

# Regulatory Analysis Form

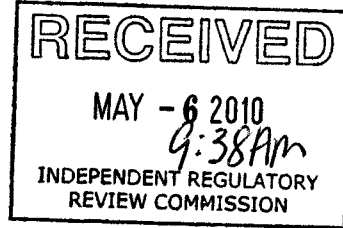
(Completed by Promulgating Agency)



# IRRC

Independent Regulatory Review Commission

## SECTION I: PROFILE



(1) Agency:

Pennsylvania Public Utility Commission

(2) Agency Number:

Identification Number: L-00070188/57-260

IRRC Number:

2673

(3) Short Title:

Rulemaking to Amend Chapter 63 Regulations so as to Streamline Procedures for Commission Review of Transfer of Control and Affiliate Filings for Telecommunications Carriers

(4) PA Code Cite:

52 Pa. Code §§ 63.321-326.

(5) Agency Contacts (List Telephone Number, Address, Fax Number and Email Address):

Primary Contact: Joseph K. Witmer, (717) 787-3663

Secondary Contact: Kathryn Sophy, (717) 783-2810

(6) Primary Contact for Public Comments (List Telephone Number, Address, Fax Number and Email Address) – Complete if different from #5:

(All Comments will appear on IRRC'S website)

(7) Type of Rulemaking (check applicable box):

Proposed Regulation

Final Regulation

Final Omitted Regulation

Emergency Certification Regulation;

Certification by the Governor

Certification by the Attorney General

## Regulatory Analysis Form

(8) Briefly explain the regulation in clear and nontechnical language. (100 words or less).

The final rules create a three-tier structure for review and approval of a telecommunications public utility application for a transfer of control and issuance of the Certificate of Public Convenience evidencing that approval as required by Sections 1102 and 1103(a) of the Public Utility Code. Currently, there is no timeline for approving an application nor issuing a certificates when the application is not protested.

The three-tiered reviews are *Pro Forma* review (30 days), *General Rule* review (60 days), and *Traditional Rule* review (unlimited).

*Pro Forma* review of an application that is not protested occurs no later than thirty days after a protest period expires. This applies to applications that do not change rates or terms and conditions of service or does not transfer control greater than twenty percent.

*General Rule* review of an application that is not protested occurs no later than sixty days after a protest period expires. This applies to applications that change rates or terms of service or have a transfer of control greater than twenty percent.

*Traditional Rule* is the current practice of unlimited review. This applies apply to protested applications or where longer review is needed because of a new or novel issue or when it is in the public interest.

Every application asking for *Pro Forma*, *General Rule*, or *Traditional Rule* review will have to file uniform preliminary information to facilitate faster review. Every application will be published in the *Pennsylvania Bulletin* and have a fifteen day protest period. If no protest is filed, an application will be reviewed as a *Pro Forma* or *General Rule* transfer. If a protest is filed, the application is subject to *Traditional Rule* review. The application and updates are filed with the Commission and the Statutory Advocates i.e., the Office of Consumer Advocate, the Office of Small Business Advocate, and the Office of Trial Staff. Advance notice is provided to consumer to minimize their filing of formal protests.

(9) Include a schedule for review of the regulation including:

- |   |                      |
|---|----------------------|
| A. The date by which the agency must receive public comments:                               | May 8, 2008          |
| B. The date or dates on which public meetings or hearings will be held:                     | June 2008 – May 2009 |
| C. The expected date of promulgation of the proposed regulation as a final-form regulation: | May 8, 2010          |
| D. The expected effective date of the final-form regulation:                                | Upon publication     |

## Regulatory Analysis Form

E. The date by which compliance with the final-form regulation will be required:

Upon publication

F. The date by which required permits, licenses or other approvals must be obtained:

N/A

(10) Provide the schedule for continual review of the regulation.

A schedule for continual review of the final regulations is unnecessary because they establish timelines for Commission review and approval of transfers of control. The Commission will monitor the operation of the rules for improvements and amendments when that becomes necessary.

## SECTION II: STATEMENT OF NEED

(11) State the statutory authority for the regulation. Include specific statutory citation.

66 Pa.C.S. § 1102 (obtaining a Certificate of Public Convenience approving a transfer of control), 1103(a) (authority to impose conditions on a Certificate of Public Convenience issued under 1102(a), 66 Pa.C.S. §§ 3019(b)(4) (authority of the Commission to condition a sale, merger, acquisition, or other transaction required to be approved under 1102(a)(3) (relating to acts requiring a certificate) to ensure no reduction in an advanced service or broadband deployment obligation), 3016(f)(1) (prohibition against cross-subsidization).

There is no time limit for reviewing any application for approval of a proposed transfer of control. This causes considerable uncertainty and unpredictability to an applicant seeking approval in Pennsylvania.

The final regulations address this uncertainty by considerably shortening the review and approval period. The Commission can act on applications that are not protested within 30 or 60 days. Currently, those applications have no timeline for review and approval.

(12) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

The final regulations are not mandated by any federal or state law. The final regulations authorize the Commission to review and act upon an application for approval of a telecommunications public utility transfer of control in a more timely fashion. The Public Utility Code does not impose any timeline for review and approval. The final rules make Commission review and approval more predictable.

## Regulatory Analysis Form

(13) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

The final regulation addresses a real need for a more predictable process and time period for reviewing and approving transfers of control that are not the subject of a formal protest or complaint under the Public Utility Code. This is needed given the pace of technological change, changes in the market, and Commission regulatory action.

Today, the Public Utility Code and the Commission's regulations impose no specific timeline. The final regulations impose timelines in a "competitively neutral" manner by allowing any incumbent or competitive carriers to seek abbreviated review depending, again, on the nature of the proposed transfer. The final rules have uniform filing, notice, and review processes to minimize formal protests and, importantly, establish faster review and approval is no one files a protest.

(14) If scientific data, studies, references are used to justify this regulation, please submit material with the regulatory package. Please provide full citation and/or links to internet source.

Not Applicable.

(15) Describe who and how many will be adversely affected by the regulation. How are they affected?

No persons, groups, or entities will be adversely affected by the final regulations.

(16) List the persons, groups or entities that will be required to comply with the regulation. Approximate the number of people who will be required to comply.

All Pennsylvania telecommunications providers, incumbent or competitor alike, will have to file the required documentation and obtain Commission approval using one of three time periods established for reviewing and acting on any merger or transfer of control subject to the Public Utility Code.

## SECTION III: COST AND IMPACT ANALYSIS

(17) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

The final regulations should reduce costs for the regulated community, the Commission, and the Statutory Advocates when an application for review and approval of a transfer of control is subject to Pennsylvania law. The final rules create a three-tier review and approval timeline. This provides more predictability, certainty, and uniformity for applications that are not protested compared to the current practice in which there is no timeline for reviewing and approving an application that is not protested.

Applicants can now seek 30 or 60 day abbreviated review and approval period if there is no protest. Applicants should realize savings in getting the need approvals in Pennsylvania compared to other states. The savings in time and resources cannot be quantified since they will vary depending on the nature, size, and scope of a transaction subject to Pennsylvania approval.

(18) Provide a specific estimate of the costs and/or savings to **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

The final regulations impose no requirements on local governments.

(19) Provide a specific estimate of the costs and/or savings to **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

The final regulations impose no requirements on state government.

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

N/A

|                            | Current FY<br>Year | FY +1<br>Year | FY +2<br>Year | FY +3<br>Year | FY +4<br>Year | FY +5<br>Year |
|----------------------------|--------------------|---------------|---------------|---------------|---------------|---------------|
| <b>SAVINGS:</b>            | \$                 | \$            | \$            | \$            | \$            | \$            |
| <b>Regulated Community</b> |                    |               |               |               |               |               |
| <b>Local Government</b>    |                    |               |               |               |               |               |
| <b>State Government</b>    |                    |               |               |               |               |               |

## Regulatory Analysis Form

|                             |  |  |  |  |  |  |
|-----------------------------|--|--|--|--|--|--|
| <b>Total Savings</b>        |  |  |  |  |  |  |
| <b>COSTS:</b>               |  |  |  |  |  |  |
| <b>Regulated Community</b>  |  |  |  |  |  |  |
| <b>Local Government</b>     |  |  |  |  |  |  |
| <b>State Government</b>     |  |  |  |  |  |  |
| <b>Total Costs</b>          |  |  |  |  |  |  |
| <b>REVENUE LOSSES:</b>      |  |  |  |  |  |  |
| <b>Regulated Community</b>  |  |  |  |  |  |  |
| <b>Local Government</b>     |  |  |  |  |  |  |
| <b>State Government</b>     |  |  |  |  |  |  |
| <b>Total Revenue Losses</b> |  |  |  |  |  |  |

(20a) Provide the past three year expenditure history for programs affected by the regulation.

| Program | FY -3 | FY -2 | FY -1 | Current FY |
|---------|-------|-------|-------|------------|
|         |       |       |       |            |
|         |       |       |       |            |
|         |       |       |       |            |
|         |       |       |       |            |
|         |       |       |       |            |
|         |       |       |       |            |
|         |       |       |       |            |
|         |       |       |       |            |

See explanation in Question 20(a).

(21) Explain how the benefits of the regulation outweigh any cost and adverse effects.

The final rules impose no additional costs on the regulated community. The final rules should save time and resources reviewing and approving applications that are not protested. The final rules provide Pennsylvania review and approval of a transaction within 30 or 60 days after a protest period expires. The savings are hard to quantify. They will vary depending on the nature, size, and scope of any application seeking Commission approval. There are no additional costs to state or local government.

## Regulatory Analysis Form

(22) Describe the communications with and input from the public and any advisory council/group in the development and drafting of the regulation. List the specific persons and/or groups who were involved.

Proposed regulations were published after comments and reply comments were received from the public.

The final rules were adopted following review of the comments and reply comments of the Broadband Cable Association of Pennsylvania (BCAP), the Independent Regulatory Review Commission (IRRC), Level 3 Communications (Petitioner), Office of Consumer Advocate (OCA), Office of Small Business Advocate (OSBA), Pennsylvania Telephone Association (PTA), Verizon Communications (Verizon), and Windstream Communications (Windstream).

The final rules were adopted after meetings of a Working Group consisting of those entities that submitted filings. The Working Group met in response to suggestions from IRRC and other parties. The Working Group started meeting in June 2008 and submitted the last round of proposals and replies in November 2009, four months before adoption of these final rules. The final rules establish uniform filing, notice, due process, and review and approval procedures based on the filings and the Working Group suggestions.

(23) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

Other nonregulatory alternatives could not be considered. Applications for transfer of control of a telecommunications public utility are subject to Sections 1102 and 1103(a), 66 Pa.C.S. §§ 1102 and 1103(a), of the Public Utility Code.

Several regulatory alternatives were considered and rejected. The first one was a proposal to abandon the proposed rulemaking and preserve the status quo. This was rejected given the opinions expressed that rules were a good idea given the need for predictability and the reality of technological change. The final rules provide for abbreviated review in a manner that is consistent with due process, notice, and an opportunity to be heard.

The second one provided shortened review and approval but only for competitive carriers and not incumbent carriers. This was rejected because it was not competitively neutral.

The third one would have limited the trigger for traditional unlimited review only if the OCA, OSBA, or OTS filed a formal complaint. This was rejected given the exclusion of equal treatment for the formal complaints of private parties, particularly BCAP. IRRC expressed a similar concern.

