

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition Of Verizon Pennsylvania Inc. For A	:	
Determination That Its Provision Of Business	:	Docket Number
Telecommunications Services To Customers	:	
Generating Less Than \$10,000 In Annual Total	:	
Billed Revenue Is A Competitive Service Under	:	P-00021973
Chapter 30 Of The Public Utility Code	:	

RECOMMENDED DECISION

Before
Wayne L. Weisman
Administrative Law Judge

HISTORY OF THE PROCEEDING

On July 1, 2002, Verizon Pennsylvania Inc. (petitioner) filed Petition Of Verizon Pennsylvania Inc. For A Determination That Its Provision Of Business Telecommunications Services To Customers Generating Less Than \$10,000 In Annual Total Billed Revenue Is A Competitive Service Under Chapter 30 Of The Public Utility Code (Petition) with the Pennsylvania Public Utility Commission (Commission), Docket Number P-00021973.

On July 9, 2002, AT&T Communications of Pennsylvania, Inc. (AT&T) filed a Motion To Intervene (AT&T Intervention Motion) and an Answer to the Petition (AT&T Answer).

On July 12, 2002, the Office of Consumer Advocate (OCA) filed a Notice

of Intervention.

On July 17, 2002, the Commission's Office of Trial Staff (OTS) filed a Notice Of Appearance.

On July 18, 2002, the Central Atlantic Payphone Association (CAPA) filed a Petition To Intervene (CAPA Petition).

On July 22, 2002, CAPA filed an Answer to the Petition (CAPA Answer).

On July 22, 2002, OTS filed an Answer (OTS Answer) to the Petition.

On July 22, 2002, Penn Telecom, Inc. (Penn Telecom) filed a Petition To Intervene (Penn Telecom Petition) and an Answer to the Petition (Penn Telecom Answer).

On July 22, 2002, CTSI LLC (CTSI) filed an Answer (CTSI Answer) and Petition To Intervene (CTSI Petition).

On July 24, 2002, the Office of Small Business Advocate (OSBA) filed a Notice of Intervention.

By Notice dated July 30, 2002, an Initial Prehearing Conference was scheduled for August 15, 2002, and the case was assigned to me.

As is my usual custom, on July 30, 2002, I issued a Prehearing Conference Order (Prehearing Order) directing, among other things, that prehearing conference memoranda be served on or before August 13, 2002, and listing mandatory contents thereof. The Prehearing Order also limited active participants to those people or entities

attending the Initial Prehearing Conference or subsequently granted that status upon Petition to Intervene under the Commission's Regulations contained in 52 Pa.Code §§5.71 - 5.76.

On August 2, 2002, Anthony E. Gay, Esquire, moved the admission *pro hac vice* of Robert P. Slevin, Esquire, on behalf of petitioner.

By Order Granting Permission To Intervene dated August 5, 2002, the AT&T Intervention Motion was granted.

On August 13, 2002, ATX Telecommunications Services, LTD (ATX) filed a Petition To Intervene (ATX Petition).

On August 13, 2002, Allegiance Telecom of Pennsylvania, Inc. (Allegiance) filed a Petition To Intervene (Allegiance Petition).

On August 13, 2002, Tamar E. Finn, Esquire, moved the admission *pro hac vice* of Robin F. Cohn, Esquire, and Eric J. Branfman, Esquire, on behalf of ATX.

By Order Granting Admission Pro Hac Vice dated August 13, 2002, Robert P. Slevin, Esquire, was admitted *pro hac vice* on behalf of petitioner.

By Order Granting Permission To Intervene dated August 13, 2002, the CAPA Petition was granted.

The Initial Prehearing Conference occurred as scheduled on August 15, 2002. Representatives on behalf of petitioner, AT&T, OCA, OTS, CAPA, Penn Telecom, CTSI, OSBA, ATX, and Allegiance participated.

By Order Granting Permission To Intervene dated August 15, 2002, the Penn Telecom Petition was granted.

By Order Granting Permission To Intervene dated August 15, 2002, the CTSI Petition was granted.

By Order Granting Permission To Intervene dated August 15, 2002, the ATX Petition was granted.

By Order Granting Permission To Intervene dated August 15, 2002, the Allegiance Petition was granted.

By Order Granting Admission Pro Hac Vice dated August 15, 2002, Robin F. Cohn, Esquire, and Eric J. Branfman, Esquire, were admitted *pro hac vice* on behalf of ATX.

By Scheduling And Briefing Order dated August 16, 2002, a schedule for proceedings in this case was established and modifications to the Commission's procedural Regulations, including those governing discovery, were set forth.

By Hearing Notice dated August 16, 2002, an Initial and further Hearing was scheduled for November 4 through 7, 2002, in Harrisburg.

On August 19, 2002, I issued a Protective Order (Protective Order) to control access to certain materials and information in this case.

On September 4, 2002, Choice One Communications of Pennsylvania Inc. (Choice One) late-filed a Petition To Intervene (Choice One Petition) and Answer (Choice One Answer) to the Petition.

On September 5, 2002, Vincent S. Cimini, Esquire, moved the admission *pro hac vice* of Christopher J. Hanifin, Esquire, on behalf of Choice One.

