

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105**

Public Meeting held December 20, 2000

Commissioners Present:

John M. Quain, Chairman
Robert K. Bloom, Vice Chairman
Nora Mead Brownell
Aaron Wilson, Jr., Statement attached
Terrance J. Fitzpatrick

Application of AT&T Communications of
Pennsylvania, Inc. and TCG Pittsburgh to Amend their
Certificates of Public Convenience to Begin to Offer,
Render, Furnish or Supply Facilities-Based
Competitive Local Exchange Telecommunications
Services in the Service Territories of ALLTEL
Pennsylvania, Inc., Armstrong Telephone Company-
Pennsylvania, The Bentleyville Telephone Company,
Citizens Telephone Company of Kecksburg, Hickory
Telephone Company, Marianna and Scenery Hill
Telephone Company, North Pittsburgh Telephone
Company, and Yukon-Waltz Telephone Company

A-310125F0002
A-310213F0002

NONPROPRIETARY

OPINION AND ORDER

BEFORE THE COMMISSION:

I. Introduction

Before the Commission for disposition are the Exceptions filed to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Robert P. Meehan, issued in the above-captioned Application proceeding, on September 6, 2000.

Exceptions were filed by AT&T Communications of Pennsylvania, Inc. (AT&T), and TCG Pittsburgh (TCG) (collectively Applicants), Citizens Telephone Company of Kecksburg (Citizens), the Rural Telephone Companies¹, and the Commission's Office of Trial Staff (OTS), on or about September 18, 2000. Replies to Exceptions were received from the OTS, the Office of Consumer Advocate (OCA), AT&T, the RTCs, and the Office of Small Business Advocate (OSBA) on or about September 26, 2000.

On October 31, 2000, this Commission received a Petition for Reopening the Record and Rehearing (Reopen Petition) from the RTCs to which the Applicants responded. As will be explained more fully below, the Reopen Petition alleges newly discovered evidence bearing on the issue of the provision of uncertificated service by the Applicants in The Bentleyville Telephone Company's service territory. While we shall address the Reopen Petition in our discussion, *infra*, we note here that the instances of uncertificated service are *de minimis* and present no impediment to our consideration of this Application.

¹ The Rural Telephone Companies (collectively RTCs) are The Bentleyville Telephone Company, Hickory Telephone Company, Marianna & Scenery Hill Telephone Company, North Pittsburgh Telephone Company, and Yukon-Waltz Telephone Company.

II. History of the Proceeding

On April 16, 2000, the Applicants filed an Application, pursuant to 66 Pa. C.S. §§1101; 1102; 1103; 3309, and applicable provisions of the federal Telecommunications Act of 1996, 47 U.S.C. §201, *et seq.* (TA-96 hereafter), to amend their Certificates of Public Convenience to authorize facilities-based competitive local exchange carrier (CLEC) service in the service territories of eight (8) rural incumbent local exchange carriers (ILECs).² The eight (8) affected ILECs are: ALLTEL Pennsylvania, Inc. (ALLTEL PA); Armstrong Telephone Company-Pennsylvania (Armstrong PA); The Bentleyville Telephone Company (Bentleyville); Citizens Telephone Company of Kecksburg (Citizens); Hickory Telephone Company (Hickory); Marianna & Scenery Hill Telephone Company (Marianna & Scenery Hill); North Pittsburgh Telephone Company (NPTC); and Yukon-Waltz Telephone Company (Yukon-Waltz). Five (5) of the affected RTCs, Bentleyville, Hickory, Marianna & Scenery Hill, NPTC, and Yukon-Waltz, are jointly represented by counsel. ALLTEL PA and Citizens were each represented by separate counsel.³ Armstrong PA limited its position in this proceeding to that of an intervenor and did not actively participate.

Presiding ALJ Meehan recommended that the Application of AT&T and TCG be approved and that the protests in opposition to the Application be denied. (R.D., p. 1).⁴

² “Rural telephone company” is defined at 47 U.S.C. §153(37)(B), as, *inter alia*, “a local exchange carrier . . . that provides telephone exchange service, including exchange access, to fewer than 50,000 access lines.”

³ ALLTEL PA sponsored the testimony of Lawrence J. Krajci and an appearance was entered on ALLTEL PA’s behalf by the law firm of Thomas, Thomas, Armstrong & Niesen.

⁴ Protests were filed by ALLTEL PA; NPTC, Citizens, Yukon-Waltz, Marianna & Scenery Hill, Hickory, Armstrong, and Bentleyville.

On May 1, 2000, the ILECs filed a Motion to Strike and/or Dismiss the Application. On May 3, 2000, the Applicants filed a Petition for Interlocutory Review and Answer to Material Question to which the ILECs responded on May 15, 2000. Also on May 15, 2000, the Applicants filed an Answer to the Motion to Strike.

On May 27, 2000, notice of the Application was published in the *Pennsylvania Bulletin*. The ILECs filed protests on June 1, 2000.

By Secretarial Letter dated June 12, 2000, the Commission returned the Petition for Interlocutory Review to the Applicants as improperly filed and notified the Parties that the proceeding was referred to the Office of Administrative Law Judge (OALJ) for expedited disposition. Additionally, the June 12, 2000 Secretarial Letter set forth certain specific issues to be addressed in the proceeding, in addition to those issues relating to the criteria for competitive entry into the service territories of the small/rural ILECs. (*See* R.D. p. 11 referencing June 12, 2000 Secretarial Letter).

On June 20, 2000, a telephonic prehearing conference was held before ALJ Meehan.⁵ The Applicants, the ILECs, the OTS, the OCA, and the OSBA participated in the conference. A procedural schedule was established, and the Parties agreed to modifications to the Commission's discovery regulations. A Protective Order applicable to proprietary information was executed by ALJ Meehan on June 23, 2000.

⁵ The ILECs sought an extension of time in which to litigate this matter. *See* June 21, 2000 Motion for Extension of Time. Said request was denied at Public Meeting of July 13, 2000.

Evidentiary hearings were held on July 19 and 20, 2000, in Harrisburg, Pennsylvania. Main Briefs were filed by all Parties, except ALLTEL PA. Reply Briefs were filed by all Parties except ALLTEL PA and Citizens.