The fourth one would have published some application in the *Pennsylvania Bulletin* but not others. This was rejected given the concern for public notice, due process, and information on the filing of any application. IRRC expressed a similar concern and suggested that all applications be treated alike.

## Regulatory Analysis Form

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

The final regulations are modeled on those in effect at the Federal Communications Commission. The final rules are more stringent because they give every applicant, not just competitors, a right to abbreviated review. The FCC rules only provide that to competitive carriers because they are “non-dominant carriers” compared to incumbents who are considered to have market dominance.

The final rules are also more stringent in three respects. First, they reflect Pennsylvania-specific law and precedent governing merger transfers of control which, under *City of York*, 295 A.2d 825 (Pa. 1972), require that a merger affirmatively benefit the public in some substantial way. Second, the final rules require findings to meet the Section 1103(a) standard for making findings that a Certificate of Public Convenience is necessary or proper for the service, accommodation, convenience, or safety of the public. Finally, the regulations require filings which address the impact of a transfer of control on competition, another specific Pennsylvania mandate.

(25) How does this regulation compare with those of other states? How will this affect Pennsylvania’s ability to compete with other states?

The final regulations reflect regulations and processes considered and adopted in other states. The final regulations do not put Pennsylvania at a competitive disadvantage. The final regulations provide a competitive advantage compared to other states because the final regulations allow any Pennsylvania carrier, not just a competitor, to obtain abbreviated review. This reduces regulatory compliance costs and makes Pennsylvania a more attractive location for operations.

(26) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

The final rules benefit the promulgating agency (the Commission), the regulated community (telecommunications carriers with Pennsylvania Certificates of Convenience), and the Statutory Advocates (OCA, OSBA, and OTS). They shorten staff time dedicated to reviewing and approving applications that are not protested. They provide the public and the regulated community with uniform filing, notice, due process requirements that shorten review and approval in cases where an application is not protested. The abbreviated review for applications particularly benefits the regulated community in Section 63.324 and 63.325 by providing abbreviated review if there are no protests.



## Regulatory Analysis Form

(27) Submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

Presently, applicants seeking approval of a transfer of control in Pennsylvania submit required information at different times and in different manners, often in a litigated administrative proceeding. The final regulation requires the applicant to submit all the necessary information in one filing. This is less costly and time consuming than having to provide similar information in multiple filings when the transfer of control is subject to Sections 1102 and 1103(a). The absence of formal filing requirements and procedures for abbreviated review and approval made approval in Pennsylvania unpredictable.

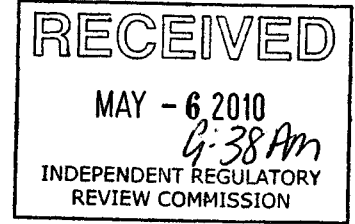
The final rules create uniform filing, notice, and due process requirements that facilitate faster review and approval of a transfer of control subject to Pennsylvania law. The combination of filing requirements and reduction in litigation costs is a benefit to public and private parties.

(28) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

The final regulations address the particular needs of applicants, small businesses, and consumers with a uniform procedure in which every application will be published in the *Pennsylvania Bulletin*, every application will contain a fifteen day protest period, and the filing of any formal complaint or protest will subject an applicant seeking shorter review (within 30 or 60 days) to the unlimited review for all applications. The rules require advance notice to consumers to minimize their concerns and the filing of formal protests or complaints.

The final rules allow an applicant to seek abbreviated review, which did not exist before the final rules, in a much shorter time period if no protest is filed. This is an improvement over the current practice in which an application that is not protested is subject to an unlimited, and unpredictable, review period.

**FACE SHEET  
FOR FILING DOCUMENTS  
WITH THE LEGISLATIVE REFERENCE BUREAU  
(Pursuant to Commonwealth Documents Law)**



DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to form and legality. Attorney General.

BY \_\_\_\_\_  
(DEPUTY ATTORNEY GENERAL)

\_\_\_\_\_  
DATE OF APPROVAL

Check if applicable  
Copy not approved. Objections attached

Copy below is hereby certified to be true and correct copy of a document issued, prescribed or promulgated by:

Pennsylvania Public Utility Commission  
(AGENCY)

DOCUMENT/FISCAL NOTE NO. L-00070188/57-260

DATE OF ADOPTION April 22, 2010

BY Rosemary Chiavetta

TITLE Secy  
(SECRETARY)

Copy below is hereby approved as to form and legality. Executive or independent Agencies.

BY Brian R. Pankiw  
Brian R. Pankiw  
Chief Counsel

4-22-10  
DATE OF APPROVAL

Check if applicable. No Attorney General approval or objection within 30 days after submission.

L-00070188/57-260  
Final Rulemaking  
To Streamline Procedures for Review of Transfer  
Of Control and Affiliate Filings for  
Telecommunications Carriers  
52 Pa. Code, Chapter 63

The Pennsylvania Public Utility Commission on April 22, 2010, adopted a final rulemaking order which sets forth amendments to Chapter 63 in order to streamline transfer of control and affiliate filings by telecommunications carriers. The contact person is Joseph Witmer, Law Bureau, 787-3663.

**EXECUTIVE SUMMARY**  
L-00070188/57-260

Rulemaking to Amend Chapter 63 Regulations so as to Streamline Procedures for  
Commission Review of Transfer of Control and Affiliate Filings for Telecommunications  
Carriers.  
52 Pa. Code, Sections 63.321 – 63.326

On April 22, 2010 the Pennsylvania Public Utility Commission (Commission or PUC) adopted an Opinion and Order approving final rules for Sections 63.321-63.326. The rules streamline the time period for reviewing and approving an application for a transfer of control filed with the Commission for a Certificate of Public Convenience under Sections 1102 and 1103(a) of the Public Utility Code (the *April Final Rules*). The *April Final Rules* address a proposed rulemaking issued on October 27, 2007 in the docket (*The October Rulemaking Order*).

The final rules contain revisions from the proposed rules. The revisions respond to Comments and Reply Comments filed by many parties. The final rules also adopt suggestions made to the Commission from a Working Group. The Commission convened that group at the suggestion of the Independent Regulatory Review Commission (IRRC) and the parties. The group met starting in June 2008 and filed the last round of responses in November 2009, four months before these final rules.

The final rules establish timelines for the review and approval of an application that reflect the pace of technological change in the telecommunications industry. Under the current practice, there is no timeline for reviewing applications that require a Certificate of Public Convenience under Sections 1102 and 1103.

The final rules establish a three-tier structure for reviewing an application and issuing a Certificate of Public Convenience. These are *Pro Forma*, *General Rule*, and *Traditional Review*.

*Pro Forma* review occurs no later than 30 days after notice in the *Pennsylvania Bulletin* and expiration of the protest period. *General Rule* occurs no later than 60 days

after notice in the *Pennsylvania Bulletin* and expiration of the protest period. *Traditional Rule* review occurs if a formal protest or complaint is filed to any *Pro Forma* or *General Rule* application or if an application presents novel issues or is in the public interest.

*Pro Forma* review applies to applications that do not affect rates or conditions of service or do not involve a transfer greater than twenty percent. *General Rule* review applies to applications that also change rates or conditions of service or involve a transfer of control greater than twenty percent. *Traditional Rule* review occurs if a protest is filed or if longer review is needed because an application presents new or novel issues.

The final rules require that an application is published in the *Pennsylvania Bulletin* with a fifteen day protest period. The notice will notify the public of any reclassification of an application. The final rules also provide that the filing of any formal protest or complaint within the protest period will subject an application to the unlimited timeline for review and approval now in place for every application under the existing *Traditional Rule*.

The final rules contain filing requirements that reflect FCC filing mandates or suggestions of the parties. Also, there are Pennsylvania-specific requirements that reflect Pennsylvania law. These include the obligation to demonstrate that an application will affirmatively benefit the public, contain findings concluding that issuance of a Certificate of Public Convenience is warranted, and analyze the impact that an application will have on competition. An applicant must provide a copy and updates to the Commission and the Statutory Advocates.

The final rules abandon proposed affiliate interest filing requirements that were aimed at ensuring compliance with Sections 3019(b)(4) and 3016(f)(1), 66 Pa.C.S. §§ 3019(b)(4) and 3016(f)(1). Instead, an applicant must file statements verifying that an application does not violate the prohibition against cross-subsidization and that the application complies with any broadband deployment or universal service commitments.

The contact person is Joseph K. Witmer, Esq. (717) 787-3663.

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg PA 17105-3265**

Public Meeting held April 22, 2010

Commissioners Present:

James H. Cawley, Chairman  
Tyrone J. Christy, Vice Chairman  
Wayne E. Gardner  
Robert F. Powelson

Rulemaking to Amend Chapter 63 Regulations so as to  
Streamline Procedures for Commission Review of  
Transfer of Control and Affiliate Filings for  
Telecommunications Carriers

Docket No. L-00070188

Petition of Level 3 Communications, LLC  
To Amend the Public Utility Commission  
Regulations to Streamline Transfer of Control and  
Affiliate Filing Requirements for Competitive Carriers

Docket No. P-00062222

**FINAL RULEMAKING ORDER**

**BY THE COMMISSION:**

Before the Commission for disposition is a staff recommendation on final rules addressing a Proposed Rulemaking adopted on September 27, 2007. The proposed rulemaking order granted an earlier Petition of Level 3 Communications, LLC (“Level 3”). Level 3 sought revision of the Commission’s rules and procedures governing transfers of control and affiliate filing requirements under 66 Pa.C.S. § 1102(a)(3) and 1103 for telecommunications public utilities, including the ancillary Certificate of Public Convenience evidencing Commission approval of a transfer.

The current regulations are set out as application filing requirements in sections 5.1, 5.11 and 5.43 of our regulations, 52 Pa. Code §§ 5.1, 5.11, and 5.43. Those procedural rules were substantially revised in 2006. The Commission has not revised its practice on reviewing applications for transfer of control other than issuance of a non-binding Policy Statement issued under Section 1102(a), 66 Pa.C.S. § 1102(a), and set forth in Section 69.901, 52 Pa. Code § 69.901 of our regulations.

*The Proposed Rules.* The proposed rules created a three-tier process for reviewing and approving applications for approval of transfers of control. The applications would be subject to Section 1102(a) and require issuance of a Certificate of Public Convenience under Section 1103(a). The first tier was the existing unlimited time span for an application. This was called *Traditional Review*. The second tier was a *General Review*. It was a shorter sixty day review and approval period for applications that involved rate changes, changed terms of service, or were a change of control exceeding twenty percent. The third tier was *Pro Forma* review. This was an even shorter thirty-day review and approval period for applications that did not change rates, that did not change terms of service, or that did not constitute a change of control greater than twenty percent.

Section 63.324 of the proposed regulations addresses *General Rule* review and approval. Section 63.325 of the proposed regulations addresses *Pro Forma* review and approval. The topics proposed in Section 324(a) through 324(l) were mirrored in Section 325(a) through 325(l).

*The Final Rules.* The final rules are promulgated even though some comments question the need for the regulation. IRRC asked the Commission to explain why this rulemaking is appropriate. The comments of the Office of Consumer Advocate (OCA) and the Office of Small Business Advocate (OSBA) (collectively Statutory Advocates) question whether this regulation is necessary. The Statutory Advocates urged the Commission to abandon the rulemaking.

