

**PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17120**

Public Meeting held April 20, 2023

Commissioners Present:

Gladys Brown Dutrieuille, Chairman  
Stephen M. DeFrank, Vice Chairman, Conflict Statement  
Ralph V. Yanora  
Kathryn L. Zerfuss  
John F. Coleman, Jr., Statement

Petition of DRIVE for a Declaratory Order  
Regarding the Expansion of its Community  
Broadband Network

P-2021-3025296

**OPINION AND ORDER**

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## BEFORE THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Windstream Pennsylvania, LLC, Windstream Buffalo Valley, Inc., (collectively, Windstream) and TDS Telecom/Mahanoy & Mahantango Telephone Company (TDS/M&M) and The United Telephone Company of Pennsylvania LLC d/b/a CenturyLink (CenturyLink/United Telephone)<sup>1</sup> (hereinafter referred to as the “ILECs”) filed on November 9, 2022, to the Initial Decision on Remand (Remand I.D.) of Deputy Chief Administrative Law Judge (ALJ) Joel H. Cheskis, issued October 20, 2022. The Remand I.D. had been issued in compliance with the Commission’s directives in the above-captioned docket. (Order entered July 20, 2022) (*July 2022 Remand Order*).<sup>2</sup>

Replies to the Exceptions of the Parties have been filed by Driving Real Innovation for a Vibrant Economy (DRIVE or Petitioner hereafter) and the Office of

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<sup>1</sup> The United Telephone Company of Pennsylvania LLC d/b/a CenturyLink is part of a previously announced acquisition of incumbent local exchange carrier assets and associated operations across 20 states, including Pennsylvania. On October 3, 2022, that transaction closed and operations began under the “Brightspeed” brand. Counsel has advised that CenturyLink will be undertaking a name change shortly to reflect the Brightspeed name. *See Exceptions, infra*, n. 1.

<sup>2</sup> This case is the second in a series of proceedings. In the first case (*DRIVE I*), the Commission determined that DRIVE was not subject to the prohibition of 66 Pa. C.S. § 3014(h)(2) and would not subject DRIVE to the Commission's jurisdiction as a public utility, *In re: DRIVE Petition*, Docket No. P-2018-3006603 (Order entered February 28, 2019). *DRIVE I* reflected, in part, the pilot program nature of the service and the Commission’s limited jurisdiction over municipal public utility operations under Pennsylvania law. DRIVE subsequently petitioned to have a similar declaration made after DRIVE expanded from a pilot in Montour County to several other counties i.e., Columbia, Northumberland, Snyder and Union Counties. The Commission denied that request and instructed DRIVE to file a Petition for Declaratory Order, i.e., this proceeding. DRIVE subsequently sought to withdraw this Petition which the Commission declined given the important public interest in Section 3014(h)(2). An Initial Decision on Remand issued. This Order deals with that record.

Consumer Advocate (OCA) on November 21, 2022, and November 22, 2022, respectively.<sup>3</sup>

The case arose after DRIVE filed a Petition for Declaratory Order (Petition) seeking a Commission order addressing Section 3014(h) of the Public Utility Code, 66 Pa. C.S. 3014(h). DRIVE is a council of political subdivisions consisting of county members that was established for the purpose of economic development. DRIVE seeks to initiate projects involving the construction, operation, and deployment of a community broadband network in Montour County as a pilot program. DRIVE subsequently expanded its project to include Lycoming, Snyder, Union, and Northumberland Counties (the Expansion).<sup>4</sup>

DRIVE's Petition asks that the Commission clarify what is legally required under Section 3014(h)(2) of the Code, 66 Pa. C.S. § 3014(h)(2). This statutory provision addresses what is required when a political subdivision or any entity established by a political subdivision seeks to provide to the public for compensation telecommunications services, including advanced and broadband services<sup>5</sup>, within the service territory of a

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<sup>3</sup> Commission dockets further note the withdrawal of appearance of Zsuzsanna E. Benedek, Esquire, and entry of appearance of Deanne M. O'Dell, Esquire, on behalf of United Telephone. Additionally, notice was received that DRIVE would not be filing Exceptions to the Remand I.D. and that Windstream and United Telephone would not be filing Replies to Exceptions.

<sup>4</sup> DRIVE also amended its organizational structure to include membership from the Expansion counties.

<sup>5</sup> The Chapter 30 definitions for broadband are speed that is at least greater than .128 Megabits per second (Mbps) down and 1.5 Mbps up (the so-called "DSL speed"). While that definition may encompass speeds greater than .128 Mbps up/1.5 Mbps down, the networks deployed under Chapter 30 are at this speed. This speed is much slower than the National Telecommunications Infrastructure Agency (NTIA)/ Federal Communications Commission (FCC) "definition" for unserved and underserved areas for broadband. The FCC/NTIA consider an area unserved if they lack 25/3 and an area

local exchange telecommunications company operating under a network modernization plan (Chapter 30 Company).<sup>6</sup>

On consideration of the Remand I.D., the Exceptions thereto, and Replies to Exceptions, we shall adopt the Remand I.D., as modified, consistent with the discussion in this Opinion and Order. The Exceptions of the Parties are, hereby, granted in part, and denied, in part, consistent with the discussion in this Opinion and Order.

The first issue is whether the Commission should open a proceeding or take other regulatory action to provide more certainty and clarity on the scope and operation of Section 3014(h)(2). On consideration, we decline, at this time, to open a proceeding or undertake other regulatory action in this matter.

The Initial Decision and Decision on Remand thoroughly addressed all of the issues except for the modification on a “nexus” or “linkage” as discussed below. That

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underserved if they lack 100/20. [Microsoft PowerPoint - State Local 2-Pager Final 01.27.2022 \(doc.gov\)](#) See also, [BEAD – The \\$42.5 Billion Infrastructure Grants | POTs and PANs \(potsandpansbyccg.com\)](#). The Treasury Department’s earlier Interim Final Rules governing the American Rescue Plan Act (ARPA) considers an area unserved if they do not have 25/3 Mbps service and underserved is they lack 100/100 Mbps although 100/20 is acceptable for some areas 20 Mbps. [Interim Final Rule \(treasury.gov\)](#) at pp. 75-76 and 70-71.

<sup>6</sup>DRIVE wants to deploy a middle mile broadband network financed from their respective county federal CARES money. This network would provide transmission capacity for internet service providers using Wireless Internet Service Providers (WISPs), a form of fixed wireless service. It should be noted that in August 2022, the FCC disqualified a fixed wireless provider from receiving \$1.3B in Rural Digital Opportunity Fund (RDOF) support to provide broadband in unserved areas and \$885M in support to a low-earth orbiting satellite provider because they could not meet the FCC’s requirements. Those matters are currently under appeal at the FCC. *See FCC REJECTS APPLICATIONS OF LTD BROADBAND AND STARLINK FOR RURAL DIGITAL OPPORTUNITY FUND SUBSIDIES, Applicants Failed to Meet Program Requirements and Convince FCC to Fund Risky Proposals (August 8, 2022)*.

discussion and this modification provides the clarity and predictability needed going forward. This is better than expending resources in a formal proceeding at this time given the looming distribution of unprecedented federal public investment capital for broadband networks and services in unserved or underserved areas of Pennsylvania. Our disposition provides potential providers seeking federal funding with clarity on how Chapter 30 would operate with federal funding.

Consistent with the discussion in this Opinion and Order, we conclude that the modifications set forth in this Opinion and Order should provide the clarity and predictability needed for interested stakeholders or parties going forward. The Exceptions on this issue are denied accordingly.

We, hereby notify the Parties that the Commission will take official notice of the findings of the United States Congress and proceedings before the Federal Communications Commission (FCC) related to, and in furtherance of, the goals as set forth in the Digital Equity Act of 2021, 47 U.S.C.A. §§ 1721, *et seq.*, *infra* and related and predecessor laws concerning broadband deployment. *See*, 66 Pa. C.S. §§ 331(g); 332(e); 52 Pa. Code § 5.408. The Commission will also take administrative notice of the activity of the Pennsylvania Department of Community and Economic Development, *infra*, in furtherance of broadband deployment in the Commonwealth.

## **I. Background<sup>7</sup>**

As noted, the Remand I.D. has been issued consistent with the Commission's discussion and directives in the *July 2022 Remand Order*. The *July 2022 Remand Order*, in pertinent part, directed that a Petition for Declaratory Order filed by DRIVE be remanded to the Office of Administrative Law Judge (OALJ) for disposition on the merits, notwithstanding DRIVE, as the Petitioner, filed a Petition to Withdraw.

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We acknowledge substantial attribution to the Remand I.D.

On consideration of the opposition of certain incumbent local exchange carriers (ILECs) and rural local exchange carriers (RLECs) to DRIVE's withdrawal of the Petition for Declaratory Order at the above docket, the *July 2022 Remand Order* found it in the public interest to deny withdrawal and address on the merits certain issues remaining in controversy and dispute among the parties. The most noteworthy of the issues which remained in controversy and uncertainty was identified as follows:

Fundamentally, the dispute between DRIVE and the RLECs is whether, in a fair reading of that section [66 Pa. C.S. § 3014(h)(2)], a political subdivision, or an entity created by it, may provision a lesser broadband speed to a lesser geographic area than what it demanded from an affected ILEC in its statutorily-required right of first refusal letter. This controversy between DRIVE and the RLECs will still exist even if a withdrawal is permitted.

*Order* at 34.

The background of the controversy raised by the DRIVE Petition that is before the Commission may be summarized as follows: DRIVE is a council of governments formed pursuant to Article 9 Section 5 of the Pennsylvania Constitution and the Pennsylvania Intergovernmental Cooperation Act, 53 P.S. §§ 2301, *et seq.*, for the purposes of economic development. The Intergovernmental Cooperation Act, *inter alia*, authorizes local governmental entities to cooperate under joint agreements in fulfilling their governmental functions, which include economic development. *See, generally, July 2022 Remand Order*, at 5, citing, *Amended Petition of DRIVE for a Declaratory Order That Its Construction and Operation of a Community Broadband Network (A) Is Not Subject to the Prohibition of 66 Pa. C.S. § 3014(h) and (B) Would Not Subject DRIVE to the Commission's Jurisdiction as a Public Utility*, Docket No. P-2018-3006603 (Order entered February 28, 2019) (*2019 Declaratory Order*, also, *DRIVE I*) at 2.



DRIVE was originally formed by Columbia and Montour Counties. Subsequently, DRIVE was joined by Northumberland, Snyder and Union Counties. *See* Remand I.D., Finding of Fact Nos. 1-2, *infra*. As an economic development council of governments, DRIVE serves the greater Central Susquehanna Region. Remand I.D. at 1.

In the proceeding which may be referred to as *DRIVE I*, the Commission addressed a Petition for Declaratory Order filed by DRIVE for what was termed a “pilot” project for the construction, operation, and deployment of a community broadband network. *See*, DRIVE original Petition (Amended) for Declaratory Order at ¶ 16. In pertinent part, the pilot project was described as follows:

\* \* \*

18. The Pilot Project will provide service to several specific locations with line of sight visibility. Successful roll-out of the service during the Pilot Project could drive network expansion to include additional locations in Montour County.
19. During the Pilot Project, DRIVE will construct the backbone of the network. The Pilot Project would deliver the following benefits:
  - a. Create a carrier-grade, wide area network platform that leverages the available fiber access to the internet in Danville and distributes that access beyond the limitations of the current cable footprint. Specifically, one point in the network will be linked via an unlicensed microwave connection to another point in the network. That second point will be linked to a third point in the network via an FCC licensed microwave connection. The third point in the network will interconnect to fiber broadband services.

- b. Build carrier-grade network connections to provide fiber connections to five Montour County facilities.
  - c. Create an alternate data link for county 911 services on a licensed microwave link (these are currently carried on a low capacity, early vintage wireless link).
20. DRIVE will not provide data or internet service to the public; it will lease access to its network to ISPs [Internet Service Providers] and other parties, who will sell internet access and other services to end users. The end users would be customers of the ISPs, rather than customers of DRIVE.

DRIVE Amended Petition (original) at 5-6.

In *DRIVE I*, DRIVE, as Petitioner, requested a declaratory order to remove uncertainty as to whether the initial project would subject it to regulation as a public utility and whether DRIVE had complied with the solicitation of a ‘right of first refusal’ (ROFR) offer to the ILECs in the territories in which the ILECs provide service as required by Section 3014(h)(2) of the Code, 66 Pa. C.S. § 3014(h)(2).

Section 3014(h)(1) of the Code, 66 Pa. C.S. § 3014(h)(1), establishes a general prohibition against the provision of telecommunications services, including advanced or broadband services, to the public for compensation by a political subdivision. *See, Petition of Central Bradford Progress Authority For A Declaratory Order Regarding Its Construction of Fiberoptic Infrastructure In Bradford County Is: (A) Not Subject to The Prohibition of 66 Pa. C.S. § 3014(h)(1); AND (B) Not Subject To The Commission’s Jurisdiction As A “Public Utility,”* Docket No. P-2018-2642849 (Order entered July 12, 2018); 2018 WL 3533527 (Pa. P.U.C.) (*Central Bradford Order*). The prohibition applies to the service territory of an ILEC operating under a Commission approved network modernization plan. *See, 66 Pa. C. S. § 3012 – ““Network*

**modernization plan.”** A plan for the deployment of broadband service by a local exchange telecommunications company under this chapter or any prior law of this Commonwealth.”

Section 3014(h)(1) of the Code provides as follows:

(1) Except as otherwise provided for under paragraph (2), a political subdivision or any entity established by a political subdivision may not provide to the public for compensation any telecommunications services, including advanced and broadband services, within the service territory of a local exchange telecommunications company operating under a network modernization plan.

66 Pa. C.S. § 3014(h)(1).

Section 3012 of the Code, 66 Pa. C.S. § 3012, defines “political subdivision” as:

**“Political subdivision.”** Any county, city, borough, incorporated town, township, municipality, municipal authority or county institution district.

66 Pa. C.S. § 3012.

There is no dispute among the Parties in this proceeding concerning the status of DRIVE as a “political subdivision” within the meaning of Chapter 30. Remand I.D. at 27.

However, Section 3014(h)(2) of Code, 66 Pa. C.S. § 3014(h)(2), which is central to the present controversy addressed in the DRIVE Petition, establishes an exception to the general prohibition against the provision of advanced or broadband

service in the service territory of an ILEC by a political subdivision. Section 3014(h)(2) of Code states as follows:

(2) A political subdivision may offer advanced or broadband services if the political subdivision has submitted a written request for the deployment of such service to the local exchange telecommunications company serving the area and, within two months of receipt of the request, the local exchange telecommunications company or one of its affiliates has not agreed to provide the data speeds requested. If the local exchange telecommunications company or one of its affiliates agrees to provide the data speeds requested, then it must do so within 14 months of receipt of the request.

66 Pa. C.S. § 3014(h)(2).

In *DRIVE I*, the Commission, on petition of DRIVE, issued a declaratory order that DRIVE complied with Section 3014(h)(2) of the Code by providing a written right of first refusal offer to the local exchange telecommunication(s) companies<sup>8</sup> affected by the pilot project and that DRIVE was not, otherwise, subject to Commission jurisdiction with regard to the portion of the Network to be located in Montour County. *DRIVE I* at 7-9. The pertinent findings and conclusions of *DRIVE I* are reprinted below:

1. That the Amended Petition of DRIVE for a Declaratory Order That its Construction and Operation of a Community Broadband Network (A) Is Not Subject to the Prohibition of 66 Pa. C.S. § 3014(h) and (B) Would Not Subject DRIVE to the Commission's Jurisdiction as a Public Utility is granted, consistent with this Order.
2. That DRIVE has complied with the requirements of Section 3014(h)(2) of the Public Utility Code, 66 Pa. C.S. § 3014(h)(2), with respect to the

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<sup>8</sup> It appears that only one ILEC was impacted by the pilot project in Montour County, Verizon Pennsylvania LLC. *DRIVE I* at Order ¶ 7.

construction and operation of its fiberoptic network in Montour County, Pennsylvania.

3. That the sole incumbent local exchange carrier operating in Montour County, Verizon Pennsylvania, LLC, has declined to provide the service requested by DRIVE within the meaning of Section 3014(h)(2) of the Public Utility Code, 66 Pa. C.S. § 3014(h)(2).
4. That DRIVE will not be in violation of the prohibition in Section 3014(h)(1) of the Public Utility Code, 66 Pa. C.S. § 3014(h)(1), if it constructs and operates a “dark” fiberoptic network in Montour County on the terms outlined in its Amended Petition.
5. That DRIVE is a “municipal corporation,” not a “public utility,” as both are defined in Section 102 of the Public Utility Code, 66 Pa. C.S. § 102; therefore, its operation of a dark fiberoptic network in Montour County, as described in its Amended Petition, will not be subject to the jurisdiction and regulation of the Public Utility Commission.
6. That DRIVE’s status as a municipal corporation not subject to the jurisdiction and regulation of the Public Utility Commission does not extend beyond its current boundaries of Columbia County and Montour County.
7. That should DRIVE expand its fiberoptic network into the service territory of any other Incumbent Local Exchange Carrier besides Verizon Pennsylvania, LLC, it shall first comply with the conditions outlined in Section 3014(h)(2) of the Public Utility Code, 66 Pa. C.S. § 3014(h)(2), and shall first obtain a clear and unequivocal denial of service from the appropriate Incumbent Local Exchange Carrier.
8. That should DRIVE expand its fiberoptic network beyond Columbia and Montour Counties, DRIVE shall first apply and obtain an appropriate Certificate of Public Convenience from the Commission.

9. That nothing herein shall be construed to exclude or exempt any third-party entity offering telecommunications services to end users through use of DRIVE's dark fiberoptic network from classification as a public utility under the Public Utility Code if it is otherwise properly classified as such. . . .

*See, DRIVE I.*<sup>9</sup>

The part of the Network within Montour County considered in *DRIVE I* has been completed and is operational. *See, DRIVE St. 2, at 3, citing DRIVE Exhibit JW-5; also Remand I.D. Finding of Fact No. 20, infra.*

On April 16, 2021, DRIVE filed the current Petition seeking declaratory order relief regarding the expansion of its community broadband network, *i.e.*, alternately Expansion Project.<sup>10</sup> In the Petition, DRIVE indicated, among other things, that it has completed the pilot project in Montour County, and that it now desired to expand its network into Columbia, Northumberland, Snyder and Union Counties, in addition to Montour County. *See Remand I.D. Finding of Fact No. 21.*

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<sup>9</sup> In the instant Petition for Declaratory Order, we acknowledge that DRIVE has emphasized that *DRIVE I* was decided on the pleadings and the disposition therein is, under DRIVE's analysis, comparable to a determination in the nature of a judgment on the pleadings pursuant to the civil practice of law as no evidentiary hearings were held. *See, e.g., DRIVE M.B. at 26; Remand I.D. at 22.*

<sup>10</sup> In a prior Commission filing, DRIVE petitioned to amend the Commission order granting it declaratory relief in *DRIVE I*. This Petition was denied, with prejudice, on a finding by the Commission that an amendment of the prior order was not appropriate. *See, Amended Petition of DRIVE for a Declaratory Order That Its Construction and Operation of a Community Broadband Network (A) Is Not Subject to the Prohibition of 66 Pa. C.S. § 3014(h) and (B) Would Not Subject DRIVE to the Commission's Jurisdiction as a Public Utility, Docket No. P-2018-3006603 (Order entered February 4, 2021; 2021 Declaratory Order or DRIVE II).*

Based on the foregoing, the Petition presently before the Commission for disposition requested a declaration that Section 3014(h)(1) of the Code, 66 Pa. C.S. § 3014(h)(1), does not apply to the Expansion Project or, in the alternative, that DRIVE has complied with the requirements of Section 3014(h)(2) with respect to the Expansion Project. Also, the Petition requested a determination that the Expansion Project will not subject DRIVE to the jurisdiction of the Commission as a public utility. It is noted that the Expansion Project was funded by contributions made to the DRIVE member counties from federal Coronavirus Aid, Relief and Economic Security (CARES) Act allocations. *See, DRIVE St. 2 at 5, infra.*<sup>11</sup>

The DRIVE Petition provided significant detail and multiple attachments in support of its position. A copy of the Petition was served on the statutory advocates and

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<sup>11</sup> In 2020, each of DRIVE’s member counties contributed money from the CARES Act allocations the Commonwealth disbursed to counties that did not receive direct funding from Treasury. Originally, these funds were required to be expended by December 31, 2020, thereby resulting in an “aggressive” procurement and deployment schedule by DRIVE. Federal legislation enacted in December 2020, extended the deadline for expending these funds until December 31, 2021. *See, DRIVE M.B. at 10, citing DRIVE St. 2, p. 5; Finding of Fact No. 23.* On December 14, 2021, Treasury issued guidance stating that in light of the foregoing, Treasury is now revising the guidance to provide that a cost associated with a necessary expenditure incurred due to the public health emergency shall be considered to have been incurred by December 31, 2021, if the recipient has incurred an obligation with respect to such cost by December 31, 2021. Treasury defines obligation for this purpose consistently with the Uniform Guidance definition in 2 C.F.R. 200.1 as an order placed for property and services and entry into contracts, subawards, and similar transactions that require payment. Treasury’s reporting framework currently permits recipients to record their expenditures through September 30, 2022. The CRF’s eligible use is restricted to “necessary expenditures incurred due to” the COVID-19 public health emergency. Treasury currently expects that this expenditure deadline will provide a sufficient amount of time for recipients to expend their funds in accordance with the eligible uses of the CRF. *See [CRF-Guidance Revision-Regarding-Cost-Incurred.pdf \(treasury.gov\)](#).*

affected incumbent local exchange carriers - ILECs, certain of which are also classified as rural ILECs (RLECs).<sup>12</sup>

On May 6, 2021, Windstream and TDS/M&M filed an Answer to the DRIVE Petition. In their Answer and as developed in their evidentiary submittals, *infra*, and articulated in their Main Brief (M.B.) filed in these proceedings, Windstream and TDS/M&M, as rural LECs, take the position that the ROFR letter sent to them by DRIVE prior to the Expansion Project and in purported compliance with Section 3014(h)(2) of the Code, was deficient. They assert that the ROFR was statutorily infirm as it did not provide them with a meaningful opportunity to evaluate the expansion's contemplated deployment of advanced service and/or broadband service so as to enable them to respond with a "clear and unequivocal" denial to provide the proposed service. *See, e.g.*, reference to *DRIVE I* at 5, at ¶ 7, stating: ". . . That should DRIVE expand its fiberoptic network into the service territory of any other Incumbent Local Exchange Carrier besides Verizon Pennsylvania, LLC, it shall first comply with the conditions outlined in Section 3014(h)(2) of the Public Utility Code, 66 Pa. C.S. § 3014(h)(2), and shall first obtain a clear and unequivocal denial of service from the appropriate Incumbent Local Exchange Carrier." (Emphasis added).