The Recommended Decision was issued on September 6, 2000, and the Exceptions and Replies were filed as previously noted. On October 31, 2000, the RTCs filed their Reopen Petition, seeking reopening of the record and rehearing. The issue raised on rehearing pertains to the provision of uncertificated local exchange service by the Applicants to certain customers in the Bentleyville service area.

III. Discussion

A. **ALJ Recommendation, Exceptions and Disposition**

1. **ALJ Recommendation**

ALJ Meehan concluded that the Applicants were entitled to a rebuttable presumption of continuing fitness to provide the proposed service. (R.D., p. 9). Accordingly, the ALJ further concluded that the only burden borne by the Applicants is to prove a “public necessity” for the proposed service. (R.D., p. 10). Relying in substantial part on the considerations addressed by this Commission in *Vanguard*⁶ and *Application of Armstrong Communications (Armstrong)*,⁷ ALJ Meehan considered the evidence of the Applicants pursuant to a public necessity standard, made several pertinent Findings of Fact as stated in his Recommended Decision, and concluded that they established a *prima facie* case that approval of the Application would serve the public necessity.⁸

2. **Exceptions to Recommended Decision**

It is axiomatic that we are not required to consider at length each and every contention or argument that is raised by a party. (*Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlt. 1993); *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlt. 1984)). In this proceeding, we shall give particular emphasis to the Exceptions of the RTCs and to the Applicants. The Exceptions of the

⁶ *Amended Application of Vanguard Telecom Corp. . . . , et al.*, Docket No. A-31021F0002; A-310621F0003 (Order entered August 23, 2000).

⁷ *Application of Armstrong Communications, Inc. . . . , et al.* (Order entered April 28, 1999).

⁸ *See* Findings of Fact Nos. 5-9; 13-21 at pages 3-6 of the R.D. All Findings of Fact shall be deemed adopted unless expressly rejected or rejected by necessary implication in our Disposition.

other Parties will be considered in the context of our disposition of the issues raised by this proceeding. In this regard, we observe that while there are some parallels in the structure of the Exceptions of the Parties, there are areas where the Exceptions are not completely symmetrical. This is most apparent with regard to the various sub-categories of the Public Necessity issue. Accordingly, for accuracy in issue delineation, we shall present a party's position on all sub-categories of a broad issue, before presenting the positions of the other Parties, and our disposition.

(a) RTCs' Exceptions

(i) The Gradual Introduction of Competition

The RTCs first argue that they have produced testimony showing the adverse impact on the public interest if competition is not introduced gradually. (RTC Exc., p. 6). Significantly, the RTCs cite the example of Yukon-Waltz. Referring to RTCs' St. 4, pp. 5-6, they explain that this company's service territory consists of eight square miles and that the Applicants' cable television system virtually overlaps its network. Based on the foregoing, the RTCs emphasize that competition from cable television facilities in the Yukon-Waltz service territory will result in an alleged and projected loss of 50-100% of that company's customer base. (RTC Exc., p. 6).

The RTCs additionally refer this Commission to the testimony of Grier Adamson, Treasurer and Chief Executive Officer of Hickory. This witness testified that the Applicants currently have installed cable television facilities that overlap five percent (5%) of the Hickory network. This overlap could increase to 50-60% with the addition of *minor* facilities and *possibly* result in the loss of 50% of that utility's customer base. (RTC Exc., p. 7) (Emphasis ours).

The RTCs also repeat the testimony of Marianna & Scenery Hill, that this ILEC could, in light of the Applicants' cable telephony availability, lose 7-10% of its customer base and face "stranded investment." (RTC Exc., p. 8). The RTCs also provide excerpted portions of testimony which further outlines Marianna & Scenery Hill's view as to the impact on universal service, the potential for "cream skimming," and the compounding revenue erosion effect of customer migration to the Applicants. When an exchange customer is lost to the Applicants, the RTCs argue that they will lose all other services to such customer, including toll. This is a result of the complete bypass of the ILEC's system. (RTC Exc., pp. 8-9 citing RTC Stmt. 2, pp. 6-11; also Stmt. 4, p. 6).

With regard to NPTC, the RTCs point out that other cable telephone operators, likewise, stand ready to offer CLEC service over existing cable systems in its territory. Therefore, it is argued that "[i]f . . . these other providers seek and are granted similar CLEC rights, the impact on NPTC's revenues could easily reach a loss in the magnitude of \$30 million." (RTC Exc., p. 10, quoting RTC St. 1, p. 13).

The above cited evidentiary references are repeated for the purpose of supporting the RTCs' view that the presiding ALJ improperly relied upon an "end result" standard and ignored the specific issues interjected in the proceeding by the Commission's June 12, 2000 Secretarial Letter. The RTCs further allege that the presiding ALJ departed from the *Vanguard* decision as well. (RTC Exc., pp. 10-11).

The RTCs argue that *Vanguard* stands for the proposition that this Commission acknowledged that the grant of a facilities-based CLEC application in that instance would not adversely affect the public interest because the competition to be

introduced would be gradual.⁹ In the present Application proceedings, the RTCs assert that the move to competition will not be gradual, but immediate. And, the “lead time” for the small/rural ILECs to prepare for competition, as anticipated in the *Vanguard* decision, will be non-existent. (RTC Exc., p. 13).

(ii) RTCs Evidence on Impact of Competition

The RTCs further complain that certain evidence was completely ignored. What intensifies their criticism is the view that estimates of customer migration and its impact on revenues was understated. The RTCs contend that their member companies did not take into consideration the Applicants’ selective marketing to high-volume, low-cost customers, and the exclusion of other cable systems from their analyses. (RTC Exc., p. 17). In sum, the RTCs counter that the probative value of its evidence is bolstered by the fact that no other Party attempted to project the specific impact that non-gradual (immediate) competition will have on these rural ILECs. They note parenthetically that AT&T has successfully convinced a number of Verizon PA customers to switch to AT&T’s CLEC services in the Pittsburgh market area and that subsequent to the release of the Recommended Decision in this proceeding, AT&T filed a promotional tariff offering free local service and 300 minutes of long distance service to any non-AT&T customer that switches to AT&T’s cable telephony service. (*See* RTC Exc., p. 18 citing TCG Tariff No. 6, Supplement No. 13, Third Revised Sheet 5 (effective August 29, 2000)).