We adopt final rules to address changes in technology and public utility regulation. The final rules reflect suggestions we received after we convened a working group, a group suggested by IRRC and Verizon. Commission staff met with and solicited concrete suggestions from the parties. Meetings were held starting in the Summer of 2008. The final filing was submitted in October 2009 and the final response was filed in November 2009. There was no consensus. The final rules address areas of disagreement and the comments, particularly from IRRC, for our consideration.

The final rules retain three tiers of review but with modifications addressing IRRC's concern for due process, notice, and reclassification. The final rules retain the *Traditional Rule* (current practice in which there is no limit to review), *General Rule* (review is completed within sixty days), and *Pro Forma* (review is completed within thirty days).<sup>1</sup> The final rules reinstate the twenty percent threshold, will publish every application in the *Pa. Bulletin*, and establish a fifteen day protest period. There is prior consumer notice. Reclassification notice occurs in the *Pa. Bulletin*. The trigger for review and approval now starts with expiration of the protest period.

There are new filing requirements that address comments asking for more detail. The rules publish an application, establish a fifteen day protest period, and will subject an application to *Traditional Rule* review if a formal protest or complaint is filed. Prior notice must be provided to consumers using a notice developed by the applicant with approval from the Bureau of Consumer Services. Any dispute between the applicant and the Bureau of Consumer Services can be appealed to the Commission mirroring the rules in Section 5.44 governing appeals from an action of staff. Commission approval will occur by Secretarial Letter or Order based on a review conducted under Section 63.324(h) of material filed in Section 324(d). This applies to *Pro Forma* as well.

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<sup>1</sup> Attached, as Appendix B, is a chart that summarizes the abbreviated processes for review of these applications.

## **Background**

Level 3 filed their Petition to open a Rulemaking on May 31, 2006. Level 3 provided copies to the OCA, OTS, OSBA consistent with Section 5.41(c) of the Commission's regulations. Level 3 also provided a copy to Verizon and the PTA as persons affected, consistent with Section 5.41(c).

The Level 3 Petition asked the Commission to initiate a rulemaking to streamline the administrative process by which certificated competitive carriers may complete transfers of control and affiliate transactions. Level 3 sought revision to the Commission's regulations arguing that the process imposes unnecessary and burdensome requirements on non-dominant, competitive carriers. Level 3 also contended that the public interest in a competitive environment does not require strict scrutiny of non-dominant carriers' transactions because those carriers lack control over bottleneck facilities and generally lack market power compared to other carriers.

The Commission's proposed rulemaking addressed acquisitions, diminutions in control, mergers, stock sales or transfers, and transfers of assets of a telecommunications public utility. We also concluded that affiliate interest filings should be addressed.

The Commission published the Proposed Rulemaking Order on February 9, 2008 in the *Pennsylvania Bulletin*, 38 Pa.B. 758. The Commission solicited Comments by April 8, 2008 and Reply Comments by May 8, 2008. Multiple parties submitted Comments and Reply Comments. IRRC submitted comments on June 9, 2009.

## **Discussion**

### **A. Disposition of IRRC's Comments**

IRRC submitted general concerns as well as comments on specific provisions of the proposed regulation. IRRC's comments on specific provisions are addressed in more



detail in the Extended Discussion of Annex A where we address the Comments and Replies of the other parties on the proposed sections.

This section will address IRRC's general concerns. We do so because those concerns raise basic issues about the need for this regulation. Disposition of those concerns also resolves many of IRRC's more specific comments as well.

*The Need for the Regulation.* IRRC questioned the need for the regulation and asked the Commission to provide information on the average length of time it takes to review applications and the number of applications that would be subject to the proposed three-tier levels of review. *IRRC Comments*, p. 2.

In response, the Commission notes that five applications seeking Commission approval for transactions in 2006 and 2007 that did not involve changes in rates or terms and conditions of service, i.e., *Pro Forma* transactions, were approved in time spans that ranged from 142 days to 310 days. One of these was litigated but the other four were settled by the parties. *PTA Comments*, p. 3.

The OCA also submitted a later filing to the working group in November 2009 that responded to a Level 3 filing (*OCA Response*). The *OCA Response* appended a chart supporting a claim that of the 114 applications filed by telephone companies pursuant to Section 1102 in 2008, two were protested and a hearing was held for one. All other Applications were not protested and there was no hearing. Moreover, the majority of those were decided in less than ninety (90) days. *OCA Response*, pp. 6-7.

In this battle of the statistics, we conclude that a two-year span of evidence showing review periods for five applications in 2006 and 2007 support the rulemaking compared to a one-year sample. However, we recognize that these same statistics and staff claims about a decline in the volume of applications could support a different result.

*Complexity of the Regulations and a Working Group.* IRRC provided a summary of the major provisions of the proposed regulations. IRRC raised concern about whether the complexity will undermine abbreviated review. IRRC urged the Commission to convene a working group to address the regulations. *IRRC Comments*, pp. 2-3.

The Commission agreed with IRRC and convened a working group on the proposed regulations. The working group met from June 2008 through May 2009. The working group solicited filings with suggestions. The last filing was submitted by Level 3 in October 2009. This triggered the *OCA Response* filed in November 2009. The Commission concludes that reliance on this working group's contribution, hopefully, has produced a better result compared to sole reliance on Comments and Replies.

*Secretarial Letters.* IRRC asked the Commission to explain how the proposed reliance on Secretarial Letters to approve applications in the proposed rulemaking was consistent with the Section 1103(a), 66 Pa.C.S. § 1103(a). Section 1103(a) mandates that a certificate of public convenience issued in response to an application must be done so by order of the Commission. *IRRC Comments*, pp. 1-2.

The Commission proposes to use Secretarial Letters for streamlined review and approval except in very limited circumstances where an Order may be better. Secretarial Letters may be issued at any time and are not limited to the Commission's public meeting schedule. Pennsylvania caselaw, particularly *West Penn Power v. PaPUC*, 100 A.2d 110, 113 (Pa. Super. Ct. 1953), holds that Secretarial Letters can be equivalent to a final and appealable order of the Commission. We use that approach in light of that precedent.

*Affiliate Interest Agreement Review.* IRRC also questioned whether the extensive proposal for reviewing telecommunications providers' affiliated interest agreements was consistent with Section 3019(b)(1) of Chapter 30, 66 Pa.C.S. § 3019(b)(1). Section 3019(b)(1) requires submission of affiliated interest agreements unless the

service is declared competitive. Any filing is for notice only and does not require Commission approval. *IRRC Comments*, p. 3.

Section 3019(b)(4) authorizes the Commission to condition any approval under Section 1101(a)(3), the subject of this rulemaking, to ensure there is no reduction in the broadband deployment obligations of the affected property or facilities. Moreover, Section 3016(f)(1) prohibits a carrier from using revenues from noncompetitive services to subsidize competitive service. The Commission relied on those ongoing mandates to develop a detailed filing and approval requirement.

In response to IRRC's concern, this provision is deleted in its entirety. Instead, the Commission provides a Filing Requirement in Sections 63.324(d) and 325(d) that makes an applicant verify that the transaction complies with the cross-subsidization prohibition of Section 3016(f)(1). An applicant subject to any broadband deployment commitment or Carrier-of-Last-Resort obligation must also verify compliance with those requirements. Finally, an applicant must address competitive impact. These filing statement substitutes address IRRC's concern with new definitions and provisions that tried to do the same thing in Section 63.626 and throughout the proposed regulations.

*The City of York Standard.* IRRC asked the Commission to explain why the Commission's proposal does not violate the caselaw mandate "that a merger will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way" as set out in *Popowsky v. Pa. PUC*, 937 A.2d 1040 (Pa. 2007) and *City of York*, 295 A.2d 825 (Pa. 1972). *IRRC Comments*, pp. 3-4.

Initially, the proposed rules in Section 63.324(d)(11)(i) and (ii) for *General Rule* applications and Section 63.325(d)(11)(i) and (ii) for *Pro Forma* applications required the applicant to append a verified statement. The statement would show how the transaction (i) will service the public interest, convenience, and necessity and (ii) describe the general and specific affirmative public benefit to Pennsylvania consumers.

The proposed rule created two separate mandates for two distinct purposes. Sections 63.324(d)(11)(i) and 63.325(d)(11)(i) required the applicant to meet the Certificate of Public Convenience standard of Section 1103(a). Section 63.324(d)(11)(ii) and 63.325(d)(11)(ii), respectively, addressed the *City of York* standard.

In response to IRRC's concerns, the final rules delete these two sections in their entirety. Instead, the final rules at Section 63.324(d)(11)(i) and Section 63.325(d)(11)(i) reiterates word-for-word the standard referenced in the comment on the *City of York* standard language applicable to a merger. Sections 63.324(d)(11)(ii) and Section 63.325(d)(11)(ii) require an applicant to append verifications establishing how the transaction "is necessary or proper for the service, accommodation, convenience, or safety of the public" in order to address the finding mandate set out in Section 1103(a). Finally, the applicant must provide a verified statement on the transaction's impact on competition. This addresses that legal requirement. These provisions effectively negate the proposed regulations addressing market power, market share, or competitive impact.

*Adequate Review Periods for Pro Forma and General Rule Applications.* The next issue IRRC raises is whether the proposed thirty and sixty day review periods for *Pro Forma* and *General Rule* applications is sufficient for interested parties to review the filings. IRRC is particularly concerned that very short review periods will simply encourage more formal protests to allow more time for review. *IRRC Comments*, p. 4.

The final regulations retain the thirty and sixty day review periods in Sections 63.324 and 63.325, respectively. There are four important revisions which address IRRC's concern about adequate review time for participants and inadvertently encouraging the filing of formal protests or complaints to get more review time.

The Commission revised the final rules to address IRRC's concerns. Sections 63.324(c) and 63.325(c) require that a copy of an application and update be

provided to the Statutory Advocates. Section 63.324(f)(1) and Section 63.325(f)(2) publish an application in the *Pennsylvania Bulletin* to provide notice.

Section 63.324(f)(2) and Section 63.325(f)(2) establish a fifteen day protest period.

Sections 63.324(g) and 63.325(g) require prior consumer notice absent a waiver from the Commission. Sections 63.324(f)(3) and 63.325(f)(3) provide that the filing of a formal protest or complaint subjects an application to *Traditional review*.

Section 63.324(h)(1)-(4) and Section 63.325(h)(1)-(4) explains how Commission review is conducted. Sections 63.324(k) and 63.325(k) provide that Commission approval will occur by Secretarial Letter or Order as permitted by Pennsylvania law.

*Incumbent Broadband Deployment and COLR Obligations.* IRRC asked the Commission to explain why applications of an incumbent carrier are treated like those of a competitive carrier. IRRC questioned regulatory parity between incumbent and competitive carriers because incumbents have broadband deployment commitments in Section 3019(b)(4) of Chapter 30, 66 Pa.C.S. § 3019(b)(4), and Carrier-of-Last-Resort (COLR) obligations as an Eligible Telecommunications Carrier (ETC) under sections 214(e)(1) and (2) of federal law, 47 U.S.C. § 214(e)(1)-(2). *IRRC Comments*, p. 4.

In response to IRRC's concern, the final rules revise the applicant's filing requirements in Sections 63.624(d) and 63.625(d). Section 63.324(d)(21) and Section 63.325(d)(21) require an applicant with a broadband deployment commitment under state or federal law to verify compliance with that obligation. Section 63.324(d)(22) and Section 63.325(d)(22) require an application with an Eligible Telecommunications Carrier (ETC) obligation to verify compliance with that obligation.

