Pennsylvania LLC 2013 Price Change Opportunity Filing et al.*, Docket Nos. R-2012-2332603, P-00930715F1000, Order adopted December 5, 2012.

[5] Docket No. P-2012-2323362, Verizon PA Answers, January 10, 2013.

[6] Docket No. P-2012-2323362, OCA Comments, January 22, 2013, at 4. *See also* 66 Pa.C.S. § 3013(d).

essentially adopts the legal position that material changes to Verizon PA's amended NMP through the arrangement with the affiliate Verizon Wireless can simply be effectuated via the Company's regular biennial NMP update reporting to the Commission. This approach lacks a solid legal foundation, is fraught with numerous risks, and undermines this Commission's statutory authority to exercise appropriate regulatory oversight and enforcement on matters involving the NMPs of Chapter 30 ILECs where such oversight and enforcement will have to continue for the foreseeable future. Carrying the oversight method that is currently adopted to its logical extreme in view of the Verizon PA – Verizon Wireless "joint venture," the Commission will be hard pressed to timely react if this arrangement is unilaterally modified resulting in the supply of a technically inferior satellite retail broadband access technology platform to end-users in selected rural and high-cost geographic locales, with the Commission notified "after the fact" through the Company's biennial NMP update report.

My concerns extend beyond the context of the Greensburg BFRR matter at Docket No. P-2012-2323362. The General Assembly has emphasized the maintenance of "universal telecommunication service at affordable rates while encouraging the accelerated provision of advanced services and deployment of a *universally available*, state-of-the-art, interactive broadband telecommunications network in rural, suburban, and urban areas..." 66 Pa.C.S. § 3011(2) (emphasis added). The Commission must be able to exercise the necessary regulatory oversight and enforcement so that the General Assembly's goals of maintaining conventional universal telecommunications services at affordable rates and ensuring the *universal availability* of *comparable* retail broadband access services are realized and stay in place well after the completion of the broadband deployment commitments of the Chapter 30 ILECs. This Commission should not countenance any potential "backsliding" where universal telephone service and universal broadband availability are in place in 2015, but may be selectively reduced in 2016. The competitive supply of wireline and wireless telecommunications and retail broadband access services alone does not guarantee the maintenance of universal and affordable telecommunications services and the universal availability of retail broadband access services in all areas of Pennsylvania.

B. The Potential Cross-Subsidization Issue Requires An In-Depth Examination

The Verizon PA — Verizon Wireless arrangement for the provision of 4G LTE retail broadband access services has raised serious cross-subsidization concerns because Verizon Wireless is an unregulated affiliate providing wireless competitive services. Verizon PA has substantial intrastate operations and non-competitive services that are subject to the jurisdiction of this Commission and are governed by relevant statutes and regulations, including the alternative regulation plan and its price stability mechanism formula in the Company's NMP.

As my previous Dissenting Statement noted:

> Although it can be conceivably argued that the price cap formula based price stability mechanism (PSM) of Verizon PA's amended NMP may shield on a going-forward basis the Company's regulated non-competitive services and its end-user ratepayers against any potential cross-subsidization effects because of its joint venture funding arrangements for the Verizon Wireless 4G LTE services,[8] the matter remains that such Verizon PA funding may inevitably include a mix of "revenues earned or expenses incurred in conjunction with noncompetitive

services," thus potentially invoking the statutory prohibition of 66 Pa.C.S. § 3016(f)(1).

Furthermore, it is unclear at this time if the Company's contemplated funding for the Verizon Wireless 4G LTE services will be limited or otherwise dedicated only for the benefit of Verizon PA end-user customers to whom the Company must extend broadband availability consistent with its amended NMP, or whether such Verizon PA funding will also be utilized by Verizon Wireless for the general offering of its competitive 4G LTE services to the broader public. For example, a Verizon Wireless cellular tower that will be constructed or upgraded through Verizon PA funding will be able to render 4G LTE services not only to Company end-users that need to be provided with Chapter 30 broadband availability, but it can also provide the same wireless services to other interested users, and can potentially also accommodate the operations of other non-affiliated wireless carriers.

[8] Contrasted with traditional cost-of-service regulation, the regulated non-competitive service rates of an ILEC that operates under a price cap based PSM [price stability mechanism] may potentially remain unaffected — at least in the short-term — by any regulated revenue or expense cross-subsidies that may flow in support of competitive services of the ILEC or of an unregulated affiliate. This does not mean that such practices do not have other inimical effects, i.e., negatively affecting the normal and efficient function of markets for competitive services where unsubsidized competitors may be forced to operate at an economic disadvantage, or that such practices are legally condoned or justified.

Dissenting Statement at 6.

