WILLIAMS MULLEN

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Federal Communications Commission
Office of the Secretary

November 13, 2006

VIA COURIER

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Natek, Inc.
236 Massachusetts Avenue, NE
Suite 110
Washington, DC 20002

RE: Application of Citizens Communications Company and Commonwealth Telephone Enterprises, Inc., For Section 214 Authority to Transfer Control of Domestic and International Authorization, File No. ITC-T/C-20060929-00450, WC Dkt. No. 06-184

Dear Ms. Dortch:

Attached for filing on behalf of RCN Corporation and RCN Telecom Services, Inc. ("RCN") is a Petition to Deny.

An original and nine (9) copies of this letter are enclosed. Please date-stamp and return the enclosed extra copy of the filing in the attached envelope. Questions regarding this filing may be addressed to the undersigned.

Respectfully submitted,

Michael W. Fleming
Brian McDermott

Counsel for RCN Corporation

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re: Application of Citizens Communications Company and Commonwealth Telephone Enterprises, Inc. For Section 214 Authority to Transfer Control of Domestic and International Authorization	File No. ITC-T/C-20060929-00450 WC Dkt. No. 06-184

PETITION TO DENY
OF
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Dated: November 13, 2006

Counsel for RCN Corporation
and RCN Telecom Services, Inc.

SUMMARY

RCN Corporation and RCN Telecom Services, Inc. assert that the Application should be denied because the Applicants have failed to demonstrate that the merger is in the public interest. Instead, the merger would harm the public interest because it will give Commonwealth, which already has and exercises significant market power, greater resources and greater incentive to continue to engage in anticompetitive and discriminatory behavior, which prevents otherwise qualified carriers like RCN from providing competitive, facilities-based alternatives to customers in the Commonwealth service territory. In the alternative, if the Commission allows the proposed transaction to proceed, it should impose conditions on the Applicants to offset the harms to the public interest caused by the merger.

Citizens has indicated that the merger is driven in large part because there is no competition in Commonwealth's territory. Citizens has stated that it will take actions that will prevent successful competitive entry in the future. The merger will only enhance the ability of Applicants to inhibit competition. Thus, because the adverse effects of the merger on competition outweigh any benefits identified by Applicants, Applicants have not demonstrated that the merger is in the public interest.

The Applicants also fail to show that the transfer will result in merger-specific benefits. Applicants offer broad conclusory statements without a scintilla of supporting evidence or any specific or enforceable commitments to back up their lofty assertions. Applicants claims that adding the backing of a company with Citizens' financial strength will enhance the abilities of the company to provide innovative and value added services in additional areas is illusory because Commonwealth has already committed to complete broadband availability throughout the Commonwealth service territory by the end of 2008.

The Commission should also investigate whether the merger will make competitive entry to Commonwealth territory more likely than not. In connection with this investigation, the Commission should review the arrangements Commonwealth has entered into that either limit the geographic scope of competitive entry, or limit the technology or types of services that competitive providers are allowed to provide in exchange for timely market entry. While RCN believes that it and similarly situated carriers are harmed by Commonwealth's conduct, the ultimate harm is done to those consumers that are denied competitive choices.

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In re: Application of Citizens Communications Company and Commonwealth Telephone Enterprises, Inc. For Section 214 Authority to Transfer Control of Domestic and International Authorization	)	File No. ITC-T/C-20060929-00450 WC Dkt. No. 06-184

PETITION TO DENY
OF
RCN CORPORATION AND RCN TELECOM SERVICES, INC.

RCN Corporation and RCN Telecom Services, Inc. (together "RCN"), pursuant to the Commission's Public Notices of October 27, 2006, and 47 C.F.R. § 1.939, hereby petition the Commission to deny the above-captioned Application ("Application") requesting approval for the transfer of control of domestic and international licenses from Commonwealth Telephone Enterprises, Inc., and its subsidiaries including Commonwealth Telephone Company ("Commonwealth"), to Citizens Communications Company ("Citizens").[1] RCN Corporation is

[1] *Domestic Section 214 Application Filed For the Transfer of Control of Commonwealth Telephone Enterprises, Inc. to Citizens Communications Company,* WC Docket No. 06-184, DA 06-2231 (Oct. 27, 2006); *Streamlined International Applications Accepted for Filing*, Report No. TEL-01082S (Oct. 27, 2006). The International Bureau found the Application to be subject to the streamlined processing procedures set forth in Section 63.12 of the Commission's rules, 47 CFR § 63.12. On November 1, 2006, RCN filed its Request to Remove Application from Streamlined Processing, asking the International Bureau to remove the Application from streamlined processing to allow the International Bureau processing timeframe to comport with the ongoing Wireline Competition Bureau ("WCB") review.