The Commission notes that ETC designation is not, strictly speaking, equivalent to the COLR mandate associated with electric and/or gas utilities. Incumbent or competitive carriers can seek ETC status. The Commission has granted ETC status to incumbent and competitive providers. The FCC granted ETC status for some wireless

carriers in Pennsylvania because the Commission was initially reluctant to exercise jurisdiction on those requests. The Commission has since affirmatively decided to make wireless ETC designations as well.<sup>2</sup>

Any Commission or FCC grant of ETC status allows the provider to get federal universal service support to provide narrowband voice service throughout the service area for which the designation is received. ETC designation requests may, or may not, be equivalent to an incumbent carrier's entire service area depending on the designation. Any carrier can relinquish that designation and the "service area" is equivalent to a "study area" but only for rural carriers. The FCC is actively considering transitioning this ETC support from narrowband voice to broadband as well.

*Consumer Notification.* IRRC expressed concern with the different treatment of prior consumer notices and the filing of formal protests or complaints in *Pro Forma* applications compared to *General Rule* transactions. IRRC suggested uniformity. *IRRC Comments*, pp. 5 and 8.

The final form rules treat every formal protest or complaint as subjecting an application to *Traditional* review. An applicant must provide prior notice to consumers, a practice consistent with the current rules for Abandonment of Service at 52 Pa.Code § 63.301 et seq. The notice is prepared by the applicant and approved by the Commission's Bureau of Consumer Services (BCS) to ensure that consumers receive an understandable notice and to discourage the filing of formal protests or complaints. An Applicant can appeal any disagreement or determination directly to the Commission.

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<sup>2</sup> *Commission Exercise of Jurisdiction to Designate Wireless Carriers As An Eligible Telecommunications Carrier (ETC) Pursuant 47 U.S.C. §214(e)(2) of the Telecommunications Act of 1996 (TA-96)*, Docket No, M-00960799 (M-2009-2091317), Secretarial Letter issued on February 26, 2009.

## **B. Disposition of the Parties' Comments and Replies.**

As an initial matter, we note that any specific objection or proposal not otherwise addressed in the final rulemaking is denied.

### *1. Summary of the Comments and Replies.*

**Level 3.** Level 3 supported the proposed regulation. Level 3 particularly supported the solicitation of Comments and Reply Comments following publication in the *Bulletin*. Level 3 argued that the filing of a formal protest or complaint should not derail abbreviated review because doing so allows the filing party to effectively delay a proceeding for unrelated business or commercial purposes. Level 3 filed suggestions on Sections 63.324 and 63.326 that will be discussed at the appropriate section below.

*Level 3 Comments*, pp. 1-3.

Level 3 supported the IRRC and Verizon suggestion to convene a stakeholders' meetings. Level 3 would not deny incumbents an opportunity to use abbreviated review but would use Comments and Replies to qualify for that review. *Level 3 Reply Comments*, pp. 1-3.

Level 3 disputed the OCA's conclusion that procedural reformation violated applicable law. Level 3 noted the Pennsylvania Supreme Court's conclusion in *Elite Industries v. Pa. PUC*, 832 A.2d 428, 431-432 (Pa. 2003), that the Commission's mandate on regulations is "broad" and the courts defer to Commission regulations so long as they are not "so entirely at odds with fundamental principle so as to be a whim and not an exercise in judgment." Level 3 noted that Pennsylvania law has long considered Secretarial Letters to be equivalent to a final Commission Order. Level 3 disputed OCA's claim that thirty and sixty day review periods are impermissibly short. Level 3 notes that the regulations allow transactions to be reclassified and, moreover,

contain substantially more filing requirement at the initial stage of an application. Those requirements bolster the ability to review and grant an application while issuing a Certificate of Public Convenience in a shorter timeframe. This is consistent with Sections 1102 and 1103.

Level 3 cited the *Chester Water Authority v. Pa. PUC*, 868 A.2d 384, 390 (Pa. 2005) precedent to refute the OCA's claim that denial of a formal proceeding or hearing whenever a formal protest is filed violated Pennsylvania due process. Level 3 concluded that the same approach can be taken here regarding the formal protests filed by entities other than the Statutory Advocates. This is preferable to the current practice of mandating hearings every time someone files a formal protest or complaint. *Level 3 Reply Comments*, pp. 5-15. PTA agrees. *PTA Reply Comments*, p. 19.

**Neutral Tandem.** Neutral Tandem supported the proposed regulation. Neutral Tandem was concerned that the Filing Requirements set out in Sections 63.324(d)(12) and 63.325(d)(12) did not include provisions requiring applicants to disclose information about their regulatory compliance, including violations of federal or state law within the last three years; and alleged violations of federal or state law in a currently pending proceeding. *Neutral Tandem Comments*, pp. 1-4.

**Verizon.** Verizon generally supported the proposed regulations. Verizon proposed changes to simplify the rules using definitions in the Public Utility Code. Verizon also claimed that the *City of York*, 295 A.2d 825 (1972) standard, which requires that a merger affirmatively benefit the public, applies only to mergers so language expanding it beyond mergers is inappropriate. Finally, Verizon claimed that provisions which require Commission review and approval of affiliate transactions contradict Section 3019(b)(1) of the Public Utility Code, 66 Pa.C.S. § 3019(b)(1). *Verizon Comments*, pp. 1-11.



Verizon dismissed the due process concerns raised by OCA, OSBA, and BCAP. Verizon noted that regulatory review of regulated carriers remains a burden, particularly when competitive carriers like cable companies can freely complete the type of transactions contemplated under Sections 1102 and 1103 devoid of Commission review. *Verizon Reply Comments*, pp. 1-4. Verizon saw no basis for allowing competitors to obtain abbreviated review of their applications while denying that same option to incumbents. Verizon also opposed allowing any formal protest or complaint to interfere with a carrier's abbreviated review. Verizon opposed the increased filing requirements given their cost and burden on an applicant. *Verizon Reply Comments*, pp. 8-11.

**Windstream.** Windstream applauded the Commission's recognition of the need to change the Commission's review and approval process for regulated company transactions. Windstream asked the Commission to eliminate unlimited review under the *Traditional Rule* and replace it with a two-track system with strict timelines. Windstream noted that other regulatory agencies have streamlined their review and approval process to sixty to ninety days. Instead, Windstream proposed an additional review period of thirty days to accommodate a hearing. *Windstream Comments*, pp. 1-16.

**PTA.** PTA endorsed a rapid review process. The PTA noted that other states approve applications with no changes in rates or services much faster than Pennsylvania. PTA was concerned that entities used the Commission's process to file formal protests or complaints to extract some gain from the applicant regardless of the issues raised in a protest or complaint. PTA proposed that no protest or complaint automatically subject an application to longer review. The Commission should examine the interest in the application, the fact-specific basis for the protest, a demonstrated nexus to the transaction, and novel or important issues before the Commission sustains any protest or complaint. The PTA opposed changing the transfer of control threshold from 20% in the Policy Statement to 10% in the proposed rule. The affiliate interest requirements were a possible violation of Section 3019(b)(1) as well. *PTA Comments*, pp. 1-12.

PTA noted that the overwhelming number of mergers and acquisitions subject to Chapter 11 do not involve rates or changes in service and would be appropriate for abbreviated review. *PTA Reply Comments*, pp. 1-20.

**BCAP.** The Broadband Coalition of Pennsylvania (BCAP) proposed abbreviated review only for competitor carriers. BCAP opposed abbreviated review for incumbent applications given their market dominance. BCAP argued that Section 3011(11) only states that the Commission should, not must, make all regulations equal between incumbent and competitive carriers. BCAP also opposed including “information services” as a filing requirement because those services are beyond the Commission’s authority in Sections 1102 and 1103. *BCAP Comments*, pp. 1-24. BCAP opposed distinguishing between “rural” and “nonrural” carriers when it came to Commission review and approval of incumbent applications. *BCAP Comments*, pp. 24-26.

BCAP asked the Commission to allow abbreviated review for applications that contain proprietary information or seek a protective order. BCAP supported using the definitions set out in Chapter 30. BCAP supported automatically subjecting an application to unlimited *Traditional Rule* review if a Statutory Advocate filed a formal protest or complaint. BCAP also urged the same treatment for private parties. *BCAP Reply Comments*, pp. 1-7.

**OCA.** The Consumer Advocate (OCA) filed detailed Comments opposing the rulemaking in its entirety. Alternatively, the OCA proposed a series of limited rules that would be applicable only to competitive carriers. *OCA Comments*, pp. 1-36. The OCA argued that incumbent carriers should not be able to use abbreviated review because they have Carrier-of-Last-Resort (COLR) obligations under federal law and broadband deployment obligations under Section 3013(a), 66 Pa.C.S. § 3013(a), of the Public Utility Code. The OCA expressed concern that abbreviated review for incumbent applications will undermine those provisions. For those reasons, OCA limits abbreviated review to competitive carriers. *OCA Comments*, pp. 1-36.

The OCA proposed an alternative that would only be provided to competitive carriers and then only if the Commission persists in this rulemaking as opposed to complete withdrawal in its entirety. *OCA Comments*, pp. 29-35. The OCA proposed that all retail and wholesale customers, including interconnected carriers, be provided *direct notice* unless the interconnection agreement waives that notice requirement. The OCA would require that an application and all the accompanying information be provided to the Statutory Advocates and all affected parties on the same day it is filed with the Commission. The OCA would make applications involving abandonment or other consumer protections ineligible for abbreviated review. *OCA Comments*, pp. 29-32.

The OCA's Reply Comments opposed the proposed modifications of the carriers and PTA as well. *OCA Reply Comments*, pp. 1-15.

**OSBA.** The Office of Small Business Advocate recognized that the proposed rulemaking will create three levels of review but suggested that all mergers, acquisitions, or similar transactions involving LECs with substantial market shares be subject to *Traditional Rule* review unless the transaction is unopposed. The OSBA also appended a series of extensive technical amendments to their comments in support of their position. *OSBA Comments*, pp. 1-24.

The OSBA opposed the PTA's proposals to reduce the filing requirements, rely on competition, and require more specificity in protests or formal complaints because they eliminated review of potential market concentration. The OSBA opposed Verizon's proposals because an intervenor would have to meet a higher showing for their protest yet be deprived of the information needed to meet it. *OSBA Reply Comments*, pp. 5-7.

*The Working Group.*

The Commission received comments from the public, industry, the Statutory Advocates (Office of Consumer Advocate, Office of Small Business Advocate), and the

Independent Regulatory Review Commission (IRRC). In particular, IRRC and other comments urged the Commission to meet with interested stakeholders and resolve concerns about the scope, complexity, limited participation rights of some parties, and the relationship with Chapter 30 before developing final rules.

Commission staff met with stakeholders, particularly industry and the Statutory Advocates, to try and resolve these more contentious issues. Their positions often repeat ones set out in earlier filings. Level 3 did amend its position to support incumbent carrier use of abbreviated review instead of limiting it to only competitive carriers. This was a major concession that aided in developing the final rules. It also became evident that there would be no agreement on resolving some particularly contentious issues. These were (1) What Transactions Are Eligible for Abbreviated Review; (2) Which Carriers are Eligible to use Abbreviated Review; (3) the Effect of a Formal Complaint or Protest; (4) the Reclassification of a Transaction Under Abbreviated Review; and (5) the Commission Process Used to Approve *Pro Forma* or *General Rule* transactions.