Windstream and TDS/M&M (collectively, RLECs, unless otherwise identified) in part, point out that DRIVE's most recent ROFR letters sent on February 9, 2021, demanded that, *inter alia*, within fourteen months, they provide 50 Megabits per second (Mbps) service downstream to 85% of residences and 95% of

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<sup>12</sup> See 66 Pa. C.S. § 3012 – "**Local exchange telecommunications company.**" An incumbent carrier authorized by the commission to provide local exchange telecommunications services. The term includes a rural telecommunications carrier and a nonrural telecommunications carrier; *also* "**Rural telecommunications carrier.**" A local exchange telecommunications company that is a rural telephone company as defined in section 3 of the Telecommunications Act of 1996 (Public Law 104-104, 110 Stat. 56). Rural includes all "non-Verizon Pennsylvania" ILECs.



businesses across their entire service footprint in the counties of Northumberland and Union. The RLECs argued, *inter alia*, that DRIVE's letters did not meet the statutory requirement of Section 3014(h)(2). They respond that the ROFR request lacked detail and when further detail and clarification was asked for, it was not forthcoming from DRIVE until contested, on-the-record proceedings before the Commission resulted. The RLECs also advise that they did not decline to provide the requested service within the meaning and intent of Section 3014(h)(2).

Additionally, the RLECs, in response to the DRIVE Petition, variously, attribute a lack of good faith to DRIVE and assert that DRIVE had no intention of constructing such a network as portrayed in the ROFR letter issued to the LECs. They point out that the Expansion Project is "much more limited geographically with much slower speeds" than DRIVE demanded of the RLECs. *See, e.g.*, RLECs M.B. at 8.

Continuing, the RLECs take the position that the "middle mile" facility that DRIVE has constructed is jurisdictional. They refute the essential position of DRIVE, that the service provided by the Network and Expansion Project is not service to the "public" within the intent of the Code. The RLECs reference and rely upon substantial legal and administrative precedent which holds that service is "public" service, notwithstanding that the service is only available to a limited and defined class of the public. The RLECs also provided significant detail and an attachment in support of their position that the DRIVE Petition should be denied. Remand I.D. at 2.

Based on the foregoing, the RLECs, through their participation in this matter, request that the Commission establish standards for the content of the ROFR letter required of the political subdivision, require that the letter be limited to services that the political subdivision has "immediate and concrete" plans to undertake, and include a statement of the speeds proposed to be available within the proposed geographic area of service. The RLECs also request that the Commission find that a ROFR letter may not

request that the affected LEC offer a greater service, either in terms of geographic scope or speeds, than the political subdivision is proposing to offer.

Despite the general opposition to the relief sought in the DRIVE Petition for Declaratory Order, the RLECs do not seek to obtain a cease and desist or shutdown of the Expansion Project. The RLECs agreed with the position as expressed in testimony submitted by Union County Chairman Jeff Reber, *infra*, that there is no public purpose to be served by a forced shut down of DRIVE's Expansion Project given that it is now built and operational. Finding of Fact No. 52, *infra*, citing Windstream/TDS St. 1-R at 6.

The DRIVE Petition was assigned to ALJ Cheskis as presiding officer. On October 14, 2021, a prehearing conference was convened as scheduled. Appearances of counsel for the Parties was noted. A procedural schedule was, thereafter, established and the Parties were directed to provide a status report on December 1, 2021. Remand I.D. at 2-3.

On December 1, 2021, DRIVE submitted a status report in which DRIVE indicated that the Parties' settlement negotiations had reached an impasse and DRIVE advised that it would file a petition for leave to withdraw its Petition for a Declaratory Order on or before December 3, 2021. Remand I.D. at 3.

On December 3, 2021, DRIVE filed a Petition for Leave to Withdraw its Petition for Declaratory Order. DRIVE stated that the public interest favored allowing DRIVE to withdraw its request for a declaratory order regarding the expansion of DRIVE's community broadband network. Remand I.D. at 3. On December 9, 2021, the OCA filed a letter indicating that it did not object to the Petition to Withdraw. *Id.* On December 13, 2021, the RLECs filed an Answer in Opposition to the Petition to Withdraw. The RLECs, in pertinent part, argued that granting withdrawal would not be in the public interest. *Id.*

On December 30, 2021, an Initial Decision was issued wherein the presiding ALJ recommended that the Commission grant DRIVE's Petition for Withdrawal and deny the RLECs' opposition. The RLECs filed Exceptions to the December 30, 2021, Initial Decision. DRIVE filed Reply Exceptions. Remand I.D. at 3.

By Opinion and Order entered July 20, 2022, *July 2022 Remand Order*, the Commission granted the RLECs' Exceptions and reversed the December 30, 2021 Initial Decision. The Commission found that it would not be in the public interest to permit DRIVE to withdraw its Petition. The matter was, therefore, remanded to the Office of Administrative Law Judge (OALJ) for expedited consideration. The Commission directed that an Initial Decision be issued on DRIVE's Petition no later than 90 days from the entry date of the Opinion and Order.

Based on the remand as directed in the *July 2022 Remand Order*, on July 22, 2022, an informal off-the-record conference call was held between the presiding officer and the Parties. Present on the call were Jonathan Nase, Esquire on behalf of DRIVE; Sarah Stoner, Esquire and Lauren Burge, Esquire on behalf of the RLECs; Zsuzsanna Benedek, Esquire on behalf of CenturyLink; Suzan Paiva, Esquire on behalf of Verizon; Barrett Sheridan, Esquire on behalf of the OCA; and Steven C. Gray, Esquire on behalf of the Office of Small Business Advocate (OSBA).<sup>13</sup> A scheduling order was issued on July 25, 2022, memorializing the procedural matters agreed to amongst the parties during the informal off-the-record conference call. Remand I.D. at 4.

On July 28, 2022, DRIVE filed a petition for protective order. That petition was granted via order dated August 2, 2022. On August 1, 2022, DRIVE filed a motion to overrule objections and compel answers to discovery. On August 3, 2022, the RLECs

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<sup>13</sup> On July 22, 2022, the OSBA filed a notice of intervention formally intervening into this proceeding.

filed an answer to DRIVE's motion. DRIVE's motion was granted via order dated August 5, 2022. Remand I.D. at 4.

On August 10, 2022, DRIVE served the following direct testimony pursuant to the agreed upon procedural schedule set for this case:

- a. Direct Testimony of Jeff Reber (DRIVE 2 Petition of DRIVE for a Declaratory Order Regarding the Expansion of its Community Broadband Network, Docket No. P-2021-3025296 (Opinion and Order entered July 20, 2022) (July 2022 Order). 5 St. 1);
- b. Direct Testimony of Jennifer Wakeman (DRIVE St. 2);
- c. Direct Testimony of Bill Risse (DRIVE St. 3) (both proprietary and non-proprietary format); and
- d. Direct Testimony of Todd Tanner (DRIVE St. 4). Remand I.D. at 4-5.

On August 11, 2022, the RLECs filed a motion to dismiss DRIVE's objections and compel responses to its set I, number 17 interrogatory and request for production of documents. On August 12, 2022, DRIVE filed an answer to the RLECs' motion. The RLECs' motion was denied by order dated August 16, 2022.

On August 17, 2022, DRIVE filed the supplemental direct testimony of its witness, Jennifer Wakeman, DRIVE St. 2 (Supp). On August 24, 2022, the RLECs filed the Joint Rebuttal Testimony of Jeanne Shearer and Bruce Mottern (Windstream/TDS St. 1-R). Also on August 24, 2022, CenturyLink filed the Rebuttal Testimony of Josh Motzer (CTL St. 1). On August 31, 2022, DRIVE filed the Surrebuttal Testimony of witness Wakeman (DRIVE St. 2-SR). Remand I.D. at 5.

On September 1, 2022, counsel for the RLECs, on behalf of both the RLECs and DRIVE, submitted a Joint Stipulation for the Admission of Testimony and Exhibits. Pursuant to the Joint Stipulation, the Parties waived cross examination of their

respective witnesses. The evidentiary hearing convened in this matter on September 2, 2022, as scheduled. Present at the hearing were Jonathan Nase, Esquire on behalf of DRIVE; Sarah Stoner, Esquire and Lauren Burge, Esquire on behalf of the RLECs; Zsuzsanna Benedek, Esquire on behalf of CenturyLink; Suzan Paiva, Esquire on behalf of Verizon; Barrett Sheridan, Esquire on behalf of the OCA; and Steven C. Gray, Esquire on behalf of the OSBA. Remand I.D. at 5.

As recognized in the Joint Stipulation, the testimony for the DRIVE witnesses and the RLEC witnesses were admitted into the record via stipulation and cross examination was waived. Similarly, the pre-served testimony of the CenturyLink witness was also admitted into the record via stipulation and cross examination was waived. Remand I.D. at 5-6.

On September 16, 2022, Main Briefs were filed by DRIVE, the RLECs, CenturyLink and the OCA. On September 22, 2022, Reply Briefs (R.B.) were filed by DRIVE, the RLECs and the OCA. The record in this case closed on September 22, 2022, on the filing of Reply Briefs. Remand I.D. at 6.

On October 20, 2022, the Remand I.D. was issued consistent with our *July 2022 Remand Order*. The Remand I.D. addressed the following issues, which we shall review under the topic headings as discussed in the Remand I.D.: (1) Should the Commission Exercise its Jurisdiction to Issue a Declaratory Order?;<sup>14</sup> (2) Does Section 3014(h) Apply to DRIVE's Expansion Project?;<sup>15</sup> (3) Did DRIVE Meet the Requirements of Section 3014(h)(2)?;<sup>16</sup> (4) Does the Construction and Operation of the

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<sup>14</sup> Remand I.D. at 18-21.

<sup>15</sup> Remand I.D. at 21-29.

<sup>16</sup> Remand I.D. at 29-45.

Expansion Project Subject DRIVE to Regulation as a Public Utility?;<sup>17</sup> (5) Does DRIVE Need to Issue Another Right of First Refusal Letter if it Expands the Expansion Project in the Future?;<sup>18</sup> (6) Was the Commission’s July 20, 2022 Order Arbitrary, Capricious and a Denial of the Parties’ Due Process Rights?;<sup>19</sup> and (7) Miscellaneous Issues – RLECs’ request for generic rules describing the content of an ROFR letter (Request of the RLECs for a clarification from the Commission that ROFR letters must include five precepts articulated in the RLEC Main Brief).<sup>20</sup>

The Remand I.D. granted, in substantial part, the Petition for Declaratory Order relief requested by DRIVE. The exception to the grant of relief sought in the DRIVE Petition for Declaratory Order was the recommendation of the ALJ that the Commission institute a rulemaking proceeding for the purposes of receiving comments in consideration of establishing generic elements or requirements for inclusion in future ROFR letters issued by a political subdivision.

Exceptions and Replies to Exceptions were filed by the Parties as noted.

## **II. Discussion**

### **A. Legal Standards**

The DRIVE Petition presently before the Commission is the third filed by this political subdivision seeking the termination of controversy and removal of

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<sup>17</sup> Remand I.D. at 46-49.

<sup>18</sup> Remand I.D. at 49-55.

<sup>19</sup> Remand I.D. at 55-56.

<sup>20</sup> Remand I.D. at 57-61.

uncertainty regarding its deployment and expansion of a broadband infrastructure network in the counties in which it has been authorized.

The applicable legal standards that apply to this matter were addressed by presiding ALJ Cheskis at Remand I.D. pages 15-18. Unless expressly noted, we, hereby, adopt the reasoning and conclusions of the Remand I.D.

Section 331(f) of the Code provides as follows:

**(f) Declaratory orders.**--The commission, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

66 Pa. C.S. § 331(f).

Further, 52 Pa. Code § 5.42 provides, in pertinent part:

**§ 5.42. Petitions for declaratory orders.**

- (a) Petitions for the issuance of a declaratory order to terminate a controversy or remove uncertainty must:
- (1) State clearly and concisely the controversy or uncertainty which is the subject of the petition.
  - (2) Cite the statutory provision or other authority involved.
  - (3) Include a complete statement of the facts and grounds prompting the petition.
  - (4) Include a full disclosure of the interest of the petitioner. . . .

52 Pa. Code § 5.42.

DRIVE, as the proponent of a rule or order from the Commission, is the party with the burden of proof in this matter. 66 Pa. C.S. § 332(a): “[E]xcept as may be otherwise provided in section 315 (relating to burden of proof) or other provisions of this part or other relevant statute, the proponent of a rule or order has the burden of proof.”

DRIVE, as the party with the burden of proof, has the duty to establish a fact by a “preponderance of the evidence.” It is well settled that the term “preponderance of the evidence” means that one party has presented evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party. *SeLing Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

Based on the foregoing, as a threshold consideration and pursuant to the authority of the Code and Commission Regulations, we conclude that exercise of our discretion to issue a declaratory order is appropriate in this matter. This is a case of first impression seeking a legal declaration on the scope and operation of Section 3014(h)(2) of the Code, 66 Pa. C.S. 3014(h)(2).

As noted, Section 3014(h)(2) provides local exchange telecommunications companies, also known as ILECs, a ‘right of first refusal’ if a political subdivision proposes to deploy advance service or broadband service, including telecommunications, in an ILEC’s respective service territory. As discussed further, *infra*, this provision reflects the fact that Chapter 30 of the Code, 66 Pa. C.S. §§ 3011-3019 (66 Pa. C.S. §§ 3001-3009 *repealed*), imposes a Provider/Carrier of Last Resort (POLR/COLR) obligation on ILECs to provide broadband within ten days of a request.<sup>21</sup> The applicable

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<sup>21</sup> Section 3014(b)(5) of Chapter 30, 66 Pa. C.S. § 3014(b)(5), provides: “A local exchange telecommunications company that elects under paragraph (1), (2) or (3) may amend its network modernization plan to extend the period of time within which broadband service must be made available to a customer to up to ten business days after the customer's request for broadband service.”



provisions of Chapter 30 also avoid the potential expenditure of investment capital constructing multiple or redundant networks. This provision also avoids the expenditure of investment capital constructing multiple or redundant networks, a concern generally referred to as overbuilding.<sup>22</sup> With the looming receipt of unprecedented federal public investment capital of \$42.5B to construct “last mile” networks to areas without access to broadband services and \$1B for “middle-mile networks,”<sup>23</sup> including in Pennsylvania, issuance of this Declaratory Order is appropriate.

The Commission concludes that issuance of a Declaratory Order will provide greater certainty and clarity to those political subdivisions or any other entities subject to Section 3014(h)(2) on how state law can mesh with federal funding to deploy broadband networks into underserved and/or unserved areas. It was the need for clarity going forward that was part of the reason why the Commission previously refused to grant Petition by DRIVE to withdraw its pleading.

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<sup>22</sup> See, e.g., TBCP Third Set of FAQs.Draft\_07.28.21\_FINAL (doc.gov) (NTIA explains that Section 908 prioritizes areas without broadband as opposed to upgrading areas with broadband in Tribal areas); *Accord* NTIA Chief Has Ambitious BEAD Goals, Clarifies Fiber Priority and Overbuilding (telecompetitor.com) (Asst Secy Davidson emphasizes “future proofing” the network using fiber technology but recognizes other technologies may be needed in some places and further notes that Rural Digital Opportunity Fund (RDOF) funded areas without funding authorization will be considered unserved as well. How the FCC’s RDOF funding then interfaces with NTIA’s BEAD funding will have to be worked out; Senate and House Committee Leaders Share Broadband Program Priorities with NTIA (avoiding overbuild is a Congressional concern). Recent federal legislation requires agencies to coordinate their broadband funding efforts as well. See *WCB Seeks Comment on Interagency Broadband Coordination Agreement* | *Federal Communications Commission* (fcc.gov).

<sup>23</sup> See, e.g., BUILDING-A-BETTER-AMERICA-V2.pdf (whitehouse.gov), pp. 383-396 and Guidebook to the Bipartisan Infrastructure Law | Build.gov | The White House. *But see* IJJA Broadband Funding & Local Government Implementation - The Atlas (the-atlas.com); see also discussion, below.

Based on the foregoing, and consistent with our conclusions in the *July 2022 Remand Order*, the issuance of a Declaratory Order in this proceeding will terminate a controversy and remove uncertainty relating to an actual dispute.

We note that declaratory orders carry the same effect as other Commission Orders and are appealable to the Commonwealth Court as final adjudications. *See* Conclusion of Law No. 6, *infra*, citing *Prof'l Paramedical Servs., Inc. v. Pa. PUC*, 525 A.2d 1274 (Pa. Cmwlth. 1987) – “Although there must be uncertainty or a controversy before such an order may issue, the existence of uncertainty or a controversy does not require the PUC to issue a declaratory order. As we previously stated, such a decision is discretionary.” *Id.* 525 A.2d at 1277.

Additionally, this Commission’s decision must be supported by substantial evidence in the record. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *National Fuel Gas Distribution Corp. v. Pa. PUC*, 677 A.2d 861 (Pa. Cmwlth.1996). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980). We conclude that substantial evidence, particularly the multiple communications demonstrating the uncertainty of how Section 3014(h)(2) is to be interpreted, exists sufficient to support issuance of this Declaratory Order.

Finally, we, hereby, notify the Parties that we will take notice of publicly available knowledge of recent federal legislation governing broadband as well as official notice of the findings of the United States Congress in Title 47 U.S.C.A. §§ 1721, *et seq.* and FCC orders related to and in furtherance of, the goals as set forth in the Digital Equity Act of 2021, and related federal statutes and administrative interpretation of such statutes, *infra*. *See*, 66 Pa. C.S. § 331(g) - “**(g) Official notice defined.**--As used in this chapter the term “official notice” means a method by which the commission may notify

all parties that no further evidence will be heard on a material fact and that unless the parties prove to the contrary, the commission's findings will include that particular fact.”; also, § 332(e); 52 Pa. Code § 5.408.

