

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120**

**PROPOSED RULEMAKING
ORDER - COMPETITIVE
CLASSIFICATION OF
TELECOM RETAIL SERVICES**

**PUBLIC MEETING OCT. 28, 2021
3001391-LAW
DOCKET NO. L-2018-3001391**

STATEMENT OF CHAIRMAN GLADYS BROWN DUTRIEUILLE

The matter before us is a recommendation for adopting final form regulations revising Sections 63 and 64 of our Code governing telecommunications. This arose as part of the Commission's earlier *Reclassification Order* and addresses Section 3019(b)(2) of the Public Utility Code (Code).¹

As an initial matter, I support following the Independent Regulatory Review Commission's (IRRC) suggestion that we reissue the proposed regulations and solicit additional input on the issues raised by my earlier statement.²

I do not agree with the proposition that the mere existence of competition and technological updates warrants the elimination of the vast majority of the many customer protections included in our existing service quality and billing regulations. The reference to cable voice service as a substitute for regulated stand-alone voice service is unpersuasive. While I applaud the great progress that has been made in providing cable internet and cable voice services, I am reminded that we still struggle with the availability of access to reliable and affordable cable service in rural and urban areas in our Commonwealth.³ Also, cable voice is not classified as a telecommunications service and, even if it were, it is rarely offered as the stand-alone voice service regulated by the Commission. Wireless service is also not a substitute to regulated stand-alone voice service because it has capacity constraints that limit its usefulness. Satellite service is too nascent to consider as a substitute today.

¹ 66 Pa.C.S. § 3019(b)(2).

² *Comments of the Independent Regulatory Review Commission*, Docket No. L-2018-3001391 (July 23, 2021), p. 3.

³ *Section 706 Report*, Docket No. 17-199 (February 2, 2018), Appendix D-2. Of Pennsylvania's 12,774M residents cited, 82.4% of rural residents and 98.2% of urban residents have no access to fixed and mobile broadband. This translates into approximately 179,000 urban residents and 481,000 rural residents without broadband. This totals over 600,000 Pennsylvanians.

A more moderate approach to updating our regulations is preferable to one that cuts far deeper than necessary, at this time, when true competition is not ubiquitous and the technological advancements,⁴ that do exist, are not universally available. Even if ubiquitous competition existed and technological advancements were universally available, there would still be issues like network reliability, public safety, adequacy, privacy, and service quality that are sufficiently critical to require detailed regulations and not reliance on Section 1501 of the Code.⁵

Section 3019(b)(2) expressly directs the Commission to take into consideration the emergence of new industry participants, technological advancements, service standards and customer demand when revising our regulations. Section 3011(a)(13) recognizes that regulatory burdens on carriers subject to Chapter 30 should be reduced to level more consistent with those of an alternative service provider.

⁴ Interconnected VoIP service, not classified by the FCC as telecommunications, has proven as reliable as traditional plain old telephone service (POTS) only if the customer possesses a high-speed Internet connection at their residence or business since it works via ethernet cable, Wi-Fi, and even LTE. For the approximately 6000,000 consumers without broadband in PA, VoIP is not an option in the absence of cable internet service unlike POTS, which we regulate and which still works in the event of a power outage, a lost internet connection also means the consumer loses voice service unless they have a cellphone. Cellphone service also has less capacity and can be quickly overwhelmed as in an emergency. Cable voice service also requires consumers to keep service by investing in an established backup power source. Technologies like low-earth orbiting satellites (LEOs) or fixed wireless are in their infancy, have capacity constraints, can be expensive like requiring a \$500 equipment fee upfront. The parties also overlook that these require access to Internet broadband service that unfortunately many Pennsylvanians still lack.