the parent of RCN Telecom Services, Inc., a telecommunications carrier providing competitive local exchange services in several states, including Pennsylvania where Commonwealth operates. The Application should be denied because the Applicants have failed to demonstrate that the merger is in the public interest. Instead, the merger would harm the public interest because it will give Commonwealth, which already has and exercises significant market power, greater resources and greater incentive to continue to engage in anticompetitive and discriminatory behavior, which prevents otherwise qualified carriers like RCN from providing competitive, facilities-based alternatives to customers in the Commonwealth service territory. In the alternative, if the Commission allows the proposed transaction to proceed, it should impose conditions on the Applicants to offset the harms to the public interest caused by the merger.

I. INTRODUCTION.

RCN is one of the largest facilities-based competitive providers of bundled phone, cable and high speed Internet services delivered over its own fiber-optic local network to consumers in major markets in the U.S. RCN has extensive operations within Pennsylvania through its operations in the Lehigh Valley and the Philadelphia area. RCN has maintained cable network

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On November 7, 2006, Citizens and Commonwealth filed a Response to Request to Remove Application from Streamlined Processing ("Citizens/Commonwealth Response to RCN"). On November 9, 2006, RCN filed its Reply to Response to Request to Remove Application from Streamlined Processing. On November 13, 2006, the International Bureau removed the Application from streamlined processing. *Streamlined International Applications Accepted for Filing*, Report No. TEL-01086S (Nov. 13, 2006). RCN incorporates its pleadings by reference.

The WCB Public Notice specified November 10, 2006 as the deadline for comments in the proceeding. November 10, 2006, however, is a federal holiday; therefore, per Rule 1.4(j), 47 C.F.R. § 1.4(j), this Petition to Deny is timely filed. On November 10, 2006, Counsel for RCN left a voicemail message with William Dever of the WCB to provide the WCB with notice that RCN would be filing its Petition to Deny on Monday, November 13, 2006.

facilities in Pennsylvania for 20 years. Outside Pennsylvania, RCN provides services in the Boston, New York, Washington, D.C., Chicago, San Francisco, and Los Angeles metropolitan markets. What distinguishes RCN from most other competitive local exchange carriers ("CLECs") is its focus on serving the residential market.

What also distinguishes RCN from most other CLECs is its eagerness to build facilities and provide telephone service to suburban markets in competition with rural telephone companies like Commonwealth, whose customers have never experienced the benefits of true competition. RCN is prepared to expand into Commonwealth's market in order to add circuit-switched telephone service to the existing package of cable television services and high-speed Internet access offered throughout its footprint in Commonwealth's service territory.[2] Commonwealth, however, is opposed to the competitive presence of RCN and other competitive carriers and has fought to prevent entry into its lucrative and subsidized telephone market.[3]

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[2] By way of example, Commonwealth has opposed even modest entry by RCN into its service territory. The attached map illustrates RCN's footprint and the tiny overlap into Commonwealth territory that is currently the point of dispute. See Exhibit A. The larger bordered area labeled "Approximate Current System Boundary" indicates the area currently served by RCN's cable facilities. Most of this area is served by Verizon as the incumbent LEC, and in Verizon territory RCN is able to offer a combined package of video, broadband, and traditional telephone service. The area in the upper right corner with a dark border and labeled "Approximate CTCo Boundary" is the main portion of Commonwealth's (CTCo's) footprint in the Lehigh Valley. The overlap of the two areas—RCN's and Commonwealth's service territories—is the finger of territory connected to the larger footprint of RCN's territory. In this small area, RCN provides cable television and broadband, but is currently prohibited from providing local exchange telephone service. RCN has sought authority to provide service in Commonwealth Territory, which Commonwealth has opposed. *Application of RCN Telecom Services, Inc. for approval to Amend its Certificate of Public Convenience to offer, render, furnish, or supply telecommunications services to the public as a Competitive Local Exchange Carrier in the service territory of Commonwealth Telephone Company*, Pennsylvania PUC Dkt No. A-310554F0002 (filed May 1, 2006) ("Expansion Application").

[3] Commonwealth receives $20 million annually in federal universal service support. Annual Report of Commonwealth Telephone Enterprises, Inc., March 13, 2006, at F-18. It paid more than $294 million in dividends in 2005. *Id.* at F-13.