In pertinent part, Section 332(e) of the Code, 66 Pa. C.S. § 332(e), and Commission Regulations at 52 Pa. Code § 5.408, set forth the procedure to be followed when the Commission's decision rests on official notice of a material fact not in evidence in the record. These sections provide that any party adversely affected shall have the opportunity upon timely request to show that the facts are not properly noticed or that alternative facts should be noticed.<sup>24</sup> In this case, the federal legislation and implementation of that federal legislation is also publicly known and available.

In addition, the Commission also notes the publicly known and available information on broadband in Pennsylvania and shall also take administrative notice of the activity of the Pennsylvania Department of Community and Economic Development, *infra*, relating to broadband deployment in unserved and underserved areas of the Commonwealth. The parties to this proceeding noted other state and federal laws and their implementation on broadband. There is no harm to the parties by doing so here.

## **B. Issues Addressed and Summary of Disposition**

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<sup>24</sup> The taking of official notice is closely related to the doctrine of taking judicial notice as exercised by the courts. Under the doctrine of judicial notice, certain facts which are incontestable need not be proven formally but will be accepted by the court. See, *National Fuel Gas Distribution Corp.*, Docket No. M-FACG8004, R-79090956 (Order entered May 16, 1986); 61 Pa. P.U.C. 479 (1986); 0086 WL 1179904 (Pa. P.U.C.), citing *Pennsylvania ex rel. Duff v. Keenan*, 347 Pa. 574, 33 A.2d 244 (1943). The federal legislation and ancillary information about that federal legislation are incontestable facts.

The Remand I.D. addressed the issues raised by the DRIVE Petition under the following seven topics noted, *supra*. In light of the public interest significance of this matter, we address each of the topics, irrespective of the filing of Exceptions.

The summary of dispositions will address the following questions:

- (1) Should the Commission Exercise its Jurisdiction to Issue a Declaratory Order?; **Disposition: Yes.** The Commission shall exercise its discretion and issue a declaratory order in this proceeding.
- (2) Does Section 3014(h) Apply to DRIVE's Expansion Project?; **Disposition: Yes.** The Commission concludes that Section 3014(h) of the Code, 66 Pa. C.S. § 3014(h) applies to the Expansion Project as described in this proceeding.
- (3) Did DRIVE Meet the Requirements of Section 3014(h)(2)?; **Disposition: Yes.** The Commission concludes that, under the facts of this dispute, DRIVE has met the requirements of Section 3014(h)(2).
- (4) Does the Construction and Operation of the Expansion Project Subject DRIVE to Regulation as a Public Utility?; **Disposition: No.** The Commission concludes that the construction and operation of the Expansion Projection, according to the conditions of this Opinion and Order, will not subject DRIVE to regulation as a public utility.
- (5) Does DRIVE Need to Issue Another Right of First Refusal Letter if it Expands the Expansion Project in the Future?; **Disposition: No.** DRIVE does not need to issue another right of first refusal letter if it expands the Expansion Project within the corporate boundaries of those counties in which it has been authorized and notice and a right of first refusal has been issued pursuant to Section 3014(h)(2) of the Code to those incumbent local exchange companies operating under

a Chapter 30 Network Modernization Plan in those counties.

- (6) Was the Commission’s July 20, 2022 Order Arbitrary, Capricious and a Denial of the Parties’ Due Process Rights?; **Disposition: No.** There is a presumption of reasonableness to the Commission’s prior actions in this proceeding.
- (7) Miscellaneous Issues – RLECs’ request for generic rules describing the content of an ROFR letter (Request of the RLECs for a clarification from the Commission that ROFR letters must include five precepts articulated in the RLEC Main Brief). **Disposition:** Consistent with the discussion in this Opinion and Order, the Commission will not initiate a rulemaking proceeding as recommended by the ALJ at this time.

### C. ALJ’s Recommendations and Supplemental Conclusions of Law

ALJ Cheskis reached seventy-two (72) Findings of Fact and drew eighteen (18) Conclusions of Law. We, hereby, adopt said Findings of Fact and Conclusions of Law and incorporate these findings and conclusions into our disposition unless they are expressly modified or rejected, or modified or rejected by necessary implication from our discussion.

On review of the record,<sup>25</sup> we set forth the following, Supplemental Conclusions of Law (Supp. Law):

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<sup>25</sup> The Commission is the ultimate fact finder. Section 335(a) of the Code, 66 Pa. C.S. § 335(a) “. . . the Commission has all the powers which it would have in making the initial decision . . .”; *Metropolitan Edison Co. v. Pa. PUC*, 22 A.3d 353 (Pa. Cmwlth. 2011); *appeal denied*, 615 Pa. 760, 40 A.3d 123 (Table); *cert. denied*, 568 U.S. 959, 133 S. Ct. 426 (Mem), 184 L. Ed. 2d 289 (2012).

Supp. Law No. 1. Of paramount concern with any matter of statutory interpretation is to ascertain and effectuate the intent of the General Assembly. *Crown Castle NG East LLC v. Pa. PUC*, 660 Pa. 674, 234 A.3d 665 (2020).

Supp. Law No. 2. The plain language of a statute is the best indication of the General Assembly's intent, and where the statutory language is clear and unambiguous, one must give effect to the plain language thereof. *Phila. Gas Works v. Pa. PUC*, 249 A.3d 963, 970 (2021), citing 1 Pa. C.S. § 1921(b), *reargument granted in part*, 256 A.3d 1092 (June 15, 2021), *on reargument*, 256 A.3d 1092 (Pa. 2021).

Supp. Law No. 3. When the words of a statute are not explicit, a determination of legislative intent may be informed by other factors, including administrative interpretations of the statute, the consequences of a particular interpretation, and analysis of other statutes addressing the same or similar subjects. *Insurance Federation of Pa. v. Cmwlth. Ins. Dept.*, 601 Pa. 20, 30, 970 A.2d 1108, 1114 (2009); *also* 1 Pa. C.S. § 1921(c).

Supp. Law No. 4. The dispute raised in the DRIVE Petition involves contested positions regarding the interpretation of and legislative intent of Section 3014(h)(2) of the Code, 66 Pa. C.S. § 3014(h)(2), based on language that is not explicit, but requires the Commission to engage in statutory interpretation to ascertain and effectuate such legislative intent.

The pertinent recommendations of the Remand I.D. are set forth below:

1. That the Petition of Driving Real Innovation for a Vibrant Economy for a Declaratory Order Regarding the Expansion of its Community Broadband Network in Columbia, Northumberland, Snyder and Union Counties filed on April 16, 2021 at docket number P-2021-3025296 is hereby granted.

2. That the prohibition of Section 3014(h)(1) applies to this expansion project because DRIVE provides utility service to the public for compensation.
3. That DRIVE complied with the requirements of Section 3014(h)(2) with respect to this expansion project.
4. That the construction and operation of this expansion project will not subject DRIVE to the jurisdiction of the Commission as a public utility.
5. That DRIVE need not issue another right of first refusal letter to affected incumbent local exchange carriers every time it constructs a new site, installs new equipment, or otherwise fills in this expansion project.
6. That should DRIVE expand its expansion project beyond its corporate limits, it shall first comply with Section 3014(h) of the Public Utility Code, 66 Pa. C.S. § 3014(h).
7. That it is recommended that the Commission institute a rulemaking proceeding to provide all affected parties with notice and opportunity to be heard regarding requirements for future right of first letters filed pursuant to Section 3014(h)(2) of the Public Utility Code, 66 Pa.C.S. § 3014(h)(2).

Remand I.D. at 66-67.

#### **D. The Issues**

As recognized in our *July 2022 Remand Order*, the issues raised in the DRIVE Petition present matters of substantial public interest concerning the deployment of broadband into unserved and/or underserved areas of the Commonwealth and the

proper interpretation of the rights and obligation of a political subdivision acting pursuant to Section 3014(h)(1)-(2) governing broadband deployment and service.

As noted, certain issues raised in the DRIVE Petition present matters of first impression. We advise the Parties that any issue or contention that we do not specifically address shall be deemed to have been duly considered and denied without further discussion. It is well-settled that the Commission is not required to consider, expressly or at length, each contention or argument raised by the parties. *See, Wheeling & Lake Erie Railway Co. v. Pa. PUC*, 778 A.2d 785, 794 (Pa. Cmwlth. 2001), *also see, generally, Univ. of Pa., et al. v. Pa. PUC*, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984).

**1. Should the Commission Exercise its Jurisdiction to Issue a Declaratory Order?**

**a. Positions of the Parties**

The positions of the parties have been summarized at Remand I.D. pages 18-20. Consistent with the remand of the proceeding as directed in the *July 2022 Remand Order*, all Parties acknowledged that the Commission should exercise its discretion and issue a Declaratory Order. The Parties differed, however, regarding the issues that should be addressed on remand.

DRIVE's position was that the Commission should exercise its discretion to issue a declaratory order consistent with the relief requested in its Petition. Exercise of Commission discretion to address the matters to terminate a controversy and remove uncertainty involving the ROFR process for political subdivisions would be consistent with the public interest concerns as noted in the remand directed by the *July 2022 Remand Order*. Remand I.D. at 18.



DRIVE argued that the Commission should not exercise its discretion to consider the issues raised by the RLECs, however. DRIVE pointed out that the RLECs did not file their own petition for a declaratory order relief, nor did they request one in their Answer to DRIVE's Petition. Remand I.D. at 19. Rather, explained DRIVE, the RLECs requested declaratory action via their rebuttal testimony. As such, DRIVE asserted that the RLECs' request for a declaratory order relief is procedurally improper because it would violate the rights of non-parties to the proceedings and be inconsistent with the *July 2022 Remand Order*. DRIVE stated that the public interest would be served by obtaining the input of other political subdivisions, ILECs and others who are not parties to the current matter prior to issuing declaratory order relief consistent with that requested by the RLECs. Remand I.D. at 19-20.

CenturyLink also agreed that the Commission should issue a declaratory order to eliminate controversies raised in this proceeding. CenturyLink asserted, however, that the Commission should reject DRIVE's position that no additional ROFR letters would be required in the future if DRIVE expands upon its Expansion Project. *See* Remand I.D. at 19, citing CenturyLink M.B. at 8.

The OCA argued that, following the Commission's denial of DRIVE's Petition to Withdraw and the record developed on remand, a Commission ruling to terminate controversy and remove uncertainty regarding the issues raised in DRIVE's Petition is appropriate. Remand I.D. at 19. The OCA was of the position that a Commission ruling on the issues raised in DRIVE's Petition will advance the public interest and Commonwealth policy goals of expanding access to broadband services where these services cannot or will not be provided by the ILECs. The OCA also pointed out that the 14-month span in which an ILEC who accepts a ROFR has to provide services is shorter than the 16 months involved in this litigation. *Id.*

**b. ALJ's Recommendation**

ALJ Cheskis recommended that the Commission exercise its discretion and issue a declaratory order regarding the DRIVE Petition. However, the ALJ also rejected the contention of DRIVE that the issues raised by the RLECs should be construed as outside of the scope of matters to be decided in the current proceedings for a declaratory order. He, therefore, recommended that this contention should be rejected. Remand I.D. at 21.

**c. Exceptions and Replies**

No Party has filed Exceptions to the recommendation that the Commission issue a Declaratory Order in this matter.

**d. Disposition**

We will adopt the reasoning of ALJ Cheskis on this issue. As noted in the *July 2022 Remand Order*, “The issue whether DRIVE can provision a broadband network of a size and speed that is below what it demanded in the ROFR letter presents a legitimate controversy that is in the public interest to timely resolve.” *Order* at 34; *also Order* at 36; “Here, a declaratory ruling at a minimum would help remove uncertainty as to whether a political subdivision, or any entity created by it, may provision a lesser broadband speed to a lesser geographic area than what it demanded from an affected ILEC in its ROFR letter;” “Rather, at a minimum, a controversy remains as to whether DRIVE may provision a lesser broadband speed to a lesser geographic area than what it demanded from an affected ILEC in its ROFR letter.”

In our disposition of the Petition for Declaratory Order filed by DRIVE, we find that the contentions raised by the RLECs (also CenturyLink) are fairly encompassed and within the scope of the controversy and uncertainty to be resolved by our disposition

of the DRIVE Petition on the merits. This includes the uncertainty surrounding the interpretation and operation of Section 3014(h)(2).

Moreover, with the looming receipt of unprecedented federal public investment capital of \$42.5B to construct “last mile” networks to areas without access to broadband services and \$1B for middle-mile networks,<sup>26</sup> including in Pennsylvania, issuance of this Declaratory Order is appropriate. This will provide greater certainty and clarity to those political subdivisions or any others subject to Section 3014(h)(2) on how state law can mesh with federal funding to deploy broadband networks.

## **2. Does Section 3014(h)(2) Apply to DRIVE’s Expansion Project?**

### **a. Positions of the Parties**

The position of the Parties has been summarized by ALJ Cheskis at Remand I.D. 21-26. We highlight the essential differences in their positions.

DRIVE would distinguish the findings in *DRIVE I* which concluded that the project, at the pilot stage in Montour County, was service to the public based on its view that the determination in *DRIVE I* was made solely on the pleadings and did not consider evidentiary submittals. Remand I.D. at 22, discussing DRIVE M.B. at 25-26.

DRIVE supported its position concerning the public aspect of the Expansion Project by explaining that it owns and operates a “middle mile network.” As a

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<sup>26</sup> See e.g., [BUILDING-A-BETTER-AMERICA-V2.pdf \(whitehouse.gov\)](#), pp. 383-396 and [Guidebook to the Bipartisan Infrastructure Law | Build.gov | The White House](#). But see [IIJA Broadband Funding & Local Government Implementation - The Atlas \(the-atlas.com\)](#).

“middle mile network,” DRIVE does not provide “last mile” telecommunications and/or advanced or broadband service directly to retail end users. The “middle mile network” facility has been described as follows: “The “middle mile network” is generally considered to be the segment of internet connectivity that connects the global internet to the “last mile network.” It is often delivered via high-speed fiber and serves as the backbone for a specific region. The “last mile network” is the portion of the network infrastructure that is the final leg of the telecommunications network that delivers telecommunications services to customers at their home or business.” Remand I.D. at 22, n. 5.

Under the “middle mile” telecommunications facility business model, DRIVE’s customers are WISPs [Wireless Internet Service Providers] who lease access to the network. Remand I.D. at 22.<sup>27</sup> As of the issuance of the Remand I.D. in this proceeding, DRIVE advised that it provides service to two customers. *Id.*, citing, DRIVE Exh. JW-14.<sup>28</sup>

DRIVE also cited and relied upon the Commission’s *Guidelines for Determining Public Utility Status - Policy Statement* and the Order adopting that Policy Statement to argue that the Commission would likely find that a project providing service to a defined, privileged, and limited group is not providing public utility service.

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<sup>27</sup> DRIVE, as described, does not provide “last mile” service to end users; DRIVE has no connection to the end-use customer’s demarcation point. *See* DRIVE M.B. at 13, citing DRIVE St. No. 3, p. 18. WISPs provide broadband service to the end users. WISPs cannot provide this service using the Expansion Project “as is.” *Id.*, citing DRIVE St. No. 4, p. 3. WISPs must install “last mile network” electronics and operate their own link to the end user, which connects to their private VLAN over DRIVE’S infrastructure. *Id.*, citing DRIVE St. No. 2, p. 5.

<sup>28</sup> At present, DRIVE has two contracts with WISPs: SkyPacket and Centre WISP. Finding of Fact No. 55, citing DRIVE Exhibit JW-14. The testimony of DRIVE is that neither of these contractees has applied to the Commission for a certificate of public convenience at this time.

Remand I.D. at 22, citing DRIVE M.B. at 26-27, citing 52 Pa. Code § 69.1401.

DRIVE asserted that, pursuant to a fact-based analysis, the evidence introduced in this case demonstrates that DRIVE's Expansion Project satisfies the criteria described in the Commission's *Guidelines for Determining Public Utility Status Policy Statement* and relevant case law for a finding that this project does not provide service to the public for compensation. DRIVE emphasized that no one among the public can simply demand access to DRIVE's network. Remand I.D. at 22, citing DRIVE M.B. at 27-28.

The RLECs countered DRIVE's contention that the service provided by the Expansion Project is not service to the public. The RLECs argued that, under the Commission's Policy Guidelines for determining public utility status, DRIVE is providing service to the public. Remand I.D. at 23, citing RLECs M.B. at 19-20. The RLECs argued that any WISP that agrees to meet basic technical standards can be served and that getting on DRIVE's system is a matter of executing a standard agreement and agreeing to the terms of use policy. The RLECs further noted that the DRIVE project will be an open access network and that WISPs are added on a non-discriminatory basis, free to compete with each other using the network. DRIVE Exh. JW-26.

The RLECs added, there are no capacity constraints on the network that restrict service. And, DRIVE's services are not contractually limited or exclusive. The RLECs relied upon and cited Commission and appellate court cases that have held that service of benefit to a narrow, limited group of customers is public utility service. RLECs M.B. at 21-22 (citations omitted). The RLECs distinguished case law relied upon by DRIVE in its Petition and referenced case law that demonstrates that, even where only one customer is served, the question is whether the service provider intends to provide service to others, which DRIVE is doing here. *Id.* at 22-23. The RLECs also argued that DRIVE clearly contemplates expanding the network.

With regard to the “middle mile” exclusion, the RLECs argued in their main brief that Commission and appellate precedent also contradicts DRIVE’s argument. RLEC M.B. at 25-27. The RLECs cited to, *inter alia*, *Application of Sprint Communications Co.*, Docket No. A-310183F0002AMA (Order entered December 1, 2006) (*Application of Sprint*), *Rural Telephone Co. Coalition v. Pa. PUC*, 941 A.2d 751 (Pa. Cmwlth. 2008), and *Crown Castle NG East LLC v. Pa. PUC*, *supra*, in support of their position that the “middle mile” transport of data and messages on a wholesale basis, not on behalf of an end-user customer, is public utility service regardless of content. Remand I.D. at 23-24.

**b. ALJ’s Recommendation**

ALJ Cheskis concluded that, neither DRIVE nor the OCA presented sufficient evidence or legal argument to warrant a finding that the prohibition of Section 3014(h)(1) of the Code does not apply to the DRIVE Expansion Project. Remand I.D. at 29. He, therefore, recommended that the position of DRIVE and supported by the OCA be rejected and that we find that Section 3014(h)(1) does apply to DRIVE’s Expansion Project. *Id.*

**c. Exceptions and Replies**

DRIVE did not file Exceptions to the recommendation that Section 3014(h)(1) does apply to the Network and Expansion Network in this proceeding.

**d. Disposition**

We shall adopt the conclusions and reasoning of the presiding ALJ concerning this issue. The primary position of DRIVE in this area is that the Network, as constructed and as it will expand, will be a “middle mile” facility which will not be used

to provide advanced or broadband service directly to end-users. Finding of Fact No. 35. Rather, the Network will be available to a “limited” class of users who contract with DRIVE to access the facility and who meet the criteria for a bilateral agreement that is acceptable to DRIVE. Finding of Fact No. 53.

As noted in *DRIVE I*, “[t]he “public” includes even the limited portion of the public consisting of large volume users—such as commercial entities and other common carriers—who will likely be the only users of DRIVE’s network. A service is public when it is available to all members of the public who may require it, even if that group is limited in number. *See, Rural Tel. Co. Coalition v. Pa. PUC*, 941 A.2d 751, 760 (Pa. Cmwlth. 2008) and *Waltman v. PA PUC*, 596 A.2d 1221,1223-25 (Pa. Cmwlth. 1991).” *DRIVE I* at 7, n. 18.

On review of the record in this matter, we find no indicia of exclusivity which leads us to conclude that the Network is not available to the public as a public utility facility, albeit one that will be accessible and available only to a limited class of users and primarily for wholesale purposes. We reprint the definition of “public utility” as stated in the Code:

**“Public utility.”**

(1) Any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for:

\* \* \*

(vi) Conveying or transmitting messages or communications, except as set forth in paragraph (2)(iv), by telephone or telegraph or domestic public land mobile radio service including, but not limited to, point-to-point microwave radio service for the public for compensation.

\* \* \*

[2](iv) Any person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service.

66 Pa. C. S. § 102.

Further, “municipal corporation” is defined as follows:

**“Municipal corporation.”** All cities, boroughs, towns, townships, or counties of this Commonwealth, and also any public corporation, authority, or body whatsoever created or organized under any law of this Commonwealth for the purpose of rendering any service similar to that of a public utility.

