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Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Abbreviated Procedures for Review of Transfer of Control and Affiliate Filings for Telecommunications Carriers;	:	
PUC Docket Nos. P-00062222 and L-00070188;	:	**IRRC No. 2573**
Public Utility Commission Final Regulation 57-260	:	

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INDEPENDENT REGULATORY REVIEW COMMISSION

COMMENTS OF
WINDSTREAM PENNSYLVANIA, LLC, AND
WINDSTREAM COMMUNICATIONS, INC.

I. INTRODUCTION

On February 9, 2008, the Pennsylvania Public Utility Commission (PUC or "Commission") published in the *Pennsylvania Bulletin* a notice of proposed rulemaking (NPRM) to address changes to the PUC's regulations at 52 Pa. Code Chapter 63, with the goal of streamlining procedures applicable to review of applications for transfer of control of telecommunications carriers.

Windstream Pennsylvania, LLC[1] ("Windstream Pennsylvania") and Windstream Communications, Inc.[2] (collectively "Windstream")[3] fully participated in the Commission's rulemaking. Windstream filed comments to the proposed rulemaking and was also an active

[1] Windstream Pennsylvania, LLC, (f/k/a Alltel Pennsylvania, Inc.) is a certificated rural incumbent telephone company (RLEC) with approximately 83 exchanges operating primarily in Western Pennsylvania, but with discontiguous service territories throughout all of Pennsylvania, including service 29 of Pennsylvania's 67 counties.
[2] Windstream Communications, Inc. is a certificated competitive local exchange carrier (CLEC) in Pennsylvania.
[3] The collective Windstream companies provide communication, information, and entertainment services offering high quality voice, video, and high-speed internet to approximately 200,000 business and residential customer lines in the Commonwealth.

participant in the Commission's subsequent collaborative held in large part due to IRRC's oversight and commentary upon the proposed rulemaking.[4]

Windstream very much appreciates the Commission's efforts to address issues impacting its regulated telecommunications sector. Windstream believes, however, that the final rulemaking adopted by the Commission falls far short of achieving regulatory reform for the most highly regulated sector of the telecommunications market, the incumbent LECs (ILEC). This is particularly unnecessary for the RLECs, which comprise fewer than 15% of the incumbent access lines in Pennsylvania and which face ample competition despite their continued misnomer as "incumbents." Consequently, the final rulemaking does not effectively "address changes in technology and public utility regulation" as the Commission states.[5]

In particular, the final rulemaking makes no progress towards parity for the regulated telecommunications carriers pursuant to Chapter 30 of the Public Utility Code.[6] It, therefore, should be disapproved. Traditional ILEC wireline companies such as Windstream Pennsylvania are and will remain subject to unnecessary but lengthy and costly regulatory review of change of control transactions in Pennsylvania. Their competitors, however, which provide similarly situated services in direct competition with wireline companies, especially wireless, cable, and Voice Over internet Protocol (VoIP), are not subject to those same regulatory delays and never will be. Given the highly competitive nature of today's telecommunications market, the

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[4] As addressed in more detail in Section II.B., below, since the Commission's inception of this rulemaking proceeding, Windstream Corporation has acquired three additional Pennsylvania RLECs – Buffalo Valley Telephone Company, Denver & Ephrata Telephone and Telegraph Company, and Conestoga Telephone and Telegraph Company, and one additional CLEC – D&E Systems, Inc. These companies, now operating as Windstream Buffalo Valley, Inc., Windstream Conestoga, Inc., Windstream D&E, Inc., and Windstream D&E Systems, Inc., join and support these Windstream comments.

[5] *Rulemaking to Amend Chapter 63 Regulations so as to Streamline Procedures for Commission Review of Transfer of Control and Affiliate Filings for Telecommunications Carriers et al.*, Docket No. L-00070188 et al., Final Rulemaking Order (Order entered April 29, 2010) at 3 ("*PA PUC Final Rulemaking Order*").

[6] 66 Pa.C.S. §§3011-3019, *as amended*, (also known as "Act 183").

Commission should be directed to compose regulations that alleviate market restrictions currently imposed unjustly and unnecessarily on only this one segment of the communications industry. To do otherwise is to establish a patently unjust discriminatory framework.