⁹ At page 12, note 11, of the RTC Exceptions, the RTCs imply that the “public interest” is to be equated with the preservation of universal service, the public safety and welfare, and the continued quality of telecommunications services. We note that these are considerations expressly enumerated in Section 253 of TA-96. However, the public interest is broader than these aforementioned considerations.

(iii) Applicants' Evidence

At pages 21-25 of their Exceptions, the RTCs discuss AT&T's [Applicants'] evidence and argue that the recent marketing information pertaining to an offer of "free" service as an inducement to switch over to AT&T/TCG is indicative of the probative weight that should be given to this evidence.

Initially, the RTCs observe that neither Applicant provided an understanding of their proposed rural CLEC services, facilities, or rates. The Applicants are also criticized for failing to submit a proposed tariff with their Application or provide evidence of proposed rates. (RTC Exc., pp. 21-22).

We note here that Citizens also argues, in its Exceptions, that the Applicants' failure to describe the scope of its services, the customers it seeks to serve, the investments it intends to make or, *inter alia*, the services it seeks to provide, amounts to a failure to prove the necessary elements required by this Commission. (Citizens Exc., p. 5).

The RTCs next attempt to discount the benefits of competition as it would apply to the territories in which they serve.¹⁰

Finally, regarding the probative value of the evidence submitted, the RTCs conclude that the strategy of the Applicants to obtain market share strongly supports their

¹⁰ Here, the RTCs quote from the testimony of witness Albaugh, RTC St. 1R, pp. 9-10, which suggests that the rural markets are not the type of markets which would exhibit a demand for increased availability of services and service providers -- "the RTCs' service territories and the numbers of customers living there are limited, as are their needs and desires for more lines and more services." We note that this contention appears to be patently at odds with Chapter 30 and TA-96. (*See Vanguard*, slip op., pp. 73-74).

worst case scenario – that local competition in rural areas will not be introduced gradually, and that the RTC members will incur significant revenue losses that will “jeopardize” their operations. (RTC Exc., p. 25).

(iv) The RTCs’ Lack of Competitive Advantage Over Applicants

In this section of its Exceptions, the RTCs assert that, as ILECs, they will not have a significant competitive advantage over the Applicants. They argue that their customer base will move towards the provider offering the lower price, notwithstanding their long association with local exchange customers. (RTC Exc., p. 26). The RTCs further complain that the Applicants can “tak[e] what is essentially a monopoly service on the cable side and us[e] that as a thrust into the rural telephony market.” (RTC Exc., p. 27).

The RTCs cite, as an example of the potential loss of market share, evidence that the Applicants have begun implementing their marketing strategy in the Yukon-Waltz service territory by including local telecommunications advertising with their cable television correspondence. (RTC Exc., p. 28 citing RTC Ex. 4A).

(v) Deregulation of the ILECS as a Proposed Solution to Competition

In order to ameliorate the negative impacts presented by non-gradual competition, the RTCs recommend that, should the Commission grant the instant Application, then it should fully deregulate the rural ILECs affected. (RTC Exc., p. 30)

citing RTC Stmt. 1, p. 27).¹¹ The RTCs assert that without the ability to timely and effectively counter competitors' offers and bear the same regulatory obligations, there will not be fair competition. (RTC Exc., p. 31). Citing the testimony of the RTCs' witness Albaugh, the RTCs take the position that the only workable solution presented in direct response to the June 12, 2000 Secretarial Letter was their proposal for deregulation.

(b) Citizens' Exceptions

(i) Trilogy Argument

Citizens filed Exceptions separate and apart from those of the RTCs. Citizens raises the "trilogy"¹² argument, and states that the Applicants did not meet the public necessity standard articulated in *Vanguard*, because AT&T will not provide universal service and the ILECs will not be afforded a chance to rebalance their local exchange rates prior to permitting competitive entry.

(ii) Limitation of Geography and Technology

In addition to its "trilogy" argument, Citizens also requested that the Commission limit the geographic and technological scope of the requested authority. In it's

¹¹ This appears to be responsive to the ALJ's recommended grant of the Application.

¹² The term "trilogy" pertains to the three arguments raised in the instant case, which were substantially similar to those considered in *Vanguard*. See *Vanguard*, slip op., pp. 73-82, discussing the position of certain rural ILECs that interconnection regulations, Universal Service funding, and access, toll, and local rate restructuring should be completed prior to competitive entry into rural service territories. (See also *FCC Local Competition Order*, 11 FCC Rcd 15499 (1996).

Main Brief, Citizens argued that the geographic scope of the Application exceeds the entire extent of the Applicants' existing facilities. Accordingly, Citizens argues that the Application should either be denied, or the scope of the Applicants' service territory should be limited to those areas (townships) where the Applicants currently provide cable service and further limited to cable technology. Citizens repeated this proposal in its Exceptions.

(c) The Applicants' Exceptions and Replies

As a threshold matter, we note that the Applicants filed Exceptions to the Recommended Decision, notwithstanding the ALJ's recommendation to grant the instant Application. The Applicants except to the ALJ's failure to impose an affirmative obligation on the affected ILECs to negotiate with the Applicants to resolve issues of interconnection, number portability, and "other issues necessary to permit consumers to exercise meaningful competitive choice." (Exc., p. 3). Thus, the Applicants' Exception seeks to correct an "omission" in the Recommended Decision.