66 Pa. C.S. § 102.

Contrary to the position of DRIVE concerning the public aspect of the Expansion Project, the Network is touted as an “open access” network. Finding of Fact Nos. 59-60. The expansion phase of the community broadband network expressly contemplates that it would be available as an alternative for the provision of service to each of the counties in which DRIVE is authorized: “[T]he intention is to gradually fill in the Expansion Project so that it can serve throughout Columbia, Northumberland, Snyder and Union Counties.” *See*, DRIVE St. 2, Testimony and sponsored exhibits of Jennifer Wakeman, Executive Director, DRIVE at 7-8.

Based on the foregoing, the intent of the DRIVE Network is to provide for potential expansion throughout the entirety of the counties in which DRIVE is authorized to serve. *See*, DRIVE M.B. at 5, n. 4.

This is supported by, as noted by the RLECs, there are no capacity or other



constraints to any, potential, WISP or other telecommunications service provider to enter into an acceptable contract with DRIVE and obtain access to the facility. *See, e.g.*, RLECs MB at 20, n. 50; n. 58, citing *Application of Laser Northeast Gathering Company, LLC*, Docket No. A-2010-2153371, (Order entered July 14, 2011); 2011 Pa. PUC LEXIS 1577 (*Laser*); also (Order entered December 5, 2011); 2011 Pa. PUC LEXIS 536, regarding contracts in an applicant’s business model to exclude potential customers.

Additionally, as noted, DRIVE, is a municipal corporation that is “organized . . . for the purpose of rendering any service similar to that of a public utility.” as defined in the Code. One of the primary economic purposes of DRIVE is to provide “middle mile” advanced/broadband service to underserved and/or unserved addresses in the affected counties at speeds and in areas which the Chapter 30 companies are not so providing.

We reject the position of DRIVE that service to a few customers is not public utility service under the facts of this dispute. This position is not consistent with recent case law to the contrary, particularly when it comes to neutral tandem wholesale transmission service and wholesale service in general.<sup>29</sup>

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<sup>29</sup> *See, DRIVE Petition for Declaratory Order*, Docket No. P-2021-3025296, Answer to Petition, pp. 5-10; *DRIVE M.-B.* at 25-26. We note that DRIVE’s reliance on a policy statement addressing Alternative Energy Portfolio Standards (“According to the Commission’s Order adopting the Policy Statement, Implementation of the Alternative Energy Portfolio Standards Act of 2004, Docket No. M-00051865 (Nov. 30, 2006), the Commission would likely find that a project providing service to a defined, privileged and limited group is not providing public utility service”) fails to consider that in *Rural Telephone Company Coalition v. Pa. PUC*, 941 A.2d 751 (Pa. Cmwlth. 2008) and, more recently, in *Crown Castle*, such caselaw holds that wholesale transmission service is a form of public utility service regardless of the type of service provided or the number of customers compared to all customers. However, we further note that DRIVE rightly concludes, as the Commission did in *Central Bradford*, that public utility service within a political subdivision may be public utility service although it is not jurisdictional unless it is provided outside those boundaries. Jurisdictional public utility service, however, does not obviate compliance with Section 3014(h)(2).

We do so because legal precedent in Pennsylvania in the *RTCC v. Pa. PUC (RTCC)* and *Crown Castle and Extenet v. Pa. PUC (Crown Castle)* cases hold that wholesale service (the so-called “carrier’s carrier” service) is telecommunications service which the Commission can certificate. These holdings<sup>30</sup> accord with federal law and accentuate the fact that the Commission should not distinguish or differentiate between the provisioning of wholesale telecommunications services or retail telecommunications services by entities as both are subject to Commission jurisdiction. Finally, industry practice and proposed federal funding clearly differentiates between “middle mile” and “last mile” networks and services. The Commission would act without regard to industry standards, precedent, and federal funding, which reflects industry realities, if we held that it does not matter what a “written request for the deployment of such service” must contain or how it is made.

### **3. Did DRIVE Meet the Requirements of Section 3014(h)(2)**

This issue represents the major disagreement in the dispute between DRIVE and ILECs. ALJ Cheskis has comprehensively addressed the positions of the Parties and we summarize those positions highlighting the most significant differences. *See, Remand I.D. at pages 29-39.*

#### **a. Positions of the Parties**

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<sup>30</sup> The Pennsylvania Supreme Court *Crown Castle* holding came after DRIVE had asked the ILECs to provide “last mile” service to, *inter alia*, 85% of the local residential consumers and 95% of the business consumers even though DRIVE intends to operate a “middle mile” network to provide wholesale transmission capacity to customers like WISPs. It is the ILECs who are expected to construct a last mile network to service that percentage of customers, a result which enhances the value of the middle mile proposal.

DRIVE argued that, if the Commission were to find that the prohibition of Section 3014(h)(1) applies to the Expansion Project, then it should decide that DRIVE has complied with Section 3014(h)(2). DRIVE advises that it sent a ROFR letter to each ILEC in the relevant counties that identified the speed and service area for which service was requested and all ILECs declined, or did not agree, to the requested deployment and/or service. In the instant case, DRIVE asked the ILECs to provide “last mile” service to, *inter alia*, 85% of the local residential consumers and 95% of the business consumers at 50 Mbps speeds.<sup>31</sup>

DRIVE urged that the Commission reject the position of the ILECs that Section 3014 requires some “linkage,” *i.e.*, “nexus” between the municipality’s plans and the request for deployment. Remand I.D. at 31, referencing DRIVE M.B. at 34. DRIVE argued that the phrase “such service” as used in Section 3014(h)(2) should be interpreted to mean that a political subdivision cannot ask an ILEC to provide service of a different type or character *i.e.*, landline telephone service and then, if the ILEC declines, provide advanced or broadband service. *Id.* at 35.

DRIVE argued that Section 3014(h) does not say that a political subdivision must have a deployment plan when it sends a ROFR letter. DRIVE references Section 3014(h)(3) of Chapter 30 which exempts services from the prohibition against a political subdivision and permits a continuation of the same type and scope of

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<sup>31</sup> See, *DRIVE Petition for Declaratory Order*, Docket No. P-2021-3025296, Petition for Declaratory Order (April 16, 2021), para. 35 (“Among other things, the August 27, 2020 Letter requested that each ILEC provide carrier grade, wide area network services at a data speed of 50 Mbps downstream to 85% of all residences and 95% of all businesses in the pertinent county or counties.”); *Accord Answer to Petition*, p. 6;

service as was being provided on the effective date of Section 3014. DRIVE notes that the Legislature could have created such a link but chose not to. *See*, DRIVE M.B. at 36.

DRIVE reiterated that Section 3014(h)(2) states that a political subdivision may offer service in an area if the ILEC serving the area “has not agreed” to the deployment requested in the ROFR letter within two months. DRIVE emphasized that none of the RLECs agreed to provide service within the statutory two-month period of time as established in the law. DRIVE attempted to reconcile language in the *DRIVE I* Order at ¶ 7, regarding a “clear and unequivocal” denial of a ROFR request. DRIVE explained that there is a difference between not agreeing to a requested deployment and providing a “clear and unequivocal” decline to provide a requested deployment or service. The difference in these conditions would, in DRIVE’s opinion, contradict the plain language of the statute.

DRIVE’s overriding concern is that Section 3014 of Act 183 was enacted as part of the policy of the Commonwealth to strike a balance between mandated deployment and market-driven deployment of broadband. *See*, Remand I.D. at 36; DRIVE R.B. at 17, citing 66 Pa. C.S. § 3011(1). DRIVE explained that Section 3014 envisions political subdivisions competing with an ILEC for the provision of broadband if the ILEC does not agree to provide the service described in the ROFR letter. Based on the foregoing, states DRIVE, the RLECs’ position, *infra*, would undermine the Legislature’s stated policy by allowing one competitor to review the business plans of another. DRIVE also argued that the Commission should reject the RLECs’ position that certain of the ILECs would have agreed to provide the requested service if information about DRIVE’s deployment plan were included in the ROFR. *Id.* at 18-19. DRIVE argued that this information was not relevant to the RLECs’ decision-making process. Remand I.D. at 36, citing DRIVE R.B. at 20.

DRIVE concluded its arguments in support of its request for declaratory relief by taking the position that allowing an ILEC to prevent consumers from receiving improved broadband service simply by not responding to an ROFR letter would undermine the Legislature’s goal of improving broadband service to customers.

CenturyLink did not take a position as to whether DRIVE’s ROFR request to CenturyLink complied with Section 3014(h)(2) of Chapter 30. CenturyLink did not contest that it declined DRIVE’s ROFR pursuant to Section 3014(h)(2). Remand I.D. at 33; CenturyLink M.B. at 8.

The RLECs, in opposing DRIVE’s compliance with Section 3014(h)(2), argued for an interpretation of the term, “such service” in 3014(h)(2), to reference the “telecommunications services” that the political subdivision would offer absent the prohibition of Section 3014(h)(1). Remand I.D. at 32; RLEC M.B. at 27. The RLECs urged the Commission to find that the statute requires some “linkage,” *i.e.*, nexus between the municipality’s plans and its request of the ILEC. *Id.*

In making the argument for linkage (nexus), the RLECs asserted that DRIVE had no intention of constructing the network detailed in the ROFR letters. They point out that the Expansion Project is much more limited and much less robust than what it demanded of the RLECs. This allegation applies to both the service provided and the scope of such service. Remand I.D. at 33. The RLECs claim that DRIVE is “gaming” the system and that what DRIVE requested in its ROFR letters is unreasonable and excessive. *Id.*

The RLECs also argued that the ROFR letters should contain some basic information. In their opinion, this should include a description of the technology to be deployed, verifications of the speeds to be offered and propagation maps, among other things. *See*, RLEC M.B. at 29-30. The RLECs claimed that they sought this information,

but DRIVE refused to provide such information until it submitted its testimony in this proceeding. *Id.* at 30-31, citing, Windstream/TDS St. 1-R at 21 and RLEC Exh. R-4. The RLECs explained that without the information they could not provide definitive answers in response to DRIVE's ROFR.

In an interrelated position, the RLECs argue against DRIVE's contention that they were not legally entitled to the detailed information regarding the Expansion Project. They state that DRIVE's position is not consistent with Section 3014(h). And, had they been provided the information at that time, they would have been able to fully and promptly respond to DRIVE's ROFR letter. *See*, Windstream/TDS St. 1-R at 16. In addition to this contention was the RLECs' associated argument that they did not decline to provide service that would match DRIVE's Expansion Project.

The OCA did not agree that the DRIVE ROFR letters sent were legally insufficient or that the statute obligated DRIVE to provide more information than was given in the ROFR. The OCA also disagreed with the RLECs' position that "such services" as used in Section 3014(h)(2) should be read as referring to the services which the political subdivision intends to deploy. The OCA argued, instead, that the placement and repetition in Section 3014(h)(1) and (2) of "advanced" and "broadband services" means that the phrase "such service" is best interpreted as referring to "advanced and broadband services" in the abstract. The OCA also agreed with DRIVE that the statute does not require the municipal entity to develop a plan for the deployment of broadband service at a particular speed and then offer that plan to the ILECs. *Id.* The OCA argued that the RLECs' arguments regarding "such services" is without sound statutory support because Section 3014(h)(2) does not expressly require the political subdivision to disclose information about its plans in the ROFR. *See*, Remand I.D. at 34.

The OCA then focuses on the statutory timeframes in Section 3014(h)(2) regarding whether the ILEC that replies to the ROFR in an equivocal manner has agreed

to provide the requested service or not. In particular, the OCA asks that the Commission find that each response by the RLECs reflects an absence of an agreement to provide the requested data speeds. It added that “the express, short time frame fixed by statute is an important element designed to remove uncertainty in just this type of situation,” and further characterizes the RLECs’ position as resulting in a “pocket veto.” The OCA requests the Commission to clarify and provide certainty regarding this element of Section 3014(h)(2), noting the Commission’s prior decision in the *Central Bradford Order*. Remand I.D. at 34-35.

The OCA noted that when the Commission addressed DRIVE’s first petition, it found that DRIVE was “obligated to offer a ROFR and obtain a ‘clear and unequivocal denial.’” *See*, Remand I.D. at 34. The OCA requests that the Commission clarify the *Central Bradford Order* on this issue. *Id.*

**b. ALJ’s Recommendation**

The ALJ recommended that the Commission reject the position of the ILECs and find that DRIVE has satisfied the statutory requirement of Section 3014(h)(2). Remand I.D. at 39-45. The ALJ found that substantial record evidence demonstrates that DRIVE has satisfied its burden to demonstrate that it has met the requirements of Section 3014(h) with regard to all of the ILECs, including the RLECs that provide service in the relevant service territory. The ALJ found that DRIVE submitted a written request for the deployment of advanced or broadband services to the ILECs and none of the ILECs agreed to provide the data speeds requested. Remand I.D. at 45.

**c. Exceptions and Replies**

The RLECs, Windstream, *et al.*, except to two recommendations of the Remand I.D. concerning DRIVE’s compliance with the ‘right of first refusal’ of

Section 3014(h)(2). The RLECs agree that Section 3014(h)(1) applies to the Expansion Project. However, the RLECs except to the finding that DRIVE met the requirements of Section 3014(h)(2) regarding the issuance of a ROFR offer. The RLECs object that their request for additional information from DRIVE should not be treated as declining to provide the service within the intent of the statute. The RLECs further except to the finding that additional ROFR letter(s) should not be required if DRIVE extends/expands beyond the “scope” of the current Expansion Project, but “[w]ithin the much larger scope of the ROFR letters ...” in the future. RLEC Exc. at 1.

In substantial part, the RLECs object that the ALJ’s recommendations on the above-cited two issues are not supported by the language of Section 3014(h) and would “thwart the purpose and plain meaning of the statute.” RLEC Exc. at 1.

The RLECs make the argument that the language of the law is clear regarding the term, “such services” so that engaging in principles of ascertaining the intent of the General Assembly is unnecessary. Consequently, on reading the provision of subsection (h)(1) and (h)(2) in *pari materia*, the RLECs argue that the prohibition must apply to the term, “such services,” and that the ROFR should conform to the identical services – speed and area - that has been requested by the political subdivision in the ROFR.

The RLECs acknowledge the collaborative preference in the law. *See* RLEC M.B. at 17-18. At RLEC Exc. at 9, they state:

In summary, the meaning of “such service” is clear on its face. Section 3014(h)(2) requires that the ROFR letter share information about the services that the political subdivision proposes to offer, so that the ILEC can evaluate whether if it can offer “such services” instead. DRIVE failed to do so



here, and therefore has not met the requirements of Section 3014(h)(2).

RLEC Exc. at 9.

In its Replies to the Exceptions of CenturyLink and the RLECs, DRIVE emphasizes the benefits of the pilot and Expansion Project in enabling broadband to segments of the counties which were previously underserved in their access to broadband. DRIVE R. Exc. at 1-4. In reply, DRIVE views the entire controversy as turning on the proper statutory interpretation of the applicable provision of Chapter 30.

In its Replies to the Exceptions of the RLECs and the Exceptions of CenturyLink, the OCA agrees with the conclusions of the Remand I.D. and states that the decision should be adopted and the Exceptions denied.

The OCA agrees that substantial evidence supports the determination in the Remand I.D. that DRIVE has complied with the requirements of Section 3014(h)(2). It replies that the Commission should not read into Section 3014(h)(2) more obligations on DRIVE – a political subdivision – during the ROFR stage than are stated in the plain language of the statute. Also, the OCA, significantly, references Section 3014(g) of the Code, 66 Pa. C.S. § 3014(g), which additionally addresses interactions between an ILEC and a political subdivision. OCA R. Exc. at 5; OCA M.B. at 26. This Section obligates the ILEC to “make technical assistance available to political subdivisions located in its service territory.” In light of Section 3014(g), the OCA argues that this provision shows that the General Assembly knew how to specify what information and in what direction information should flow between a political subdivision and an ILEC, in a specific context. *Id.*

Additionally, the OCA asks that the Commission reject the Windstream/TDS position that DRIVE had an obligation under the Section to disclose its future plans to Windstream and TDS/M&M. The OCA notes this position is not supported by the statutory language of the statute nor by the comparative framework of Sections 3014(g) and 3014(h).

The OCA also relies upon the holding of the Commission's *Central Bradford Order* to argue that the Exceptions of the RLECs, that the record does not support a decision that they "did not agree" to provide the service sought by DRIVE prior to the Expansion Project and the Exceptions of CenturyLink that DRIVE should be under an obligation to issue additional ROFR requests should the Expansion Project be modified within the counties which are DRIVE members, should be denied.

#### **d. Disposition**

As an initial matter, the Commission recognizes that there was a considerable lack of clarity until today on how Section 3014(h)(2) operates so the differing interpretations are understandable. Given that uncertainty and the fact that the record clearly establishes what was being asked and what was intended to be deployed, particularly in light of recent Pennsylvania precedent and industry differentiation between "last mile" and "middle mile" networks, the parties to this proceeding were reasonably apprised of what was at stake sufficient to respond to the written request. However, going forward, the parties and public are put on notice that Section 3014(h)(2) requires that there be a reasonable nexus between what a political subdivision is asking of an ILEC and what the political subdivision intends to deploy. It will not be acceptable to mix last mile and middle mile networks unless they are part of a comprehensive deployment request.

We reach this conclusion because the main requirement of Section 3014(h)(2) i.e., making sure that both Parties understood what was being asked, was met. DRIVE has

completed its middle-mile project without harm to the ILECs last mile POLR/COLR obligation. There is no evidence of overbuilding. The ILECs or DRIVE, for their part, can deploy a last mile network capable of providing service to residential and business consumers similar to what DRIVE asked of the ILECs.

Moreover, this conclusion that DRIVE has complied with Section 3014(h)(2) of the Code must necessarily involve engaging in statutory interpretation of this applicable section. *See*, DRIVE R. Exc. at 4. We would agree with the RLECs' citation to applicable principles of statutory interpretation as expressed in their position.

This need for interpretation arises whether the statute requires a “nexus” or, as the parties here claim in using the term linkage, generally on what is required when a political subdivision submits a written request for deployment of such network or service to an ILEC under Section 3014(h)(2). The important question here is whether there must be a reasonable connection between what a political subdivision is asking an ILEC to deploy and what the political subdivision intends to deploy itself.

In the instant case, DRIVE asked the ILECs to provide “last mile” service to, *inter alia*, 85% of the local residential consumers and 95% of the business consumers at 50 Mbps speeds.<sup>32</sup> DRIVE does not intend to construct a “last mile” network to provide broadband service to end users.<sup>33</sup> DRIVE only intends to construct a “middle mile”

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<sup>32</sup> *DRIVE Petition for Declaratory Order*, Docket No. P-2021-3025296, Petition for Declaratory Order (April 16, 2021), para. 35 (“Among other things, the August 27 Letter requested that each Telephone Company provide carrier grade, wide area network services at a data speed of 50 Mbps downstream to 85% of all residences and 95% of all businesses in the pertinent county or counties.”); *Accord Answer to Petition*, p. 6.

<sup>33</sup> *DRIVE Petition for Declaratory Order*, Docket No. P-2021-3025296, Petition for Declaratory Order (April 16, 2021), para. 15 (“In all counties, DRIVE's Network will be an Open Access Network; it will provide a backbone that can be leased

network<sup>34</sup> that can provide the transmission capacity needed for the last mile network it asks the ILEC to construct. The middle mile service DRIVE provides is to wireless internet service providers (WISPs) who, in turn, provide service to retail residential and business customers.<sup>35</sup>

DRIVE contends that there does not have to be a nexus or connection between what it seeks from an ILEC and what it intends to deploy itself. The rationale for this position is straightforward. If the statute does not expressly allow interpretation of a statutory term in light of industry practice, law, and funding, the Commission should not impose a requirement upon a political subdivision. A political subdivision does not have to demonstrate that what they ask an ILEC to do is reasonably proximate to what they propose to do. The ILECs/RLECs contend that DRIVE's "written request" was

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for use. The key components for transmitting network signals over the Network are transceivers and network switches. DRIVE will not provide any of these electronic components; Internet Service Providers ("ISPs") and other entities leasing access to the Network will be required to install network electronics and operate their own networks over DRIVE's infrastructure. The ISPs are also responsible for providing all customer services, including billing, to end-users receiving broadband service."); M.B., at 26 ("DRIVE owns and operates a middle mile network; it does not provide last mile service to retail end users. DRIVE'S customers are WISPs who lease access to the Network.").

<sup>34</sup> *DRIVE Petition for Declaratory Order*, Docket No. P-2021-3025296, Petition for Declaratory Order (April 16, 2021), para. 17 ("DRIVE will lease the Expansion Project's network to ISPs and other entities, who will install the equipment necessary to use DRIVE's Network to sell broadband and other services to end-users.").