## 2. *Disposition of the Five Major Issues.*

*Which Transactions Are Eligible for Abbreviated Review.* The final regulations are limited to the acquisitions, mergers, stock sales or transfers, transfers of assets and transfers of control listed in the proposed Purpose. These require submission of an application seeking Commission approval under Section 1102, 66 Pa.C.S. § 1102, and the required Certificate of Public Convenience governed by Section 1103, 66 Pa.C.S. § 1103, evidencing Commission approval of the application. The final rules exclude Securities Certificates or similar financial transactions. We prefer to limit the final rules to the proposed subjects because there were no extensive objections to these types of transactions. The final rules also exclude Diminution in Control based on the comments.

*Which Carriers Are Eligible for Abbreviated Review.* The final rules allow any applicant i.e., an incumbent or competitive carrier, to seek abbreviated review of their

applications. We recognize the continual assertion that abbreviated review should be limited to competitors or entities that clearly lack market power or control over bottleneck facilities. This assertion is less critical than developing a general rule applicable to all applicants. Abbreviated review for all applicants is preferable to allowing some applicants to get abbreviated review while denying that same relief to others based on current allegations about market power.

Market power is an elusive, complex, and changing term. For example, a current competitor with an overall small Pennsylvania market share may have a considerable market share of available Internet backbone facilities. On the other hand, a large Pennsylvania incumbent may have very little market share in critical Internet backbone facilities. This observation is evident in the variation in the comments on the extent and importance that competition should play in final rules. Compare *BCAP Comments*, pp. 13-17 (minimal competition) with *PTA Reply Comments*, pp. 8-13 (competition is robust and thriving).

A final rule should not rest on a preliminary determination about the market power of certain regulated carrier categories, where such a determination will then govern whether a carrier obtains abbreviated review for a change of control application.

Therefore, we conclude that it is more evenhanded to allow every applicant to seek abbreviated review so long as an applicant understands that formal protests or complaints may arise based on allegations of market power. This approach, coupled with published notice of all applications and allowing a protest period, is preferable to imposing detailed upfront filing mandates for some carriers while denying abbreviated review to others.

*The Effect of a Formal Protest or Complaint.* To facilitate abbreviated review, the proposed regulations confined the unlimited time span of the *Traditional Rule* to applications in which the Statutory Advocates filed a formal protest or review. This limited the ability of others to trigger a *Traditional Rule* proceeding.

There was substantial opposition to that proposal. The final regulations hold that the filing of any formal protest or complaint by any entity will trigger *Traditional Rule* review. This is current practice in virtually all other proceedings before the Commission. If, however, the formal protest or complaint does not raise material factual issues, formal evidentiary hearings would not be required as part of *Traditional Rule* review.<sup>3</sup> We conclude that technology and market changes do not justify departing from that rule for a discrete class of applications.

*Reclassification of a Transaction and Challenges to Reclassifications.* Presently, every application is subject to the unlimited review of the *Traditional Rule* if a formal protest is filed. The proposed rules continued the *Traditional Rule* but created two abbreviated review periods for faster review and approval. Most comments do not dispute reclassification although there is considerable disagreement over *when* the Commission will reclassify and *how* the applicant should receive notice.

As an initial matter, we adopt IRRC's suggestion that the publication requirements for *Pro Forma* transactions should mirror those set out for *General Rule* transactions, i.e., publication in the *Bulletin*. *IRRC Comments*, p. 8. This means that reclassification and notice must be reconciled with notice published in the *Pa. Bulletin*.

We conclude that any challenge to the reclassification should be filed during the fifteen day protest period following publication. The Commission will address challenges to reclassification during consideration of the application based on whether or not a formal protest or complaint to the application has been filed by any entity.

Under the final rules, notice will be published for the reclassification of every application in the *Pa. Bulletin*. A challenge to the Commission's proposed

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<sup>3</sup> The *Chester Water* decision held that Section 1103(b) did not require the Commission to hold evidentiary hearings when there were no material factual issues in dispute.

reclassification is not automatically subjected to *Traditional Rule* review. In cases where the application is reclassified and there is no formal protest or complaint, the Commission or staff will address the challenge during review and approval.

If, however, a formal protest or complaint to the filed transaction is filed in addition to any challenge to the Commission's proposed reclassification, the entire filing will be subject the application to the *Traditional Rule*. This is consistent with our determination that a filed formal protest or complaint subjects an application to *Traditional Rule* review. In that case, the reclassification and the formal protest or complaint will be disposed of during the *Traditional Rule* review.

We do not believe that a challenge standing alone should subject an unprotested *Pro Forma* or *General Rule* review to *Traditional Rule* review. That approach is punitive because a challenge to reclassifying an application becomes tantamount to a formal protest or complaint application even though there is no formal protest or complaint.

*Commission Review and Approval.* Most comments support abbreviated review for *Pro Forma* and *General Rule* applications although the OCA did oppose the rulemaking in its entirety. The final rules address IRRC concerns with notice of a transaction, due process opportunities to participate, and reclassification of an application, and how the Commission approves an application. *IRRC Comments*, pp. 4-8.

In response to IRRC concerns, we conclude that abbreviated review and approval of an unprotested *Pro Forma* or *General Rule* application should be similar although we modify the rules to address IRRC's concerns in several critical ways. First, every application will be now published in the *Pa. Bulletin*. Second, every notice will establish a fifteen day protest period. Third, every notice will inform the applicant and the public about any reclassification of an application. Also, consumers will receive prior notice.

The Commission will review and approve an unprotected *Pro Forma* application in a Secretarial Letter no later than thirty days after expiration of the protest period. Review can be completed quickly because there are no formal protests or complaints, there have been no rate changes, no changes in conditions of service, or the change in control is less than twenty percent.

The Commission will also review and approve an unprotected *General Rule* application using the same approach with the only difference being the timing of the approval. The application will be published, there will be a fifteen day protest period, and any reclassification will be contained in the notice. There will also be prior consumer notice. The major difference is that the Commission will review and approve an unprotected *General Rule* application by a Secretarial Letter at Public Meeting no later than sixty days after the protest period. Review is longer because, although the application is unprotected, the application contains rate changes, a change in the conditions of service, or the change of control exceeds twenty percent.

### 3. *Disposition of the Ancillary Issues.*

The ancillary issues were (1) Affiliated Interest filing requirements; (2) the 10% threshold; (3) the Filing Requirements; (4) using a “deemed approved” approach if an application is not approved by a date certain; (5) eligibility of applications with proprietary information or confidential agreements for abbreviated review; and (6) including “information services” and the Herfindahl-Hirschman Index (HHI) test for competition.

*Affiliated Interest Transactions.* The final rules delete the proposed Section 63.626 section in its entirety. Instead, the final rules require two requirements. Section 63.324(d)(11)(iii) and Section 63.325(d)(11)(iii) require an applicant to address competitive impact. Section 63.324(d)(23) and Section 63.325(d)(23) require an applicant to verify compliance with the prohibition against cross-subsidization under state and federal law, a prohibition set out in Section 3016(f)(1), 66 Pa.C.S. § 3016(f)(1).



*The 10% Threshold.* The final regulation retains the twenty percent threshold figure. This provides guidance to all applicants seeking review and approval of a transfer of control better than adherence to an FCC requirement for a discrete class of applicants.

*Revised Filing Requirements.* The Filing Requirements are revised to include Neutral Tandem’s suggestion to address regulatory compliance with state and federal law. The Filing Requirements also contain a verified statement in Sections 63.324(d)(11) and 63.325(d)(11) addressing the impact on competition in Pennsylvania.

*Deemed Approved.* The final rules abandon the “deemed approved” approach. Final rules in Sections 63.324(k) and Section 63.325(k) require the Commission to issue a determination based on facts set out in Sections 63.324(d)(11) and 63.325(d)(11)

This includes a holding that a merger will “affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way” as set out in *Popowsky v. Pa. PUC*, 937 A.2d 1040 (Pa. 2007) and *City of York*, 295 A.2d 825 (Pa. 1972). This includes findings to warrant issuance of a Certificate of Public Convenience in Section 1103(a), 66 Pa.C.S. § 1103(a) and addressing competitive impact.

The Commission will review an application in Sections 63.324(h)(1)-(4) and Sections 63.325(h)(1)-(4) when determining whether to approve an application in Section 63.324(k) or Section 63.325(k), respectively.

The Commission will act on an unopposed *Pro Forma* application no later than thirty days after expiration of the protest period. The Commission will act on an unopposed *General Rule* application no later than sixty days after expiration of the same protest period. However, a failure by the Commission to meet these deadlines will not result in a transaction being “deemed approved” under these regulations.

*Review of Applications Containing Proprietary Information.* The final regulations do not differentiate between applications with or without proprietary information. The final regulations publish all applications and establish a protest period of fifteen days under Section 5.14(d). This reflects IRRC's suggestion that all transactions be treated alike for public notice. Parties seeking access to that information can execute the necessary confidentiality agreement or seek appropriate relief from the Commission. The Statutory Advocates will receive a copy of the proposed transaction and they can execute any confidentiality agreement while the Commission sets the application for publication. This is consistent with BCAP's comments stating that transactions involving proprietary information should not be denied abbreviated review. *BCAP Reply Comments*, p. 2.

Consequently, there is no need to treat applications with proprietary information differently from applications that do not classify information as proprietary. We agree that there is no need to deny an applicant the opportunity to use abbreviated review simply because their filing may contain proprietary information or require an interested party to execute a confidentiality agreement.

*Inclusion of "Information Services" and the "Herfindahl-Hirschman Index" Competition Test.* The final regulations delete inclusion of Information Services, notwithstanding the increased convergence of telecommunications and information services. This avoids unsettled law on controversial issues. The Commission can revisit this issue later as appropriate.

The final regulations also delete the mandatory Herfindahl-Hirschman Index filing in favor of a general statement in the Section 63.324(d)(11) and 325(d)(11) Filing Requirements. An applicant must address competitive impact to meet that requirement of Pennsylvania law although a general statement is better than requiring an applicant to develop and fund a Herfindahl-Hirschman Index study that may not even interest anyone. That triggers unnecessary expense. Equally important, a party with that concern can file a formal protest or complaint and ensure a detailed consideration under *Traditional Rule*

review. We conclude it is better to examine a detailed concern afterwards instead of imposing a preliminary mandate to prepare a Herfindahl-Hirschman Index filing.

### **Extended Discussion of Annex A**

*Section 63.321. Purpose.* The provision details the types of applications for which a telecommunications public utility can seek Commission approval. This provision reflects the Commission's statutory authority to issue a certificate of public convenience evidencing the approval of the type of transactions in this section.

*Objections.* There were no objections.

*Disposition.* The final rules eliminate "Affiliate Interest" applications because we abandon that topic. The rules replace "transactions" with the phrase "an application seeking Commission approval." The phrase also uses the general term "applicant" because it is more encompassing than a more limited term for submissions seeking Commission approval under Section 1102(a), 66 Pa.C.S. § 1102(a) and a Certificate of Public Convenience under Section 1103, 66 Pa.C.S. § 1103. The final rules exclude Securities Certificates and Diminution of Control as well.

*Section 63.322. Definitions.*

*Objections.* There were objections to some of the definitions. They are disposed of on a word-by-word basis in this section.