II. WINDSTREAM'S POSITION

In May of 2006, Level 3 Communications LLC ("Level 3") filed a petition with the Commission requesting that the PUC open a rulemaking proceeding aimed at streamlining the Commission's process for issuance of Certificates of Public Convenience (CPC) related to the transfer of control and affiliate transactions. During the ensuing process, the Commission appeared willing to consider engaging in true reform by considering a process that would blunt the leverage certain parties currently enjoy by addressing the impact of filed protests. In the end, however, the Commission has proposed final regulations that in fact strengthen that discriminatory position. The Commission now codifies as an automatic trigger the filing of a protest by any entity, an action that automatically derails an application by subjecting it to a traditional, unrestricted regulatory review that can take upward of several months of protracted litigation at the Commission before the requested relief is granted.[7]

It is particularly this aspect of the Commission's final regulations that is fatal to the Commission's endeavor to streamline change of control applications for ILECs, resulting in improper disparity of the regulatory environment in violation of Chapter 30.[8] In order to level the regulatory playing field while still providing the Commission the tools it needs to perform its

[7] As Verizon notes in its comments to IRRC, the final rulemaking also proposes new burdens, such as identification of all state or federal violations found or even just alleged, a task for multi-state carriers such as Windstream that could be substantially burdensome yet yield little if any relevant information.

[8] Section 3011(13) of Act 183 of 2004, 66 Pa.C.S. § 3011(13) obligates the Commission to "[r]ecognize that the regulatory obligations imposed upon the incumbent local exchange telecommunications companies should be reduced to levels more consistent with those imposed upon competing alternative service providers." An "alternative (continuation)

duties under Pennsylvania law, IRRC should disapprove the Commission's final rulemaking. Instead, the Commission should be directed to give further consideration to comments and proposals made before it that sought to create a reformed process with stricter time limits, and which would have removed incentives and rewards for parties to engage in regulatory extortion.

The gravamen of Windstream's continuing opposition to the Commission's rulemaking is the provision that compels a "traditional review" process when any party files a formal protest. This process effectively circumvents any intended relief by perpetuating a significant inequity in the current system, namely forcing applicants to seek negotiated settlements focused on short-term benefits with intervenors (primarily competitors using such proceedings to garner unfair competitive advantages) in exchange for a relatively expedited conclusion. In lieu of an automatic reversion to the traditional review process under the circumstances preserved in the final regulations, the Commission should have considered other options provided to it, including Windstream's proposal for a two-track system with the opportunity to extend the general review period for an additional 30 days, or the PTA's proposal to subject all change of control applications to a written comment/reply comment process providing the Commission the opportunity to vet real issues from obstructionist ones.

In this manner, administrative hearings, which consume valuable time, financial, and other resources, will be required *only* where valid Chapter 11 application issues requiring the litigated process are presented. This would bring much needed regulatory parity and certainty to the process while preserving the Commission's authority to examine more extensively an application when legitimate transaction issues are raised.

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service provider" is any entity "that provides telecommunications services in competition with a local exchange telecommunications company." 66 Pa.C.S. § 3012.

The certainty of timely regulatory action without the wasteful consumption of limited financial and human resources by unnecessary litigation is crucial for companies seeking change of control approval under Chapter 11 of the Public Utility Code, as well as for their customers, employees, and shareholders. While accomplishing the dual goals of ensuring parity and certainty, these proposals made before but rejected by the Commission, with little consideration, have the added benefit of providing the necessary framework for the Commission and the statutory advocates to perform their duty under Pennsylvania law while preserving due process for legitimate protests.

A. The Highly Competitive Communications Market Requires Prompt Regulatory Action

In rejecting efforts to streamline the traditional review process for change of control applications by reining in the impact of the perfunctory protest, the Commission ultimately determined that "technology and market changes do not justify departing from that rule for a discrete class of applications."[9] Windstream respectfully, but strongly, disagrees with that Commission assessment as there is no rational basis for continuing to subject only one class of competitor to these applications.

The communications market is highly competitive, with a great deal of competition coming from unregulated wireless, VoIP, and cable competitors. Any final Commission regulations should reflect this reality and anticipate that the transformation occurring in the market will only accelerate.[10] However, highly regulated RLECs like Windstream remain

[9] *PA PUC Final Rulemaking Order* at 18.