(i) The Gradual Introduction of Competition

The Applicants, in their Replies to Exceptions, allege that the injection of a principle of "gradualism" to the public necessity standard based on the *Vanguard* decision is a blatant misreading of that case. (R.Exc., p. 5). The Applicants assert that it is an error to conclude from the discussion in *Vanguard* that the introduction of competition through facilities-based entry is, in fact, to be further modified by the concept of gradualism as an additional prerequisite to competitive entry. Rather, gradualism is to be viewed as an observation in that case rather than a substantive standard. (R.Exc., p. 6). The Applicants state that "[a]s the ILECs' apparently would apply it, even a facilities-based entrant would only be eligible for certification as a CLEC in the rural companies' territories if it could prove that it would only compete "gradually" – thus limiting the

ILECs' preferred field of facilities-based competitors to the lackadaisical, inefficient, incompetent or underfunded." (*Id.*)

Based on the foregoing, the Applicants counter the RTCs' arguments concerning gradualism by asserting that this is not what the General Assembly intended when it enacted Chapter 30. Also, the Applicants reply that this is not what the residential customers in these rural areas want and not what this Commission had in mind in *Vanguard*. (R.Exc., p. 6). The Applicants state that "[c]ertainly, the Commission did not condition Vanguard's right to offer services under that certification on some obligation that Vanguard would only compete with the ILECs "gradually." (*Id.*)

The Applicants also reply to the "trilogy" argument of the ILECs that was specifically raised by Citizens in its Exceptions. These arguments were that the Applicants failed to meet the "public necessity" standard articulated in *Vanguard*. Citizens additionally proposed that the Application should be limited in geographical and technological scope. The Applicants reply that these issues were considered and rejected in *Vanguard*.¹³

(ii) The ILECs' Ability to Respond to Competition

The Applicants refute the RTCs' position that they do not possess the tools to effectively respond to competition. According to the Applicants, the evidence shows that the ILECs are well-positioned to compete for those customers having an option against any new entrant and will further enjoy months of "lead time" prior to actual competition. (R.Exc., p. 8 citing OCA St. 1, p. 7; Tr. 372-373). The Applicants

¹³ With regard to universal service, the Applicants assert that Section 253(f)(1) of TA-96 prohibits this Commission from requiring the Applicants to apply for universal service eligibility authorization under Section 214 of the Act. We do not agree that this prohibition is entirely applicable under the facts of this case and will explain, below.

additionally cite the relative strengths of incumbency with NPTC, Marianna & Scenery Hill, Hickory, Bentleyville, and Yukon-Waltz. These strengths include relatively low local exchange rates, strong personal relationships with customers and the community, high quality of service, a low consumer complaint rate, and leadership in introducing state-of-the-art telecommunications services -- particularly NPTC and Marianna & Scenery Hill. (R.Exc., pp. 8-10). In sum, the Applicants stress that the ILECs possess unique competitive advantages over new entrants. (R. Exc., pp.10-11).

(iii) The Effect of Facilities-Based Competition on ILECs

The Applicants note that none of the public advocates who participated in the proceeding, the OTS, the OCA, and the OSBA, found any merit in the ILECs' claims of potential financial ruin based on the grant of their Application. (R.Exc., p. 12). The Applicants argue, therefore, that the estimates of market share loss projected by the ILECs are inaccurate as they ignore the "substantial difficulties faced by any new entrant in attempting to break into a market dominated by a monopoly incumbent." (*Id.*)

As an example of the speculative nature of the ILEC's testimony concerning loss of market share, the Applicants state that Hickory witness Mr. Adamson, after acknowledging that the Applicants' cable plant overlaps 5% of Hickory's system, testified that with the addition of "minor facilities"¹⁴ the Applicants would be able to take a 50% share of that company's market. (R.Exc., pp. 13-14). The major flaw in the ILECs' estimates, according to the Applicants, is the assumption that they will not hold on to any of the customers to whom the Applicants have access. (R.Exc., p. 14).

¹⁴ These "minor facilities" would include, *inter alia*, fiber optic cable which, alone, would cost upward of \$150,000. (R.Exc., p. 14, n. 34).

However, that level of market success has not been the Applicants' experience with their operations in the service territory of Verizon PA.¹⁵ (*Id.*)

The Applicants next address the ILEC's contentions surrounding their promotional offering to residential customers in Verizon PA's service territory. This promotional offering, under which Applicants proposed to waive recurring fees for local exchange service for several months when customers switch their local service, was referenced extensively in the Exceptions of the ILECs. The ILECs used this to support their argument that the Applicants would engage in flexible pricing, *i.e.*, "free service" to which the ILECs could not competitively respond. The Applicants contest the merits of the arguments raised by the ILECs. However, the Applicants also protest that the RTCs' Exceptions included a copy of a newspaper article concerning the promotion that they find to be objectionable as hearsay. (R. Exc., p. 15).

(iv) ILEC Proposal for Deregulation

The Applicants strongly oppose the ILECs' notion of deregulation. The Applicants state that the record indicates that the "deregulation" suggested by the ILECs is not a solution to the alleged adverse consequences of competition. Rather, this would be tantamount to affording the ILECs freedom to raise rates for captive customers in order to fund areas where a competitor is seeking to enter. The Applicants cite the testimony of ALLTEL PA witness Mr. Krajci, who described the pricing flexibility sought by the ILECs in the following manner: ". . . the pricing flexibility would be to allow the ILEC to set rates for those 10 percent of the customers [those customers in the

¹⁵ We note that on August 1, 2000, the corporate name of Bell Atlantic-Pennsylvania, Inc. was changed to Verizon Pennsylvania Inc. (Verizon PA). Also, the corporate name of GTE North, Inc. was changed to Verizon North, Inc. (Verizon North).

ILEC exchange who are overlapped by the Applicants] differently from the remaining 90 percent of the customers.” (R. Exc., p. 23 quoting Tr. 390-391).

The Applicants additionally point out that this Commission rejected a similar “rebalancing” proposal submitted by Verizon PA, and further state that the appropriate forum in which to address the ILECs deregulation proposal is the streamlined process established by Chapter 30. The Applicants refer to a process whereby the ILECs may seek the competitive classification of telecommunications services, followed by a Commission determination of competitive status on the basis of evidentiary findings.