The proposed rules contained definitions for "Affiliated Interest," "Formal Complaint," "Formal Investigation," "Formal Proceeding," "Incumbent Local Exchange Carrier," "Informal Complaint," "Informal Investigation," "Informal Proceeding," "Party," "Pennsylvania Counsel," "Person," "Staff," "Statutory Advocate," and

“Verification.” These reflect definitions contained in the Public Utility Code or the Commission’s existing regulations at 52 Pa. Code §§ 1.1, 3.1 and 5.1, *et seq.*

*Objection and Disposition.* There were no objections to these long-standing terms. The final rules adopt them as set out in the proposed rulemaking.

The proposed rules set out definitions for “controlling interest” and “diminution in control” as a modified version of definitions set out in the Commission’s Policy Statement on Utility Stock Transfers at 52 Pa.Code § 69.901.

*Objection.* The use of a ten percent figure in these terms raised questions. IRRC asked the Commission to explain why the Commission used the ten percent figure as a threshold when the current Policy Statement on Utility Stock Transfers in Section 69.901(b)(2), 52 Pa.Code 69.901(b)(2) uses a twenty percent threshold. *IRRC Comments*, p. 4.

PTA believed that it is a mistake for the Commission to jettison its own rules in favor of simple uniformity with the FCC’s ten percent rule for regulated telecommunications companies. PTA noted that other Pennsylvania utilities will continue to follow the twenty percent rule. *PTA Comments*, p. 11.

*Disposition.* The final regulations delete the proposed ten percent figure and retain the twenty percent figures set out in the Commission’s *Policy Statement* at 52 Pa.Code § 69.901 *et seq.* The proposed percent figure reflects the figure used at the FCC in their *Streamlined Order* but it is not consistent with the Commission guidelines set out in the *Policy Statement*. The FCC figure would subject a greater number of relatively small transactions to regulatory approval with no discernible public benefit. The Commission supported efforts to mesh state mandates with federal mandates, *Proposed Rulemaking Order* (October 19, 2007) at 14; however, given the need for abbreviated review and current Commission guidelines, we prefer to use the twenty percent figure.

*Objection.* Level 3 is concerned about the lack of clarity on *how* the ten percent figure in the definitions is calculated. Level 3 notes a lack of clarity if the threshold is calculated based on assets and facilities “within Pennsylvania” or if assets and facilities are calculated on a “nationwide” basis. If the calculation is within Pennsylvania, a *General Rule* review could apply because the threshold is met. If assets and facilities were calculated nationwide, a *Pro Forma* review could apply as the threshold is not met. *Level 3 Comments*, pp. 4-5.

*Disposition.* On consideration, we agree with Level 3 that clarity is needed albeit limited to the twenty percent figure. The final definition for “controlling interest” will apply “within Pennsylvania” or “nationwide” whichever is larger. This provides certainty and maximizes use of the *Pro Forma* or *General Rule* using a twenty percent threshold.

*Objection.* Level 3 also believed that the ten percent threshold should not be used in Section 63.324(a)(3) to define diminution of control. Level 3 argues that the lower threshold would burden market transactions and is already covered by provisions addressing direct and indirect transfers of control anyway under Section 63.324(a)(2).

*Disposition.* We agree. The final rules strike Section 63.324(a)(3) and the definition. The definition appears to burden market transactions. The concern of that definition is addressed in Sections 63.324(a)(2) and 63.325(a)(2) as a matter of direct and indirect transfers of control. The final rules also remove the equivalent provision for *Pro Forma* review in Section 63.235(a)(3) for the same reason. We also delete the proposed ten percent threshold and reinstate the current twenty percent guideline figure instead.

*Objection.* IRRC noted that the term “information service” is used in several of these definitions. IRRC asks the Commission to explain why the definitions contain “information service” because at least one Comment thought the term is inappropriate. *IRRC Comments*, p. 4. BCAP opposed the inclusion of “information services” because

those services are beyond the Commission's authority under Sections 1102 and 1103. *BCAP Comments*, pp. 1-24. BCAP also notes that the term "competitive carrier" is defined only in the definitions section but is not used anywhere in the regulation so it should be deleted. *BCAP Comments*, p. 22, n. 51. Verizon suggested that the term be removed as well. *Verizon Comments*, Annex A, p. 3.

*Disposition.* We agree. The final regulations delete reference to "information service" in the definitions and regulations. We do so given the General Assembly's 2008 enactment of legislation concerning Internet Protocol (IP) enabled services in general and Voice over Internet Protocol (VoIP) in particular P.S. § 2251.1 et seq. The 2008 legislation restricted Commission authority in some areas, particularly the regulation of rates, terms and conditions of retail VoIP or IP-enabled services, although the Commission retained its authority in other areas.<sup>4</sup> Moreover, federal regulation and legislation in this area are constantly changing. The Commission can revisit this issue if or when that becomes appropriate. The final regulations delete "competitive carrier" given BCAP's observation.

*Objection.* Verizon proposed reliance on federal law and would limit definitions to Act 183 and the Public Utility Code, particularly for "telecommunications service," "telecommunications carrier" and "public utility." PTA and BCAP supported Verizon. *PTA Comments*, Annex A, pp. 1-3; *BCAP Comments*, pp. 21-23.

*Disposition.* We disagree. The proposed rules contain definitions that incorporate the very sections cited from the broader Public Utility Code while incorporating ancillary federal definitions that are neither new nor novel. The inclusion of federal definitions is more encompassing and consistent with our deleting terms for matters like information service, *dominant market power*, *predominant market presence*, and the *Herfindahl-Hirschman Index* because they were new or may be beyond our authority.

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<sup>4</sup> See generally *Palmerton Telephone Company v. Global NAPS South, Inc., et al.*, Docket No. C-2009-2093336, Order entered March 16, 2010.

We recognize the concern that deletion of the proposed definitions for “Dominant Market Power,” the “Herfindahl-Hirschman Index” (“HHI”), and “Predominant Market Presence” may be inadvisable. However, other comments make a compelling case for eliminating new definitions that create ambiguity even if they reflect current merger guidelines at the FCC<sup>5</sup> and the Department of Justice. We solve the issue by substituting a mandate that an applicant address competitive impact in Sections 63.324(d)(11) and 63.325(d)(11). A party with a greater concern can raise these FCC and U.S. Department of Justice (U.S. DOJ) principles by filing a formal protest or complaint and raising them in a *Traditional Rule* review.

The definition of *Pro Forma Transaction* reflects the FCC’s *Streamlined Regulation Order* and the Commission Policy Statement on Utility Stock Transfers. There is a new definition that addressed diminutions of the controlling interest of stock based on the twenty percent rule set out in the Commission’s *Policy Statement* at 52 Pa.Code 69.901. This definition also encompassed mundane and repetitive transactions that require an application and a certificate of public convenience but do not involve changes in rates and terms or conditions of service.

*Objection.* IRRC noted that the definitions define *Pro Forma Transaction* but fail to define *General Rule transaction*. *IRRC Comments*, p. 4.

*Disposition.* We agree. The critical difference between a *Pro Forma Transaction* abbreviated review and a *General Rule Transaction* abbreviated review turns on whether the application seeking abbreviated review contains rate changes, changes in terms or conditions of service, or whether the transfer of control is twenty percent or less. The final rule inserts a definition of a *General Rule Transaction* that is consistent with this distinction. The final rule also slightly revised the proposed definition for a *Pro Forma*

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<sup>5</sup> *Streamlined Regulation Order*, paragraph 28. The FCC carefully distinguishes between applicants that are not dominant with regard to “any service” compared to those that are dominant in one service and not another. This approach apparently reflects federal definitions of service set out in 47 USC 153.

*Transaction* that clearly distinguishes between the two abbreviated review procedures based on the twenty percent threshold for transfers of control. Finally, as noted earlier, “Diminution in control” is eliminated because the final rule eliminates that as well.

*Objection.* Level 3 identifies the lack of definition for two vaguely defined and ambiguous terms in Section 63.324(j)(2) for “major acquisition” or “substantial market shares” in the proposed regulations. Level 3 believes that this rule using these undefined terms is unnecessary because the Commission has built safeguards into the process sufficient to ensure that a transaction which raises concerns about major acquisitions or substantial market shares will not escape Commission review. Level 3 proposes definitions if the Commission retains this provision using those undefined terms. *Level 3 Comments*, pp. 12-13. Verizon and Windstream agree with Level 3. *Verizon Comments*, p. 8, n. 8; *Windstream Comments*, Annex A, pp. 17-19.

*Disposition.* We agree. The undefined terms in Section 63.324(j)(2) are as unnecessary as the provision, given the relationship between these related revisions in the final rules. The same applies to an identical Section 63.325(j)(2) provision as well.

The final rules contain three revisions resolving this concern. The final rules reinstate the long-standing practice that the filing of any formal protest or complaint by any entity triggers a *Traditional Rule* review. This ameliorates objections to differentiating between the treatment of Non-Statutory Advocate formal protests or complaints compared to those of a Statutory Advocate. The final rules also abandon attempts to detail concerns with market power and concerns like market share or major acquisitions, best represented in a proposed mandate to include an Herfindahl-Hirschman Index analysis. Instead, an applicant has to address competitive impact in a filing. Someone with more concerns can file a formal protest or complaint and examine the issue in a *Traditional Rule* review. The final rules delete a Herfindahl-Hirschman Index mandate consistent with these determinations.



*Objections.* IRRC noted the absence of definitions for “assets” and “customer base” used in Section 63.324(a). IRRC asked that both terms be defined. IRRC expressed the same concern for Section 63.625(a) as well. *IRRC Comments*, p. 5. Verizon suggested use of the term applicant as well. *Verizon Comments*, Annex A, p. 9.

*Disposition.* We agree. The Definitions in the final rules include a definition for “Assets” and “Customer Base” as well as “applicant” for clarity and consistency.

*Section 63.323. Applicability.* The proposed regulation formalized the scope of relief sought in the Level 3 Petition as well as the Comments and Reply Comments of Level 3, Verizon, and the PTA. This provision is consistent with the Commission’s authority to issue a certificate of public convenience granting an application to approve an acquisition, diminution in control, mergers, stock sales or transfers, and transfers of assets or control of a telecommunications public utility under Sections 1102(a) and 1103 and Chapter 30 of the Public Utility Code.

*Objection.* IRRC’s comments recommend amending the regulation to include a reference to a telecommunications public utility’s “affiliated interest” as well. *IRRC Comments*, p. 4.

*Disposition.* We agree. We also agree with IRRC that there is no need for an extensive provision detailing affiliated interest filing requirements in Section 63.626. The Commission deleted that provision given IRRC’s observation that the provision may violate the Section 3019(b), 66 Pa.C.S. § 3019(b), limitation on affiliated interest agreement review and approval. In addition, the detailed provisions are less effective than a verified statement confirming compliance with the prohibition against cross-subsidization under state and federal law, particularly Section 3016(f)(1), 66 Pa.C.S. § 3016(f)(1). A verified statement is simply an easier and less expensive way.

*Objection.* The OCA noted that, despite the reference to Section 1102(a)(3) of the Public Utility Code, however, the proposed language of Section 63.323 does not conform specifically to Section 1102(a)(3) because it does not include a reference to the applicant’s affiliated interests. The OCA proposes insertion of the clause “and an affiliated interest of a telecommunications public utility” to bring the provision completely within Section 1102(a)(3), 66 Pa.C.S. § 1102(a)(3). *OCA Comments*, p. 34; *OSBA Comments*, p. 7.