⁵ Competition must be ubiquitous to be an effective replacement for regulations. Verizon notes that competition replaces regulatory oversight in formerly monopoly markets. *Accord Verizon Comments* at 5. The record does not define competition nor how to measure it except for an incomplete discussion of lost access lines noted *infra*. *Compare Verizon Comments* at 3-10 citing *FCC Voice Subscription* (April 2021) with *FCC Voice Subscription Report* (April 2021) Table 1, pp. 8-9 showing ILEC over-the-top VoIP grew from 67 to 70, ILECs coaxial cable grew from 55 to 56, and ILEC fiber-to-the-premises grew from 8,590 to 8633 while CLEC ability to compete to provide service declined from 3,514 to 3,082 using last mile facilities and reliance on UNE-L declined from 1,529 to 1,352. Professor Harry Trebing, a former FCC economist and Michigan State Public Utility Institute Director, defined effective competition to exist when there are at least five providers of the service and no one provider has more than 40% of market share. Anything less makes competition ineffective by making consumers price takers not price makers. *Compare Harry Trebing* (Michigan Institute of Public Utilities Lectures, 1993) and David S. Schwartz, *Crossing the Rubicon with Harry Trebing* (2002) <https://ipu.msu.edu/wp-content/uploads/2019/08/Crossing-the-Rubicon-with-Harry-Trebing.pdf> and William G. Shepherd, *Wrong Numbers* (May 2000)(discussing a proposed MCI-T-Mobile merger in light of Trebing's approach available at [Wrong Numbers—MCI WorldCom, Sprint, and monopoly power in the long-distance market | Economic Policy Institute \(epi.org\)](https://www.epi.org/publications/wrong-numbers-mci-worldcom-sprint-and-monopoly-power-in-the-long-distance-market/) with *Verizon Comments*, pp. 2-5 and *PTA Reply*, and *CR Comments*. Cf. *Comments of the OCA*.

The guiding principles of Sections 3019(b)(2) and 3011(a)(13) should be the *primus inter pares* considerations in the present rulemaking. Those principles must be considered *in pari materia* with other *preceding* provisions in the statute emphasizing the importance of universal service, affordable rates, nondiscrimination, and the deployment of broadband be it mandated or by competition.⁶ A holistic consideration of Sections Section 3019(b)(2), 3011(a)(11) and (13), and Section 3016(a) does not support substantial deviation from the final form regulation before us today.

Section 3019(B)(2).

A. Emergence of New Industry Participants

Our 35 Chapter 30 Companies, which are the traditional incumbent service providers in Pennsylvania and referred to as local exchange telecommunications companies (LETCs) in Chapter 30 of the Code, assert that they continue to experience significant losses in the number of voice service access lines to unregulated competitors over the past few years.⁷ They argue that this competition from these unregulated competitors should result in the Commission rescinding a substantial portion of our regulations addressing the safety, adequacy, reliability, and privacy of telecommunications services and the ordering, installation, suspension, termination, and restoration of any telecommunications service. However, a Section 3019(b)(2) proceeding is to consider new industry participants, technological advancements, service standards and consumer demand. But, the commentators have made competition a component of the statutory criteria and, even then, have presented no real substantial evidence to support their claim other than aggregate figures on line losses set forth in the Federal Communication Commission’s *Voice Subscription Report* (April 2021) which also show competition increases and declines. These partial references, moreover, fail to address the extent to which these “lost” incumbent stand-alone access lines used to provide stand-alone voice have been, or will be, replaced by the incumbents’ own modernized “multiservice” last-mile lines that are providing not only voice, but also internet and video service, backhaul service, and mobile services as well.

I note that the current version of Chapter 30 enacted seventeen years ago incorporated a statutory provision that permitted our LETCs to obtain pricing regulatory relief once the LETC presents evidence that competition from alternative service providers is no longer nascent in their service territory. If competition were a criteria in Section 3019(b)(2), which it is not, and were as pervasive as claimed, beyond the

⁶Compare e.g., Section 2011(a)(1), (2), (8), and (11) with Verizon Comments, p. 2, n. 7 citing 2011(a)(11). It should be noted that Section 3011(a)(11) must be read in conjunction with (a)(9) addressing competition in any region where there is market demand. That has occurred in 153 of Verizon’s 504 exchanges and in none of the exchanges operated by all the remaining ILECs who also rely on Section 3011(a)(11). See PTA Reply Comments, p. 3.

⁷ *Verizon Comments*, pp. 3-10; *PTA Reply Comments*.

superficial reference to access line losses, the incumbents would have long ago, under Section 3016 of the Code,⁸ petitioned to obtain “competitive” classification in their remaining exchanges by presenting these claims and additional evidence beyond that made here. That has not occurred except for Verizon’s attempt to reclassify 196 of its 504 exchanges. This illustrates that competition is not ubiquitous.

I support the overall approach in Sections 63.22 to 63.44 on Service Quality Measurements because the existing rules retain a minimum amount of regulation as needed to ensure information about network reliability and quality of service. The proposed regulations governing Service Records (63.22), Service Interruptions (63.24), Accounts and Records (63.35), and Surveillance (63.51-63.55), Trouble Reports (63.57), Installation (63.58), Transmission (63.63), and Inspections and Metering (63.64) should be retained. I support modification of our earlier approach to now state that reports are to be provided upon Commission request except in some limited instances like the Annual Report.