<sup>35</sup> *DRIVE Answer*, p. 35. See also, p. 26 ("In DRIVE I, the Commission concluded that DRIVE'S Pilot Project would provide telecommunications services "to the public" because "[a] service is public when it is available to all members of the public who may require it, even if that group is limited in number." . . . The evidence introduced in this proceeding demonstrates that DRIVE'S service is not, in fact, available to all members of the public who may require it. DRIVE owns and operates a middle mile network; it does not provide last mile service to retail end users. DRIVE'S customers are WISPs who lease access to the Network.").

insufficient and that it lacked the information needed to enable them to respond.<sup>36</sup> The ILECs/RLECs further contend that there must be a “nexus” between what DRIVE seeks and what DRIVE intends to provide.<sup>37</sup>

The language governing a “written request for the deployment of such service” set out in Section 3014(h)(2) must be read *in para materia* with Pennsylvania caselaw, industry practice, and capital investment realities. The language in Section 3014(h)(2) does not expressly prohibit implementation of this provision with a view to precedent, industry practice, and funding.<sup>38</sup> The Commission can and should consider industry practice, law, and funding when the parties ask the Commission. These factors provide more certainty as a matter of law on what is required when a political subdivision submits

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<sup>36</sup>*DRIVE Petition for Declaratory Order*, Docket No. P-2021-3025296, Answer to Petition, pp. 7-10.

<sup>37</sup>*DRIVE Petition for Declaratory Order*, Docket No. P-2021-3025296, Answer to Petition, p. 10.

<sup>38</sup> The most recent public information on the NTIA funding of \$42.5 billion indicates that the FCC will issue a revised map by June 30, 2023. <https://ntia.gov/press-release/2022/biden-harris-administration-announces-timeline-national-high-speed-internet> A revised FCC map will be the basis for allocating the NTIA funding to states based on the percentage that any given state has of unserved and underserved consumers compared to the nation. The 2021 *FCC Joint Board Report*, which reflected a regulatory conclusion that if one location in a census block was served the entire census block was served, showed that Pennsylvania has over 500,000 consumers in urban and rural areas without broadband, although most are in rural areas. This number is likely to increase now that the FCC revised maps will not reflect this prior regulatory conclusion. The Pennsylvanians, in excess of 500,000 that are without broadband today, as a percentage of the nation’s population without broadband, suggests that Pennsylvania should receive, at a minimum, about \$1 billion in public capital investment in broadband networks. See *In re: The Deployment of Advanced Services To All Americans*, Docket No. 20-69 (January 21, 2020) (the Section 706 Report), pp. 248-250. The issuance of this Declaratory Order addressing how Section 3014(h)(2) interfaces with this potential funding administered by the Pennsylvania Broadband Development Authority provides political subdivisions and ILECs with the clarity and predictability needed when considering whether to seek federal funds.

a written request for the deployment of such service under Section 3014(h)(2).

DRIVE contends that the statute only requires a “written request” without providing specific details. DRIVE views such requests for clarification on what is being asked as tantamount to seeking a detailed deployment plan.<sup>39</sup> Again, DRIVE claims that there need not be a “nexus” between what it wants the ILECs to build and what DRIVE intends to use to provide their proffered service.<sup>40</sup> DRIVE seems to reason that the general language in Section 3014 does not require a requesting party to differentiate between “last mile” and “middle mile” networks in their written request. All they need to do is submit one general request.

The language addressing a “written request for the deployment of such service” in Section 3014(h)(2) does not expressly differentiate between “middle mile” and “last mile” networks<sup>41</sup> or services. Chapter 30 is also silent on what speeds are within a Section 3014(h)(2) written request although the definition of broadband stipulates speeds equal to or greater than .128 Mbps up/1.5 Mbps down. Chapter 30 is also silent on what process applies when disputes about compliance with Section 3014(h)(2) arise.

The reference to “such deployment” in Section 3014(h)(2) means that there must be a “nexus” between the written request made by a political subdivision to an ILEC and

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<sup>39</sup>*DRIVE Petition for Declaratory Order*, Docket No. P-2021-3025296, DRIVE M.B. at 50-51.

<sup>40</sup>*DRIVE Petition for Declaratory Order*, Docket No. P-2021-3025296, Answer to Petition, pp. 5-10; *DRIVE M.B.* at 35.

<sup>41</sup> The “last mile” refers to services that are provided to retail consumers. The “middle mile” refers to the network that connects multiple networks, which is a form of wholesale service, but does not provide service to end-users at a retail level. DRIVE made a request to construct a “last mile” service capable of providing 25/3 but DRIVE’s business plan focused only on building a “middle mile” network for WISPs and other potential wholesale customers.

what service the requesting party is proposing to provide. The reasonable nexus can be determined in light of precedent, industry practice, and capital investment realities. Anything less leads to confusion, a duplication of efforts, the construction of redundant networks, a waste of taxpayer and customer dollars, potential cost avoidance, and significant delay in the provision of broadband service to unserved and underserved Pennsylvanians. The Petitioner cannot make a written request to an ILEC asking the ILEC to build out a “last mile” network capable of providing service to 85% to 95% of the ILEC’s customers so that the Petitioner can build its “middle mile” network and enhance its value carrying the traffic generated once the ILEC builds the “last mile” network.

The Commission recognizes that there was a considerable lack of clarity until today on how Section 3014(h)(2) operates so the differing interpretations are understandable. Given that uncertainty and the fact that the record clearly establishes what was being asked and what was intended to be deployed, the parties to this proceeding were reasonably apprised of what was at stake sufficient to respond to the written request. Going forward, the parties and public are put on notice that Section 3014(h)(2) requires that there be a reasonable nexus between what a political subdivision is asking of an ILEC and what the political subdivision intends to deploy. It will not be acceptable to mix last mile and middle mile networks unless they are part of a comprehensive deployment request.

Concerning the position of DRIVE, while we find that DRIVE has complied with Section 3014(h)(2) under the facts of this Petition, we would, going forward, observe that its position that the Right of First Refusal (ROFR) bears no relation to the network contemplated is extreme. *See*, DRIVE M.B. at 44, n. 20. However, DRIVE would seem to be amenable and would acknowledge the relevance and materiality of a distinction between service classifications in the ROFR that provides the affected ILEC with a fair and reasonable opportunity to consider, evaluate, and respond to the request. DRIVE has

recognized this need for minimal articulation of a distinction in service types. *See*, DRIVE M.B. at 35. Notwithstanding, DRIVE would argue for a cursory rejection of the view that “last mile” and “middle mile” service may be relevant in an ILEC’s review of the ROFR.

DRIVE has referenced Section 3014(h)(3) in support of its position that the contested Section 3014(h)(2) does not require or delimit a political subdivision’s prospective deployment plan when it issues a ROFR to an affected ILEC. DRIVE argues, in pertinent part:

Section 3014(h)(3) states that the prohibition of subsection (1) does not prevent a political subdivision from continuing to provide service “of the same type and scope” as was being provided on the effective date of Section 3014. If, however, a political subdivision changes the type or scope of services it provides after the effective date of Section 3014(h), it must issue an ROFR Letter.

DRIVE M.B. at 36; (emphasis supplied).

At DRIVE M.B.at. 38, it argues that the statutory intent of Section 3014(h)(2) should not be interpreted to require (as compared to necessarily imply) a link or nexus between “last mile” and “middle mile” networks. Such comparisons would, under the reasoning of DRIVE, be improvident:

The RLECs interpretation of Section 3014(h) would require that DRIVE’S middle-mile network be compared to the RLECs’ last mile network. Comparing such networks is impossible; it is a classic case of comparing apples and oranges. DRIVE St. No. 2 p. 28; DRIVE St. No. 3 p. 15. The Commission should not interpret Section 3014(h) to require the comparison of networks that are not comparable.

DRIVE M.B. at 38.



While noting these positions of DRIVE and the RLECs, under principles of statutory interpretation, we see a need to clarify our rejection of either of their positions based on statutory interpretation. We do so in light of Pennsylvania caselaw, industry practice, and capital investment realities so that, going forward, there is more clarity on disposition of the positions of DRIVE and the RLECs.

As explained earlier, the language addressing a “written request for the deployment of such service” in Section 3014(h)(2) does not expressly differentiate between “middle mile” and “last mile” networks<sup>42</sup> or services as well. Chapter 30 is also silent on what speeds are within a Section 3014(h)(2) written request although the definition of broadband stipulates speeds equal to or greater than .128 Mbps up/1.5 Mbps down. Chapter 30 is also silent on what process applies when disputes about compliance with Section 3014(h)(2) arise.

The language governing a “written request for the deployment of such service” set out in Section 3014(h)(2) must be read *in para materia* with Pennsylvania caselaw, industry practice, and capital investment realities discussed above. Entities like DRIVE may be essential to deploy broadband in high-cost rural areas given the lack of broadband there today. Legal precedent in Pennsylvania in the *RTCC v. Pa. PUC (RTCC)* and *Crown Castle and Extenet v. Pa. PUC (Crown Castle)* cases hold that wholesale service (the so-called “carrier’s carrier” service) is telecommunications service which the

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<sup>42</sup> The “last mile” refers to services that are provided to retail consumers. The “middle mile” refers to the network that connects multiple networks, which is a form of wholesale service, but does not provide service to end-users at a retail level. DRIVE made a request to construct a “last mile” service capable of providing 25/3 but DRIVE’s business plan focused only on building a “middle mile” network for WISPs and other potential wholesale customers.

Commission can certificate. These holdings<sup>43</sup> accord with federal law and accentuate the fact that the Commission should not distinguish or differentiate between the provisioning of wholesale telecommunications services or retail telecommunications services by entities as both are subject to Commission jurisdiction. Since both are subject to our jurisdiction, it follows that both are relevant to interpreting Section 3014(h)(2). Finally, it is not arbitrary or capricious to rely on industry practice and proposed federal funding which clearly differentiates between “middle mile” and “last mile” networks and services. The Commission would act without regard to industry standards, precedent, and federal funding, which reflects industry realities, if we held that it does not matter what a “written request for the deployment of such service” must contain or how it is made because a vague or general submitted communication is sufficient.

As discussed, below, we do not adopt the recommendation of the presiding ALJ to initiate a rulemaking proceeding to receive comments for our consideration towards establishing generic elements or for adoption of generic principles for inclusion in ROFR letters by political subdivisions.

Federal law and policy also reflect the provisions in Chapter 30 addressing the regulatory concern for underserved and unserved communities’ accessibility to broadband has achieved national attention. This joint focus is reflected, in part, from public information on the challenges of underserved and unserved communities as well as

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<sup>43</sup> The Pennsylvania Supreme Court *Crown Castle* holding came after DRIVE had asked the ILECs to provide “last mile” service to, *inter alia*, 85% of the local residential consumers and 95% of the business consumer even though DRIVE intends to operate a “middle mile” network to provide wholesale transmission capacity to customers like WISPs. It is the ILECs who are expected to construct a last mile network to service that percentage of customers.

the official notice we take that in 2021, Congress enacted the “Digital Equity Act of 2021.” *See*, Section 60301 of Pub. L. 117–58, codified at 47 U.S.C. §§ 1721, *et seq.* At 47 U.S.C. § 1722, it is stated:

**§ 1722. Sense of Congress**

It is the sense of Congress that—

(1) a broadband connection and digital literacy are increasingly critical to how individuals—

(A) participate in the society, economy, and civic institutions of the United States; and

(B) access health care and essential services, obtain education, and build careers;

(2) digital exclusion—

(A) carries a high societal and economic cost;

(B) materially harms the opportunity of an individual with respect to the economic success, educational achievement, positive health outcomes, social inclusion, and civic engagement of that individual; and

(C) exacerbates existing wealth and income gaps, especially those experienced by covered populations;

(3) achieving digital equity for all people of the United States requires additional and sustained investment and research efforts;

(4) the Federal Government, as well as State, tribal, territorial, and local governments, have made social, legal, and economic obligations that necessarily extend to how the citizens and residents of those governments access and use the internet; and

(5) achieving digital equity is a matter of social and economic justice and is worth pursuing.

(Pub. L. 117–58, div. F, title III, §60303, Nov. 15, 2021, 135 Stat. 1212.)

47 U.S.C. § 1722.

Congress has also promulgated the Broadband Deployment Accuracy and Technology Availability Act, Pub. L. No. 116-130, 134 Stat. 228 (2020) (codified at 47 U.S.C. §§ 641-646) (Broadband DATA Act). Pursuant to the Broadband DATA Act, the FCC has been instructed to create maps showing the extent of the availability of broadband internet access service in the United States. *See*, 47 U.S.C. § 642(c). The law has procedures in which a state, local, Tribal governments, service provider, or other entity is able to submit challenges to and based on, the data. *Broadband Data Task Force, Wireline Competition Bureau, and Office of Economics and Analytics Announce Start of Fabric Bulk Challenge Process*, WC Docket Nos. 19-195, 11-10, Public Notice, DA 22-913 (BDTF/WCB/OEA Sept. 2, 2022).<sup>44</sup>

In addition to citing the goals of the Digital Equity Act of 2021, which goals are substantially in lockstep with the overriding goal of Pennsylvania’s Act 183 regarding broadband accessibility to citizens of the Commonwealth, the federal Digital Equity Act of 2021 has emphasized the importance of deployment of the “middle mile” network infrastructure.<sup>45</sup> The “middle mile” infrastructure is the network facility

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<sup>44</sup> Under *Fixed Availability Challenges*, “Challengers may dispute the availability of fixed broadband service at a particular location, including whether a connection could be installed or the network technology and maximum advertised download and upload speed reported by a provider, based on one of nine pre-established challenge reasons or categories.” *See, Establishing the Digital Opportunity Data Collection; Modernizing the FCC Form 477 Data Program*, WC Docket Nos. 19-195, 11-10, Third Report and Order, 36 FCC Rcd 1126, 1155, para. 72 (2021) (*Third Report and Order*); 47 CFR § 1.7006(d)(1)(iv); *See, FCC, Broadband Data Collection Availability Challenges*, <https://www.fcc.gov/sites/default/files/bdc-fixed-challenge-overview.pdf> (last visited Nov. 16, 2022).

<sup>45</sup> The Digital Equity Act of 2021 (47 U.S.C. § 1741(a)(9)) defines “middle mile” as follows:

**(9) MIDDLE MILE INFRASTRUCTURE**

The term “middle mile infrastructure”—

business model constructed by DRIVE and DRIVE’s compliance with Section 3014(h)(2) is in dispute in the current Petition. *See* Remand I.D. at 22, n. 5; Conclusion of Law No. 12.

The “middle mile” network is of significance to our consideration of the dispute raised in the DRIVE Petition as consider Pennsylvania precedent and take official notice that, while there is a federal emphasis upon the “middle mile” infrastructure’s importance, the vast bulk of the current federal funding has focused on “last mile” service to end-users when it comes to broadband deployment. This federal goal is co-extensive with the Act 183 state goals of universally accessible broadband to communities. *See*, 47 U.S. C. § 1741(b):

**(b) PURPOSE; SENSE OF CONGRESS**

**(1) PURPOSE**

The purposes of this section are—

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(A) means any broadband infrastructure that does not connect directly to an end-user location, including an anchor institution; and

(B) includes—

(i) leased dark fiber, interoffice transport, backhaul, carrier-neutral internet exchange facilities, carrier-neutral submarine cable landing stations, undersea cables, transport connectivity to data centers, special access transport, and other similar services; and

(ii) wired or private wireless broadband infrastructure, including microwave capacity, radio tower access, and other services or infrastructure for a private wireless broadband network, such as towers, fiber, and microwave links.

(A) to encourage the expansion and extension of middle mile infrastructure to reduce the cost of connecting unserved and underserved areas to the backbone of the internet (commonly referred to as the “last mile”); and

(B) to promote broadband connection resiliency through the creation of alternative network connection paths that can be designed to prevent single points of failure on a broadband network.

47 U.S.C. § 1741(b); (emphasis added).

We also observe that prior to the current federal legislation establishing federal funding to stimulate increased broadband availability as illustrated by the CARES law allocations involved in the DRIVE Petition (Finding of Fact No. 22), the American Recovery and Reinvestment Act of 2009 was a prior, federal government effort to provide financial incentives for increased broadband deployment by telecommunications carriers to high-cost, mostly rural, areas. *See, In the Matter of the Petition of Windstream Pennsylvania, LLC for BFRR Deployment Extensions Relating to Carrier Serving Areas in the Albion, Coalport, Conneautville, Rimersburg, Rockland, Rural Valley, Shippenville, and Sigel Exchanges*, Docket No. P-2011-2248534 (Order entered August 11, 2011) at 4; 2011 WL 3647124 (Pa. P.U.C.):

The American Recovery and Reinvestment Act of 2009 (ARRA)<sup>1</sup> provides federal funding opportunities for incumbent local exchange carriers (ILECs) to deploy broadband to rural areas across the nation. *Id.* at 2. The ARRA appropriated \$7.2 billion to expand access to broadband services throughout the United States primarily through the Broadband Initiatives Program (BIP) administered by Rural Utilities Service (RUS) under the United States Department of Agriculture and the Broadband Technology Opportunities Program (BTOP) administered by the National Telecommunications and Information Administration (NTIA) under the United States Department

of Commerce. Approximately, \$2.5 billion of the \$7.2 billion was appropriated to the BIP. *Id.* at 2.

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<sup>1</sup> *See*, Pub. L. No. 111-5, 123 Stat. 115 (2009).

The most recent federal funding in the Broadband Equity and Deployment program (BEAD) allocates approximately \$42.5B for “last mile” connections and \$1B for “middle mile” connections in unserved or underserved locations. Consequently, it is not arbitrary or capricious to conclude that “middle mile” is akin to wholesale service and that “last mile” is akin to retail service when determining compliance with Section 3014(h)(2).

The recent unprecedented expansion in federal funding for largely “last mile” service to end-user consumers as compared to the “middle mile” networks evidenced by the ARPA legislation and, most recently, the IIJA legislation support determining whether compliance with Section 3014(h)(2) exists based, in part, on differentiating “last mile” networks from “middle mile” networks. The Broadband Equity and Deployment provisions and the United States Department of Agriculture’s Rural Utilities Service (USDA/RUS) law also contains a similar recognition of these industry practices when it comes to funding broadband.

Moreover, in the instant DRIVE Petition, ALJ Cheskis has found that Windstream has received federal Rural Digital Opportunity Funds (RDOF) to provide 1 GigaBytes per second (Gbps) fiber to the premises of 1,282 households in Northumberland County and 2,003 households in Union County. Finding of Fact No. 15, citing Windstream/TDS St. 1-R at 7-8.

In conclusion, statutes addressing the same or similar subjects are consistent in recognizing the necessity for increased deployment of broadband beyond existing coverage, particularly for last mile networks and service, and they differentiate

between funding for “middle mile” networks and service compared to funding for “last mile” service to end-users. The underserved and/or unserved areas tend to be overwhelmingly rural. *See, e.g.*, DRIVE M.B. at 9: “These are rural counties, with areas that currently lack access to broadband, or that have access to the internet at speeds that do not meet the Federal Communications Commission’s (FCC’s) minimum data speed of 25 mbps download. DRIVE St. 2 p. 3. For example, “the majority of Windstream’s footprint [in Union and Northumberland Counties] has access to speeds of at least 10 mbps.\*” Windstream/TDS St. No. 1-R pp. 7-8.”

Similarly, statutes addressing underserved and unserved broadband<sup>46</sup> service areas, acknowledge that it is in the public interest to establish funding for the

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<sup>46</sup> We do not find a definition of “unserved” or “underserved” in the Code. Such comparable definitions are found in the federal law. *See, e.g.*, 47 U.S.C.A. § 1702:

## **§ 1702. Grants for broadband deployment**

### **(a) DEFINITIONS**

#### **(1) AREAS, LOCATIONS, AND INSTITUTIONS LACKING BROADBAND ACCESS**

In this section:

##### **(A) Unserved location**

The term “unserved location” means a broadband-serviceable location, as determined in accordance with the broadband DATA maps, that--

**(i)** has no access to broadband service; or

**(ii)** lacks access to reliable broadband service offered with--

**(I)** a speed of not less than--

**(aa)** 25 megabits per second for downloads;  
and

**(bb)** 3 megabits per second for uploads;  
and



purposes of creating financial incentives to promote accomplishing the regulatory objective of increased deployment of broadband into unserved/underserved areas. Such funding has, variously, been made available to regulated telecommunications companies and other, non-regulated, actor/entities.