By Order Granting Permission To Intervene dated September 9, 2002, the late-filed Choice One Petition was granted.

By Order Granting Admission Pro Hac Vice dated September 9, 2002, Christopher J. Hanifin, Esquire, was admitted *pro hac vice* on behalf of Choice One.

By Order Granting In Part And Denying In Part Motion To Compel dated September 13, 2002, Allegiance's Motion To Dismiss Objections And To Compel Answers To Interrogatories directed against petitioner was granted in part and denied in part.

Also on September 13, 2002, MCI WorldCom Network Services, Inc. (MCI) late-filed a Petition To Intervene (MCI Petition).

On September 16, 2002, Kathleen Misturak-Gingrich, Esquire, moved the admission *pro hac vice* of Michelle Painter, Esquire, on behalf of MCI.

By Order Granting Admission Pro Hac Vice dated September 19, 2002, Michelle Painter, Esquire, was admitted *pro hac vice* on behalf of MCI.

By Order Granting Permission To Intervene also dated September 19, 2002, the late-filed MCI Petition was granted.

By letter dated September 23, 2002, on September 24, 2002, CAPA filed its withdrawal of its intervention in this case.

On October 18, 2002, OCA filed and served its Motion To Classify As Non-proprietary Selected Information Provided By Verizon (OCA Motion).

Also on October 18, 2002, I sent all parties a directive that answers or objections to the OCA Motion should be filed and served not later than October 23, 2002.

By Order Granting Motion To Compel dated October 22, 2002, petitioner's Motion To Dismiss Objections And To Compel Answers To Interrogatories directed against both Penn Telecom and CTSI was granted.

Petitioner timely made its Response (Response) to the OCA Motion.

By Order Granting Motion To Classify As Non-proprietary Selected Information Provided By Verizon dated October 24, 2002, the OCA Motion was granted.

By letter dated and filed October 25, 2002, Allegiance filed its withdrawal of its intervention in this case.

On October 31, 2002, OTS filed and served its Motion To Classify As Non-proprietary Selected Information Provided By Verizon (OTS Motion).

Also on October 31, 2002, I sent all parties a directive that answers or objections to the OTS Motion should be filed and served not later than 3:00 p.m. on November 1, 2002.

Petitioner was the only party to respond to the OTS Motion, doing so by letter dated November 1, 2002.

By Order Granting Motion To Classify As Non-proprietary Selected Information Provided By Verizon dated November 1, 2002, the OTS Motion was granted.

On November 4 and 5, 2002, the Initial and further Hearing in this case was held. A total of 9 witnesses presented live testimony¹, 19 statements (with accompanying appendices and/or exhibits) were admitted into evidence², as were 17 exhibits³. A transcript of the proceeding containing 340 pages (numbered 44 through 383) was produced.

By Hearing Cancellation Notice dated November 5, 2002, the further Hearing sessions that had been scheduled for November 6 and 7, 2002, were canceled.

On November 6, 2002, OSBA filed and served its Motion For Admission Of Evidence (OSBA Motion) pursuant to the provisions of 52 Pa.Code §5.402(b). The OSBA Motion requested that Attachment 1 thereto, which consisted of petitioner's response to OSBA's Set I, Interrogatory No. 4, be admitted "into the record".

In accordance with the Commission's Rules of Administrative Practice and Procedure, answers or objections to OSBA's Motion were due not later than November 21, 2002. 52 Pa.Code §§1.12(a), 1.55(a) and (b), 1.56(a)(1) and (b), 5.103(c), 5.402(b).

¹ Petitioner - 3 witnesses, AT&T - 1 witness, OSBA - 1 witness, OCA - 1 witness, CTSI/Penn Telecom - 1 witness, OTS - 2 witnesses.

² Petitioner Statements 1.0; 1.1; 2.0; 2.1; 3.0; 3.1; 4.0, AT&T Statements 1.0; 1.1; 1.2, OSBA Statements 1; 2, OCA Statements 1 Revised; 1-S, CTSI/Penn Telecom Joint Statement 1, OTS Statements 1; 1-SR; 2 Revised; 2-SR.

³ Petitioner cross-examination exhibits 1; 2; 3; 4; 5; 6; 7; 8, AT&T cross-examination exhibit 1, OSBA cross-examination exhibits 1; 2; 3, CTSI/Penn Telecom cross-examination exhibits 1; 2, OTS exhibits 1; 2; and cross-examination exhibit 1.

On November 13, 2002, petitioner filed and served its Objection (Objection) to OSBA's Motion. No other party timely filed either an answer or objection to OSBA's Motion.

By Order Denying Office Of Small Business Advocate Motion For Admission Of Evidence dated November 22, 2002, the OSBA Motion was denied.

Timely Main and Reply Briefs were filed and served by petitioner, OTS, OCA, OSBA, AT&T, CTSI/Penn Telecom (jointly), and MCI. ATX and Choice One did not file and serve either Main or Reply Briefs.