3. Disposition

(a) Public Necessity

This matter presents this Commission with the review of “public necessity” in the circumstance where the Applicants are seeking to provide CLEC service through a distinctly independent network. Applying the standards of *Vanguard* to the instant proceeding leads us to conclude that the Applicants have established that they are managerially and financially fit to provide the proposed service. Presiding ALJ Meehan concluded that the Applicants enjoyed a rebuttable presumption of continuing fitness based on their certification as CLECs actively engaged in the provision of service in the territories of Verizon PA and Verizon North. Presiding ALJ Meehan found the ILECs’ evidence on the impact of granting the Application to be conjectural and speculative in nature and insufficient to sustain their protests (*See also* R.D., pp. 9-10).

On consideration of the evidence of “public necessity” and the overarching consideration of the public interest, we find that the grant of the instant Application is required.

(b) Gradual Introduction of Competition and Evidence Regarding the Impact of Competition

The record demonstrates that the ILECs failed to meet their burden of proving any cognizable adverse consequences resulting from a grant of the instant Application. Even were the evidence presented by the ILECs to be viewed in its best light, it does not support deferral or, moreover, the outright denial, of the instant Application. Lost revenues resulting from the effects of competition are occurrences against which federal and state law does not insulate any firm. The loss of potential revenue opportunities occasioned by an independent system is directly related to the suspension of Section 251 obligations. TA-96, as well as Chapter 30, represents a careful balancing of interests of small/rural ILECs and competition.¹⁶ The lack of potential revenues for a “stand-alone” competing system is an associated trade-off for the suspension of TA-96 mandated obligations. As noted in *Vanguard* and *Armstrong*, “[f]acilities-based service is competition in its truest sense and is clearly a part of what Congress envisioned in the federal act. The burden is on the facilities-based CLEC to make a go of its business. Its performance in the market will dictate the success or failure of that business.” (*Armstrong*, slip op., p. 14).¹⁷ Thus, neither the Applicants nor the ILECs have any guarantees regarding the success or failure of a venture. And, both federal and state law, unequivocally, have determined that market forces should be the

¹⁶ Through TA-96, Congress sought to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.” *Telecommunications Act of 1996*, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996).

¹⁷ We also cite the observations of the OCA at pages 22-23 of its Main Brief, that NPTC, and ALLTEL, have engaged in the pursuit of competitive opportunities not unlike that involved in the instant Application. Thus, competition compels the firm to respond to the challenges of consumer choice.

determinative factor in this area, as modified by considerations of universal service and public health, safety, and welfare.

Further, the existence of an independent competing system does not represent an event catastrophic to the financial well-being of the ILECs. As OCA witness Dr. Johnson testified, under the worst case scenario, if a rural ILEC is not successful in dealing with competition and finds that it cannot sustain a normal profit level, it should be able to either sell, consolidate and/or merge with another firm perhaps with deeper pockets. (*See* OCA M.B., p. 32, citing OCA Stmt. No. 1, p. 19).

Also, the assumption that every household having a cable telephony option will exercise that prerogative to switch is not consistent with the record and results in our conclusion that the evidence of adverse consequences is not as dire as predicted. The testimony of AT&T witness Mosca relative to AT&T's performance in the Pittsburgh market area is that **[BEGIN PROPRIETARY] [END PROPRIETARY]**. (*See* Tr., p. 37). This percentage of customer migration substantially reduces the ILEC's projections of customer loss, revenue erosion, and related impact on universal service.

In sum, we find that ALJ Meehan has correctly applied the applicable law and policy to the instant Application.

**(c) Deregulation As a Proposed Solution
to the Instant Application**

We shall also reject the proposal of the ILECs that deregulation is a solution to the competitive entry of these Applicants into their service territories at this time. We reject this proposal without prejudice to our consideration of the additional relaxation of any regulatory requirements, including but not limited to, flexible and/or promotional tariffs, streamlined filing requirements, and expedited competitive service

designation. This Commission has demonstrated its commitment to eliminate all regulatory processes which, in our opinion, serve to prevent a “level playing field” for competition. (66 Pa. C.S. §3006). At present, we are convinced that the affected ILECs have available to them sufficient alternatives to address competition in their service territories. In addition to the streamlined filing requirements for small companies recognized in the *Small Co. Chapt. 30 Order*, this Order also provides for opportunities for rate rebalancing during the period of USF receipt, as well as providing for emergency rate relief should the revenue stream call into question a small/rural ILEC’s ability to meet its Chapter 30 Network Modernization Plan (NMP) commitments.¹⁸

Finally, we find that the ILEC’s proposal for “deregulation” is complex and, from the testimony, suggestive of undue discrimination against those customers who are not presented with the alternative posed by the Applicants’ cable system. We would have to be satisfied, were this proposal to go farther, that the implications for universal service funding and other related issues were fully addressed. In sum, should CLEC entry result in the need for this Commission to reassess any policy regarding the ability of the small/rural ILEC to competitively respond, we would consider this in a generic docket.

¹⁸ We further acknowledge the observations of the OCA that “some of the Rural ILECs appear to be a part of financially strong and diverse large companies.” (OCA M.B., p. 21). Thus, the prospect of diversification through merger, consolidation, and/or joint ventures, remains viable.

(d) Limiting the Geographic and Technological Scope of the Instant Application

ALJ Meehan extensively quoted from *Vanguard*, note 62, at page 83, to conclude that a similar argument seeking to limit a CLEC application on a county-by-county basis, additionally foreclosed Citizens' position. He, therefore, recommended that the Applicants should be granted a service territory throughout the entire service territories of the respective ILECs, as requested by the application. (R.D., p. 18).

We agree with the reasoning and conclusion of ALJ Meehan. We further add that it is of doubtful consistency with TA-96, and Chapter 30, to limit or relegate competition to a particular form of technology. Both statutes express a determination to remove the impetus for innovation, technological advancement and change from regulatory oversight.

Also, as noted in the above discussion, we find no significant adverse effects on the affected RTCs by the grant of the instant Application, consistent with this Opinion and Order.

(e) Applicants' Evidence

In *Vanguard*, the Commission directed that company to meet with the Bureau of Fixed Utility Services concerning issues involving tariff formatting, universal service and lifeline. Additionally, the Commission directed Vanguard to comply with the Telecommunications Relay Service 711 timetable and switching requirements for all carriers providing voice grade service, and to contact each county or municipal authority where it intends to provide local telecommunication services and make the necessary arrangements for the provisioning of Emergency 911 service.

