

EPDS OGCOI

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

In the Matter of

RCN TELECOM SERVICES
OF PHILADELPHIA, INC.

v.

PECO ENERGY COMPANY
and
INFRASOURCE, INCORPORATED¹

PA No. 01-003

To: Chief, Enforcement Bureau

REPLY OF INFRASOURCE INCORPORATED

Pursuant to Section 1.106 of the Commission's Rules, InfraSource Incorporated, through its undersigned counsel, hereby respectfully submits the following Reply to the Opposition of RCN Telecom Services of Philadelphia ("RCN"). InfraSource filed a Petition for Reconsideration of the Enforcement Bureau's *Phase I Order* released December 18, 2002 in the above-captioned proceeding and RCN filed its Opposition on January 27, 2003.²

¹ InfraSource Incorporated was originally named in this proceeding as Exelon Infrastructure Services, Inc. However, Exelon Infrastructure Services changed its name to InfraSource in January 2002.

² In the Matter of RCN Telecom Services of Philadelphia, Inc., Complainant v. PECO Energy Company and Exelon Infrastructure Services, Inc., Respondents, File No. PA 01-003, *Phase I Order*, DA 02-3485 (rel. December 18, 2002).

I. RCN ADMITS THAT INFRASOURCE DOES NOT OWN OR CONTROL THE UTILITY POLES AT ISSUE IN THIS CASE

1. In its Opposition, RCN admits that InfraSource does not own or control any of the utility poles at issue in this case.³ This admission is important because the Pole Attachments Act only provides the Commission with jurisdiction over parties that: (1) are local exchange carriers or electric, gas, water, steam, or other public utilities and (2) own or control the poles at issue.⁴ InfraSource has contended from the outset that it meets neither of those prongs, but RCN has insisted that the Commission nonetheless has jurisdiction. With RCN's admittance that InfraSource neither owns nor controls the poles at issue, however, a finding of jurisdiction is impossible. No matter how vigorously RCN may argue the first jurisdictional prong, it has conceded that InfraSource does not satisfy the second. Thus, the Commission must dismiss the Amended Complaint as to InfraSource.

2. In its Response to the Amended Complaint, InfraSource argued that RCN's pursuit of a claim against InfraSource despite the clear lack of either legal or factual support warranted a finding that the Amended Complaint constitutes a frivolous pleading under FCC Rule Section 1.52.⁵ As such, InfraSource asserted that the Commission should assess forfeitures against RCN pursuant to Section 503 of the Communications Act of

³ In the Matter of RCN Telecom Services of Philadelphia, Inc., Complainant v. PECO Energy Company and Exelon Infrastructure Services, Inc., Respondents, File No. PA 01-003, *Opposition of RCN Telecom Services of Philadelphia, Inc. to Petition for Reconsideration of InfraSource, Inc.*, p. 2 n.5 (filed Jan. 27, 2003).

⁴ See 47 U.S.C. § 224(a)(1) (2000); 47 C.F.R. § 1.1402(a) (2001).

⁵ In the Matter of RCN Telecom Services of Philadelphia, Inc., Complainant v. PECO Energy Company and Exelon Infrastructure Services, Inc., Respondents, File No. PA 01-003, *Response to Amended Complaint of Exelon Infrastructure Services, Inc.*, pp. 22-23 (filed June 18, 2001); 47 C.F.R. § 1.52 (2001).

1934.⁶ At this time, RCN's admission that InfraSource does not own or control any of the utility poles at issue in this case is further indication that its case against InfraSource is frivolous. Accordingly, InfraSource reiterates its request that the Bureau assess forfeitures against RCN.

II. INFRASOURCE'S JURISDICTIONAL ARGUMENTS ARE PROCEDURALLY PROPER AND SUBSTANTIVELY CORRECT

3. In its Opposition, RCN asserts that the jurisdictional arguments contained in InfraSource's Petition for Reconsideration are procedurally improper and substantively incorrect.⁷ RCN first contends that because the Bureau did not reach InfraSource's jurisdictional defenses in the *Phase I Order*, it was improper for InfraSource to assert on reconsideration that the Bureau should have reached those issues and dismissed it in accordance with them. RCN's contention ignores the well-established rule that reconsideration is appropriate where the petitioner shows either a material error or omission in an order.⁸ In this case, the first strand of InfraSource's argument was that the Bureau erred in the *Phase I Order* by not reaching, *i.e., by omitting*, the jurisdictional issues.⁹ Raising that argument through a petition for reconsideration of the *Phase I Order* was perfectly proper.

⁶ *Response to Amended Complaint of Exelon Infrastructure Services, Inc.* at 22-23; 47 U.S.C. § 503 (2000).

⁷ *Opposition of RCN Telecom Services of Philadelphia, Inc. to Petition for Reconsideration of InfraSource, Inc.*, pp. 3-5.

⁸ In the Matter of American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint, File No. SAT-PDR-19990803-00077, *Memorandum Opinion and Order*, 15 FCC Rcd. 15448, 15450-51 (2000).