FINDINGS OF FACT

1. Petitioner is an incumbent local exchange carrier providing service in Pennsylvania.
2. Petitioner has petitioned the Commission for a determination that its provision of business telecommunications services to customers generating less than \$10,000 in annual TBR is a competitive service under Chapter 30 of the Public Utility Code.
3. In this proceeding, petitioner seeks to have 95 telecommunications services, shown on Attachment 1 to the filed Petition, classified as competitive.
4. Petitioner only provided information on competitive presence in its 339 exchanges for about a dozen of the 95 services sought to be declared competitive.

5. Petitioner only provided information on competitive presence in its 339 exchanges for the business market as a whole, not limited to business customers generating less than \$10,000 in annual TBR.

6. Petitioner did not perform a service-by-service analysis, with respect to the competitive criteria contained in 66 Pa. C.S. §3005(a)(1), for each of the 95 services sought to be declared competitive.

7. The relevant geographic area, for purposes of determining the availability of like or substitute services for the services sought to be declared competitive, is each of petitioner's 339 individual exchanges, since it cannot be assumed that competitive conditions are identical within each exchange.

8. Petitioner did not provide information on like or substitute services for each of the 95 services in each of the 339 exchanges in petitioner's service territory.

9. The scope of petitioner's reclassification request is the business market segment of customers generating less than \$10,000 in annual TBR.

10. Petitioner provided survey information on the business market segment of customers generating less than \$10,000 in annual TBR as to a few of the 95 services, but the surveys did not include every petitioner exchange or wire center and did not include a majority of the 95 services.

11. The market for business customers generating less than \$10,000 in annual TBR is not the same as the business market for higher revenue customers.

12. The viability of the competitors listed in Attachment 2 to the filed Petition as providing some services to the business market as a whole is uncertain.

Several of these competitors are in bankruptcy and several others are experiencing financial difficulty, as denoted by low stock prices.

13. Data in Attachments 2 and 3 to the filed Petition do not provide information about the nature of the customers who use competitive providers or the size of the customers.

14. Attachments 2 and 3 to the filed Petition are not exclusive to business customers generating \$10,000 or less in annual TBR, but include all business customers.

15. The Rural Business Customer Survey defined rural as those areas that are non-metropolitan.

16. 439 interviews of business customers generating less than \$10,000 in annual TBR was the extent of the sample in the Rural Business Customer Survey.

17. 96 rural firms out of the 439 had their primary local service from a CLEC, as opposed to from petitioner.

18. 231 of petitioner's 339 exchanges were designated as rural.

19. The survey only obtained responses from 153 out of the 231 rural exchanges.

20. No information was obtained to determine whether the 96 rural firms having local service by CLEC's were concentrated or distributed among the 153 rural exchanges.

21. Petitioner's Business Customer Market Share survey only covered 149 of petitioner's 339 exchanges, or only 44% of the total number of exchanges in petitioner's service territory.

22. Petitioner's Business Customer Market Share survey was initially national in scope, then modified to include business customers generating less than \$10,000 in annual TBR in petitioner's service territory.

23. After initial results from the Business Customer Market Share survey, further interviews of the customers were conducted to determine customers whose annual TBR was less than \$10,000.

24. The Business Customer Market Share survey was conducted through random sampling and was not stratified.

25. Attachment 2 to the filed Petition does not encompass every service listed in Attachment 1 to the filed Petition.

26. Under the Commission's Global Order, it was ordered that petitioner's business services would be declared competitive for customers generating \$80,000 or more in annual TBR on the date of entry of the Global Order, where LNP was available.

27. The Commission's competitive classification for petitioner's business services pursuant to the Global Order was reduced to a threshold of "\$10,000 or more" in TBR two years after local number portability was available throughout petitioner's service territory.

28. The relief requested by petitioner, if granted, would eliminate Commission regulatory authority over the rates, terms and conditions under which petitioner provides its business services, including business local exchange services, to all customers generating less than \$10,000 in annual TBR.

29. Petitioner currently has authority to lower rates for customers generating less than \$10,000 in annual TBR on 10 day's notice.

30. Petitioner could not identify any instance in which petitioner has used its existing authority to lower rates for customers generating less than \$10,000 in annual TBR since the authority was provided in the September 30, 1999 Global Order.

31. 78 rural exchanges, over one-third of the total of 231 exchanges identified as rural, were not covered at all by the Rural Business Customer Survey.

32. According to the surveys sponsored on behalf of petitioner, petitioner continues to provide local exchange service to nearly 80 percent of the respondents.

33. Petitioner did not submit an analysis demonstrating that the revenues generated by the business customers that are the subject of its Petition, customers generating less than \$10,000 in annual TBR, exceeds the relevant cost of the basic service functions that competitors must purchase from petitioner to provide a competitive service.

34. The imputation analysis submitted by petitioner includes revenues generated by all business customers, not just the relevant business market of business customers generating less than \$10,000 in annual TBR.

35. Petitioner was unable to provide an estimate of the number of CLEC business customers generating less than \$10,000 in annual TBR.

36. Petitioner could not provide the portion of its existing business customers that generate less than \$10,000 in annual TBR as of February, 2002, the date of petitioner's market share evidence that the petitioner provided to support its Petition.

37. Attachments 2 and 3 to the filed Petition do not provide information which exclusively refers to business customers generating less than \$10,000 in annual TBR.