Consistent with the recommendation of ALJ Meehan, similar conditions should be imposed on the Applicants in this proceeding. We further note that the objections of the ILECs to the lack of specificity regarding tariff provisions are premature in this proceeding involving entry.

(f) Universal Service

With regard to universal service considerations, we note as follows. It is one of the Commission's goals that all rural customers have access to technological advances and new services at reasonable rates.¹⁹ We have previously expressed that "competition will promote the widespread deployment of advanced services,"²⁰ and "[f]acilities-based service is true competition."²¹ AT&T/TCG's proposed facilities-based entry will provide a competitive alternative to rural residents in the Commonwealth, and will also provide the RTCs with an incentive to modernize their own networks to compete with AT&T/TCG. Our experience with competitive utility markets suggests that the incumbent utilities start out with important advantages. The RTCs, as historic sole providers of local exchange service in their respective territories, are well positioned to compete. Moreover, as far back as the enactment in 1993 of Chapter 30, 66 Pa. C.S. §§3001-3009, and then TA-96, *supra*, the RTCs have been on notice that competition was coming, and they have had several years to prepare for it.

Despite the RTC's arguments relative to the adverse effects on universal service, no party in this proceeding argued for an eligible carrier designation. Based on

¹⁹ In fact, this is explicitly stated in 66 P. C.S. §3001(5): "The General Assembly finds and declares that it is the policy of this Commonwealth to . . . (5) ensure the efficient delivery of technological advances and new services throughout this Commonwealth in order to improve the quality of life for all Pennsylvanians."

²⁰ Opinion and Order, Pa. PUC Docket Nos. P-00991648 and P-00991649, September 30, 1999, slip op. at 107 ("Global Order").

²¹ *Vanguard* Order p. 13.

the record, there is no clear evidence that rural customers will be placed in jeopardy if this Application is approved without imposing an eligible carrier requirement on AT&T/TCG at this time.²² In addition, under TA-96, the Commission always has the ability, through its own motion or upon request, to designate a common carrier as an eligible carrier in a selected service territory.²³ Thus, if a CLEC becomes the dominant carrier in a rural service territory, any party can petition the Commission to review whether the universal service burden should be placed upon the CLEC. In reviewing this issue, the Commission will look at the totality of the existing circumstances, including market share, and what market offerings are present which address universal concerns. Accordingly, the Commission will be able to take the necessary steps in the future to protect the Commonwealth's rural customers if such action becomes necessary.

(g) Failure of the Presiding ALJ to Direct Negotiations

We disagree with the Applicants' Exception that the ALJ erred by failing to impose an affirmative obligation on the affected ILECs to negotiate with the Applicants to resolve issues of interconnection, number portability, and "other issues necessary to permit consumers to exercise meaningful competitive choice. In making this determination, we agree with the ALJ that these are "collateral matters that can be resolved at another point in time." (R.D., p. 10). We further agree with the RTCs in their Reply Exceptions that the RTCs will have an obligation to negotiate with the Applicants in good faith. As such, we believe it is premature at this time to determine the nature and degree of interaction between the RTCs and the Applicants since the real test of the negotiations will not occur until the Applicants are actually certificated in the affected ILECs' service territories. However, we note that in the FCC *Local Competition Order*, Para. 13, it was

²² An "eligible telecommunications carrier" is a carrier that is eligible to receive universal service support, and that is required to offer throughout a specific area the services for which such support is provided. (47 U.S.C. §214(e)(1)).

²³ 47 U.S.C. §214(e)(1),(2).

noted that an entrant who constructs its own network will still need an agreement with the ILEC to enable the entrant's customers to place calls to and receive calls from the ILEC's subscribers. Therefore, we shall deny the Applicants' Exceptions on this issue without prejudice.

B. Entry Standards When A CLEC Applies for Authority To Provide Facilities-Based Service in an RTC's Territory

Section 1103(a) of the Public Utility Code, 66 Pa. C.S. § 1103(a) provides in relevant part:

A certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or the safety of the public.

In addition to “fitness”, the Commission has traditionally required applicants for new authority to prove that there is a “public need” for the proposed service and that the existing level of service is inadequate.²⁴ However, neither “public need” nor “inadequacy” is mentioned in the statutory language quoted above. As such, formulation of the specific standards to be used in determining whether to grant a certificate has been left to the discretion of the Commission. *Seaboard Tank Lines, Inc. v. Pa. PUC*, 502 A.2d 762 (Pa. Cmwlth 1985). Accordingly, in cases such as the present one, where a CLEC seeks to provide facilities-based service in an RTC territory, the Commission has previously eliminated the “public need” and “inadequacy” requirements as inconsistent with the pro-competition policies of state and federal law in

²⁴ *Chemical Leaman Tank Lines, Inc. v. Pa. PUC*, 201 Pa. Superior Ct. 196, 191 A.2d 876 (1963).

this area and has instead limited its review to whether the applicant has demonstrated public necessity” and “fitness.”²⁵

While we agree with the ALJ that AT&T/TCG has satisfied the test enunciated in *Vanguard*, we conclude that the Commission should alter this test and eliminate the “public necessity” requirement in future applicants for facilities based services. First, since the words “need” and “necessity” are synonyms, it is not clear what public policy we are promoting by dropping the “need” test but retaining a “necessity” test. Second, since the policy favoring facilities-based local exchange competition is firmly rooted in state and federal law, it does not serve any purpose to require an applicant to attempt to prove in each case that competition serves the public interest. Indeed, requiring an applicant to attempt to “prove” this point is anti-competitive, because it provides a basis for protests and expensive, time-consuming hearings, that may discourage entry.

Accordingly, we find that, consistent with the pro-competition policies of state and federal law, henceforth, an applicant need only demonstrate fitness in order to obtain a certificate to provide facilities-based telecommunications service in the territory of an RTC.²⁶ Given the Commission’s policy favoring facilities-based competition, when future applicants establish their fitness, then approval of their application would be “necessary or proper” to further the public interest, as required by 66 Pa. C.S. §1103(a).

²⁵ See *Vanguard*, (Order entered August 23, 2000), slip op., p. 18.