*Disposition.* We agree. The proposed rules contained detailed provisions in Section 63.326 governing Commission review and approval of affiliated interest transactions. The vast majority of the comments asked the Commission to explain how those detailed provisions were consistent with the language severely limiting Commission review and approval of affiliated interest transactions in Section 3019(b)(1) of Chapter 30, 66 Pa.C.S. § 3019(b)(1). The final rules removed that section in its entirety to avoid confusing affiliated interest transactions with the Commission’s residual authority to prevent cross-subsidization in Section 3016(f)(1) and review utility contracts under Section 2101(a).

We include this language with the caveat that the addition shall not be construed to mandate review and approval in a manner contrary to Section 3019(b)(1). This addition reflects the Commission’s authority under Sections 3019(b)(4) and 3016(f)(1), 66 Pa.C.S. §§ 3019(b)(4), 3016(f)(1).

*Section 63.324. General Rule Transaction.* The proposed regulation incorporated the parties’ suggestion that the Commission review mirror federal review by the FCC and the U.S. DOJ. The Commission proposed to complete review and approval of a *General Rule* transaction within sixty days after publication in the *Pennsylvania Bulletin*. This reduced the current unlimited review and approval time span under the *Traditional Rule*.

This provision was modeled on the FCC practice of dating the FCC's review period from posting at the FCC. In this case, however, web posting is not legal notice in Pennsylvania. The Commission concludes that if a transaction involved changes in conditions of service or rates, legal notice is preferable because it provides for a quicker review on transactions with issues of public concern.

*Section 63.324(a)(1)-(7).* The proposed regulation listed the transactions eligible for *General Rule* review under the sixty day rule. The list is greater than that proposed by the parties. More transactions are included so the Commission can refocus scarce resources on complex, novel, or controversial transactions.

*Objection.* Verizon suggests that, rather than trying to enumerate a list of transactions that might qualify as "general rule transactions," the Commission could merely refer to the transactions covered by 66 Pa. C.S. § 1102(a)(3) or (4) and preserve its right to reclassify particular transactions as *Pro Forma* applications or as outside the scope of the abbreviated review for good cause shown. *Verizon Comments*, pp. 5-6.

*Disposition.* The Commission acknowledges Verizon's point but will not make the revision. A general statement may have the virtue of being more encompassing but we conclude that a list minimizes the filing of formal protests or complaints while providing more clarity and better direction for future applicants.

*Section 63.324(a)(3).* The proposed regulation included any dilution in control greater than 10%. This addressed situations in recent mergers in which there was a significant dilution in a public utility's ownership of stock in the merged or spun-off entity even if there was no loss of control. In those instances, stock ownership was diluted but it never fell below a 51% ownership. In these situations, dilution in voting percentage transfers utility property by reducing but not changing public utility control. These kinds of transactions were included within the regulation because they are transfers of assets even if control is retained.

The proposed regulation included telecommunications utility stock transfers within the scope of the regulation and adopted the FCC's 10% threshold compared to the 20% reflected in the non-binding Policy Statement. The 10% threshold is based on the 10% relied on by the FCC in the *Streamlined Regulation Order*<sup>6</sup> and cited by Level 3 in their petition. The proposal also reflects similar decisions by other state regulators on affiliate transactions as well.<sup>7</sup>

*Objection.* Level 3 believed that the transaction described in Section 63.324(a)(3) should not be included under the general rule. In most instances, if a party reduces its ownership by ten percent or more, it may be adding a new minority owner or an existing owner may be increasing their ownership level. Level 3 believed this rule will have unintended consequences if for example a mutual fund or other investor accumulates more than ten percent of the stock of a company on the open market. They do not obtain a board seat or exert any control over the day to day operations of the company. In those circumstances, obtaining approval before that ten percent threshold is impossible. *Level 3 Comments*, p. 5.

*Disposition.* We agree with Level 3. Given our earlier agreement with Level 3's concerns about the definition, we also agree with Level 3 on the need for striking Section 63.324(a)(3) and the ancillary definition from the final rules. Level 3 presents a cogent argument that inclusion appears to burden market transactions, particularly when the concern in this section is already included within the direct and indirect transfers of control under Section 63.324(a)(2). The final rules also remove the equivalent provision for *Pro Forma* review in Section 63.235(a)(3) for the same reason and for consistency.

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<sup>6</sup> *Streamlined Regulation Order*, paragraph 30 and n. 65.

<sup>7</sup> *In the Matter of the Review of Chapter 4901:1-6, Ohio Administrative Code*, Case No. 06-1345-TP-ORD (June 6, 2007), Proposed Rule 4901:1-6-09(D) Affiliate Transactions, p. 48.

*Section 63.324(a)(6).* The proposed regulation included transfers of a customer base within the general rule if there is a change in terms of service or rates. Otherwise, a transfer of a customer base is a *Pro Forma Transaction* under Section 63.325. The Commission was concerned about customer impact and education, particularly in matters involving a change in rates or conditions of service. This is entirely consistent with the FCC's *Streamlined Regulation Order* and the Commission's current regulations governing Abandonment of Service at 52 Pa. Code § 63.301 *et seq*, particularly Section 63.305. The Commission has faced a lot of customer inquiries with transfers of a customer base, particularly where there are changes in rates or conditions of service. The lack of notice may, in the worst case, constitute a form of sanctioned slamming.

*Objections.* Level 3 did not object to the proposal but sought three clarifications. Level 3 notes that a customer base is an "asset" under Section 63.324(a)(1) and would be subject to the 10% threshold whereas the Section 63.324(a)(6) provision seems to contemplate a complete transfer of the customer base. There is uncertainty about how a partial transfer of a customer base is managed under the rules, particularly which provision will control. Level 3 also seeks to know if the "change in rates" provision includes rate reductions. Finally, Level 3 wants assurances that post-transaction rate changes through company integration would be done as a tariff filing. *IRRC Comments*, p. 5; *Level 3 Comments*, pp. 6-7.

*Disposition.* We agree with Level 3 on the need to explain the interplay of Section 324(a)(1) and Section 324(a)(6) albeit in a manner consistent with retention of the twenty percent threshold figure.

The transfer of a customer base without a change in rates or terms of service but exceeding twenty percent would be a transfer of an asset under Section 324(a)(1) and subject to *General Rule*. The same transfer of a customer base without a change in rates or terms of service under Section 324(a)(6) that is less than twenty percent would be a transfer of an asset under Section 325(a)(1) and, as a consequence, it would be subject to

*Pro Forma* review. The critical feature is the presence or absence of a change in rates or terms of service, including rate reductions. It is a change in rates, either an increase or a decrease, that is usually important to consumers. The final rules reflect that and, as Level 3 notes, a change following approval of an application would become a tariff issue.

*Section 63.324(b). Reclassification of a general rule transaction.* This provision addressed reclassification of a *General Rule Transaction*.

Section 63.324(b) stated that reclassification would favor a change to a *Pro Forma Transaction* classification. Section 63.324(b)(1)-(3) governed the new “trigger date” for review if a transaction is reclassified. In all instances, the “trigger date” would be the date the Commission informs the applicant of a reclassification. These provisions provided an applicant with a right of appeal directly to the Commission, using a process set out in Section 5.44 of our rules, if an applicant disputes reclassification.

*Objections.* IRRC recommended that the Statutory Advocates be given notice of any reclassification. *IRRC Comments*, p. 5. OSBA suggested language emphasizing the reclassification to *Pro Forma* review. *OSBA Comments*, Annex A, p. 8.

*Disposition.* In response to IRRC’s concern, the final rules will publish applications for transfers of control in the *Pa. Bulletin*. This notice allows the public, the Statutory Advocates, and the applicant to file a formal protest or complaint or challenge to a reclassification. That notice will contain any Section 63.324(b) or 63.325(b) reclassification. A reclassification challenge is filed during the fifteen day protest period.

The Commission will address any reclassification challenge involving an unprotested application during review and approval of the application. A challenge to any reclassification involving a protested application subjects the application to the *Traditional Rule* and, there, the challenge is considered in that review.

We do not think it appropriate to rule that an applicant's challenge to reclassification in an abbreviated review transaction subjects the application to *Traditional Rule* review in the absence of another filing of a formal protest or complaint that has already made the application a protested application.

*Section 63.324(c). Notification requirements for general rule transactions.* The proposed regulation contained a revised version of proposals presented by Level 3, Verizon, and the PTA.

Section 63.324(c) proposed that a filing be submitted no later than sixty days before the closing of any transaction. The Commission agreed with Verizon on the need for a viable period to trigger review. The Commission recognized that an applicant seeks approval on or right at the closing, not significantly after. By allowing a filing to occur forty-five, thirty, or fifteen days before a closing, the proposed sixty day review period would have extended beyond the closing. The proposed regulation contained a "trigger date" for filing sixty days *before* closing a transaction. Barring some unforeseen event, an applicant would have had Commission approval on or shortly near their anticipated closing date.

The proposed Sections 63.324(c)(1) through (4) adopted suggestions from Level 3 and Verizon that a filing be made at the time that any filing is made with the FCC or the U.S. DOJ. This provision also required additional notification on subsequent filings, including providing notice to the statutory advocates and the Commission.

Section 63.324(c)(5) required notifications if the Commission requires it in response to a request. The first would be at the request of a statutory advocate. The second would be at the request of another telecommunications public utility. The third and fourth are at the request of staff or a person or party with a stake in the transaction.

This provision required notification when a party does not file a protest or delay a proceeding but wants to keep abreast about a transaction. This provision provided an alternative to a formal adjudicatory proceeding in limited instances. The Commission proposed a viable and less expensive way of keeping abreast of a proceeding.<sup>8</sup>

*Objections.* OSBA wanted the rules to require the application to be served on the Statutory Advocates. *OSBA Comments*, Annex A, p. 8. Verizon would have deleted most of the filing requirements, limited the notice mandate to only those applications that required a certificate of public convenience, and filed the initial application on the same day as the first filing made with a federal agency. *Verizon Comments*, pp. 4-5. PTA did not think it necessary to require an applicant to respond to requests from the Statutory Advocates, other carriers, the Commission, or the public. *PTA Comments*, pp. 5-6.

*Disposition.* We agree with the OSBA that the Statutory Advocates should be provided copies of the application and any updates. We do not agree that service is required. That unnecessarily increases costs. Service is a legal requirement whereas providing a copy is a notice requirement. We agree with Verizon that an applicant should be allowed to file on the same date that they file with a federal agency. We also agree with Verizon that the term Applicant should be used as opposed to another term. *Verizon Comments, Annex A*, p. 9.

We disagree that substantial revision in the information requirements is necessary. The purpose of the information is to discourage the filing of formal complaints and protests simply to get information and updates. This keeps the public updated without making a formal filing that would also trigger *Traditional Rule* review.

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<sup>8</sup> *Telephone Company in Pennsylvania Eliminates Provisions Restricting Competition to Address Justice Department Concerns, Procompetitive Changes to Rural Incumbent Telephone Company's Settlements with New Entrants Will Deter Misuse of Regulatory Challenges and Benefit Rural Pennsylvania Telephone Customers*, United States Department of Justice, Antitrust Division, Press Release 07-448, June 25, 2007 (*Pennsylvania Telco Release*).