[10] For example, as Windstream reported to the Commission in this proceeding in 2008, the FCC's March 2008 Local Telephone Competition Report estimated that as of June 2007 wireless customers in Pennsylvania outnumbered wireline customers by almost 4 million. That number continues to grow. As of June 2008, the number of wireless subscribers in Pennsylvania was 9,894,870, more than double the 4.4 million in 2001. According to preliminary results of the National Health Interview Survey as recently reported by the Centers for Disease Control, as of December 2009, one of every four homes today do not have a landline phone but do have at least one wireless (continuation)

regulatorily handicapped under the Commission's final regulations. Windstream supports the Commission's intent to codify its current practice of streamlining filings the Commission has already recognized as pro-forma, for example, where there will be no change in control of utility services, such as changes in a business entity from a C corporation to a limited liability company.[11] But, by retaining the traditional review process and codifying it as applicable automatically whenever any party files a protest, the reform falls short of comprehensively addressing the inequities inherent in the outdated Chapter 11 review process and does not render regulatory parity as required by Chapter 30. Such elevation of the "traditional review" process to automatic status is not only anachronistic in today's competitive communications market, it also fails to serve the public interests.

B. Protests Provide Opposing Parties Regulatory Leverage Where Traditional Review Is Unnecessary

The rules should not provide for automatic reclassification of an application from a general review to a traditional review proceeding merely upon the filing of any protest.[12] Such action unnecessarily grants an inordinate amount of leverage to an intervening party which, as has been demonstrated in recent application proceedings before the Commission, may result in

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phone, an increase over the last six months of 2008 of 4.3%. See www.cdc.gov. Moreover, since 2001, ILECs in the Commonwealth have experienced a loss of over 2.3 million customers (which does not include customer growth that also is lost as more competitors vie for the same customer base). CLECs (which do not include unregulated VoIP, cable, and wireless carriers), today account for over 20% of all end-user access lines in Pennsylvania. See www.fcc.gov.wcb.stats (Local Telephone Competition: Status as of June 30, 2008). At least 10 CLECs are currently authorized to offer end user services to Windstream's customers in Pennsylvania, again a number that does not include cable, wireless, and VoIP providers, which are becoming increasingly predominant. Cable companies that can provide both entertainment content and broadband services now pass ninety-six percent (96%) of homes in Pennsylvania. These numbers demonstrate the pressure wireline providers face from wireless substitution and other alternative providers.

[11] *See Joint Application of Frontier Communications of Breezewood, Inc. et al.*, Docket Nos. A-310400F0004 *et al.*, Order entered October 17, 2003, 2003 WL 22917026.

[12] Windstream notes that the original proposed rulemaking retained this automatic trigger only upon the filing of a protest by a statutory party such as the Office of Consumer Advocate or Office of Small Business Advocate. While Windstream opposes any automatic trigger, even if restricted to statutory advocates, the final rulemaking wrongly expands that automatic trigger to apply to *any* protest. This guarantees that any entity, including competitors of the regulated ILECs with private agendas not benefitting the public interest, will continue to seek to delay a market transaction for their own personal gain.

applicants being pressured to negotiate short-term rate or other concessions simply as a means of ending the protest to truncate the proceeding and complete the proposed transaction. By codifying such a provision, the final rulemaking regulations continue to promote this "incentive and reward" system of extorting short-term, traded-for-benefits in exchange for a relatively quicker and less expensive regulatory review that have been the crippling hallmark of the traditional review process.

Indeed, the most recent change of control proceeding involving Windstream Corporation's acquisition of three RLECs in eastern Pennsylvania and one CLEC,[13] provided just that. The settling petitioners (Windstream Corporation and the Statutory Parties) arrived at terms and conditions which resolved public advocate issues through a series of compromises and concessions, including promises by the regulated entities regarding service quality reports, enhanced lifeline informational packets, rate freezes for both residential and small business customers for one to two year periods, reports and commitments on employment levels, and maintenance of local community and charitable giving.

The competitor cable association BCAP (the Broadband Cable Association of Pennsylvania, a commentator to the Commission's proposed regulations that insisted on continuation of the protracted protest option) was not a signatory to the settlement. Nonetheless, the regulated applicant parties offered commitments addressing standard BCAP issues by filing a stipulation with the presiding ALJ agreeing not to protest applications such as may be filed by a BCAP member as well as addressing other wholesale and interconnection commitments that favorably impacted BCAP members.

[13] D&E Telephone and Telegraph Company, Buffalo Valley Telephone Company, Conestoga Telephone and Telegraph Company, and D&E Systems, Inc., respectively.