38. Attachment 2 to the filed Petition only provides evidence of the competitive offering of 12 of the 95 services petitioner seeks to have declared competitive in this proceeding.

39. If the Commission grants the Petition as filed, petitioner would then be able to raise the prices on all the services listed in Attachment 1 to the filed Petition in all 339 of petitioner's exchanges without Commission review.

DISCUSSION

As the party seeking to have telecommunications services classified as competitive, petitioner has the burden of proof in this matter pursuant to 66 Pa.C.S. §3005(a)(2).

To establish a sufficient case and satisfy the burden of proof, petitioner must show that the telecommunications services are competitive by a preponderance of the

evidence. *Cf.*, Samuel J. Lansberry, Inc. v. PA Public Utility Comm'n, 134 Pa.Comm.w. 218; 221-222, 578 A.2d 600; 602(1990), alloc. den., 602 A.2d 863(Pa., 1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by any opposing party. Se-Ling Hosiery v. Marquies, 364 Pa. 45, 70 A.2d 854(1950). Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. Mill v. Comm'w., PA Public Utility Comm'n, 67 Pa.Comm.w. 597, 447 A.2d 1100(1982), Edan Transportation Corp. v. PA Public Utility Comm'n, 154 Pa.Comm.w. 21, 623 A.2d 6(1993), 2 Pa.C.S. §704. Substantial evidence has been defined as such evidence as a reasonable mind might accept as adequate to support a conclusion. Pinero v. PA State Horse Racing Comm'n, 804 A.2d 131(Pa.Comm.w., 2002). That is, more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk and Western Ry. v. PA Public Utility Comm'n, 489 Pa. 109, 413 A.2d 1037(1980); Erie Resistor Corp. v. Unemployment Compensation Bd. of Review, 194 Pa.Super. 278, 166 A.2d 96(1960); Murphy v. Commonwealth, Dep't. of Public Welfare, White Haven Center, 85 Pa.Comm.w. 23, 480 A.2d 382(1984).

This case is a statutory proceeding arising under the provisions of 66 Pa.C.S. §3005. As such, the specific requirements set forth in that section by the legislature control the Commission's determination. At minimum, the Commission must make findings as to each of the following:

1. evidence of ease of market entry, including the existence and impact of cross-subsidization, rights-of-way, pole attachments and unavoided costs;
2. presence and viability of other competitors, including market shares;
3. the ability of competitors to offer those services or other activities at competitive prices, terms and conditions;
4. the availability of like or substitute services or other activities in the relevant geographic area;
5. the effect, if any, on protected services;

6. the overall impact of the proposed regulatory changes on the continued availability of existing services;
 7. whether the consumers of the service would receive an identifiable benefit from the provision of the service or other activity on a competitive basis;
 8. the degree of regulation necessary to prevent abuses or discrimination in the provision of the service or other activity;
- and,
9. any other relevant factors which are in the public interest.
- 66 Pa.C.S. §3005(a)(1).

As the statutorily prescribed **minimum** factors that must be considered, it is incumbent upon petitioner, as the party bearing the burden of proof, to adduce sufficient evidence as to each of these legislatively established factors so as to enable the Commission to make the required determination. If petitioner fails to adduce sufficient evidence as to any one or more of the factors, the Commission cannot make all of the required determinations and the Petition must be rejected. This conclusion accords with that of Administrative Law Judge Michael C. Schnierle in Petition of Bell Atlantic-Pennsylvania, Inc. For a Determination of Whether the Provision of Business Telecommunications Services is Competitive Under Chapter 30 of the Public Utility Code, Docket Number P-00971307, Recommended Decision, July 24, 1998.

In this proceeding, petitioner is seeking a determination that its provision of ninety-five (95) telecommunications services to business customers generating less than \$10,000 in annual total billed revenue (TBR) are competitive services pursuant to 66 Pa.C.S. §3005. The 95 telecommunications services are set forth in Attachment 1 to the Petition.

Two important preliminary issues were vigorously contested. These issues are: what is the relevant business market for purposes of applying the statutory factors;

and, what is the relevant geographic area for purposes of examining the availability of like or substitute services?

Petitioner argues that the relevant business market is the entire group of business customers, regardless of annual TBR, in its entire service territory. OTS, OCA, OSBA, CTSI/Penn Telecom, AT&T, and MCI all argue that the relevant business market is confined to those businesses generating less than \$10,000 in annual TBR. Petitioner is wrong and the other parties are right.

The filed Petition in this case begins:

Verizon Pennsylvania Inc. (“Verizon PA”) hereby petitions the Pennsylvania Public Utility Commission (the “Commission”) for a determination that its provision of business telecommunications service **to customers generating less than \$10,000 annually in total billed revenue** is a competitive service under Chapter 30 of the Public Utility Code. (emphasis added, footnote omitted).

This language would appear to be a recognition by petitioner that the class of customers that are effected by the Petition is limited to only those business customers that generate less than \$10,000 in annual TBR. Additionally, the request for relief contained in the Petition also appears to recognize this specific limited class of business customers. It says:

Wherefore, for all of the foregoing reasons, Verizon PA requests that the Commission classify Verizon PA’s provision of business telecommunications service **to customers generating less than \$10,000 annually in total billed revenue** as a competitive service pursuant to Chapter 30 of the Public Utility Code. (emphasis added).