Verizon's explanations do not assuage these concerns, and I find them totally unpersuasive. The potential cross-subsidy issue here requires a better in-depth examination as suggested by the OCA. Any rulings in this area should have been avoided at this time.[7]

Verizon's Answer indicates that the provisions of 66 Pa.C.S. § 3016(f) and 52 Pa. Code § 63.143(4) "are not relevant to the joint venture to provide wireless broadband services because they relate to the pricing of 'competitive' services, which are non-price regulated services within this Commission's jurisdiction,"[8] and that the "statute and regulation by their terms apply only to 'competitive' services, a term referring to services that are within this Commission's jurisdiction but for which Chapter 30 provides pricing flexibility."[9] In short, Verizon PA suggests that the cross-subsidy safeguards contained in the Chapter 30 statute and our regulations only concern Verizon PA's *own* competitive and price deregulated services, and not those of any of its affiliates. And, further, because retail broadband access and wireless services are not regulated by the Commission, such cross-subsidy safeguards somehow do not apply.

Verizon PA engages in a very narrow and misplaced reading of the statute and our regulations. If we were to accept the unfounded rationale of Verizon PA's legal argument, the Company can provide essential intrastate and interstate switched and special access services to its affiliate Verizon Wireless totally for free. The fact that Verizon Wireless' 4G LTE services

[7] Docket No. P-2012-2323362, OCA Comments, January 22, 2013, at 26-27.

[8] Docket No. P-2012-2323362, Verizon PA Answer No. 2 to Directed Questions, January 10, 2013, at 2-3.

[9] Docket No. P-2012-2323362, Verizon PA Answer No. 2 to the Commission, January 10, 2013, at 5.

are unregulated and competitively priced is totally irrelevant and immaterial to the core issue of whether the large funding (as a "Contribution in Aid of Construction")[10] by Verizon PA (and the affiliated ILEC Verizon North) for the construction of wireless towers to be used in the provision of 4G LTE services *constitutes an improper cross-subsidy.*

Verizon PA's other argument that its intrastate regulated non-competitive services allegedly "do not generate enough revenues to cover their stand-alone costs, much less extra revenue that could be used to provide a 'subsidy' in the economic sense" and a "a 'cross-subsidy' cannot occur" is equally unpersuasive for a number of reasons.[11] Verizon PA invokes the 2011 Direct Testimony of OCA witness Dr. Robert Loube in the proceeding involving the intrastate carrier access charges of Verizon PA and Verizon North at Docket No. C-20027195[12] but then conveniently switches to its own "proprietary margin analysis" in order to support its allegation that the universe of its intrastate regulated non-competitive services is allegedly incapable of generating and providing "extra revenue" (or a positive margin) and thus a potential cross-subsidy.[13] However, as Dr. Loube's testimony indicated, such a margin analysis is greatly influenced by the existing rules of jurisdictional accounting separations for Verizon PA's regulated and unregulated operations and other factors. For example, when Verizon PA provides retail broadband access services through DSL, none of the generated revenues is attributed to the Company's intrastate regulated services. However, 75% of the costs and the investment associated with the loops used for the provision of DSL are assigned to the intrastate regulated services cost base of Verizon PA.[14] Dr. Loube's analysis and testimony also indicated "that if Verizon is losing money, it is only in the non-regulated sector."[15] Thus, Verizon PA's claim that its intrastate regulated non-competitive services are incapable of generating a positive margin and thus a potential cross-subsidy is seriously doubtful and likely spurious.

The acceptance of Verizon PA's argument that its intrastate regulated non-competitive services — a substantial portion of the Company's overall operations — are somehow incapable of generating any positive margins creates a new line of inquiry. If this claim is true, how can Verizon PA (and Verizon North) generate the substantial "Contribution in Aid of Construction" that will finance the installation of the Verizon Wireless 4G LTE cellular towers during the December 2012-December 2022 period while maintaining the adequacy and reliability of the Company's existing wireline network and finalizing wireline broadband deployment where necessary under the existing Chapter 30 NMP by 2015?

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[10] Docket No. P-2012-2323362, Verizon PA Answer No. 3.b to Directed Questions, January 10, 2013, at 3-4. The actual figure for this "Contribution in Aid of Construction" amount is proprietary.

[11] Docket No. P-2012-2323362, Verizon PA Answer No. 2 to the Commission, January 10, 2013, at 6.

[12] *AT&T Communications of Pennsylvania, LLC v. Verizon North LLC and Verizon Pennsylvania Inc.*, Docket No. C-20027195, Direct Testimony of Dr. Robert Loube, OCA St. No. 1, March 29, 2011.

[13] Docket No. P-2012-2323362, Verizon PA Answer No. 2 to the Commission, January 10, 2013, n. 1, at 6.

[14] *AT&T Communications of Pennsylvania, LLC v. Verizon North LLC and Verizon Pennsylvania Inc.*, Docket No. C-20027195, Direct Testimony of Dr. Robert Loube, OCA St. No. 1, March 29, 2011, at 32-34 (non-proprietary information).

[15] *AT&T Communications of Pennsylvania, LLC v. Verizon North LLC and Verizon Pennsylvania Inc.*, Docket No. C-20027195, Direct Testimony of Dr. Robert Loube, OCA St. No. 1, March 29, 2011, at 30-31 (non-proprietary information).

For these reasons, Verizon PA's arguments on the cross-subsidy issue are legally unsustainable and factually suspect. This issue should have remained open and subjected to a more in-depth examination.