Citizens has indicated that the merger is driven in large part because there is no competition in Commonwealth's territory. Citizens has stated that it will take actions that will prevent successful competitive entry in the future. The merger will only enhance the ability of Applicants to inhibit competition. Thus, because the adverse effects of the merger on competition outweigh any benefits identified by Applicants, Applicants have not demonstrated that the merger is in the public interest.

RCN will be directly harmed by the merger and is thereby a party in interest to this proceeding. The acquisition of Commonwealth by Citizens will only exacerbate the anticompetitive conduct of Commonwealth by giving Commonwealth greater resources and greater incentive to keep all competitive carriers, including residential-service focused entrants such as RCN, out of its market indefinitely. Accordingly, for reasons set forth herein, the Commission must deny the Application or, in the alternative, condition the merger with sufficient safeguards to offset the public interest harms inherent in the proposed transaction.

II. STANDARD OF REVIEW.

In considering applications for the transfer of control of Commission licenses, the Commission must determine whether the proposed transfer of control will serve the public interest, convenience and necessity.[4] The Commission must also consider whether the transfer of control could result in public interest harms by substantially frustrating or impairing the

[4] *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-65, (rel. Nov. 17,2005) ("*SBC/AT&T Merger Order*") ¶ 16.

objectives or implementation of the Communications Act or related statutes.[5] The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.[6] The Commission's public interest evaluation includes, among other things, "a deeply rooted preference for preserving and enhancing competition in relevant markets."[7] Robust competition is clearly in the public interest because it lowers rates for consumers, increases efficiency, and introduces new services and features.

In determining the competitive effects of the proposed merger, the Commission is informed by, but not limited to, traditional antitrust principles.[8] Among the issues to be considered is "whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets and the merger's effect on future competition."[9] Further,

> We also recognize that the same consequences of a proposed merger that are beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.[10]

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[5] *Id.*

[6] *Id.*

[7] *Id.* ¶ 17.

[8] *Id.* ¶ 18.

[9] *Id.*

[10] *Id.*

In reviewing mergers of large ILECs, the Commission routinely considers the impact on competition and competitive carriers.[11] Safeguarding competition is one of the Commission's main functions, and as a result, Applicants bear a high burden of showing that the benefits alleged by the merger will outweigh the potential for reduced or impaired competition. Accordingly, the Commission also has the authority to impose and enforce conditions that ensure the public interest is served by the transaction, including conditions based upon the Commission's extensive regulatory and enforcement experience to ensure that the merger will, overall, service the public interest.[12]

The Commission also considers "whether the combined entity will be able, and is likely, to pursue business strategies resulting in demonstrable and verifiable benefits that could not be pursued but for the combination."[13] The claimed benefits must be transaction-specific, and they must be verifiable.[14] Applicants are required to provide sufficient evidence supporting each benefit claim for the Commission to verify.[15]

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[11] *See Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee,* 15 FCC Rcd 14032 (2002) at ¶¶ 173-208; *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer of Control,* 14 FCC Rcd 14712 (1999) at ¶¶ 186-254; *Applications of NYNEX Corp, Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries,* 12 FCC Rcd 19985 (1997) at ¶¶ 3-16; *Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Pacific Telesis Group and Its Subsidiaries,* 12 FCC Rcd 2624 (1997) at ¶¶ 15-33.

[12] *Id.* ¶ 19.

[13] *Id.* ¶ 182.

[14] *Id.* ¶ 184.

[15] *Id.*

III. ARGUMENT.

A. Commonwealth is currently either blocking or limiting the scope of competition in its markets.

RCN and other carriers have attempted to bring competitive telephone choices to customers within the Commonwealth territory and Commonwealth has responded by impeding competitive entry by carriers such as RCN.[16] In doing so, Commonwealth has asserted arguments to block competitive entry that are contradicted by applicable law.[17] The most glaring example of Commonwealth's anticompetitive position is that the Pennsylvania PUC has ruled that a carrier that is already certificated as a CLEC enjoys a rebuttable presumption of continuing

[16] RCN's dispute with Commonwealth is not "an unadjudicated claim in a pending Commission complaint proceeding." Citizens/Commonwealth Response to RCN at 4. The dispute is over a simple application to obtain additional authority to provide CLEC service in a new geographic area. RCN is simply seeking authority that is granted routinely upon a demonstration of fitness. RCN has made no "claim" against Commonwealth, other than its assertion that it has the right to provide CLEC service to Commonwealth's otherwise captive customer base under state and federal law.