Even if petitioner has not recognized, by the terms of its own Petition, that the relevant business market for purposes of applying the statutory factors is limited to

the market made up of business customers generating less than \$10,000 in annual TBR only, there are reasons for so finding.

Petitioner's business customers that generate less than \$10,000 in annual TBR do not make up petitioner's entire group of business customers. There is at least one other component of petitioner's entire group of business customers – business customers that generate \$10,000 or more in annual TBR. The inclusion of this “\$10,000 or more annual TBR” group as part of the business market for purposes of applying the statutory factors would distort the resulting determination. Whether the “\$10,000 or more annual TBR” group is competitive is irrelevant to competitive ness with respect to the business customers that generate less than \$10,000 in annual TBR. The competitiveness, or lack thereof, existing for the “\$10,000 or more annual TBR” group neither proves nor renders probable the existence or non-existence of competition for business customers generating less than \$10,000 in annual TBR.

Most significantly, the Commission, in Re: Nextlink Pennsylvania, Inc., 93 PA PUC 172, 196 PUR4th. 172(1999), *aff'd. sub nom.*, Bell-Atlantic Pennsylvania, Inc. v. PA Public Utility Comm'n, 763 A.2d 440(Pa.Commw., 2000), *reargument den.* (Jan. 5, 2001), *appeal on other grounds pending*, 1 EAP 2002(PA) (Global Order), established those businesses generating less than \$10,000 in annual TBR as a distinct business market for purposes of applying the statutory factors to determine the presence or absence of competition. In the Global Order the Commission approved petitioner's request to grant the competitive designation to petitioner's business services, including Business Individual Case Basis contract offerings to the following extent:

- (1) Upon entry of this Order, BA-PA's (retail) business services will be declared competitive per 66 Pa. C.S. §3005 for customers generating \$80,000 or more in annual total billed revenue (TBR) where Local Number Portability (LNP) is available. (footnote omitted) BA-PA TBR is billed revenue from all tariffed services.

(2) Business services will remain available to all business customers at current rates under Commission-approved tariffs until December 31, 2003.

(3) Customers generating less than the \$80,000 threshold will be governed by existing business tariffs. For business customers generating between \$40,000 and \$80,000 in annual TBR, BA-PA may offer Individual Case Basis (ICB) contracts where: (a) the customer already subscribes to local exchange service from a CLEC; or (b) the customer actually has received a bona fide bid with stated terms and conditions for local exchange services from a CLEC. One (1) year after LNP is available statewide in BA-PA's service territory, BA-PA may offer ICB contracts for customers generating between \$10,000 and \$40,000 in annual TBR under the same conditions as listed in the prior sentence. However, in no case can the ICB offering be below BA-PA's cost. BA-PA will file with the Commission under proprietary seal all ICB proposals at the same time as the proposal is presented to the customer. BA-PA will file with the Commission all ICB contracts under proprietary seal. (footnote omitted).

(4) Any multi-year contract with a business customer executed within one (1) year of FCC section 271 approval is subject to commission review and revision under federal law and 66 Pa. C.S. §508, as applicable, if there is an allegation that the contract constitutes an anticompetitive action. Thereafter, the Commission shall exercise the powers granted to it by federal law and section 508 as it deems appropriate.

(5) If BA-PA waives, or offers to waive, termination liability in any contract in return for re-signing its customer, BA-PA must also waive such liability for a ninety (90)-day period to permit that customer to switch to a competitive carrier. BA-PA must also send the customer a Miranda Warning-type letter describing the waiver provisions of a settlement, as proposed in the Joint Petitions for Settlement. Receipt of the letter triggers the ninety (90)-day cooling-off period, during which the BA-PA contract in question may be canceled without incurring any termination liability.

(6) Competitive business services are subject to imputation on a total services/total business activity basis (i.e. Centrex,

toll, special access, all business services, etc.). (footnote omitted).

(7) After providing written notice to the Commission, BA-PA will reduce the \$80,000 threshold for business services declared competitive based upon the following schedule:

(a) For customers generating \$40,000 or more in TBR, one year after LNP is available throughout BA-PA's service territory; and

(b) For customers generating \$10,000 or more in TBR, two years after LNP is available throughout BA-PA's service territory.