I support substantial revisions of Automatic Dialing Device, Extended Area Service, Payphone, Underground Utility Service, Long-Distance Utility Service, Operator Supported Services, and Wholesale Service portions of the regulations with a backstop provision that should the public interest demand, the Commission retains the appropriate jurisdiction to serve the public interest.

B. Service Standards and Consumer Demand.

Section 3019(b)(2) of the Code also requires the Commission to consider service standards and consumer demand. On these points, a recent event involving over 140 informal complaints against one incumbent provider suggests that consumer demand for network reliability, adequacy, and public safety continues to exist.

An even more recent letter from the General Assembly, whose standing committees will comment on our final form rules, asked the Commission to investigate outages and network reliability.⁹ While those matters and allegations have been appropriately referred to our independent enforcement authority under the *Lyness* doctrine, their existence illustrates the extent to which consumers expect this Commission to regulate telecommunication service standards. I do not support revisions to our rules that rescind the practice of requiring notice to the Commission of any outage reported to the FCC, providing customer credits based on the length of a service outage in any exchange, or eliminating the need for reports and metrics measuring network reliability. The Pennsylvania public relies on the Commission to continue to address these matters.

⁸ 66 Pa.C.S. § 3016(a)(1)-(3).

⁹ See attached Letter. Under the *Lyness* doctrine, a regulatory agency cannot be prosecutor and judge. The Commission’s independent enforcement arm, BI&E, is looking into those claims.

Section 3011(a).

Many commentators called for a reduction in our rules to those imposed on alternative service providers (or CLECs) due to the presence of competition. They view the rules imposed on LETCS or ILECs as harmful to their ability to compete everyday with CLECs for a consumer's business.¹⁰

This call for the wholesale rescission of our existing telecom regulations or for the incorporation of sunset provision for telecom regulations contains no substantial evidence of ubiquitous competition. But, even if it did, the call fails to address the fact that Chapter 30 also recognizes that the obligations and duties imposed on an ILEC are not identical with those expected of a CLEC. For this reason, the statute expects that the Commission *should* reduce regulations to levels *more consistent with* those of an ILEC. Section 3011(a)(13) must be balanced against *preceding* provisions such as Sections 3011(a)(2) addressing universal service at affordable rates, (a)(8)'s concern that competitive service be deployed without jeopardizing universal service, and that the promotion of advanced and broadband services not jeopardize universal service in Section 3011(a)(12).

The call for absolute regulatory parity between ILECs and CLECs fails to account for the fact that incumbent LETCs, or ILECs, like incumbent providers in the water, electric, and gas public utilities, have universal service Carrier of Last Resort (COLR) obligations¹¹ under state law and are Eligible Telecommunications Carriers (ETC) with obligations arising from the receipt of federal support tied to that ETC designation.¹² The competitor LETCs, or CLECs do not.

Pennsylvania's Basic Service versus Federal Stand-Alone Service. The comments to Section 53.57, *inter alia*, state that Pennsylvania's definition and requirements for intrastate "basic" service should be reconciled with federal rules requiring stand-alone voice as a condition of federal support when there are technological limitations.¹³ IRRC has raised this concern as well.¹⁴

¹⁰ See e.g., *PTA Comments*, p. 4.

¹¹ That anticipation, at least in Pennsylvania, was accompanied by an equally important commitment to universal service, assurances that rates remained just and reasonable, and that eligible consumers could get Lifeline service from LECs subject to Chapter 30. Section 3011(a) and 3019(f). The comments recognize this interplay of universal service/COLR and competition. See e.g., *PTA Reply Comments*, pp. 5-6.

¹² See e.g., *Comments of Claverack Communications*, Docket No. L-2018-3001391 (May 25, 2021) *inter alia*.

¹³ *Comments of Claverack Communications, Inc.*, Docket No. L-2018-3001391 (May 25, 2021); *Accord IRRC Comments* (July 23, 2021), p. 5.

¹⁴ *IRRC Comments* (July 23, 2021), p. 5.