RCN has been in settlement discussions with Commonwealth (and two other Pennsylvania RLECs opposing RCN CLEC applications) since the August 3, 2006 Prehearing Conference on their Application for authority to provide CLEC service in Commonwealth's territory. Discussions are continuing but to date a settlement agreement has not been reached.

[17] Commonwealth alleges, without basis or merit, that RCN lacks the financial, technical, and managerial fitness to provide service within Commonwealth's service territory. The argument is specious because RCN has already demonstrated to the Pennsylvania PUC that it satisfies the fitness criteria in the course of its earlier certification proceedings. RCN is already certificated in Pennsylvania and is currently doing business in Pennsylvania as an Interexchange Reseller (statewide authority at Docket No. A-310554), as a Competitive Access Provider (statewide authority at Docket No. A-310554F0003), and as a Competitive Local Exchange Carrier in the service territory of Verizon Pennsylvania, Inc. (Docket No. A-310555F0002). The Pennsylvania PUC has even recently had the opportunity to review RCN's fitness to provide service in the course of granting the approvals needed to complete certain transactions related to RCN's bankruptcy and restructuring. Securities certificate of RCN Telecom Services, Inc. to support, as a guarantor, the debt financing of its parent, RCN Corporation, (Docket No. S-00041022). Further, Commonwealth's management is intimately familiar with the fitness of RCN's management since Commonwealth and RCN were affiliates under common ownership by C-TEC Corp. ("C-TEC"). Several of the current executives of Commonwealth Telephone Enterprises, Inc., including the Chief Executive Officer, Michael J. Mahoney, had been senior executives at RCN. RCN's and Commonwealth's history together as affiliates may also demonstrate why Commonwealth is so strongly opposed to RCN's entry to its markets: Commonwealth has close knowledge of RCN's network and ability to provide competitive services.

fitness based on certification as a CLEC actively engaged in the provision of service in other parts of the state.[18] Commonwealth has provided absolutely no evidence to rebut the presumption of RCN's fitness to provide telephone service. RCN certainly satisfies the fitness criteria and is thereby entitled to have its CLEC authority expanded to include the Commonwealth service territory.[19] Clearly, Commonwealth's opposition to the RCN's application is an example of an attempt to delay, impede, and otherwise interfere with facilities-based competition from a provider that is obviously fit to provide such service.[20] But for

[18] *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 (Order entered April 10, 2001) at 17. RCN obviously has the fitness to provide telephone service since it already provides cable and broadband within Commonwealth territory. RCN has provided cable service there for 20 years.

[19] In addition, RCN's Expansion Application does not implicate any assertion by Commonwealth of a claimed rural carrier exemption under section 251(f)(1). RCN can provide service in competition with Commonwealth through an interconnection arrangement that does not implicate the exemption, similar to the arrangements Commonwealth has already agreed to provide to another CLEC and several CMRS providers. When RCN amended its Expansion Application at the Pennsylvania PUC, RCN made it clear that it is not seeking UNEs or resale from Commonwealth. Therefore, the rural carrier exemption should not be an issue in the consideration of RCN's Expansion Application.

[20] Citizens and Commonwealth have suggested that RCN's opposition to the merger in this proceeding is intended "solely for delay." Citizens/Commonwealth Response to RCN at 6. This is nonsense. On a conference call with investors on November 7, 2006 to discuss quarterly earnings, the Chief Executive Officer of Citizens Communications stated to the investment community that Citizens and Commonwealth did not expect to consummate the merger until "mid-year 2007." Final Transcript, CZN-Q3 2006 Citizens Communications Co. Earnings Conference Call, Nov. 7. 2006, at 2 ("Citizens Earnings Call") (attached as Exhibit B.) On the same day, the CEO of Commonwealth Telephone Enterprises, Inc. also said during his quarterly earnings call with investors that they expected to complete the merger in "mid 2007." Final Transcript, CTCO-Q3 2006 Commonwealth Telephone Enterprises, Inc. Earnings Conference Call, Nov. 7. 2006, at 3 ("Commonwealth Earnings Call") at 3 (attached as Exhibit C.) That target deadline gives this Commission at least eight full months to complete its review of the Application. There is no reason to think that the Commission would be unable to consider and provide a remedy to every one of RCN's objections to the transfer within the eight-month window that Citizens and Commonwealth already expect.