93 PA PUC 281 – 282(1999).

The Global Order effectively established four separate and distinct business markets: 1) business customers generating \$80,000 or more in annual TBR; 2) business customers generating \$40,000 or more in annual TBR; 3) business customers generating \$10,000 or more in annual TBR; and, 4) business customers generating less than \$10,000 in annual TBR. The first business market was granted the competitive designation (where LNP was available) as of the entry date of the Global Order. The second business market, customers generating \$40,000 or more in annual TBR, was granted the competitive designation one year after LNP was available throughout petitioner's service territory. The third business market, customers generating \$10,000 or more in annual TBR, was granted the competitive designation two years after LNP was available throughout petitioner's service territory. The fourth, and last, Commission established business market is the business market with which this case is concerned. Unlike the first three Commission established business markets, the granting of the competitive designation to the market composed of business customers generating less than \$10,000 in annual TBR is not pre-approved, depending only upon the length of time since LNP became available throughout petitioner's service territory. To the extent that the Commission made the statutorily required determinations in the proceedings culminating in the Global Order, it did so only as to the first three business markets. If this were not

so, the Commission could not have pre-approved the granting of the competitive designation, dependent only upon the length of time elapsing after LNP became available throughout petitioner's service territory. It is clear, however, that the Commission did not, in the proceedings culminating in the Global Order, make the required determinations with respect to the business market composed of business customers generating less than \$10,000 in annual TBR. If it had, the competitive designation could have been granted on a pre-approved basis, conditioned only upon the happening of some exogenous event such as, for instance, three years after LNP was available throughout petitioner's service territory, or one year after 271 approval. The only reason this proceeding must occur is so that the Commission can make the statutorily required determinations with respect to the business market composed of business customers generating less than \$10,000 in annual TBR that it did not make in the proceedings culminating in the Global Order.

The second preliminary issue is that of the relevant geographic area for purposes of examining the availability of like or substitute services. Petitioner argues that the relevant geographic area is its entire service territory, on an all-inclusive basis. That is, petitioner argues that the presence of like or substitute services anywhere in its entire Pennsylvania service territory is sufficient to determine that a particular business service should be declared to be competitive for business customers generating less than \$10,000 in annual TBR throughout petitioner's service territory. To the contrary, OTS, CTSI/Penn Telecom, AT&T, and OSBA argue that the correct interpretation of this statutorily established factor is that the determination must be made in each of petitioner's 339 local exchanges, on an exchange by exchange basis. Once again, petitioner is wrong and the other parties are right.

Petitioner has a total of 339 exchanges located throughout its service territory. Of these, 231 exchanges are characterized as rural exchanges. A significant percentage of the relevant business market, customers generating less than \$10,000 in

annual TBR, is served by the 231 rural exchanges. Likewise, a significant percentage of the relevant business market is served by the 108 non-rural exchanges. It is not reasonable to suppose that because for one or more of the 95 business services for which petitioner seeks the competitive designation like or substitute services are available in some (or even all) of the 108 non-rural exchanges means that the same state of affairs exists in any of the 231 rural exchanges. It is not even reasonable to believe, without some proof, that because for one or more of the 95 business services for which petitioner seeks the competitive designation like or substitute services are available in some of the 231 rural exchanges means that the same state of affairs exists in all of the 231 rural exchanges. Conclusions as to the availability of like or substitute services in all of the rural exchanges based upon some or all of the non-rural exchanges, or even based upon some, but not all, of the rural exchanges would be mere suppositions.

Difficult, expensive, and time consuming as it may be, it is petitioner's burden to establish the availability of like or substitute services for each of the 95 business services in each of its 339 exchanges.⁴

Having decided that the relevant business market for purposes of applying the statutory factors is business customers generating less than \$10,000 in annual TBR, and that the relevant geographic area for examining the availability of like or substitute services is petitioner's entire service territory on an exchange by exchange basis, petitioner's Petition must be denied for failure to bear the burden of proof.

⁴ It is recognized that this means petitioner has the burden of 32, 205 (339 exchanges x 95 business services) items of proof. However, it is entirely within petitioner's power to reduce that number by seeking a competitive determination for less than all 95 business services at a time and/or in less than all 339 exchanges at one time. Petitioner chose to file an "all or nothing" Petition.

Petitioner's lack of evidence is shown by Attachment 2 to its Petition, and by two surveys, the Rural Business Customer Survey and the Business Customer Market Share Survey, upon which petitioner relies.

Attachment 2 to the Petition shows the presence of competitive service providers on an exchange by exchange basis for each of petitioner's 339 exchanges. However, Attachment 2 only identifies 12 out of the 95 services that petitioner seeks to have declared competitive. Evidence as to competitors providing the remaining 83 services is not presented by Attachment 2 to the Petition. As the party bearing the burden of proof, it must be assumed that if petitioner had evidence favorable to its position with respect to these other 83 services it would have presented such evidence. Additionally, petitioner acknowledged that none of the information provided in its Petition or Attachment 2 (or Attachment 3) to the Petition was limited to the relevant business market, customers generating less than \$10,000 in annual TBR. Therefore, even for the 12 business services which Attachment 2 to the Petition shows competitors are providing, there is no evidence that they are being provided to the relevant business market.

The Rural Business Customer Survey and the Business Customer Market Share Survey are each incapable, either alone or in combination, of providing the evidence needed to bear petitioner's burden of proof.

The Rural Business Customer Survey was based on responses from 439 firms. These responses came from only 153 of the 231 rural exchanges in petitioner's service territory. One-third of the rural exchanges are not represented in the Rural Business Customer Survey at all. Of those rural exchanges that are represented, there was no evidence presented as to how the 439 responding firms were distributed. A heavy concentration of the 439 firms in such exchanges as Middletown, Mechanicsburg, Norristown, Bryn Mawr, Media, or McKeesport (all categorized as rural exchanges) would mean that less densely populated rural exchanges could be "represented

exchanges” with only one firm located there. This is not sufficient credible evidence to prove the availability of like or substitute services in petitioner’s entire service territory on an exchange by exchange basis.