C. The Verizon PA — Verizon Wireless Arrangement Is Not A Joint Venture

I am troubled by the legal reasoning that the interpretation and use of the term "joint venture" in Section 3014(n)(2), 66 Pa.C.S. § 3014(n)(2), should be broadly construed under some "common and approved usage" so that a Chapter 30 ILEC with an NMP can have "another tool" and the "maximum flexibility to meet" its broadband deployment commitments and obligations. First, the Chapter 30 contains highly technical and precise terminology. Section 1903 of the Statutory Construction Act (Act), 1 Pa.C.S. § 1903, provides that "phrases shall be construed according to rules of grammar and according to their common and approved usage," and it also adds "but technical words and phrases and such others as have acquired a peculiar and appropriate meaning or are defined in this part, shall be construed according to such peculiar and appropriate meaning or definition."

As I stated in my original Dissenting Statement, the Pennsylvania Supreme Court has given a specific meaning to the term "joint venture," and in fact there is a body of Pennsylvania law on the subject of joint ventures, all of which arose prior to the enactment of the original and subsequent versions of the laws enacting Chapter 30:

> The existence or non-existence of a joint venture depends upon what the parties intended in associating together. It must arise from a contractual basis, although the contract need not be express but may be implied from the acts and conduct of the parties. To constitute a joint venture certain factors are essential: (1) each party to the venture must make a contribution, not necessarily of capital, but by way of services, skill, knowledge, materials or money; (2) profits must be shared among the parties; (3) there must be a "joint proprietary interest and right of mutual control over the subject matter" of the enterprise; (4) usually, there is a single business transaction rather than a general and continuous transaction. The existence or non-existence of a joint venture depends on the facts and the circumstances of each particular case and no fixed nor fast rule can be promulgated to apply generally to all situations. A joint venture is not a partnership, a tenancy in common, nor a so-called "mining partnership"; it is an association of parties - of rather recent origin - to engage in a single business enterprise for profit.

McRoberts v. Phelps, 391 Pa. 591, 599-600, 138 A. 2d 439, 443-444 (1958) (footnotes omitted).

Thus, the interpretation and use of the term "joint venture" in Section 3014(n)(2), 66 Pa.C.S. § 3014(n)(2), cannot be equated or supplanted by a broad and loose "agreement" or "arrangement" that is merely designed to accommodate an ILEC's unilateral interpretation of its broadband deployment commitments and obligations. When the *McRoberts v. Phelps* criteria are applied to the provisions of Chapter 30 (including the BFRR obligations for a Chapter 30 ILEC in Section 3014(c), 66 Pa.C.S. § 3014(c)), the ILEC's participation in a true joint venture under Chapter 30 must amount to "active participation" and not to a "passive partnership" *where the ILEC's statutory responsibility for broadband deployment is delegated to an unregulated affiliate*. I believe it was the Legislature's intent that the obligation to deploy broadband remain

with the regulated ILEC, if only to ensure the ability of this Commission to enforce the law. By federal and state law, we have no jurisdiction over wireless providers.

In fact, the proprietary (i.e., confidential) "joint venture" agreement driving the fulfillment of Verizon PA's obligations is not even a part of the record of this proceeding. We therefore cannot reveal its contents or rely on it in this decision. Even then, the agreement is the tail wagging the dog. We are to seal the fate of these Greensburg customers and all other BFRR customers by whatever way Verizon PA and Verizon Wireless choose to wag the tail, modifying their agreement surely for their self-interest, but not necessarily for the public good.

What little we can say of this agreement does not comport with Pennsylvania joint venture law. As Verizon PA has indicated in its Answers to the Directed Questions, any "revenue resulting from the providing 4G LTE service to end user customers belongs to Verizon Wireless," and "[o]perational expenses, including depreciation and taxes, are the responsibility of Verizon Wireless and will be offset by the [Verizon PA/North supplied] Contribution in Aid of Construction."[16] Similarly, "going forward after the construction to provide 4G LTE service has been completed, Verizon Wireless remains responsible for providing the service, including customer service and billing, as well as for providing Verizon PA/North with information they need to meet their regulatory reporting obligations." Also, "Verizon Wireless is the owner of the equipment used to provide its wireless broadband service."[17] In short, under the *McRoberts v. Phelps* standards, Verizon PA and Verizon Wireless are not sharing the profits of their "joint venture" nor a " 'joint proprietary interest and right of mutual control over the subject matter' of the enterprise." Thus, the arrangement between Verizon PA and Verizon Wireless cannot be properly classified as a "joint venture" for purposes of Section 3014(n)(2), 66 Pa.C.S. § 3014(n)(2).

For these reasons, I respectfully dissent in the decisions reached by the majority in the two above-referenced proceedings.

James H. Cawley
Commissioner

Dated: February 28, 2013

[16] Docket No. P-2012-2323362, Verizon PA Answer No. 3.c(1)&(2) to Directed Questions, January 10, 2013, at 4-5.

[17] Docket No. P-2012-2323362, Verizon PA Answer Nos. 3.f &g to Directed Questions, January 10, 2013, at 5-6.