Commonwealth's opposition to RCN's competitive entry, RCN could have been providing telephone service within Commonwealth's territory already.[21]

Indeed, statements by Commonwealth's top executives demonstrate that delaying competitive entry and preventing competition is an important aspect of the Company's business model. On the November 7, 2006 Commonwealth Telephone Enterprises, Inc. Earnings Conference Call, the Chief Executive Officer of Commonwealth was asked by an analyst, "I'm wondering if you could give us a quick update on the competitive dynamics? How much of it is to wireless substitution versus cable competition, and what you're seeing in terms of cable competition entering the market?" The CEO of Commonwealth replied, "We have not seen any uptick in competition from the cable industry in our service territory. We continue to think that the – believe, rather, that the primary driver of our line loss is wireless, with some little of Voice Over IP in some of our markets. But, we've not seen any real change in the competitive dynamic

[21] Applicants have suggested in their pleadings before the Commission that Commonwealth's anticompetitive actions might be protected by the Noerr-Pennington doctrine, which protects conduct permitted by the First Amendment from allegations of violations of antitrust laws. Citizens/Commonwealth Response to RCN at 6. RCN respectfully submits that Applicants' anticompetitive conduct extends beyond participation in certification proceedings. But even with respect to proceedings such as RCN's Pennsylvania certification, the Noerr-Pennington is simply not applicable because Commonwealth's conduct fits squarely within the recognized "sham" exception to the Noerr-Pennington doctrine:

> The "sham" exception to Noerr encompasses situations in which persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay.

City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 111 S.Ct. 1344 (1991), *citing California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972). This is precisely what Commonwealth has engaged in at the Pennsylvania PUC. The grounds for opposing RCN's fitness for providing service have no merit since RCN is entitled under Pennsylvania law to a rebuttable presumption of fitness and Commonwealth has offered no evidence to the contrary.

and that's why we think the [financial] results have been consistent."[22] A moment later, another investment analyst asked, "How many of your access lines have cable VOIP competition today?" The CEO of Commonwealth said, "We think it's very small." Commonwealth's Executive Vice President and Chief Operating Officer added, "We have only one cable provider that offers voice services today. And they're really doing very little marketing. And it's a small part of our serving territory. None of the other cable providers currently provide a voice offering."[23] By bringing this issue up on its earnings call, Commonwealth considers the lack of competition critical for Wall Street approval.

Moreover, what competition exists in Commonwealth territory is strictly limited by agreement with Commonwealth.[24] As the Pennsylvania PUC noted when it granted limited service territory expansion to Service Electric, a cable telephony provider, Commonwealth and Service Electric agreed to a settlement that limited Service Electric's footprint within Commonwealth territory:

> On June 7, 2006, Service Electric filed its Fourth Amendment to Application (Settlements with Commonwealth, Frontier and TDS/M&M). Pursuant to these settlements, Service Electric is amending the Application to limit geographically its request for expanded CLEC certification to those portions of the Commonwealth, Frontier and TDS/M&M service areas in which a current Service Electric cable television affiliate holds cable

[22] Commonwealth Earnings Call at 6.

[23] *Id.* at 7.

[24] Application of Service Electric Telephone Company, LLC for expanded authority to offer, render, furnish or supply telecommunications services as a Competitive Local Exchange Carrier to the public in the Commonwealth of Pennsylvania in the service territories of Commonwealth Telephone Company et al., Docket Nos. A-310651F0002AMA et al, Order (Aug. 21, 2006).

> television franchises. Commonwealth, Frontier and TDS/M&M have withdrawn their Protests. Accordingly, the entire Application is now unprotested.[25]

Commonwealth's opposition to RCN's entry is clear proof that Commonwealth is actively preventing full competition from cable telephony carriers by limiting how and where its competitors provide service. And the lack of competition is likely to get worse following the merger because Citizens' CEO has made clear that Commonwealth's rural carrier monopoly status and "fragmented" competition from cable companies are the most important elements of the acquisition.

B. The acquisition of Commonwealth by Citizens will harm the public interest because it will give Commonwealth greater resources and greater incentive to continue to engage in anticompetitive behavior.

The acquisition of Commonwealth by Citizens will harm the public interest because it will give Commonwealth access to the enormous resources of Citizens that will be used to further stifle competition in its markets. Citizens is the seventh largest carrier in the United States, with more than 2.1 million ILEC access lines across 24 states. Citizens has more than $2.1 billion in annual revenues, and its Frontier Communications brand is well-recognized nationwide. Putting this kind of financial and regulatory muscle behind a single-state entity like Commonwealth suddenly gives Commonwealth the clout and leverage of a national carrier.