The Business Customer Market Share Survey consists of a sample size of only 415 usable responses. Assuming that this sample size is large enough to provide credible information, the Business Customer Market Share Survey indicates that approximately 20% of the 415 respondents used only competitive providers other than petitioner. As AT&T points out in its Main Brief, “only a provider that is used to absolute dominance could consider an 80 percent market share as proof of vibrant competition.” AT&T Main Brief at 14. More importantly, the Business Customer Market Share Survey covered just 149 of petitioner’s 339 total exchanges. Responses from less than half (44%) of petitioner’s exchanges, with no information regarding the distribution of those 415 respondents over the 149 exchanges, means that any projection as to the presence of competition throughout petitioner’s service area on an exchange by exchange basis would be mere speculation.

Finally, it also bears mentioning that neither the Rural Business Customer Survey nor the Business Customer Market Share Survey covered all 95 business services for which petitioner seeks a competitive designation.

In summary, petitioner failed to provide credible evidence that competition exists for the provision of any of the 95 business services in each of its 339 exchanges.

One other example of the deficiencies in petitioner’s case should serve to highlight the complete lack of probative, credible evidence presented by petitioner as to each of the nine statutorily required findings the Commission must make.

Petitioner was bound to prove the “presence and **viability** of other competitors, including market shares” (emphasis added). While petitioner offered some limited evidence as to the presence of competitors, it presented no evidence in its case in chief as to the capability of competitors to develop and survive. However, OTS did present some significant evidence on this subject.

OTS quoted from petitioner’s pleadings in the WorldCom, Inc. bankruptcy case, In re: WorldCom, Inc. et al., Case No. 02-13533 (AJG), United States Bankruptcy Court, Southern District of New York, Chapter 11, where petitioner described the entire telecommunications industry as “bankruptcy plagued”. Further, in the WorldCom, Inc. bankruptcy case, petitioner characterized the bankrupt (a competitor of petitioner in 82 exchanges) as having a troubled payment history and opined that WorldCom may not be administratively solvent in its Chapter 11 case and may not be able to be liquidated for a sufficient amount to cover all postpetition liabilities. Additionally, OTS presented evidence regarding the viability, or more accurately the suspect viability, of a number of other competitors of petitioner. Adelphia Communications, Global Crossings, Plan B Communications, Winstar, and XO Communications are all in bankruptcy proceedings. These bankrupt competitors operate to various degrees throughout petitioner’s service territory, ranging from XO Communications’ presence in 10% of petitioner’s exchanges to Plan B Communications’ presence in 63% of petitioner’s exchanges. While establishing some degree of competitive presence, this information serves only to cast doubt on these competitors’ viability.

OTS also brought forth evidence on other competitors of petitioner who, while not in bankruptcy, are, at best, of doubtful viability. To quote from OTS’s main Brief:

Allegiance, which is present in 11% of Verizon’s exchanges, experienced a stock price decline from a 52-week high of \$9.85 to a recent price of \$.81 per share. CTC Communications, with a presence in 93% of Verizon’s

exchanges, had a fourth quarter 2000 stock price of \$20 per share, a second quarter 2001 stock price of \$7 per share, and a recent price of \$.13 per share. ATX, which is present in 74% of Verizon's exchanges, was de-listed from the NASDAQ in August 2002, and had a recent share price of \$.45 per share. Stock prices of less than \$1.00, particularly after having historically been significantly higher, are generally a good indicator of lack of investor confidence in the future ability of a company to attain or continue profitably, and possibly continue to remain in business.
OTS Main Brief at 24 – 25.

Finally, one of petitioner's witnesses claimed that a market share analysis of petitioner's business local exchange services is "inappropriate" in this case.⁵ The Pennsylvania legislature, in drafting 66 Pa.C.S. §3005(a)(1), obviously disagreed.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of, and the parties to, this case.
2. As the party seeking to have telecommunications services classified as competitive, petitioner has the burden of proof in this matter pursuant to 66 Pa.C.S. §3005(a)(2).

⁵ Petitioner Statement 1.1 at 6.

3. To establish a sufficient case and satisfy the burden of proof, petitioner must show that the telecommunications services are competitive by a preponderance of the evidence.

4. A preponderance of the evidence means by presenting evidence more convincing, by even the smallest amount, than that presented by any opposing party.

5. Any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence.

6. Substantial evidence has been defined as such evidence as a reasonable mind might accept as adequate to support a conclusion.

7. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.

8. This case is a statutory proceeding arising under the provisions of 66 Pa.C.S. §3005. As such, the specific requirements set forth in that section by the legislature control the Commission's determination.

9. At minimum, the Commission must make findings as to each of the following:

1. evidence of ease of market entry, including the existence and impact of cross-subsidization, rights-of-way, pole attachments and unavoided costs;
2. presence and viability of other competitors, including market shares;
3. the ability of competitors to offer those services or other activities at competitive prices, terms and conditions;

4. the availability of like or substitute services or other activities in the relevant geographic area;
 5. the effect, if any, on protected services;
 6. the overall impact of the proposed regulatory changes on the continued availability of existing services;
 7. whether the consumers of the service would receive an identifiable benefit from the provision of the service or other activity on a competitive basis;
 8. the degree of regulation necessary to prevent abuses or discrimination in the provision of the service or other activity;
- and,
9. any other relevant factors which are in the public interest.