(c)(6) The consequences of a particular interpretation.

In addition, on consideration of the positions of the Parties, ALJ Cheskis recommended that the position of the RLECs be rejected. In pertinent part, he reasoned as follows:

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\* \* \*

**(B) Unserved service project**

The term “unserved service project” means a project in which not less than 80 percent of broadband-serviceable locations served by the project are unserved locations.

**(C) Underserved location**

The term “underserved location” means a location--

- (i) that is not an unserved location; and
- (ii) as determined in accordance with the broadband DATA maps, lacks access to reliable broadband service offered with--
  - (I) a speed of not less than--
    - (aa) 100 megabits per second for downloads; and
    - (bb) 20 megabits per second for uploads; and
  - (II) a latency sufficient to support real-time, interactive applications.

Finally, this case must be viewed in light of the policy goal of the Commonwealth articulated in Section 3011 of the Public Utility Code to “maintain universal telecommunications 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). When doing so, it is not reasonable to construe Section 3014(h) in a manner that makes achieving the policy goal more difficult. DRIVE is commended for its efforts to invest resources in accelerating the deployment of broadband services in rural parts of the Commonwealth. The RLECs should welcome this investment, not create barriers. As the OCA noted in its main brief, the Commission should construe Section 3014(h) to advance the public interest, rather than favoring any private interest. Debating the specific meaning or intent of particular words or phrases in a statute, as has occurred here for several years, does not accelerate the deployment of broadband services. While some of the arguments made by the RLECs on this issue may make good business sense, their positions are not consistent with the plain and unambiguous language of Chapter 30. Instead, it is in the public interest for the Commission to encourage as much investment in broadband infrastructure as possible, especially in rural areas, and not create barriers.

Remand I.D. at 45.

We agree with the observations of the presiding ALJ concerning the policy goals of Section 3014 but further augment and modify the above reasoning consistent with this Opinion and Order.

The position of the RLECs in opposition to the process involved in the DRIVE Petition, including their objections to the substance and content of the ROFR letters issued concerning the Expansion Project, must be Rejected to the extent that those positions contradict the determination that DRIVE complied with the general provisions

of Section 3014(h)(2) by providing information sufficient for the ILECs and the Commission to determine that DRIVE asked the ILECs to build a “last mile” network so that it could deploy its “middle mile” network in their service territories.

Under the facts of this dispute and that conclusion, granting the RLECs’ advocacy for relief in countermand to the DRIVE Petition would, from our analysis, tilt the balance established by the General Assembly in the law in favor of the RLECs to the detriment of the political subdivision. Adoption of the RLECs’ position, in full, would also operate contrary to the public interest and intent of Act 183. *See*, 1 Pa. C.S. § 1922(1), (2), and (5): (1) “the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable,” (2) “the General Assembly intends the entire statute to be effective and certain,” and (3) “the General Assembly intends to favor the public interest as against any private interest.”

The RLECs argue for a draconian interpretation of the written request for such service by the political subdivision that would introduce a standard of strict, technological conformity with the network identified in the ROFR and the network the political subdivision proposes in its request. DRIVE correctly notes that such requests for that level of specification in this proceeding on clarification is tantamount to seeking a detailed deployment plan.<sup>47</sup>

In addition, CenturyLink argues for an interpretation of the law that would impose a residual obligation on the political subdivision under the law and require the political subdivision to re-issue the written ROFR solicitation to the ILEC in the event that a prior, approved, network facility constructed by the political subdivision is enhanced or improved. In support of this interpretation, CenturyLink cites the following example in support of its reasoning:

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<sup>47</sup> *DRIVE Petition for Declaratory Order*, Docket No. P-2021-3025296, DRIVE M.B.at 50-51.

. . . if DRIVE adds several additional towers or otherwise significantly supplements or modifies its network or operations – particularly in a small portion of Snyder County served by CenturyLink – CenturyLink should be afforded an opportunity to deploy “such service” and that can only happen if DRIVE reissues a ROFR. CTL M.B. at p. 11. As noted in the record, CenturyLink ultimately declined DRIVE’s ROFR Request. Declining DRIVE’s ROFR Request should not operate as a permanent waiver of CenturyLink’s statutory right to review and make a ROFR determination regarding future expansions and changes to DRIVE’s operations or business. Yet, that is exactly the result arising from the Initial Decision.

CenturyLink Exc. at 5-6; (emphasis added).

The position of the RLECs is, essentially, that there should be “linkage” between the ROFR and the network implemented by the political subdivision under Section 3014(h)(2). *E.g.*, Remand I.D. at 31. The RLECs have been critical of the pilot and Expansion Project of DRIVE. They observe, *inter alia*, that the DRIVE facility is a wireless network costing \$2.8 million, involving the refurbishing of seventeen towers using unlicensed citizens band radio spectrum that would provide “a minimum of 25 Mbps.” It is the view of the RLECs that this network does not “begin” to provide the type and scope of coverage demanded in the ROFR letters.

While the RLECs’ position for “linkage” as between the ROFR request of the political subdivision and the network that is, ultimately, constructed, appears reasonable on its face, our view of the term, nexus is more appropriate and differs from that of the “linkage” referred to by the RLECs. We do not view nexus as imposing a requirement of technological detail and certainty tantamount to a detailed deployment plan that “linkage” seeks. DRIVE correctly notes when it comes to an ROFR request such that the network resulting from the political subdivision’s efforts is not able to adapt

and/or evolve due to unforeseen or foreseen circumstances. Such circumstances causing a need for change may result from a host of reasons, including, but not limited to, funding availability,<sup>48</sup> engineering decisions, advances in technology, property right-of-way acquisition, changing demographics of the community, etc. *See*, Finding of Fact No. 31; 49; Remand I.D. at 43-44. We, therefore, reject the RLECs’ interpretation of the law for strict conformity tantamount to a right to request a detailed deployment plan as a requirement under Section 3014(h)(2) that effectuates the legislative intent of the disputed section.

Also, according to the argument of CenturyLink, broadband deployment achieved by the political subdivision must remain technologically stagnant. Should it not remain so, CenturyLink takes the position that Section 3014(h) is “protectionist” such that it requires a repeat of the ROFR process every time the network undergoes improvement or modification. *See*, CenturyLink Exc. at 7: “If DRIVE in the future expands or modifies its network or operations beyond its ROFR request – regardless of whether within or outside the geographic areas subject to its ROFR – then DRIVE must initiate another ROFR Request. In this manner, Section 3014(h)(2) remains an exception to the general prohibition at Section 3014(h)(1) against a political subdivision’s deployment of advanced and broadband services.” (emphasis supplied).

Contrary to the position of the RLECs, we view nexus as a reasonable identification of the network, services, and speed requested by the political subdivision of the LEC and service location or service area pertaining to the service, as modified by our conclusion concerning a distinction between “last mile” and “middle mile” service. In this case, DRIVE made a reasonable request for a last mile network that would enhance

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<sup>48</sup> DRIVE unsuccessfully sought funding to expand. *See*, DRIVE St. 2 at 10: “DRIVE partnered with the Commonwealth to submit an NTTA grant application to fund the installation of one site per county for internet access in Union, Snyder and Montour Counties, but that application was denied funding in February 2022.”

the value of its middle mile network. That is more than a general request but less than being tantamount to a detailed deployment plan.

Additionally, such construction as argued for by the RLECs of strict technological disclosure tantamount to a detailed deployment plan would improperly place an undue burden of technical specificity and detail on the political subdivision at the ROFR stage of a service request - a stage that we consider to require enough information to make an informed response which, in this case, was clear to the parties and the Commission given our conclusion that the main requirement of Section 3014(h)(2) i.e., making sure that both Parties understood what was being asked, was met. DRIVE has completed its middle-mile project without harm to the ILECs last mile POLR obligation. There is no evidence of overbuilding. The ILECs or DRIVE, for their part, can deploy a last mile network capable of providing service to residential and business consumers like what DRIVE asked.

While we reject the position of the RLECs concerning an interpretation of the law for strict, technological conformity tantamount to a detailed deployment plan, we would clarify our interpretation of the proper scope of the ROFR below, finding the position of DRIVE needs consideration and clarification as well.

DRIVE contends that the statute only requires a general “written request” without providing specific details. DRIVE views such requests for clarification on what is being asked as tantamount to seeking a detailed deployment plan.<sup>49</sup> DRIVE also claims that there need not be a “nexus” between what it wants the ILECs to build and what DRIVE

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<sup>49</sup>*DRIVE Petition for Declaratory Order*, Docket No. P-2021-3025296, DRIVE M.B., pp. 50-51.

intends to use to provide their proffered service.<sup>50</sup> DRIVE also argues that service to a few customers is not public utility service, despite recent case law to the contrary dealing with neutral tandem wholesale transmission service and wholesale service in general, and that they are not a public utility.<sup>51</sup> DRIVE seems to reason that the general language in Section 3014 does not require a requesting party to do anything other than make a general request and not differentiate between “last mile” and “middle mile” networks in their written request.

The language governing a “written request for the deployment of such service” set Section 3014(h)(2) must be read *in para materia* with Pennsylvania caselaw, industry practice, and capital investment realities. Entities like DRIVE may be essential to deploy broadband in high-cost rural areas given the lack of broadband there today. Legal precedent in Pennsylvania in the *RTCC v. Pa. PUC (RTCC)* and *Crown Castle and Extenet v. Pa. PUC (Crown Castle)* cases hold that wholesale service (the so-called “carrier’s carrier” service) is telecommunications service which the Commission can

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<sup>50</sup>*DRIVE Petition for Declaratory Order*, Docket No. P-2021-3025296, Answer to Petition, pp. 5-10; *DRIVE M.B.*, p. 35.

<sup>51</sup> *DRIVE Petition for Declaratory Order*, Docket No. P-2021-3025296, Answer to Petition, pp. 5-10; *DRIVE M.B.*, p. 25-26. DRIVE’s reliance on a policy statement addressing Alternative Energy Portfolio Standards (“According to the Commission’s Order adopting the Policy Statement, Implementation of the Alternative Energy Portfolio Standards Act of 2004, Docket No. M-00051865 (Nov. 30, 2006), the Commission would likely find that a project providing service to a defined, privileged and limited group is not providing public utility service”) fails to consider that in *Rural Telephone Company Coalition v. Pa. PUC*, 941 A.2d 751 (Pa. Cmwlth. 2008) and, more recently, *Crown Castle v. Pa. PUC*, *Supreme Court of Pennsylvania, Middle District*, J-81-2019 (July 2020) caselaw holds that wholesale transmission service is a form of public utility service regardless of the type of service provided or the number of customers compared to all customers. However, DRIVE rightly concludes, as the Commission did in *Central Bradford*, that public utility service within a political subdivision may be public utility service although it is not jurisdictional unless it is provided outside those boundaries. Jurisdictional public utility service, however, does not obviate compliance with Section 3014(h)(2).

certificate. These holdings<sup>52</sup> accord with federal law and accentuate the fact that the Commission should not distinguish or differentiate between the provisioning of wholesale telecommunications services or retail telecommunications services by entities as both are subject to Commission jurisdiction. The fact that precedent makes this distinction and subjects both the Commission jurisdiction reinforces use of this approach when interpreting Section 3014(h)(2). Finally, industry practice and proposed federal funding clearly differentiate between “middle mile” and “last mile” networks and services. The Commission could be seen to be arbitrary and capricious way if we acted without regard to industry standards, precedent, and federal funding, which reflects industry realities, if we held that it does not matter what a “written request for the deployment of such service” must contain or how it is made.

Consequently, the statute requires more than a general “written request” but without specific details tantamount to a detailed deployment plan. When determining compliance, considerations of precedent, industry practice, and funding, are relevant. This approach is consistent with the provisions in Chapter 30 addressing collaboration when it comes to a Section 3014(h)(2) request.

Section 3014(h)(2) provides for collaboration as well. This arises from the language in Chapter 30 that provides a time certain of two months in which the offeree LEC has in which to respond to the request for service issued by the political subdivision. *See*, Section 3014(h)(2); – “A political subdivision may offer advanced or broadband services if the political subdivision has submitted a written request for the deployment of such service to the local exchange telecommunications company serving the area and,

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<sup>52</sup> The Pennsylvania Supreme Court *Crown Castle* holding came after DRIVE had asked the ILECs to provide “last mile” service to, *inter alia*, 85% of the local residential consumers and 95% of the business consumer even though DRIVE intends to operate a “middle mile” network to provide wholesale transmission capacity to customers like WISPs. It is the ILECs who are expected to construct a last mile network to service that percentage of customers.



within two months of receipt of the request, the local exchange telecommunications company or one of its affiliates has not agreed to provide the data speeds requested. . . .” (emphasis supplied).

Within the two-month time frame of Section 3014(h)(2), we find that it is the obligation of the LEC to request and obtain clarification concerning the technical specifications and other requirements that the LEC considers material and significant in order to evaluate and respond to the ROFR but, again, it cannot be tantamount to seeking a detailed deployment plan.<sup>53</sup>

Because the statutory scheme of Act 183 accounts for a two-month period in which the LEC is directed to reply and/or respond to the ROFR, we must rationally assume the intent of the law is that this time be used for dialogue and collaboration between the stakeholder participants, political subdivision and ILEC.<sup>54</sup> As an addendum to the two-month period in which the LEC must respond, the LEC is under a fourteen (14) month mandate to complete the task of providing the service identified in the ROFR.

Therefore, time is a material element of the General Assembly’s statutory scheme in establishing the mutual rights and obligations of the stakeholders. *See, e.g.*, OCA position. Anything less leads to confusion, a duplication of efforts, the construction of redundant networks, a waste of taxpayer and customer dollars, potential cost

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<sup>53</sup>*DRIVE Petition for Declaratory Order*, Docket No. P-2021-3025296, DRIVE M. B., pp. 50-51.

<sup>54</sup> The general rule of statutory interpretation, to give words their plain and unambiguous meaning, is subject to several important qualifications, including the “precept” that the General Assembly “does not intend a result that is absurd, impossible of execution, or unreasonable.” *Mercury Trucking, Inc. v. Pa. PUC*, 618 Pa. 175, 194, 55 A.3d 1056, 1068 (2012), citing *Commonwealth v. Shiffler*, 583 Pa. 478, 879 A.2d 185, 189–90 (2005).

avoidance, and significant delay in the provision of broadband service to unserved and underserved Pennsylvanians.

The RLECs have complained that they sought clarification of the service desired in the ROFR, but such clarification was not forthcoming from DRIVE until after contested proceedings were in play.<sup>55</sup> The RLECs further express concern that a political subdivision can demand a “wildly exaggerated and very expensive network to be operational within 14 months” in order to create an operational and financial impossibility, thereby ensuring a rejection from the ILEC and the hurdle of Section 3014(h)(1) cleared. The RLECs acknowledge, however, that the statutory scheme of Section 3014 anticipates good faith collaboration between the stakeholders. They state, in pertinent part, “[i]t is regrettable that DRIVE and the RLECs could not work together to resolve their disagreement over the proper interpretation of Section 3014(h), the RLECs’ focus is on future broadband deployment and the place of Section 3014(h) in the expansion of broadband for the benefit of all Pennsylvanians.” RLECs M.B. at 10.

DRIVE, in reply to the concern of the RLECs that their queries were not answered, notes that two ROFR solicitation letters were sent to the RLECs – one dated August 27, 2020, and a second dated February 9, 2021. DRIVE M.B. at 18. This period of time, of course, spans more than the two-month period set out in the law. In response to the August 27, 2020 ROFR letter, DRIVE received responses declining the requested deployment from Frontier, DRIVE Exhibit JW-16, CenturyLink, DRIVE Exhibit JW-18, Verizon PA, DRIVE Exhibit JW-20, and Verizon North, DRIVE Exhibit JW-19. *Id.* DRIVE, consequently, has taken the position that it received responses from the RLECs

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<sup>55</sup> The RLECs have remarked, in opposition to the DRIVE Petition, that the litigated proceedings required them to undertake engineering analysis of data requests of DRIVE, which left them less than the statutory sixty days. *See*, RLECs M.B. at 9.

that neither agreed to, nor decline, the requested deployment. *Id.*, citing DRIVE Exhibits JW-21 and JW-26.

The ROFR letters from DRIVE asked the RLECs to provide broadband service at a data speed of 50 mbps throughout their service territories in Union and Northumberland Counties. Both TDS and Windstream eventually responded to the February 9, 2021 ROFR letter (second letter) by saying they could neither agree to nor decline the requested deployment. *See*, DRIVE Exhibits JW-21 and JW-26.

On review of the record in this proceeding, we find it difficult to engage in micro-management of the interaction between the Parties that led to the instant, adversarial proceedings. The parties to this proceeding were reasonably apprised of what was at stake sufficient to respond to the written request. However, going forward, the parties and public are put on notice that Section 3014(h)(2) requires that there be a reasonable nexus between what a political subdivision is asking of an ILEC and what the political subdivision intends to deploy. It will not be acceptable to mix last mile and middle mile networks unless they are part of a comprehensive deployment request. The collaboration that occurred here and going forward must be sufficient to ensure that the main requirement of Section 3014(h)(2) is met i.e., making sure that both Parties understood what was being asked.

The Commission acknowledges that the deployment of advanced service and broadband will, invariably, involve complicated technological and engineering decisions and evaluation. These efforts must necessarily involve experts and subcontractors of various expertise and disciplines employed by and/or retained by the Parties. Finding of Fact Nos. 31; 33-42. These types of exchanges as between the political subdivision and the affected LEC should, therefore, be recognized as an accepted consequence of implementing broadband in unserved and underserved areas.

When the disputed sections of the law are read and reviewed in context, we find that Section 3014 establishes a legislative intent that collaborative activity precede the eventual deployment of a telecommunications facility or provision of service by the political subdivision in the event the ROFR request is declined (not agreed to) by the LEC. However, this exchange must take place in good faith as it does not portend to proceed from arms-length negotiations between the parties.<sup>56</sup>

Because the record demonstrates that the parties understood what was being asked, responded to what was being asked, and deployed a middle mile network in response to what was being asked, the same record provides no basis for making an affirmative assessment of culpability against either DRIVE or the RLECs as to which Party was the least diligent in communicating under the Section 3014(h)(2) process in a collaborative manner. Notwithstanding this inability, the law imposes an obligation on the political subdivision to issue a written request with sufficient detail to afford the LEC a right of first refusal prior to exercising its right to provision the service itself. This obligation, however, as we note here today, requires a nexus between what the political subdivision is requesting of an ILEC and what the requesting political subdivision is proposing to provide. It is not tantamount to a detailed deployment plan. This, in turn, is juxtaposed with the pre-existing duty on the part of the LEC to provide technical assistance to the political subdivision. 66 Pa. C.S. § 3014(g).

In light of these considerations, we conclude that when the political subdivision in the ROFR provides a written request that gives the information on which the LEC is reasonably apprised of the nexus addressing a proposed network type, requested speed

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<sup>56</sup> We note that DRIVE's reluctance to provide information and data requested by the RLECs was, in part, out of a concern for competitive and/or unfair business advantage reasons. This issue raises a question of inherent tension between the "middle mile network" business model and incumbent LEC facilities.

and the desired service area(s), absent a clear showing of bad faith,<sup>57</sup> this information is sufficient, particularly in light of our conclusion regarding the “last mile” and “middle mile,” distinction to find compliance. Given these considerations and that qualification, the political subdivision has, therefore, complied with the law because the ILECs understood what was being asked. Although the RLECs have alluded to improper motives or incomplete information on the part of DRIVE, we do not find that the record supports that conclusion given our ability to address Section 3014(h)(2) in light of that record. As noted, the information submitted and the record demonstrate that the parties and the Commission understood the nature of the political subdivision request as did the ILECs.