²⁶ This is the same standard that the Commission has adopted where a CLEC seeks to enter the territory of Bell Atlantic-Pennsylvania, Inc. (currently Verizon Communications). See *In Re Implementation of the Telecommunications Act of 1996*, Docket No. M-00960799; Order entered on June 3, 1996.

C. Presumption of Fitness and Reopen Motion

1. The RTC Position

ALJ Meehan concluded that the Applicants were entitled to a rebuttable presumption of continuing fitness to provide the proposed service. (R.D., p. 9). The RTCs rely upon evidence of uncertificated service in Bentleyville's service territory and the alleged unsafe cable installation in the service territory of Yukon-Waltz, to assert that the ALJ's conclusion was contrary to the weight of the evidence. (RTC Exc., p. 29).

Further, the RTCs cite newly discovered evidence that they state will refute the Applicants' position that the instances of uncertificated service, or service in violation of Commission regulations, were "innocent" mistakes. (*See* Reopen Petition, p. 6). The RTCs cite two instances, both relating to customers in the Bentleyville service area and having Charleroi, Pennsylvania addresses. In one instance, it is alleged that a customer informed Bentleyville that he was discontinuing service from them. This customer, who is a cable TV subscriber of AT&T, confirmed that he was receiving local exchange service from AT&T. In another instance, the RTCs refer to an AT&T solicitation of a Bentleyville customer which solicitation was, apparently, abandoned after further inquiry. (Reopen Petition, pp. 7-8).

2. AT&T/TCG Answer

In its Answer, AT&T/TCG aver that the RTC claim that they have knowingly and purposely solicited customers outside of the area in which they are currently certificated has no merit. (Answer, p. 2). In addition to their position that the RTC Petition fails under the standards of *Duick v. PG&W*, 56 Pa. PUC 553 (1982), the Applicants point out that the incidents in question involve, at most, two customers located in Bentleyville's territory directly adjacent to their own. The Applicants explain

the details associated with these two customers, and acknowledge that these incidents were “innocent mistakes.” The Applicants note:

The one customer who managed to obtain service is a Mr. Mendolo, who apparently contacted AT&T/TCG to order the installation of two new lines with telephone numbers different from what he has today (and the fact that he was willing to accept new telephone numbers probably is why his order slipped through the safeguards AT&T had put in place, a problem AT&T has now fixed). In the other incident described in the RTC’s Petition, another customer – a Mrs. Shriver – was allegedly contacted by AT&T/TCG regarding cable telephony service. To date, however, AT&T has found no record of such a solicitation. In any event, as RTC’s own Petition makes plain, that customer was not switched from Bentleyville to AT&T/TCG’s service.

(Answer, p. 4, n. 5).

3. Disposition

This aspect of technical fitness has been described by the Commission as follows:

In this regard, lack of fitness is demonstrated by persistent disregard for, flouting, or defiance of the Public Utility Law and the Commission’s orders and regulations . . . and by violations in matters affecting the safety of operations. (Citations omitted).

See Re Perry Hassman, 55 Pa. P.U.C. 661, 662-63 (1982).

What this Commission must do, is review the record, as a whole. If, as a whole, the record does not show a pervasive and persistent flouting of the Commission’s rules and regulations, we may still grant authority if there is positive evidence of the Applicant’s fitness independent of the evidence relating to a period of prior unlawful

operation. *See Brinks, Inc. v. Pa.PUC*, 500 Pa. 387, 456 A.2d 1342 (1983). *B. B. Motors Carriers, Inc. v. PaPUC*, 289 A.2d 210 (Pa. Cmwlth. 1978). We conclude that the record, as a whole, establishes the Applicants' fitness to obtain the amendments sought here. While we do not condone the disregard of any Commission regulation, the instances cited by the RTCs appear to be isolated instances of consumer solicitation. These instances of consumer solicitation and interest are a product of the dual existence of cable and telephone facilities in the territories at issue. In one instance cited by the RTCs, it strikes the Commission that consumers are, apparently, curious regarding telephony service over said cable facilities and are in the process of initiating inquiries. We shall serve a copy of this decision on the Commission's Law Bureau to the extent there is a need to evaluate the propriety of alleged AT&T initiated contacts further. However, as a whole, we do not conclude that the conduct of the Applicants suggests a flouting of, or flagrant disregard of Commission regulations. The Exceptions of the RTCs and affected ILECs are denied, consistent with the discussion herewith. The Reopen Petition is, therefore, denied.

Conclusion

Based on the foregoing, we shall adopt the Recommended Decision of ALJ Meehan consistent with our discussion herein; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by AT&T Communications of Pennsylvania, Inc. and TCG Pittsburgh, to the Recommended Decision of Administrative Law Judge Robert P. Meehan, issued September 6, 2000, are granted to the extent consistent with the discussion contained herein.

2. That the Exceptions separately filed by Citizens Telephone Company of Kecksburg, the Rural Telephone Companies, and the Office of Trial Staff are denied, consistent with this Opinion and Order.

3. That the Recommended Decision of Administrative Law Judge Robert P. Meehan that was issued September 6, 2000, is adopted consistent with this Opinion and Order.

4. That the protest filed by ALLTEL Pennsylvania, Inc., North Pittsburgh Telephone Company, Citizens Telephone Company of Kecksburg, Yukon Waltz Telephone Company, Marianna & Scenery Hill Telephone Company, Hickory Telephone Company, Armstrong Telephone Company, and the Bentleyville Telephone Company, to the Application of AT&T Communications of Pennsylvania, Inc., and TCG Pittsburgh, at Docket Nos. A-310125F0002 and A-310213F0002, are denied.

5. That the Application of AT&T Communications of Pennsylvania, Inc. and TCG Pittsburgh to amend their certificates of public convenience to begin to offer, render, furnish or supply facilities-based competitive local exchange telecommunications services in the service territories of ALLTEL Pennsylvania, Inc., North Pittsburgh Telephone Company, Citizens Telephone Company of Kecksburg, Yukon Waltz Telephone Company, Marianna & Scenery Hill Telephone Company, Hickory Telephone Company, Armstrong Telephone Company, and the Bentleyville Telephone Company, to the application of AT&T Communications of Pennsylvania, Inc., and TCG Pittsburgh, at Docket Nos. A-310125F0002 and A 310213F0002, is approved.