These regulatory promises by the change of control applicants were necessary to try to reach an amicable resolution in lieu of further protracted and expensive litigation in order to attempt to move the transaction forward. Thus, filed protests resulted in precisely those short-term benefits the Supreme Court has recently determined were not necessary (as discussed in Section C. below). Despite these settlement efforts, and notwithstanding that this Windstream change in control application did not impact services or rates and raised no new or novel issue that had not been addressed in prior similar proceedings, the application was still subject to intensive litigated procedures, including extensive discovery and hearing preparation. This process extended the application's review period from its initial filing date of May 21, 2009, to a final adjudication by the Commission by order entered November 6, 2009, a period of almost 6 full months during which employees, customers, and the markets in general were left to twist in the regulatory winds.

C. The Extraction Of Short-Term Benefits Through The Filing of Protests Is No Longer Recognized As Required Under Pennsylvania Law

Placing the focus on long-term benefits, including the enhancement of services to customers, is appropriate in today's competitive telecommunications market, and can be achieved through pro-forma or general review, but not with the current automatic protest trigger. Indeed, the Supreme Court affirmed this view in its decision in *Popowsky*, a recent case affirming the merger of Verizon and MCI, in which the Court found that "the *City of York* does not support the requirements advanced by the OCA, and implicit in the Commonwealth Court's decision, that the Commission must secure legally binding commitments to assure public benefit from a merger."[14]

[14] *Popowsky v. Pennsylvania Public Utility Commission*, 937 A.2d 1040, 1055 (Pa. 2007) ("*Popowsky*").

No protest should be per se sufficient to warrant an automatic 6 to 9 month review process. This is particularly so if their protests do not specifically detail substantive, factual concerns of actual adverse consequences likely to result from the proposed transaction. Rather than automatically reclassify an application to a traditional review process upon receipt of a protest, the Commission should consider, as Windstream proposed, extending the general review process by an additional 30 days to accommodate a hearing, if necessary, but on an abbreviated schedule. This abbreviated schedule would provide a "90-day process" similar to the abbreviated procedures adopted for regulatory filings under ILECs' alternative regulation plans authorized under the original Chapter 30,[15] and continued without reformation as to abbreviated review under Act 183. Another very viable alternative is the process that was spearheaded by the PTA and Level 3, and supported by Windstream, in the collaborative before the Commission, and which is outlined in the PTA's June 4, 2010 comments filed before IRRC.

The Supreme Court in *Popowsky* affirmed this new approach and the emphasis on long-term benefits. The Court accepted the Commission's position that "nothing in Section 1103 of *City of York* requires that the essential public benefits must necessarily arise in the short term" and recognized the Commission's vigorous defense of "the validity of a longer-term approach to public benefit in the present price-cap regulatory environment."[16] The Court specifically cited to the Commission's position that there was "no requirement in *City of York* that the merged company make special concessions or rate reductions as a *quid pro quo* for regulatory approval" and that the Commission's discretion to impose conditions was not a "mandate to extract short-

[15] Act 67 of 1998, 66 Pa.C.S. §§3001-3009 (repealed) ("Chapter 30").
[16] *Popowsky*, 937 A.2d at 1051-52.

term rate concessions to the exclusion of any consideration of a longer-term approach to public benefit."[17] Thus persuaded, the Court concluded:

> Indeed, the Commission's opinion makes it clear that its decision to accept a likelihood of longer-term benefits in lieu of more immediate price concessions is grounded in the same philosophy as the General Assembly's decision to move from cost-based to price-cap regulation – both decisions appear to incorporate the underlying understanding that, in a competitive environment, market forces will constrain price and encourage valuable innovation. ... [This] policy is entirely rational.[18]

Time is of the essence for all companies undertaking a merger or acquisition and a critical concern in the traditional review process. The sooner a company can complete the regulatory review process, the sooner it can achieve estimated synergies, provide certainty to customers and transitioning employees, and seek funding in capital markets. Further, as the Commission is well aware, the traditional review process was developed at a time when companies in the communications sector were monopolies and consumers' interests were served through the state regulators conducting granular reviews of change of control applications under Chapter 11. Today, markets have evolved, and that granular review is no longer appropriate or necessary. Consumers are now in a position to evaluate whether services offered by a new company are sustainable in the marketplace, because, as the Court agreed, "in a competitive environment, market forces will constrain price and encourage valuable innovation."[19]

Closing a transaction expeditiously provides certainty for employees and customers and enhances the seamlessness of the transaction by allowing the company to quickly implement billing, customer service, and operational transitions. In today's competitive communications market, the speed with which companies bring new or enhanced services to the market is critical.