10. If petitioner fails to adduce sufficient evidence as to any one or more of the statutory factors, the Commission cannot make all of the required determinations and the Petition must be rejected.

11. The relevant business market for purposes of applying the statutory factors is limited to the market made up of business customers generating less than \$10,000 in annual TBR only.

12. The competitiveness, or lack thereof, existing for a “\$10,000 or more annual TBR” group neither proves nor renders probable the existence or non-existence of competition for business customers generating less than \$10,000 in annual TBR.

13. The Commission, in the Global Order, established those businesses generating less than \$10,000 in annual TBR as a distinct business market for purposes of applying the statutory factors to determine the presence or absence of competition.

14. The relevant geographic area for examining the availability of like or substitute services is petitioner's entire service territory on an exchange by exchange basis.

15. The Rural Business Customer Survey and the Business Customer Market Share Survey are each incapable, either alone or in combination, of providing the evidence needed to bear petitioner's burden of proof.

16. Petitioner acknowledged that none of the information provided in its Petition or Attachment 2 (or Attachment 3) to the Petition was limited to the relevant business market, customers generating less than \$10,000 in annual TBR. Therefore, even for the 12 business services which Attachment 2 to the Petition shows competitors are providing, there is no evidence that they are being provided to the relevant business market.

17. 66 Pa.C.S. §3005(e)(1) requires the Commission to determine that the requesting local exchange carrier has unbundled each basic service function on which the competitive service depends and has made the basic service functions separately available to any customer under nondiscriminatory tariffed terms and conditions, including price, that are identical to those used by the local exchange telecommunications company and its affiliates in providing its competitive service.

18. 66 Pa.C.S. §3005(e)(2) requires the Commission to determine that the price which a local exchange telecommunications company charges for a competitive service shall not be less than the rates charged to others for any basic service functions used by the local exchange telecommunications company or its affiliates to provide the competitive service, and that revenues from the rates for access services reflected in the price of competitive services shall be included in the total revenues produced by the noncompetitive services.

19. 66 Pa.C.S. §3005(e)(3) requires the petitioning local exchange carrier to file tariffs or price lists for competitive services with the Commission that shall either be in the public records or, if the Commission determines that the rates are proprietary, be filed under seal and made available under the terms of an appropriate protective agreement.

20. 66 Pa.C.S. §3005(g)(1) prohibits a local exchange company from maintaining or imposing any resale or sharing restrictions on any service that the Commission finds to be competitive.

21. 66 Pa.C.S. §3005(g)(2) prohibits a local exchange carrier from using revenues earned or expenses incurred in conjunction with noncompetitive services to subsidize or support any competitive services.

22. The Commission is required by 66 Pa.C.S. §3005(a)(1) to consider the viability of competitors when determining whether a service or services are competitive.

23. Petitioner failed to prove the presence and viability of other competitors with regard to business telecommunications services to customers generating less than \$10,000 in annual TBR as required under 66 Pa.C.S. §3005(a)(1).

24. Petitioner already has the regulatory authority under 52 Pa.Code §53.59(f)(1) to reduce rates on 10 days' notice, to respond to competition, for business customers generating less than \$10,000 in annual TBR.

25. Petitioner has not established that it has met the statutory requirement, under 66 Pa.C.S. §3005(e)(1), that it unbundle each basic service function

on which a competitive service depends and make those basic service functions available to competitors under nondiscriminatory tariffed terms and conditions.

26. Petitioner has not met its burden of proof with respect to the requirements set forth in 66 Pa. C.S. §3005(a)(1).

27. Petitioner has not met its burden of proving that there currently is sufficient competition for business customers generating less than \$10,000 in annual TBR to permit the competitive classification of all of petitioner's business services to all of those customers in all areas of petitioner's service territory.

28. Petitioner has failed to provide evidence that is sufficient for the Commission to make competitive findings for each of the 95 services for which a competitive designation is sought.

29. Petitioner has failed to provide evidence sufficient for the Commission to make the competitive findings required by 66 Pa. C.S. §3005(a)(1), including evidence as to competitor presence and the availability of substitute or like services for each of the services sought to be declared competitive in the relevant geographic area, with respect to business customers generating less than \$10,000 in annual TBR.

PROPOSED ORDER

THEREFORE,

It is Recommended that the Commission adopt the following Order:

1. That the Petition Of Verizon Pennsylvania Inc. For A Determination That Its Provision Of Business Telecommunications Services To Customers Generating Less Than \$10,000 In Annual Total Billed Revenue Is A Competitive Service Under Chapter 30 Of The Public Utility Code filed in this case on July 1, 2002, by Verizon Pennsylvania Inc. is denied.

2. That the record at Docket Number P-00021973 be marked closed.

Date: January 23, 2003

Wayne L. Weismandel
Administrative Law Judge