⁹ In the Matter of RCN Telecom Services of Philadelphia, Inc., Complainant v. PECO Energy Company and Exelon Infrastructure Services, Inc., Respondents,

4. RCN also contends that if the Bureau reaches the substantive aspect of InfraSource's jurisdictional argument, it should find that jurisdiction exists despite the fact that InfraSource is not a utility and does not own or control the utility poles at issue.¹⁰ RCN argues that because InfraSource and PECO Energy Company ("PECO"), the owner of the poles, have the same parent company, they can be grouped together as a single "utility enterprise."¹¹ Not surprisingly, RCN cites no authority for this proposition. In fact, established authority is squarely against it. As a general matter, the separate legal identity of companies in the same corporate family is well-recognized in American jurisprudence.¹² More specifically, the United States District Court for the Eastern District of Virginia recently ruled that under the Pole Attachments Act, jurisdiction over a utility does not automatically give rise to jurisdiction over non-utility entities with the same parent company.¹³ RCN's novel theory is thus unsustainable as a matter of law.¹⁴

III. INFRASOURCE'S PROCEDURAL ARGUMENTS ARE PROCEDURALLY PROPER

5. RCN asserts that two of InfraSource's procedural arguments are themselves procedurally improper: (1) that the Amended Complaint improperly contains make-ready

File No. PA 01-003, *Petition for Reconsideration of InfraSource, Inc.*, pp. 4-6 (filed Jan. 17, 2003).

¹⁰ *Opposition of RCN Telecom Services of Philadelphia, Inc. to Petition for Reconsideration of InfraSource, Inc.* at 3-4.

¹¹ *Id.* at 3.

¹² *United States v. Best Foods*, 524 U.S. 51, 61 (1998).

¹³ *UCA, L.L.C. v. Lansdowne Community Development, L.L.C.*, 215 F. Supp.2d 742, 756-57 (E.D. Va. 2002).

¹⁴ Additionally, as noted above, RCN has conceded that InfraSource does not own or control any of the poles at issue in this case.

issues that were not raised in the initial Complaint and (2) that the Amended Complaint does not comply with FCC Rule Section 1.1404(k).¹⁵ RCN contends that because the Bureau did not reach these arguments in the *Phase I Order*, it was improper for InfraSource to assert them on reconsideration. However, as discussed above, parties are entitled to seek reconsideration on issues that were erroneously omitted from orders.¹⁶ Thus, InfraSource was well within its rights to assert that the Bureau should have ruled on these issues, and, in accordance with them, dismissed the Amended Complaint as to InfraSource.

6. RCN also contends that InfraSource's argument regarding the Amended Complaint containing make-ready allegations is untimely.¹⁷ RCN asserts that the Bureau "ruled" on this issue in an *Order* released June 1, 2001¹⁸ and that InfraSource was required to file any petitions for reconsideration within thirty days of that date.¹⁹ Contrary to RCN's assertion, however, the Bureau did not formally rule on this issue in the *Order*. The impetus for the *Order* was a motion for extension of time filed by PECO and InfraSource, and an examination of the ordering clauses shows that the Commission formally ruled only

¹⁵ *Petition for Reconsideration of InfraSource, Inc.* at 6-8; 47 C.F.R. § 1404(k) (2001).

¹⁶ In the Matter of American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint, File No. SAT-PDR-19990803-00077, *Memorandum Opinion and Order*, 15 FCC Rcd. 15448, 15450-51 (2000).

¹⁷ *Opposition of RCN Telecom Services of Philadelphia, Inc. to Petition for Reconsideration of InfraSource, Inc.* at 4.

¹⁸ In the Matter of RCN Telecom Services of Philadelphia, Inc., Complainant v. PECO Energy Company and Exelon Infrastructure Services, Inc., Respondents, File No. PA 01-003, *Order*, 16 FCC Rcd. 11857 (rel. June 1, 2001).

¹⁹ *Opposition of RCN Telecom Services of Philadelphia, Inc. to Petition for Reconsideration of InfraSource, Inc.* at 4.

on that motion.²⁰ Additionally, even if the Bureau had formally ruled on the propriety of inclusion of make-ready claims in the Amended Complaint, InfraSource could not have petitioned for reconsideration at that time because the Commission's rules prohibit the filing of petitions for reconsideration of interlocutory rulings. FCC Rule Section 1.106(a)(1) states that "[p]etitions for reconsideration of [interlocutory actions other than those designating a case for hearing] will not be entertained".²¹ Therefore, InfraSource's argument, as raised in a petition for reconsideration of a final order (the *Phase I Order*), was timely.

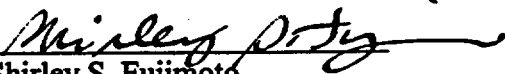
²⁰ *Order* at 11859.

²¹ 47 C.F.R. § 1.106(a)(1) (2001). *See also* 47 C.F.R. § 1.102(b)(2) (2001) (petitions for reconsideration of interlocutory actions will not be entertained in non-hearing actions conducted pursuant to delegated authority).

7. WHEREFORE, THE PREMISES CONSIDERED, InfraSource respectfully requests that the Bureau consider this Reply and proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

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Dated: February 3, 2003

CERTIFICATE OF SERVICE

I, Gloria Smith, do hereby certify that on this 3rd day of February 2003, a copy of the foregoing "Reply of InfraSource Incorporated" was mailed via U.S. Mail, postage prepaid to each of the following:

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