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[17] *Id.* at 1052, note 13.
[18] *Popowsky*, 937 A.2d at 1059.
[19] *Popowsky*, 937 A. 2d at 1059.

This, the Commission recognized and the Supreme Court affirmed, serves the public interest better than short-term concessions made merely to secure a relatively prompt closing to a transaction that often already has been scrutinized by federal authorities for any anti-trust or general marketplace concerns.

D. Other Agencies' Reviews

1. Federal

Federal agencies like the Federal Communications Commission (FCC), Department of Justice (DOJ), and Federal Trade Commission (FTC) evaluate the impact of proposed transactions on competition. Their reviews are concurrent, and their focus in reviewing mergers is to ensure that mergers not be permitted to create or enhance market power or to facilitate its exercise through significant increases in market concentration. Mergers that either do not significantly increase concentration or do not result in a concentrated market ordinarily require no further analysis, and need no additional granular state review in which opportunistic competitors can engage an applicant in forced negotiations in order to settle out a state proceeding.[20] The state review processes are largely duplicative of the exhaustive review that occurs at the federal level yet are more susceptible to the special extortionary interests of intervening competitors.

The regulatory process known as traditional review was developed in 1994, two years before the passage of the Telecommunications Act of 1996 (TCA-96) and a world of difference

[20] Even the FCC acknowledges that streamlined procedures are appropriate for RLECs, referred to by the FCC generally as "incumbent independent LECs," the non-Regional Bell Operating Companies such as Verizon and AT&T. *See In the Matter of Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations*, CC Docket No. 01-150, FCC 02-78, Report and Order Released March 21, 2002, at 18 (citing favorably *In the Matter of ALLTEL Corp., Petition for Waiver of Section 61.41 of the Commission's Rules and Applications for Transfer of Control,* 15 FCC Rcd 14191, 14195 (1999) (finding that the merger of ALLTEL and Aliant would not create a giant communications services provider of sufficient size to dominate the industry or (continuation)

away from the technological revolution that has redefined the telecommunications environment. Windstream strongly encourages IRRC to disapprove the Commission's final rulemaking and direct the Commission to avoid any approach that codifies automatic triggers and increases burdens in favor of an abbreviated approval process that subjects applicants to a more exhaustive review process only where circumstances truly require it. In today's competitive market, traditionally regulated RLECs should not continue to be held hostage to a regulatory procedure that provides incentives and rewards to parties, including competitors, who protest an application simply to barter a benefit by obstructing the process.

2. State

As Windstream noted before the Commission, other Commonwealth agencies have review processes of mergers and acquisitions that are more reflective of today's marketplace realities. Under the state Department of Banking regulations, mergers or consolidations that result in a national or interstate bank do *not* require the approval of the Department. Instead, they may be accomplished upon notice to the Department and filing of a certificate of approval by the U.S. Comptroller of the Currency.[21] Additionally, in mergers or consolidations that result in a state banking institution which may require approval by the Department, such approval is accomplished in approximately 60 days (plus an additional 30 days under limited circumstances). With the exception of an additional advertising requirement, a proposal to *convert* a national or interstate bank to a "Pennsylvania banking institution" follows similar substantive and procedural processes as mergers/consolidations and takes approximately 30 days

affect significantly the Commission's implementation of the Communications Act and federal communications policy).

[21] 7 P.S. §1604(g).

to review.[22] The state review process, when implicated, is abbreviated. The outermost time frame for review by the Department is 90 days, and that is only if there has been an amendment to the initial application. Without amendment, the Department conducts its review and issues an order approving or disapproving the application within 60 days.