The “basic” service definition set forth in our current rules reflects a monopoly era when the Commission regulated intrastate voice service and the FCC regulated interstate voice. Since then, voice service is now usually blended into a packaged voice service that combines intrastate and interstate voice. This packaged voice service is often bundled with broadband service where broadband is available. The FCC requires recipients of federal support to provide “stand alone” voice service, usually a packaged voice service, as well as bundled voice and broadband service. The final rules should retain the definition of “basic” service limited to intrastate voice but should also be revised to include package voice services that provide unlimited local and long-distance calling, 911, and telecommunications relay service provided by new entrants. This allows those providers to comply with the ancillary requirements while reconciling our “basic” service for those without a package voice in a way that also ensures compliance with FCC mandates. This also ensure that all consumers, not just Lifeline consumers, will have access to stand-alone voice service if it is a “basic” intrastate voice service or a packaged voice service offered to comply with federal mandates.¹⁵

Tariffs, Product Guides, or Similar Documents. The comments calling for reliance on Section 1501 and the Commission’s current rules as well as tariffs, price lists, or other documentation for noncompetitive stand-alone service, and then only through December 31, 2023, are unpersuasive. This ignores the language in the VoIP Freedom Bill retaining Commission authority over VoIP if it is a protected service provided under tariff. That may not be the case if it is protected voice service but is offered using a price list or a similar document. That is because allowing protected service provided under tariff to be done using a price list or a similar document circumvents these provisions and deregulates VoIP without the proceeding mandated for protected services in Section 3016. A better approach is to reconcile Chapter 30 with the VoIP Freedom Bill and our *Reclassification Order* by revising the rules to allow regulatory compliance by tariff, product guide, or similar document. However, a product guide or similar document should only be allowed when the LETC is not providing a protected service or the service does not implicate COLR or ETC Designation. In that case, the LETC must use a tariff. All providers, however, should be allowed to post their information electronically so long as it is approved by the Commission’s Bureau of Consumer Services.¹⁶

¹⁵ *Accord, Comments of Claverack Communications, Inc.*, Docket No. L-2018-3001391 (May 25, 2021), p. 4, n. 2. Claverack provides this only to Lifeline consumers and although most consumers prefer a voice and internet bundle, there may be other consumers interested in this voice package. Importantly, this voice package meets the “stand alone voice service” required by the FCC in the recent RuDOF auction in which the Commission grants providers ETC designation consistent with that rule. *See also Comments of the Office of Consumer Advocate*, Docket No. L-2018-3001391 (May 25, 2021) at p. 3 citing *Comments of Cause*.

¹⁶ Consumers seeking information on regulated voice service face a daunting task trying to locate that information or obtain access to a human customer service representative (CSR). Commission review would ensure predictability while promoting consumer education.

Section 3016.

Sunset of All Regulations. The commentators rely on an incomplete reference to lost access lines to support an assertion that competition warrants the wholesale elimination of regulations. They make those claims in this quasi-adjudicatory rulemaking proceeding as opposed to a quasi-judicial Section 3016 proceeding. The commentators also rely on the same claims about competition to support a mandatory sunset date.

This approach circumvents the process set out in Section 3016(a) governing how an ILEC with a universal service/COLR obligation or ETC Designation must proceed. An agency order cannot by fiat obviate a requirement for a proceeding set forth in law by the General Assembly. That will happen here if we provide relief based on competition claims that have not been substantiated. A better approach is to revise the regulations to, in the incremental manner prescribed by Chapter 30, Section 3019(b)(2), reflect new industry participants and technological advancements without addressing further relief based on competition claims that are not supported by persuasive evidence.¹⁷

In conclusion, I do not support any revisions of the regulations which do not strike the appropriate balance between Sections 3011(a), 3019(b)(2), and Section 3016 while recognizing the universal service mandate and the need to address new industry participants and technological advancements in Section 3019(b)(2). Any other result constitutes an end-run around the petition process set out in Section 3016 of the Code. The quasi-adjudicatory proceeding set out by the General Assembly to test the reality of claims that competition in Pennsylvania is ubiquitous, therefore meriting complete rescission or substantial elimination of our rules, should not be supplanted by this rulemaking.



October 28, 2021
Date

Gladys Brown Dutrieuille, Chairman

¹⁷ The claim that universal service and COLR go to a service and not the underlying rules adopted by the Commission fails to explain how a statutory mandate like Section 3016, universal service, COLR, or an ETC Designation can be enforced. However, the observation that COLR is an integral part of universal service under Chapter 30 is consistent with recognition that universal service in the energy and gas industries also use COLR as a means to attain universal service. *Compare PTA Reply Comments*, pp. 5-6 with Section 3011 and 1501 of the Public Utility Code.