At the same time, Commonwealth would retain the right to claim its rural carrier exemption under section 251(f)(1) of the Telecommunications Act within Commonwealth

[25] *Id.* at 3.

territory. Under the rural carrier exemption, Commonwealth would not be obligated to provide unbundled network elements—especially local loops to residential end users— or collocation of facilities, or make its retail offerings available for resale at the wholesale discount.[26] Therefore, a carrier that wanted to compete with Commonwealth to serve residential end users would be required to build facilities throughout the Commonwealth territory and could not rely on leasing or reselling components of the Commonwealth network or services without first going through the process of defeating any assertion of the rural carrier exemption. A carrier with the financial resources of Citizens, armed with a rural carrier exemption, will create significant impediments to competitive entry.

In fact, the acquisition of Commonwealth was predicated on maximizing the value of the company through continued exploitation of its monopoly status as a rural telephone company. In announcing the acquisition, the Chief Executive Officer of Citizens Communications stated that Commonwealth was an attractive target "first and foremost" because of its rural carrier profile.[27] One aspect that made Commonwealth so attractive was the "very fragmented cable competition" within its service territory.[28] Since Commonwealth provides no cable television services, the "very fragmented cable competition" could refer only to the potential competition to its monopoly revenues from cable companies such as RCN providing telephone service. The term

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[26] Commonwealth has already executed agreements permitting direct interconnection of its network with the networks of CMRS carriers and one CLEC, Service Electric, under terms described above.

[27] Final Transcript, CZN-Citizens Communications Co. Merger & Acquisition Announcement, Sep. 18, 2006 ("Citizens Merger Announcement") at 2 (attached as Exhibit D).

[28] *Id.*

"fragmented competition" indicates Citizens' belief that Commonwealth faces no immediate threat to its revenue-earning potential and therefore, would be in a position to maximize profits through its monopoly status. Without Commission action in this proceeding, the lack of competition in Commonwealth's market will extend well into the future.

It is these monopoly revenues that Citizens will have a greater incentive to protect if its acquisition of Commonwealth is approved. Citizens will pay Commonwealth shareholders more than $1.15 billion for the company, and Citizens must return that investment to its own shareholders as soon as possible (75% of the purchase is payable in cash, and the remainder in Citizens' stock).[29] One way to maximize Commonwealth's return is to impede competitive entry wherever possible, such as by delaying and obstructing entry by companies like RCN that have already established communications networks within Commonwealth territory.[30]

Yet, Commonwealth is not opposed to its own competitive entry into the territory of other incumbent LECs. Commonwealth also owns a CLEC—CTSI, LLC—that competes with Verizon and Embarq in Pennsylvania. Commonwealth uses CTSI as a part of its "edge-out" strategy that effectively extends its own service footprint into other LECs' territories in order to

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[29] Citizens has told the financial community that the acquisition will be "free cash flow accretive in first year," meaning that Citizens expects to be able to recoup its acquisition costs almost immediately. Citizens Merger Announcement at 2. This indicates that the acquisition is low-risk to Citizens and that Commonwealth faces very little competition.

[30] In contrast, where Citizens faces rigorous competition from cable companies, it engages in deep price cutting to maintain market share. As John C. Hodulik, Analyst for UBS Securities LLC, reports, the Citizens' bundle of services "hit a new low" in price, and Citizens' competitor Time Warner would have to respond to the Citizens' product offer. UBS Investment Research, TelMeDaily, Nov. 8, 2006 ("UBS Report") (attached as Exhibit E.) It is possible that the price for Citizens' triple play offering is so low that it is below cost, in which case Citizens may be using federal universal service funds to cross-subsidize its offerings for competitive services.

serve customers of Commonwealth that may need service to locations outside Commonwealth's exchanges. Citizens has stated that not only will it continue the "edge-out" CLEC strategy, but it will also merge the CLEC operations with the ILEC operations where possible in order to reduce costs.[31] So it is clear that Citizens and Commonwealth recognize the value of the competition presented by CLECs, so long as the competition stays away from Commonwealth's own service territory.