Our reasons for reaching the above interpretation of the responsibilities to provide certainty and clarity under Section 3014 are, fundamentally, two-fold. First, there must be a nexus between what a requesting political subdivision seeks from an ILEC and what they intend to provide. Second, the RLECs in this matter are under a pre-existing statutory duty to provide technical assistance to the relevant political subdivision. 66 Pa. C.S. § 3014(g). The need for technical assistance is, in our review of the law, based on the recognition by the General Assembly that the incumbent LECs/RLECs are in a superior position pertaining to technical expertise in the provision of advanced service and/or broadband in a specific service area when compared to other actors. *See, e.g.*, DRIVE M.B. at 12, n. 6, referencing DRIVE St. No. 3 p. 15. On balance, we find that the political subdivision was in a position of technical knowledge without ILEC

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<sup>57</sup> Bad faith “describes conduct of a dishonest nature.” *Erie Municipal Airport Auth. v. Agostini*, 620 A.2d 55, 57 (Pa. Cmwlth. 1993), *appeal denied*, 537 Pa. 624, 641 A.2d 589 (Table), citing *Moyer v. State Real Estate Commission*, 276 A.2d 327, 330 (Pa. Cmwlth. 1971). In this context, bad faith implies a tainted or fraudulent motive; it must be proven by clear, precise and indubitable evidence. *In Re Condemnation by City of Philadelphia of Leasehold of Airports, Inc.*, 398 A.2d 224 (Pa. Cmwlth. 1979). “Bad faith becomes palpable when such motive is obvious or readily perceived.” *Redevelopment Authority of the City of Erie v. Owners . . .*, 274 A.2d 244, 247 (Pa. Cmwlth. 1971). *Id.*

technical expertise of what it sought sufficient to make a request for a “last mile” network in support of its “middle mile” proposal. The RLECs were in possession of superior knowledge, including technological expertise, including the industry practice of differentiating between “last mile” and “middle mile” in networks, which often includes proprietary information and data<sup>58</sup> concerning the broadband infrastructure needs of a specific area and/or specific addresses within their service territory, to understand and respond to what was being asked.

We have considered the publicly known actions of the FCC and others, and take official notice that the FCC, pursuant to a recently promulgated statute, have been tasked with creating a national broadband map to aid the public in determining where high-speed service is - and is not - available across the country. The FCC has observed that “high-speed, high-quality internet service is essential for participation in modern life.” *See*, [fcc.gov](http://fcc.gov).; *also* [padced.gov](http://padced.gov). The federal initiative to create this sort of database is evidence of a need for publicly available information regarding the deployment of broadband infrastructure of a specific area. This recent federal effort connotes a lack of such information and data being readily available to the general public previously.<sup>59</sup>

Another basis is that, in addition to the pre-existing statutory obligation of the RLECs to provide technical assistance to the political subdivision, the RLECs in the present controversy were given actual notice of the bids issued by DRIVE in its efforts to construct and operate the pilot and Expansion Project. The actual notice of such bids regarding the Expansion Project were a third opportunity for participation and

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<sup>58</sup> *See*, 66 Pa. C.S. § 3014(f)(3): “Under no circumstances shall the commission compel the public release of maps or other information describing the actual location of a local exchange telecommunications company’s facilities.”

<sup>59</sup> The RLECs have specifically complained that propagation maps were specifically sought from DRIVE but were not provided until contested proceedings before the Commission. Such maps were, apparently, provided to ROFR bidders. *See*, RLECs M.B. at 30. The FCC mapping should make this publicly known.

engagement by LECs subsequent to issuance of the Act 183 ROFR. No LEC submitted a bid for consideration. Remand I.D. Finding of Fact Nos. 24-26.

As a corollary to the above reasoning, a review of Act 183 discloses that upstream and downstream data speeds are stated in relative, not absolute, terms, requiring such speeds to have a minimum capability, not definitive ability. *See*, DRIVE R. Exc. at 2. In Union and Northumberland Counties, for example, the RLECs' witnesses testified that "the majority of Windstream's footprint has access to speeds of at least 10 mbps." Windstream/TDS St. No. 1-R pp. 7-8. Those speeds are now seen as woefully inadequate for modern life – for children to attend school on-line, for adults to work remotely, or for anyone to attend healthcare appointments on-line. DRIVE St. 2-R p. 24.

We agree with the following discussion and observations in the Remand I.D.:

Technology changes rapidly and the political subdivision should not be committed to a certain deployment requirement if that technology is no longer warranted or provides optimal service. For this reason, it may also be that political subdivisions could provide speeds and sizes that ultimately are larger than originally requested in the ROFR if those services are warranted and provide optimal service. Such changes should not negate the ability of a political subdivision to provide such investment, especially in an effort to achieve the overall Commonwealth policy of accelerating the deployment of broadband services. The intent of Chapter 30 is to encourage and accelerate such deployment and a political subdivision that wishes to invest in infrastructure that will help achieve that goal should not be deterred if it is ultimately determined that the service deployed does not match the service requested of the RLEC in the 3014(h)(2) request . . .”

Remand I.D. at 44.

All Parties agree that the project is complete, operational, and that no aspect of the public interest would be served by inhibiting such operation. Finding of Fact No. 52. We view this as a favorable indication that the parties knew what was being asked and of the collaboration needed sufficient to comply with Act 183. The benefits of the Expansion Project have been described, in pertinent part as follows: Throughout the four counties included in the Expansion Project, there are 113,208 addresses. The Expansion Project should enable WISPs using the Network to make broadband service available at a data speed of 50 mbps or greater to 66,740 (or 59.0%) of them. The Expansion Project also should enable WISPs using the Network to make broadband service available at a data speed of 25 mbps or greater to 77,962 (or 68.9%) of them. *See*, DRIVE St. No. 3 pp. 10-11.

DRIVE has completed its middle-mile project without harm to the ILECs last mile POLR/COLR obligation. There is no evidence of overbuilding. The ILECs or DRIVE, for their part can deploy a last mile network capable of providing service to residential and business consumers like what DRIVE asked. However, these observations are rooted in the fact that DRIVE itself never intended to provide these “last mile” services as a WISP but, instead, intended to provide the “middle mile” network that these WISPs would need.

Also, throughout the four counties included in the Expansion Project, there are 13,942 underserved addresses. The “middle mile” Expansion Project should enable WISPs using the Network to make “last mile” broadband service available at a data speed of 50 mbps or greater to 7,444 (or about 53.4%) of them. The Expansion Project should enable WISPs using the Network to make broadband service available at a data speed of 25 mbps or greater to 9,356 (or about 67.1%) of these addresses. DRIVE St. No. 3, p. 11.



As explained, a “middle mile” facility serves as the backbone for a specific region. It is, generally, the segment of internet connectivity that connects the global internet to the “last mile network” as it enables other alternative providers to access the facility and provide the “last mile” of service to the end-use customer’s premises. Although DRIVE will own the “middle mile” Expansion Network, the WISPs will contract with DRIVE and obtain the necessary equipment (customer premises equipment or CPE) needed to provide “last mile” service to the end-user. *See*, Finding of Fact No. 38; 54. DRIVE owns the internet bandwidth on the network. *See*, DRIVE St. 3 at 12. However, DRIVE will not have control over the business operations of the contracting WISPs or other users of the facility/Expansion Project that are providing this “last mile” service. Such users of the Expansion Project may engage in a variety of telecommunications and related services based on their individual business models to render service to the public that is made possible by the facility. The Remand I.D. has detailed the project as follows:

35. The expansion project is a middle-mile network located entirely within the corporate boundaries of the member counties of DRIVE and all services provided by the expansion project are provided within the boundaries of the member counties of DRIVE. DRIVE St. 2 at 26.
36. DRIVE’s expansion project is a microwave network. The key components for transmitting network signals over the network are microwave dishes and antennae installed at the sites. DRIVE St. 2 at 4.
37. The expansion project uses 911 towers, private towers, farm silos and company rooftops interconnecting with two wholesale fiber internet service providers, which provide direct internet access (DIA) across the DRIVE Network to a point on the tower where that internet access transitions to a wireless internet service provider (WISP), who provides last mile service to retail end users. DRIVE St. 3 at 6. 11

38. To provide last-mile service, WISPs install last-mile electronics, including Customer Premises Equipment (CPE). DRIVE St. 4 at 4.
39. The CPE radios and antennae are owned and maintained by the WISP. DRIVE St. 4 at 4.
40. DRIVE owns all of the tower-based gear: microwaves, CBRS and 5.8 GHz base station radios, antennae, switches, cabinets, power supply systems, and UPS gear. DRIVE St. 3 at 12.
41. There are a few network servers located in the DRIVE offices that are part of a Network Operations Center. DRIVE St. 3 at 12.
42. DRIVE also owns the internet bandwidth on the network. DRIVE St. 3 at 12.
43. SkyPacket Networks, Inc. (SkyPacket) generally uses CBRS access radios to connect back to the network base stations. The radios use the 3GPP 4GLTE standard and require a SIM card programmed and provided by the WISP. The SIM cards and the CBRS licensed frequencies they operate on are the property of the WISPs. DRIVE St. 4 at 6.
44. DRIVE has no control over the equipment that the WISPs use. DRIVE St. 4 at 6.
45. WISPs file required federal reports, such as the Form 477. They also market their networks, install equipment, bill customers, and perform similar customer-service functions. DRIVE St. 3 at 13-14; DRIVE St. 4 at 4.
46. DRIVE has no control over WISP marketing, pricing, service or customer service. DRIVE St. 4 at 2-3.

Remand I.D. at 10-11.

Given that the parties understood the nature of the written request, we see no reason to constrain the Expansion Project facility to the technology of the present day when doing so ignores the dynamic nature of technological change and may be contrary to the intent of Act 183 *See*, Remand I.D. at 44.

In the present DRIVE Petition, we decide that the Section 3014(h)(2) exception to the general prohibition against the provision of broadband by a political subdivision to the public for compensation should be construed in light of Pennsylvania caselaw, industry practice, and capital investment realities when the parties ask the Commission to resolve a dispute about compliance with Section 3014(h)(2). We do so because these factors provide more certainty supporting an interpretation as a matter of law on what is required when a political subdivision submits a written request for the deployment of such service under Section 3014(h)(2). Anything less leads to confusion, a duplication of efforts, the construction of redundant networks, a waste of taxpayer and customer dollars, potential cost avoidance, and significant delay in the provision of broadband service to unserved and underserved Pennsylvanians.

**i. Conclusion – Statutory Interpretation Section 3014(h)(2)**

On application of principles of statutory construction to the facts of this dispute, we determine that DRIVE has complied with Section 3014(h)(2) of the Code, 66 Pa. C.S. § 3014(h)(2) albeit based on a different approach.

DRIVE contends that there does not have to be a nexus or connection between what it seeks from an ILEC and what it intends to deploy itself.<sup>60</sup> The rationale

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<sup>60</sup>We use the terms “nexus” apart from “linkage” in our disposition by design. Linkage is

for this position is straightforward. If the statute does not expressly allow interpretation of a statutory term in light of industry practice, law, and funding, the Commission should not impose a requirement upon a political subdivision. A political subdivision does not have to demonstrate that what they ask an ILEC to provision is reasonably proximate to what they propose to do.

We find that the position of DRIVE does not reflect the entirety of proper statutory interpretation. The language in Section 3014(h)(2) does not expressly prohibit implementation of this provision with a view to industry practice, law, and funding.<sup>61</sup>

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tantamount to a request for a detailed deployment plan not envisioned in the statute and a matter of concern to DRIVE. Nexus, on the other hand, refers to a connection between the written request made by a political subdivision to an ILEC and what service the requesting party is proposing to provide. The Petitioner cannot make a written request to an ILEC asking the ILEC to build out a “last mile” network capable of providing service to 85% to 95% of the ILEC’s customers so that the Petitioner can build its “middle mile” network and enhance its value carrying the traffic generated once the ILEC builds the “last mile” network.

<sup>61</sup>The most recent public information on the NTIA funding of \$42.5 billion indicates that the FCC will issue a revised map by June 30, 2023. <https://ntia.gov/press-release/2022/biden-harris-administration-announces-timeline-national-high-speed-internet> A revised FCC map will be the basis for allocating the NTIA funding to states based on the percentage that any given state has of unserved and underserved consumers compared to the nation. The 2021 *FCC Joint Board Report*, which reflected a regulatory conclusion that if one location in a census block was served the entire census block was served, showed that Pennsylvania has over 500,000 consumers in urban and rural areas without broadband although most are in rural areas. This number is likely to increase now that the FCC revised maps will not reflect this prior regulatory conclusion. The Pennsylvanians, in excess of 500,000 that are without broadband today, as a percentage of the nation’s population without broadband, suggests that Pennsylvania should receive, at a minimum, about \$1 billion in public capital investment in broadband networks. *See, In re: The Deployment of Advanced Services To All Americans*, Docket No. 20-69 (January 21, 2020) (the Section 706 Report), pp. 248-250. The issuance of this Declaratory Order addressing how Section 3014(h)(2) interfaces with this potential funding administered by the Pennsylvania Broadband Development Authority provides political subdivisions and ILECs with the clarity and predictability needed when considering whether to seek federal funds.

The Commission can and should consider precedent, industry practice, and capital investment realities when the parties ask the Commission to interpret the general language in Section 3014(h)(2). These considerations provide more certainty as a matter of law on what is required when a political subdivision submits a written request for the deployment of ‘such’ service under Section 3014(h)(2).

The ILECs/RLECs contend that DRIVE’s “written request” was insufficient and that it lacked the information needed to enable them to respond. The ILECs/RLECs further contend that there must be a “linkage” between what DRIVE seeks and what DRIVE intends to provide. The RLECs have argued, *inter alia*, that the requirement of the ROFR to provide service at the requested speed to their entire service footprint was more than what DRIVE required from the WISPs with whom it contracts under the middle mile business model. *See*, RLECs M.B. at 34-34; Windstream/TDS St. No. 1-R at 14.

In contrast, DRIVE contends that the statute only requires a “written request” without providing specific details. DRIVE views such requests for clarification on what is being asked as tantamount to seeking a detailed deployment plan. DRIVE also claims that there need not be a “linkage” between what it wants the ILECs to build and what DRIVE intends to use to provide its proffered service. DRIVE seems to reason that the general language in Section 3014 does not require a requesting party to differentiate between “last mile” and “middle mile” networks in their written request.

The Commission recognizes that the language addressing a “written request for the deployment of such service” in Section 3014(h)(2) does not expressly differentiate between “middle mile” and “last mile” networks<sup>62</sup> or services. Chapter 30 is also silent

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<sup>62</sup> As discussed, the “last mile” refers to services that are provided to retail consumers. The “middle mile” refers to the network that connects multiple networks, which is a form

on what speeds are within a Section 3014(h)(2) written request, although the definition of broadband stipulates speeds equal to or greater than 0.128 Mbps up/1.5 Mbps down. Chapter 30 is also silent on what process applies when disputes about compliance with Section 3014(h)(2) arise.

Consistent with sound principles of statutory interpretation, we find that the language governing a “written request for the deployment of such service” set out in Section 3014(h)(2) must be read *in para materia* with Pennsylvania caselaw, industry practice, and capital investment realities. *See*, 1 Pa. C.S. § 1903(a): “(a) Words and phrases shall be construed according to rules of grammar and according to their common and approved usage; 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.” Entities like DRIVE may be essential to deploy broadband in high-cost rural areas given the lack of broadband there today. Legal precedent in Pennsylvania in the *RTCC v. Pa. PUC*, *supra* and *Crown Castle* cases hold that wholesale service (the so-called “carrier’s carrier” service) is telecommunications service which the Commission can certificate. These holdings<sup>63</sup> accord with federal law and accentuate the fact that the Commission should not distinguish or differentiate between the provisioning of wholesale telecommunications services or retail telecommunications services by entities as both are subject to Commission jurisdiction.

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of wholesale service, but does not provide service to end-users at a retail level. DRIVE made a request to construct a “last mile” service capable of providing 25/3 but DRIVE’s business plan focused only on building a “middle mile” network for WISPs and other potential wholesale customers.

<sup>63</sup> The Pennsylvania Supreme Court *Crown Castle* holding came after DRIVE had asked the ILECs to provide “last mile” service to, *inter alia*, 85% of the local residential consumers and 95% of the business consumer even though DRIVE intends to operate a “middle mile” network to provide wholesale transmission capacity to customers like WISPs. It is the ILECs who are expected to construct a last mile network to service that percentage of customers.

Finally, we observe that industry practice and proposed federal funding clearly differentiates between “middle mile” and “last mile” networks and services. The Commission would act without regard to industry standards, precedent, and capital investment realities, which reflects industry realities, if we were to hold that it does not matter what a “written request for the deployment of such service” must contain or how it is made.

The Commission concludes that reference to “such deployment” in Section 3014(h)(2) means that, as a minimum consideration, there must be a “nexus” between the written request made by a political subdivision to an ILEC and what service the political subdivision is proposing to provide. Anything less leads to confusion, a duplication of efforts, the construction of redundant networks, a waste of taxpayer and customer dollars, potential cost avoidance, and significant delay in the provision of broadband service to unserved and underserved Pennsylvanians. A Petitioner cannot make a written request to an ILEC asking the ILEC to build out a “last mile” network capable of providing service to 85% to 95% of the ILEC’s customers so that the Petitioner can build its “middle mile” network and enhance its value carrying the traffic generated once the ILEC builds the “last mile” network.

We recognize that there was a considerable lack of clarity until this proceeding on how Section 3014(h)(2) operates so the differing interpretations are understandable. Given that uncertainty and the fact that the record clearly establishes what was being asked of the RLECs and what was intended to be deployed, the Parties to this proceeding were reasonably apprised of what was at stake sufficient to respond to the written request. However, going forward, the Parties and public are put on notice that Section 3014(h)(2) requires that there be a reasonable nexus between what a political subdivision is asking of an ILEC and what the political subdivision intends to deploy. It will not be acceptable to mix last mile and middle mile networks unless they are part of a

comprehensive deployment request.

In conclusion, we find that the main requirement of Section 3014(h)(2), *i.e.*, making sure that all Parties understood what was being asked, was met. DRIVE has completed its middle-mile project without harm to the ILECs last mile POLR/COLR obligation. There is no evidence in this proceeding of overbuilding. The ILECs or DRIVE, for their part, can deploy a last mile network capable of providing service to residential and business consumers consistent with what was requested by DRIVE.

**4. Does the Construction and Operation of the Expansion Project Subject DRIVE to Regulation as a Public Utility?**

**a. Positions of the Parties**

DRIVE argued that the construction and operation of the Expansion Project will not subject DRIVE to regulation as a public utility. DRIVE explained that it is not a public utility with respect to the pilot project because DRIVE is not a “person” or a “corporation” as defined in Section 102 of the Code, 66 Pa. C.S. § 102. Petitioner relied upon the determinations in *DRIVE I* wherein the Commission found that a municipal corporation operating within its corporate limits may provide public utility service without obtaining a certificate of public convenience so long as it is providing service solely within its corporate limits. DRIVE took the position that the determination in *DRIVE I* should be persuasive and followed in this case. DRIVE added that all of the cities in the expansion project are well within the boundaries of the member counties of DRIVE. Also, DRIVE argued that public policy should encourage regionalization rather than counties building separate networks. Remand I.D. at 46-47.

In its Reply Brief, DRIVE stated that, although the RLECs did not take a position on whether DRIVE should be subject to the Commission’s jurisdiction, “it does,



however, offer questions suggesting that the Commission should find that DRIVE is not a public utility.” DRIVE R.B. at 21. DRIVE replied, in pertinent part, that the RLECs presented no argument as to why the Commission should make different findings in the current DRIVE Petition than were made in *DRIVE I* when it concluded that DRIVE was a municipal corporation under the Code. Therefore, it asserted that the Commission should find that the Expansion Project will not subject DRIVE to regulation as a public utility because DRIVE is a municipal corporation providing service entirely within its corporate boundaries.

The RLECs and CenturyLink did not take a position on the jurisdictional question of the status DRIVE as a public utility. Remand I.D. at 46-47.

The OCA argued in support of the position of DRIVE. The OCA noted that, in response to DRIVE’s prior petition, the Commission determined that DRIVE’s community broadband access project in Montour County did not subject DRIVE to the Commission’s jurisdiction as a public utility. Remand I.D. at 46; OCA M.B. at 27, quoting *DRIVE I* at 6-10. The OCA added that, based on the similarities between DRIVE’s operation of a dark fiberoptic network in Montour County with leased access to internet service providers and DRIVE’s operation of its Expansion Project, it is reasonable to determine that DRIVE is not subject to the Commission’s jurisdiction as a municipal corporation operating within its boundaries. *Id.*

The OCA concluded that “[t]he mere geographic expansion by DRIVE, contained within its own political boundaries, does not render the services that are provided as public utility services.” *See* Remand I.D. at 46.