Similarly, the Pennsylvania Department of Health (DOH), which licenses health care facilities (including hospitals), recently underwent a review process that significantly truncated the process for regulatory review of change of control applications for regulated entities. Prior to 1996, the DOH operated under statutory provisions that required the issuance of "certificates of need," which appears to have followed a regulatory practice and procedure similar to what is in place currently for utility applications for a CPC under Chapter 11 of the Public Utility Code. However, statutory provisions regarding certificates of need were subject to periodic sunset review,[23] and in 1996, all provisions related to the issuance of certificates of need were allowed to sunset without reenactment,[24] resulting in a current review process that is substantially streamlined, and in particular does not allow parties to derail or complicate a legitimate change in control application. This is particularly the case since the DOH's formerly applicable certificate of need process was very burdensome and often time consuming, with evidentiary hearings to address objections, because protests to applications from competing interests were very common. Available on the DOH's website (www.health.state.pa.us), is a series of change of

[22] *See generally* 7 P.S. §§1701-1711.
[23] 38 P.S. §448.904a.
[24] *See e.g.* Chapter 7 of HCFA, 38 P.S. §§448.701-448.712, as well as all other sections of HCFA that reference a "certificate of need."

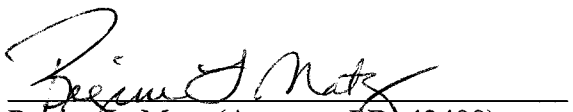
ownership inquiries that must be completed and provided to the DOH at least 30 days in advance of the proposed transfer. Upon receipt of the information, the DOH conducts a review, follows up with any further inquiries as necessary, and issues a letter response. There is little justification to burden RLECs with greater regulatory oversight of mergers or acquisitions than the DOH imposes on the facilities charged with providing health care to consumers. The Commission should be able to take both solace and advice from the DOH's oversight of change in ownership or transfer of control proceedings involving matters as critical as health care by considering DOH's current review procedures. Since the sunset of the original DOH process, review of corporate transfers of health care facilities by the DOH has been streamlined. The Commission's procedures for the traditional review process could and should be similarly eliminated or streamlined.

III. CONCLUSION

Timely review by the Commission, without being subject to extortive processes which the Pennsylvania Supreme Court has recognized is not necessary in order for an application proceeding under Chapter 11 to be in the public interest, is a goal that is both supportable and attainable at the Commission. This timely review could be accomplished by the creation of the two-track system with strict time limits in the interest of regulatory certainty and parity advocated by Windstream before the Commission, or the alternative proposal set forth by the PTA and also supported by Windstream. Protests should not provide automatic triggers for more exhaustive review when there has been no determination that a credible claim is presented and more granular review required. Windstream believes that the procedures it and the PTA proposed would greatly benefit RLECs as they seek to add scale and scope to their operations to remain competitive in the current communications market. Abolishing the traditional review upon the

perfunctory filing of a protest by any party while implementing a reasonable alternative would allow the Commission to review transactions on a substantive basis and provide all parties the process that is due. It will also provide the regulated entity the competitive parity, certainty, and shield from extortion that is currently absent and will remain absent under the final regulations.

Respectfully submitted,



Regina L. Matz (Attorney I.D. 42498)
THOMAS, LONG, NIESEN & KENNARD
212 Locust Street, Suite 500
Post Office Box 9500
Harrisburg, PA 17108-9500
(717) 255-7600

Counsel for Windstream Pennsylvania, LLC
Windstream Communications, Inc.
Windstream Buffalo Valley, Inc.,
Windstream Conestoga, Inc.,
Windstream D&E, Inc., and
Windstream D&E Systems, Inc.

Dated: June 11, 2010

THOMAS, LONG,
NIESEN & KENNARD
Attorneys and Counsellors at Law

REGINA L. MATZ
Direct Dial: 717.255.7622
rmatz@thomaslonglaw.com

June 11, 2010

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Via Hand Delivery

Hon. Arthur Coccodrilli, Chairman
Pennsylvania Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

In re: Abbreviated Procedures for Review of Transfer of Control and Affiliate Filings for Telecommunications Carriers
IRRC No. 2673
Public Utility Commission Final Regulation 57-260

Dear Chairman Coccodrilli:

Enclosed for filing please find one copy of the Comments of Windstream Pennsylvania, LLC and Windstream Communications, Inc. in the above-referenced matter.

Please feel free to contact me if you have any questions.

Very truly yours,

THOMAS, LONG, NIESEN & KENNARD

By: Regina L. Matz
Regina L. Matz

cc: George D. Bedwick, IRRC Vice Chairman
Silvan B. Lutkewitte, III, IRRC Commissioner
John F. Mizner, IRRC Commissioner
S. David Fineman, IRRC Commissioner
Kim Kaufman, IRRC Executive Director
Joseph K. Witmer, Esquire, PA PUC

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