6. That within fifteen (15) days of the date on which the Commission's Order in this proceeding is entered, AT&T Communications of Pennsylvania, Inc., and TCG Pittsburgh shall meet with the Commission's Bureau of Fixed Utility Services to determine the appropriate tariff format consistent with the Commission's Order.

7. That within sixty (60) days of the date on which the Commission's Order in this proceeding is entered, AT&T Communications of Pennsylvania, Inc. and TCG Pittsburgh shall file their respective initial tariffs. At the same time, AT&T Communications of Pennsylvania, Inc. and TCG Pittsburgh shall serve a copy of the initial tariff on each entity receiving a copy of the Application. To the extent that the proposed initial tariffs contained rates, then the initial tariffs may become effective on or after one day's notice from the date on which they were served and filed. Proposed initial tariffs which do not contain rates may not become effective prior to sixty (60) days notice. The Initial Competitive Local Exchange Carrier Tariff shall be labeled "Competitive Local Exchange Carrier Tariff."

8.. That AT&T Communications of Pennsylvania, Inc. and TCG Pittsburgh shall comply with all the provisions of the Public Utility Code, 66 Pa. C.S. §§101, *et seq.*, as now existing or as may be hereafter amended, and with all pertinent rules, regulations and Orders of the Pennsylvania Public Utility Commission, now in effect or as may be prescribed by the Pennsylvania Public Utility Commission, including but not limited to: the *MFS Intelenet, et al.*, Docket No. A-310203F0002, *et al.*; the *Universal Service Investigation*, Docket No. I-00940035; and the Global Order, Docket No. P-00991648, *et al.*

9. That henceforth, an applicant for a certificate of public convenience to provide facilities-based competitive telecommunications service in the territory of a rural telephone company need only demonstrate that it is fit in order to obtain a certificate.

10. That the authority granted herein, to the extent that it duplicates authority now held or subsequently granted to the Applicants, shall not be construed as

conferring more than one operating right to AT&T Communications of Pennsylvania, Inc., and TCG Pittsburgh.

11. That AT&T Communications of Pennsylvania, Inc., and TCG Pittsburgh shall maintain separate accounting systems for their respective interexchange toll operations, and competitive local exchange carrier operations.

12. That AT&T Communications of Pennsylvania, Inc., and TCG Pittsburgh shall file such affiliated interest agreements as may be necessary relative to any transactions with affiliates.

13. That AT&T Communications of Pennsylvania, Inc. and TCG Pittsburgh shall contact each county or municipal authority where it intends to provide telecommunications services and make the necessary arrangements for the provisioning of Emergency 911 service.

14. That AT&T Communications of Pennsylvania, Inc. and TCG Pittsburgh shall comply with the Telecommunications Relay Service 711 timetable and switching requirements for all carriers providing voice grade service.

15. That in the event AT&T Communications of Pennsylvania, Inc. and TCG Pittsburgh have not, on or before sixty (60) days (120 days including an approved extension) from the date on which the Commission's Order in this proceeding is entered, complied with the requirements set forth herein, the Application, at Docket Nos. A-310125F0002 and A-310213F0002, may be dismissed and the authority granted herein may be revoked without further Commission Order.

16. That upon the establishment of filed rates and the approval of an initial tariff, Certificates of Public Convenience shall be issued authorizing AT&T

Communications of Pennsylvania, Inc. and TCG Pittsburgh to furnish services as facilities-based Competitive Local Exchange Carriers (within the designated service territories of the Incumbent Local Exchange Carriers listed in Ordering Paragraph No. 2, above) consistent with the Commission's Order to be entered in this proceeding.

17. That the October 31, 2000, Petition for Reopening the Record and Rehearing is denied and the record in this matter shall be marked closed.

BY THE COMMISSION,

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: December 20, 2000

ORDER ENTERED: April 10, 2001

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Harrisburg, Pennsylvania 17105-3265

Application of AT&T Communications
Of Pennsylvania, Inc. and TCG Pittsburgh
To Amend their Certificates of Public
Convenience To Offer, Render, Furnish or
Supply Facilities-Based Competitive Local
Exchange Services in the Service Territories
of ALLTEL Pennsylvania, Inc., Armstrong
Telephone Company-Pennsylvania, The
Bentleyville Telephone Company, Citizens
Telephone Company Of Kecksburg, Hickory
Telephone Company, Marianne and Scenery
Hill Telephone Company, North Pittsburgh
Telephone Company, and Yukon-Waltz
Telephone Company

Public Meeting December 20, 2000
DEC-2000-OSA-0368
Docket No. A-310125F0002;
A-310213F0002, P-00001845

STATEMENT OF COMMISSIONER AARON WILSON, JR.

This motion represents the Commission's evolving approach to delivering basic and advanced telecommunications services in rural Pennsylvania, consistent with the pro-competitive provisions of 66 Pa. C.S. §3001(5) and the preceding provisions of Section 3001 – including a prohibition against discrimination and a requirement that charges for local service be reasonable.

I support this motion for several reasons. First, the parties in this proceeding have not specifically requested, nor have they provided evidence in support of, the imposition of any Eligible Telecommunications Carrier (ETC) designation under Section 214(e)(1) of the Telecommunications Act of 1996 (TA-96) at this time. *Fitzpatrick Motion, p. 3, paragraph 3*. Second, the motion correctly rejects staff's recommendation that a party establish immediate adverse ramifications and that the competitor's independent facilities must cover all or nearly all of an incumbent's service territory before ETC designation is appropriate.

Finally, the Commission is aware of the fact that issues surrounding discrimination, cream-skimming, and unequal service obligations, if and when they do arise in rural markets, represent the same policy challenges for those markets that they represent for urban markets. *See, e.g., Electronic Byways: State Policies for Rural Development Through Telecommunications* (Westview Press: The Aspen Institute, 1992).

Commissioner Aaron Wilson, Jr.

December 20, 2000