**b. ALJ's Recommendation**

On consideration of the positions of the Parties, ALJ Cheskis observed that resolution of this issue was governed by the considerations previously decided by the Commission in *DRIVE I*. In pertinent part, the ALJ reasoned:

Nothing in the record of this case demonstrates that DRIVE's expansion project that is the subject of this proceeding is different than DRIVE's pilot project that was the subject of DRIVE I to warrant finding that DRIVE's construction and operation of the expansion project would subject DRIVE to regulation as a public utility. Nor have any parties advocated here for different treatment of the expansion project from the pilot project. As DRIVE noted in its main brief, "here, all of the sites in DRIVE's expansion network are located well within the boundaries of the member counties of DRIVE, and all of the services that DRIVE provides to WISPs are provided entirely within the member counties of DRIVE." DRIVE M.B. at 52; citing, DRIVE St. 2 at 13 and DRIVE St. 2-SR at 26; see also, OCA M.B. at 27-28. As a result, I find that the construction and operation of DRIVE's expansion project within DRIVE's corporate limits does not subject DRIVE to regulation as a public utility. To the extent that its construction and operation no longer remains within DRIVE's corporate limits, DRIVE likely will be subject to Commission jurisdiction for the service provided outside of the corporate limits.

Remand I.D. at 48-49.

**c. Disposition**

We hereby adopt the recommendation of the ALJ. We determine that the recommendation of the Remand I.D. is to be adopted while noting that there is an interplay between the rights afforded to "municipal authorities" under the law, that enables such municipal authorities, once constituted, to provide a service within the

entirety of their statutory enabled corporate boundaries outside of the jurisdiction and authority of the Commission and the pre-condition placed upon “political subdivisions” under Section 3014(h) of Chapter 30. *See, SARAA v. Pa. PUC*, 911 A.2d 612, 620, n. 13 (Pa. Cmwlth. 2006), *appeal denied*, 592 Pa. 762, 823 A.2d 412 (2007) (Table), citing *In re Acquisition of Water System in White Oak Borough*, 372 Pa. 424, 427–28, 93 A.2d 437, 439 (1953).

The Commission has determined that it does not have jurisdiction over the reasonableness of the rates fixed or over the service provided by a municipal authority beyond the limits of the municipality which created it. *Graver v. Pa. PUC*, 469 A.2d 1154 (Pa. Cmwlth. 1984) (*Graver*); *see also Margaret Collins v. Pennsylvania-American Water Co.*, Docket No. F-2017-2628770 (Order entered August 29, 2019).

In the present DRIVE Petition, the ALJ has correctly observed that the construction and operation of DRIVE’s Expansion Project within DRIVE’s corporate limits does not subject DRIVE to regulation as a public utility. Remand I.D. at 48. However, to the extent that DRIVE’s construction and operation no longer remains within DRIVE’s corporate limits, DRIVE will be subject to Commission jurisdiction for the service provided outside of the corporate limits. *Id.* at 49. Also, such expansion must also comply with Section 3014(h)(2) of the Code regarding any expansion into additional counties.

**5. Does DRIVE Need to Issue Another Right of First Refusal Letter if it Expands the Expansion Project in the Future?**

**a. Positions of the Parties**

The positions of the Parties have been summarized at Remand I.D., at 49-52.

DRIVE was of the position that it does not need to submit another ROFR letter every time it constructs a new site, installs new equipment or facilities, or otherwise fills in the Expansion Project. DRIVE relied on its analysis of the proper statutory interpretation of Section 3014(h) to argue: (1) the consequence of the ILECs either declining the requested deployment or not agreeing to the requested deployment within two months is that, according to the plain language of Section 3014(h), DRIVE may offer advanced or broadband service in the area described in the ROFR letter; (2) the General Assembly could have required political subdivisions to issue subsequent ROFR letters every time they change the type or scope of the network but did not include such language and the Commission should find this exclusion intentional; (3) that requiring a political subdivision to issue multiple ROFR letters requesting ILECs to provide the same data speed in the same geographic area would serve no purpose other than giving ILECs multiple “bites at the apple” and establish obstacles for political subdivisions to bring broadband service to underserved areas; and (4) in reply to the position of the RLECs, DRIVE disagrees that the term “such service” in Section 3014(h)(2) triggers a new “event” for the new service in a new geographic area, or that Section 3014(h) does not support a geographic-based claimed right that is obtained due to the ILEC declining the ROFR.

DRIVE acknowledged that it needs to issue additional ROFR letters if, in the future, DRIVE expands its network beyond the area described in its initial ROFR letter. *See*, Remand I.D. at 51, citing DRIVE R.B. at 23-24. According to DRIVE, however, the “controversy here is whether DRIVE must issue ROFR letters if DRIVE in the future expands its network by constructing a new site, or installing facilities or equipment, within the area described in its initial ROFR letters, within the boundaries of Columbia, Northumberland, Snyder and Union Counties.

The RLECs oppose DRIVE’s position that, based on its ROFR request to provide territory-wide service in each member county, any future expansion is

“immunized” from any further application of Section 3014(h). They argue that the terms, “such service,” as set forth in Section 3014(h) triggers a new Section 3014(h) event for the new service in a new geographic region. Remand I.D. at 48, referencing RLEC M.B. at 38.

The RLECs add that if DRIVE concludes that additional expansion should be undertaken, additional notice to the LECs and additional ROFR(s) should be issued in order to provide them the opportunity to provide the “additional” service. Remand I.D. at 49-50. As discussed further below, the use of the word “expansion” in this Decision can be used: (1) to describe the addition of facilities within the area requested in the ROFR but where no facilities were initially deployed and, (2) to describe the addition of facilities beyond what was requested in the ROFR be undertaken. Remand I.D. at 49, n. 7.

CenturyLink specifically disagreed with DRIVE’s position that it would not need to issue an additional ROFR opportunity in the future if DRIVE installs additional towers or undertakes similar projects to fill in the Expansion Project. CenturyLink M.B. at 8-9. CenturyLink averred that it does not seek to impede DRIVE’s efforts or DRIVE’s existing operations but asserts that DRIVE must comply with Section 3014(h) in the future. Remand I.D. at 50.

CenturyLink argued that DRIVE wrongly conflates Section 3014(h) of the Code with Section 1101 of the Code, 66 Pa. C.S. § 1101, regarding certificates of public convenience. CenturyLink takes the position that Section 3014(h) imposes an obligation on DRIVE to submit a ROFR letter to an ILEC which ILECs have a statutory right to accept or to decline. CenturyLink added that “a plain reading of Section 3014(h) does not support a geographic-based claimed right that DRIVE somehow obtains due to the ILEC declining the ROFR request.” Remand I.D. at 50.

CenturyLink refutes DRIVE's interpretation of Section 3014(h), objecting that such interpretation "effectively relegates the ROFR process to a 'once and done' event that would permanently waive statutory rights of the declining ILEC while allowing DRIVE unlimited, unspecified expansions without having to comply with Section 3014(h)." Remand I.D. at 50, referencing CenturyLink M.B. at 10. This position, according to CenturyLink, would render Section 3014(h)(2) meaningless which would "run afoul of Section 3014(h)'s statutory scheme." *Id.*, CenturyLink M.B. at 10-11.

CenturyLink concluded that if DRIVE "fills in" and expands beyond the limited areas identified in the ROFR, or otherwise modifies the nature of its plans and network, then that would be a significant change in facts and circumstances. Remand I.D. at 50, citing CenturyLink M.B. at 10-11.

The OCA argued that when the requirements of Section 3014(h)(2) are satisfied, then the Section 3014(h)(1) prohibition is lifted as to the ILEC's service territory covered by the ROFR letter such that, "so long as DRIVE is operating within its political boundaries, it should not be required to reissue a ROFR to the ILEC each time it seeks to expand on its initial project." Remand I.D. at 50, citing OCA M.B. at 28-29. The OCA observed that such a determination would be consistent with the *Central Bradford Order*. *Id.*

The OCA concluded that the RLECs' position that "DRIVE would need to chip away at the Section 3014(h) municipal broadband prohibition on a pocket-by-pocket basis within an ILEC service area is not support by Section 3014(h)(2)" and is contrary to the public interest and need for access to improved, faster broadband services. Remand I.D. at 51, citing OCA M.B. at 30.

**b. ALJ's Recommendation**

The ALJ recommended that the position of CenturyLink be rejected. The pertinent reasoning is reprinted, below:

CenturyLink's arguments to the contrary are without merit and will be rejected. For example, CenturyLink argues that "Section 3014(h) does not convey broad rights to DRIVE similar to a certificate of public convenience obtained under Chapter 11 of the Pennsylvania Public Utility Code" or a "geographic-based claimed right that DRIVE somehow obtains due to the ILEC declining the ROFR request," but rather imposes an obligation on the political subdivision which, if met, allows that a political subdivision "may offer advanced or broadband services." This argument is not consistent with the General Assembly's policy of promoting the deployment of broadband services. Certainly, Section 3014(h) is clear that the political subdivision must issue the ROFR. However, unless the ILEC agrees within two months to provide the data speeds requested, the political subdivision can provide the service to the service area requested. In this case, DRIVE's ROFR sought the service in the ILEC service territory within the confines of DRIVE's corporate limits.

Requiring DRIVE to submit another ROFR letter every time it constructs a new site, installs new equipment or facilities, or otherwise fill in its expansion project within the confines of its corporate limits within the service territory requested defeats the purpose of Section 3014(h) and Chapter 30 in general – to accelerate the deployment of broadband services in general. Section 3014(h) is confined to the terms contained in the ROFR. CenturyLink is correct that DRIVE must initiate another ROFR request if DRIVE in the future expands or modifies its network or operations beyond its ROFR request, but here DRIVE only seeks a declaration that it does not need to submit another ROFR when it "fills in" its project requested in the ROFR.

Remand I.D. at 53-54.

**c. Exceptions and Replies**

The Exceptions of CenturyLink focus upon the, possible, future expansion of the DRIVE pilot and Expansion Project. *See CenturyLink Exc. at 2-7.*

**d. Disposition**

We, hereby, deny the Exceptions of the RLECs, particularly CenturyLink, and adopt the recommendations of the Remand I.D. We conclude, consistent with our discussion *infra* of Section 3014(h)(2), that DRIVE need not issue another ROFR letter for “expansion” of the Expansion Network facility, within the counties in which it is authorized and has issued a written ROFR for the identified area. This determination is qualified by the requirement that DRIVE comply with the requirements of Section 3014(h)(2) for any service area in which a Chapter 30 company has not, previously, been provided notice.

DRIVE makes the persuasive argument that the issuance of additional ROFR letters for the Network and Expansion within areas already the subject of a written request for such service would be duplicative and serve no purpose. We agree. Consistent with our determinations of the statutory intent of Section 3014(h)(2), we find that, based on the fact specific record of this dispute, DRIVE need not issue a subsequent ROFR to the counties of Montour County, Columbia County, Northumberland County, Snyder County and Union County given our conclusion that the parties were informed about the scope of the proposed political subdivision sufficient to respond.

**6. Was the Commission’s July 20, 2022 Order Arbitrary, Capricious and a Denial of the Parties’ Due Process Rights?**



In its Main Brief, DRIVE argued that the *July 2022 Remand Order* arbitrarily and capriciously required this case to be tried on an extremely expedited basis. Remand I.D. at 55. DRIVE pointed out that at the time of that Order, the case had been before the Commission for fifteen months and no hearings had been held. *Id.*, referencing DRIVE M.B. at 55.

DRIVE complained that there is no statutory deadline for this proceeding and no Party requested an expedited process. Yet, the Commission placed this proceeding on an expedited litigation schedule that required several rounds of written testimony and a hearing within six weeks. In conclusion, DRIVE claimed that it was adversely impacted by this decision and was impaired in its ability to prepare its case and, therefore, was denied an opportunity to be heard in a reasonable time and in a meaningful manner.

No Party expressed a position on this issue.

The OCA, in connection with the procedural objections of DRIVE raised in this matter, noted its objection to the RLECs' request that the Commission establish generic rules in this proceeding as to what information a ROFR letter should include. The OCA felt that such a ruling would implicate due process concerns of non-parties who could be affected. The OCA added that, in *DRIVE I*, the Commission declined to refer issues raised by the DRIVE Petition and the RLECs' pleadings to a forum open to wider participation.

**a. ALJ Recommendation**

The presiding ALJ, with acknowledgement of DRIVE, limited his disposition of issues to those matters as directed in the *July 2022 Remand Order*. He found that the procedural objections of DRIVE were not within the scope of these

directives and, as such, limited his discussion to the Parties' positions on the merits of the Petition for Declaratory Order and did not make a determination as to whether the *July 2022 Remand Order* was arbitrary or capricious because it required the case to be tried on an expedited basis. Remand I.D. at 56.

**b. Exceptions and Replies**

No Party has filed Exceptions to the disposition of this issue by the presiding ALJ.

**c. Disposition**

The disposition of this concern in the Remand I.D. is adopted and that it was appropriate to remand the matter in order to develop a record supporting issuance of a Declaratory Order needed to reduce uncertainty governing the interpretation of Section 3014(h)(2).

**7. Miscellaneous Issue - Miscellaneous Issues – RLECs' Request for Generic Rules Describing the Content of an ROFR Letter (Request of the RLECs for a Clarification from the Commission that ROFR Letters must Include Five Precepts Articulated in the RLEC Main Brief)**

**a. Positions of the Parties**

As noted, DRIVE opposed the position of the RLECs that the Commission issue a ruling in order to establish generic rules or principles that an ROFR letter should include. DRIVE M.B. at 56. DRIVE viewed the RLECs' request as procedurally improper. The RLECs took the position that the written ROFR letter should contain certain information to include, specifically: (1) Confirmation that the proposed network

will serve households in the RLECs' territory; (2) A description of the technology to be deployed; and (3) Verification of the speeds to be offered and geographic scope. *See* RLEC Exc. at 10.

The OCA also opposed the RLECs' position for rules describing the content of a ROFR letter. Remand I.D. at 57; OCA M.B. at 32. The OCA noted that such a request was procedurally and substantively flawed, not within the Commission's authority to adopt and could harm or impede a political subdivision's efforts to improve broadband access and broadband service speeds. *Id.*<sup>64</sup>

#### **b. ALJ's Recommendation**

The ALJ recommended that the RLECs' position to include such generic rulings in the present DRIVE Petition be rejected. The ALJ, however, was in favor of a generic proceeding. He recognized that such a proceeding could draw together affected parties who could "informally" agree to the specific requirements of the ROFR letters without the need for future adjudication. Remand I.D. at 60. This was, in the opinion of the ALJ, in helping to accelerate the deployment of broadband services throughout the Commonwealth by providing an initial format of ROFR letters, upon which the different terms of service area infrastructure and operational capabilities could be applied. *Id.* Also, this would, under his recommendation, conserve Commission and party resources by eliminating some or most of the potential litigation.

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<sup>64</sup> The Remand I.D. acknowledged that the OCA provided further responses to the RLECs' issues they wanted the Commission to address generically. It was also noted that the OCA provided initial responses to a list of questions that were directed to the Parties during the October 14, 2021, prehearing conference. ALJ Cheskis concluded that such questions need not be addressed to dispose of DRIVE's Petition for a Declaratory Order. Remand I.D. at 58; *also* n. 8.

As noted, the ALJ did not recommend that the Commission consider for adoption the requests of the RLECs of certain precepts in the present DRIVE Petition based on notice and an opportunity to be heard from all potential stakeholders and interested parties, and, without the further development of an evidentiary record. Remand I.D. at 61.

**c. Disposition**

On consideration of the recommendation of the presiding ALJ in this matter, we decline at this time to institute a generic proceeding in the nature of an investigation or rulemaking proceeding, for the purposes of attempting to standardize the elements of a ROFR given the disposition in this Declaratory Order. Rather, we continue to acknowledge the case specific approach when it comes to determining compliance with Section 3014(h)(2) as the preferable alternative to any attempt to develop a form ROFR that may be applicable in various circumstances in various conditions. *See, DRIVE I.*

While the prospect of establishing a consensus among interested stakeholder parties may be of benefit, the Commission will not open a proceeding or undertake other regulatory action in this matter. The Initial Decision and Decision on Remand thoroughly addressed all of the issues except for the disposition and modification on a “nexus” as discussed herein. That discussion and this modification provides the clarity and predictability needed going forward. This is better than expending resources in a formal proceeding at this time given the looming distribution of unprecedented federal public investment capital for broadband networks and services in unserved or underserved areas of Pennsylvania. Our disposition provides potential providers seeking federal funding with clarity on how Chapter 30 operates with that federal funding.

### **III. Conclusion**

Consistent with the discussion in this Opinion and Order, the Petition for Declaratory Order of DRIVE is granted; **THEREFORE,**

#### **IT IS ORDERED:**

1. That the Petition of Driving Real Innovation for a Vibrant Economy (DRIVE) for a Declaratory Order Regarding the Expansion of its Community Broadband Network filed April 16, 2021, at Docket No. P-2021-3025296 is granted, consistent with this Opinion and Order.

2. That the Initial Decision, Upon Remand, issued October 20, 2022, at Docket No. P-2021-3025296 is adopted, consistent with this Opinion and Order and the Exceptions filed thereto are granted and denied, consistent with this Opinion and Order. Declaratory relief is, hereby, granted consistent with this Opinion and Order.

3. That the Commission declares that Section 3014(h)(2) of the Public Utility Code, 66 Pa. C.S. § 3014(h)(1), is applicable to the construction and expansion of DRIVE's fiberoptic network in the following counties: Montour County, Columbia County, Northumberland County, Snyder County and Union County.

4. That the Commission declares that DRIVE will not be in violation of the prohibition in Section 3014(h)(1) of the Public Utility Code, 66 Pa. C.S. § 3014(h)(2), if it constructs and operates a "dark" fiberoptic network in Montour County, Columbia County, Northumberland County, Snyder County and Union County on the terms outlined in its Petition.

5. That the Commission declares that incumbent local exchange carriers operating in Montour, Columbia, Northumberland, Snyder and Union Counties have been issued rights of first refusal for the provision of service and have declined to provide the “middle mile” service requested by DRIVE within the meaning of Section 3014(h)(2) of the Public Utility Code, 66 Pa. C.S. § 3014(h)(2).

6. That the Commission declares that DRIVE has complied with the requirements of Section 3014(h)(2) of the Public Utility Code, 66 Pa. C.S. § 3014(h)(2), with respect to the construction, operation, and expansion of its fiberoptic network in the following counties: Montour County, Columbia County, Northumberland County, Snyder County and Union County.

7. That the Commission declares that DRIVE’s status as a municipal corporation not subject to the jurisdiction and regulation of the Public Utility Commission does not extend beyond its current, corporate boundaries of Montour County, Columbia County, Northumberland County, Snyder County and Union County.

8. That should DRIVE expand its fiberoptic network into the service territory of any other Incumbent Local Exchange Carrier besides those carriers operating pursuant to a Network Modernization Plan beyond the Counties of Montour County, Columbia County, Northumberland County, Snyder County and Union County, it shall first comply with the conditions outlined in Section 3014(h)(2) of the Public Utility Code, 66 Pa. C.S. § 3014(h)(2), and shall first obtain a clear and unequivocal denial of service from the appropriate Incumbent Local Exchange Carrier.

9. That should DRIVE expand its fiberoptic network beyond the counties of: Montour County; Columbia County; Northumberland County, Snyder County and Union County, DRIVE shall first apply and obtain an appropriate

certification from the Commission consistent with the statutory requirement of Section 3014(1)-(2) of the Code.

10. That nothing herein shall be construed to exclude or exempt any third-party entity offering telecommunications services to end users through use of DRIVE's dark fiberoptic network from classification as a public utility under the Public Utility Code if it is otherwise properly classified as such.

11. That pursuant to 66 Pa. C.S. §§ 331(g), 332(e) and 52 Pa. Code § 5.408(a), the Commission notifies the Parties that it relies upon publicly available federal law on broadband deployment and intends to take official notice of the facts and findings as set forth in the following: (a) findings of the United States Congress in Title 47 U.S.C.A.; (b) orders of the Federal Communications Commission in furtherance of the goals of broadband deployment as directed in Title 47 U.S.C.A.; (c) the activity and programs of the Pennsylvania Department of Community and Economic Development as authorized by the General Assembly, including, but not limited to, Act 183 and related provisions pertaining to broadband deployment in the Commonwealth of Pennsylvania; and (d) subsequent federal funding programs for broadband deployment in unserved and underserved areas in the CARES, ARPA, and IIJA legislation.

12. That a copy of this Opinion and Order shall be served upon all statutory advocates, the Commission's Law Bureau and the Pennsylvania Department of Community and Economic Development.

**BY THE COMMISSION**

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: April 20, 2023

ORDER ENTERED: August 2, 2023