In addition, Citizens has announced plans recently to offer a "Triple Play" package throughout its service territory,[32] a product package of cable, broadband and telephone designed to compete with cable companies like RCN. While this sort of product package should be encouraged, as should all competition, Citizens' offer is unusual in that it provides new subscribers with an entire year of DISH TV for free, or a brand new Dell personal computer for free, if the customer will commit to a two-year contract for service.[33]

Thus, when Citizens takes over Commonwealth, it would be able to lock up residential customers before competitive carriers would be able to compete for them, and deny them the ability to reap the benefits that competition will bring to Commonwealth's territory. Commonwealth's conduct now is tilting the playing field in Citizens' favor by denying

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[31] Citizens Merger Announcement at 4.

[32] Citizens Earnings Call at 2.

[33] *Id.* At least one analyst believes that Citizens' offer will result in a price war with cable companies where Citizens faces competition. *See* note 30, supra. In order to protect itself against losses in those markets, Citizens is trying to limit its exposure by demanding a high contract termination fee. UBS Report at 2. A high termination fee would significantly increase the barrier to competitive entry where Citizens offers this package because customers would be severely penalized for taking service from another provider after accepting the Citizens offer.

competitors' access to the Triple Play customers that Citizens intends to lock-up in long-term contracts.

It is therefore crucial that RCN or any other qualified Applicant be permitted to enter Commonwealth's entire market before Citizens takes control of the company for the simple reason that Commonwealth has yet to introduce long-term contracts to customers. The CEO of Citizens recognized this fact as one significant difference between Citizens and Commonwealth and has said Citizens would immediately implement a strategy to provide service to customers under contracts after it has completed its acquisition of Commonwealth.[34] In Citizens' markets, "Citizens has over 35% of [its] customer base already on either 1 or 2-year contracts, and we are aggressively driving that number up higher."[35] This approach would have major implications not only for competitive carriers like RCN that target the residential market, but also for competitive carriers that cater to large businesses. The strategy of locking up the most valuable customers to long-term commitments, and thereby preventing competition for business, immediately makes competitive entry more difficult for all new entrants. As the Commission has stated, "To the extent the [ILEC] can lock in the larger business customers whose traffic would economically justify the construction of new facilities, the [ILEC] can foreclose competition[.]"[36] Long-term contracts with customers before competition has been established will constitute a significant barrier to entry.

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[34] Citizens Merger Announcement at 3.

[35] Citizens Merger Announcement at 3.

[36] *Access Charge Reform*, 14 FCC Rcd 14221 (1999) at ¶ 79.

These are examples of what CLECs can expect from Commonwealth telephone after it is acquired by Citizens, and they demonstrate how crucial it is to enter the market before the acquisition is completed and Citizens is able to implement its changes. Immediate competitive entry would provide competitive choices to residential consumers in Commonwealth's service territory and begin to level the playing field for Citizens' expected triple-play offerings.

C. The Applicants fail to satisfy the public interest standard for Transfer of Control applications.

The Applicants make passing reference to the public interest standard that they must satisfy in order for the Commission to approve the proposed transfer of control of both their domestic and international licenses, but they fail to show that the transfer will result in merger-specific benefits.[37] Applicants fail to identify a single positive benefit that will come from the merger. Instead, Applicants tout the "access to each other's network capabilities, technical and financial strengths and complementary services."[38] What exactly do the Applicants mean by this statement? Applicants offer broad conclusory statements without a scintilla of supporting evidence or any specific or enforceable commitments to back up their lofty assertions.

While that kind of demonstration may suffice for competitive carriers that are subject to constant competitive pressure and constrained by the forces of the marketplace, it is clearly not sufficient to meet the demonstration required to justify the further expansion of one of the largest ILECs in the country. Incumbent LECs are a completely different class of carrier,

[37] Application at 7-9. *See SBC/AT&T Merger Order* ¶ 182-184.

particularly ones that are not subject to the pressures of competition. The Commission has a heightened obligation to review the purported public interest benefits made by incumbent LECs for whom their captive ratepayers have few competitive alternatives due to their monopoly status.

The Applicants do claim that the merged entity will be able "to compete more effectively" with cable telephony carriers like RCN because it will be much larger and have greater depth of expertise.[39] As explained above, however, Commonwealth does not compete with cable telephony carriers now to any appreciable degree. In the words of Commonwealth's Executive Vice President and Chief Operating Officer, "We have only one cable provider that offers voice services today. And they're really doing very little marketing. And it's a small part of our serving territory. None of the other cable providers currently provide a voice offering."[40] The Commission should recognize monopoly power for what it is—the increased size and resources and "depth of expertise" will likely lead to more limitations on competitive entry and less competition.

The Applicants also claim that adding the backing of a company with Citizens' financial strength will enhance the abilities of the company to provide "innovative and value added services" "in additional areas."[41] The Applicants do not specify what kinds of innovative and

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[38] *Id.* at 7.

[39] Application at 8.

[40] Commonwealth Earnings Call at 7. Compare Service Electric, who does "very little marketing," with RCN who markets aggressively. RCN's customer growth has exceeded expectations for two consecutive quarters.

[41] Application at 7.

value-added services they will be more able to provide, or which additional areas will receive them. The Commission should inquire further into this statement because Commonwealth has already committed to complete broadband availability throughout the Commonwealth service territory by the end of 2008 as a part of its Chapter 30 Network Modernization Plan.[42] To the extent that "innovative and value added services" means broadband, this implied commitment is not merely speculative, it is illusory. If it means something else, the Applicants should clarify what they intend to provide, how the merger makes it more likely that such services will be provided, precisely what specific and enforceable commitments Applicants are making to ensure the delivery of such services, and the method and metrics Applicants will use to demonstrate that Applicants are meeting its commitments.

Applicants identify "growing their customer base through new business opportunities" as a purported benefit of the merger.[43] Yet Commonwealth's views on "growing their customer base through new business opportunities" as a positive public benefit are completely one-sided: growing the business is a commendable goal for Commonwealth, but allowing a competitor to grow its business should be discouraged, if Commonwealth is to be believed. Commonwealth's efforts to intentionally stymie the efforts of competitive carriers such as RCN to grow their businesses, rather than competing with such carriers head-to-head, should indicate to the Commission how little Commonwealth truly values new services for consumers within Commonwealth's territory. The benefit of "growing their customer base through new business

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[42] Petition for Amended Alternative Regulation and Network Modernization Plan of Commonwealth Telephone Company, Dkt. No. P-00961024F1000, Order (Mar. 3, 2005).

opportunities" inures solely to shareholders and management in Commonwealth's world view, and not to the public.

Applicants not only have failed to satisfy their burden of demonstrating that the merger is in the public interest, but they have failed to produce any verifiable evidence that the merger will result in benefits to consumers. The Commission should request further information from the Applicants to support their claims of positive benefits to the public and then assess the validity of that information. For example, the Commission needs to test whether the acquisition of the third largest ILEC in Pennsylvania by the seventh largest ILEC in the United States will actually accelerate broadband deployment throughout Commonwealth's rural territory any more than Commonwealth has already committed to provide.

The Commission should also investigate whether the merger will make competitive entry to Commonwealth territory more likely than not. In connection with this investigation, the Commission should review the arrangements Commonwealth has entered into that either limit the geographic scope of competitive entry, or limit the technology or types of services that competitive providers are allowed to provide in exchange for timely market entry. While RCN believes that it and similarly situated carriers are harmed by Commonwealth's conduct, the ultimate harm is done to those consumers that are denied competitive choices. Competitive entry brings new products, better service, and lower rates, and the Commission should take steps to ensure that Commonwealth and Citizens face full competition within Commonwealth's markets.

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[43] Application at 8.

IV. THE COMMISSION SHOULD ORDER CONDITIONS TO OFFSET THE COMPETITIVE HARMS.

As explained above, the Commission should conclude that the ongoing competitive harms and the likelihood that the merged entity will have the means and the incentive to continue to engage in anticompetitive behavior demonstrate that the proposed transaction is not in the public interest. For this reason, the Application for the transfer of control of domestic and international licenses should be denied. In order for the transaction to proceed, the Applicants must be willing to agree to steps to be taken to offset the ongoing harms to the public interest. The Commission has the authority to impose and enforce conditions that ensure the public interest is served by the transaction, including conditions based upon the Commission's extensive regulatory and enforcement experience to ensure that the merger will, overall, service the public interest.[44]

RCN proposes that the Commission consider imposing on Citizens and Commonwealth the following conditions, *inter alia*, in order for their Application to be approved:

First, Citizens and Commonwealth must cease and desist from anticompetitive and discriminatory conduct against other carriers, including agreeing not to oppose petitions from carriers previously certificated in Pennsylvania to provide competitive local exchange services to expand service into Citizens or Commonwealth service territory. Agreeing to this step will not mean that unqualified carriers will be permitted to compete with rural LECs in the future. The Pennsylvania PUC will continue to exercise its oversight authority to approve CLEC service

[44] *SBC/AT&T Merger Order* ¶ 19.