*Section 63.324(d). Contents of Notification for General Rule Transactions.* This provision detailed the upfront filing requirements. The list incorporated the filing requirements in Sections 5.14 of the Commission’s Rules of Administrative Practice and Procedure to promote consistency and self-contained provisions.

This provision relied on the detailed information requirements the FCC imposed on applicants for streamlined review in the *Streamlined Regulation Order*. The Commission’s review of the *Streamlined Regulation Order* identified significant information requirements beyond those identified in the comments. The Commission agreed that, in this instance, regulatory uniformity and predictability warranted reliance on these requirements as opposed to unique mandates for the Commission.

Section 63.324(d)(11) listed the affirmative benefits that an applicant must allege in support of an application. This facilitated compliance with the obligation under Pennsylvania law, set out in *City of York v. Pa. PUC*, 295 A.2d 825 (Pa. 1972) and *Popowsky v. Pa. PUC*, 937 A.2d 1040 (Pa. 2007) requiring that a merger demonstrate an affirmative public benefit. This provision allowed the Commission to determine when, and under what circumstances, conditions may be appropriate under Section 1103 to meet this requirement.

*Objection.* IRRC asked the Commission to explain how the regulations complied with the *City of York* standard of review. IRRC Comments, pp. 3-4.

*Disposition.* The final regulations reiterate word-for-word the *City of York* standard in Section 324(d)(11)(i) that will be applicable to a merger or similar transaction. This addresses the concern about not extending that precedent.

Section 324(d)(11)(ii) is revised to require an applicant to propose findings sufficient to meet the Section 1103(a) determination that a Certificate of Public

Convenience “is necessary or proper for the service, accommodation, convenience, or safety of the public.” This addresses OCA’s concern with making findings in a manner that is consistent with the Section 1103(a) obligation to make findings.

Section 324(d)(11)(iii) requires an applicant to append a verified statement on the transaction’s impact on competition in Pennsylvania. This effectively negates the need for other filing requirements on competition.

*Objection.* IRRC asked why incumbent carriers and competitive carriers had identical requirements in Sections 63.324(d) and 63.325(d) even though incumbents also had broadband deployment commitments and COLR obligations. *IRRC Comments*, p. 4.

*Disposition.* The final rules on filing requirements in Sections 63.324(d) and 63.325(d) contain two provisions requiring the applicant to address, as appropriate, their respective broadband deployment commitment in Section 63.324(d)(21) and their COLR obligation in Section 63.324(d)(22). These requirements are also set out in Sections 63.325(d)(21) and 63.325(d)(22) for *Pro Forma* applications. They are not limited to “ILECs” for the reasons set out below.

Currently, incumbent carriers have broadband deployment commitments under Section 3019(b) of Chapter 30, 66 Pa.C.S. § 3019(b). However, federal developments in pursuit of a National Broadband Plan issued in March 2010 envision reforming the federal Universal Service Fund (FUSF) to transition support from narrowband voice to deployment of a broadband network.

The proposal to only require incumbent carriers to address any broadband deployment commitment is an older paradigm undergoing rapid change, including current proposals to support broadband deployment commitments using federal grants and loans. Sections 63.324(d)(21) and 63.325(d)(21) require any applicant with a

broadband deployment commitment under state or federal law to address compliance with that commitment in Pennsylvania.

In recognition of IRRC's concern about COLR, the final regulation revised the applicant's filing requirements in Sections 63.624(d)(22) and 63.625(d)(22) to address that concern albeit one required of any applicant with an Eligible Telecommunications Carrier (ETC) status. An applicant with ETC status will have to file a verified statement affirming that they will continue to comply with the requirement.

*Objection.* The OSBA proposed that an applicant provide a verified statement addressing the expected effect on the applicant's capital structure over the next five years. *OSBA Comments*, pp. 9-10 and Annex A, p. 19.

*Disposition.* We agree. The final regulations in Sections 63.324(d)(20) and Section 63.325(d)(20) include the OSBA proposal. We use the term "applicant" here as well since it is more encompassing and Verizon's suggestion for clarity and consistency.

*Objection.* Neutral Tandem wants the Commission to require an applicant to provide information on their three-year history of regulatory compliance under state and federal law in Sections 63.324(d)(12). *Neutral Tandem Comments*, p 3.

*Disposition.* We agree. The final regulations in Section 63.324(d)(12) and Section 63.325(d)(12) adopt the proposed revision for clarity and consistency.

*Objection.* Level 3 raised concerns and proposed alternative language for Section 63.342(d)(6). Level 3 was concerned that the Section 63.324(d)(6) mandate to describe the geographic area was too broad, confusing, and would consume resources identifying every geographic calling area. Level 3 proposed, instead, a revision that the applicant provide "a summary of the services and service territories" impacted by the application. *Level 3 Comments*, pp. 7-8.

*Disposition.* We agree with Level 3. The final rules adopt the proposed language in Section 63.324(d)(6) and Section 63.325(d)(6).

*Objections.* Level 3 was concerned about the Section 63.324(d)(13) verified statement that every customer received notice. Level 3 thought this inadvisable because it is highly unlikely that individualized notices can be provided, securities law prevent giving notice until a transaction becomes public, and relying on billing inserts will delay the process because those can take up to sixty days. Level 3 proposed that the applicant affirm that “customers will receive” notice. *Level 3 Comments*, pp. 8-9.

IRRC asked how a verified statement that customers received notice for *General Rule* transactions in Section 63.324(d)(13) worked with a Section 63.324(g) requirement to provide notice to customers of a rate or terms of service change in consultation with the Commission’s Bureau of Consumer Service. *IRRC Comments*, pp. 5-6.

*Disposition.* We agree with IRRC and Level 3. A verified commitment to providing notice may be more workable for *General Rule* and *Pro Forma* abbreviated review applications. However, the Commission remains concerned that customers receive prior notice of an impending transaction, most particularly when the transaction involves a change in rate or terms of service – changes that subject an abbreviated review application to *General Rule* review. This rule is consistent with Section 63.305, 52 Pa.Code § 63.305, of our rules on abandonment of service by a local service provider.

The final regulations require an applicant to provide prior notice to the consumers. This requires an applicant to provide advance notice unless that is not practical, a possibility raised by Level 3. In that case, the applicant can seek a waiver of this requirement under Section 1.2 of our rules, 52 Pa.Code § 1.2. In either instance, the notice is prepared and approved by the applicant and the Bureau of Consumer Services. This ensures that consumers receive an understandable notice that should discourage the

filing of formal protests or complaints by a confused consumer. Moreover, any disagreement between an applicant and the Bureau of Consumer Services can be resolved by a direct appeal to the Commission mirroring the procedures set out in our current rule at Section 5.44, 52 Pa.Code § 5.44.

This approach is sound because the final rules require publication of an application seeking abbreviated review. Publication, notice, and protest give consumers and the Statutory Advocates information and a time period to decide on future action. Equally important, this will discourage the filing of those formal protests or complaints that will now subject a *General Rule* or *Pro Forma* application to *Traditional Rule* review.

This solution also addresses IRRC's concern about consistency with the prior notice provisions in Section 63.324(g) and the need to explain how the Commission's Bureau of Consumer Services will do this. Section 63.324(d)(13) required a verified statement that consumers received notice whereas Section 63.324(g) mandates the same except for good cause shown. In Section 63.324(g), moreover, the applicant must consult with the Commission's Bureau of Consumer Services to ensure the language is understandable and that the consumers receive all the relevant information.

Carriers have historically worked with the Bureau of Consumer Services on such notices, whether in advance or after the fact. This best ensures that consumers receive understandable notice about the transaction. This occurred informally.

The final rules anticipate that this informal process will continue here. In the unlikely event an applicant and the Commission staff are unable to agree on suitable language or what constitutes relevant information, the applicant can always appeal from staff action under Section 5.44 of our rules.

The final rules require an applicant to provide advance notice under Section 63.324(d)(13) and Section 63.325(d)(13) consistent with Section 63.324(g)

unless prior notice is not practical. In that case, a waiver granted under Section 1.2 of our rules allows the applicant to provide notice after the fact.

Transactions involving changes in rates or terms of service, particularly a change in their provider due to a transfer of a customer base, are far more compelling matters to consumers than concerns about competitive impact or transactions that may involve rates but not their consumer rates.

*Objection.* PTA expressed its preference for statements as opposed to verified statements. PTA also suggested that a reference to a pending matter in a federal agency occur also by the electronic location. PTA proposed elimination of the verified statements on “market power” in Sections 63.324(d)(11)(iii) and 63.324(d)(18), the verified statements and copies of other Pennsylvania certificates in Section 63.324(d)(14), and the verified statements regarding anticipated regulatory action at the federal level or by other states in Section 63.324(d)(17).

*Disposition.* We agree with PTA on Section 63.324(d)(18) and that an electronic reference to a pending matter should be provided but not in place of providing a copy.

We disagree with PTA on eliminating verified statements. Verified statements have clearer legal implications compared to statements. Given the importance of the applications and the public interest, the final regulations retain verified statements. We disagree on eliminating a requirement that an applicant provide verified copies of current Pennsylvania certificates. A complete and comprehensive understanding of an applicant’s operations in Pennsylvania is an important consideration. This is the same logic the Commission used for adopting Neutral Tandem’s proposed language on an applicant’s regulatory history as well.

*Objections.* Verizon would eliminate all verified statements going to eligibility for abbreviated review, the *City of York* standard, impacts on competition, and notices to consumers. *Verizon Comments, Annex A, pp. 5-8.*

*Disposition.* We conclude that retention of the proposed filing requirements, albeit with some modifications, is important for several reasons. The final filing requirement modifies information on the territory covered, deletes reference to undesirable provisions on competitive impact, and gives an applicant the secondary option of providing consumers notice after the fact when prior notice is not practical. The amended requirements now contained in a submitted application greatly assist the Commission and the public in quickly getting pertinent information about a transaction while reducing the filing of formal protests or complaints. Given that our final rules now hold that the filing of a formal protest or complaint subjects abbreviated review applications to *Traditional Rule* review, the submission of more information earlier is even more important to discourage the filing of formal protests or complaints.

*Section 63.324(e). Continuing Obligations for Notification of General Rule Transactions.* This provision reflected a determination that the Commission must be given updated notice and information about a pending proceeding. This maximized information and furthered the goal of making abbreviated review workable.

*Objections.* Verizon provided several proposed revisions to the applicant's ongoing obligation to keep the Commission and the interested public current on developments elsewhere if they pertain to an application for abbreviated review pending at the Commission. *Verizon Comments, Annex A, p. 8.*

*Disposition.* We agree with Verizon. The final rules are revised to incorporate much of Verizon's suggestion. The final rules adopt Verizon's proposal to inform the Statutory Advocates by providing notice and a copy but they do not impose a legal mandate to "serve" a copy. Instead, providing a copy should reduce costs.

*Section 63.324(f). Commission Publication of General Rule Transactions.* This provision incorporated current publication requirements for applications under Section 5.14 of the Commission’s Rules of Administrative Practice and Procedure. The provision requires notice to consumers for transfers of a customer base.

*Objections.* This was a particularly controversial part of the proposed regulation because it would allow some formal filings to be treated as “general comments” as opposed to a formal protest or complaint. Moreover, some formal protests or complaints would not warrant a hearing and unlimited review under *Traditional Review*.

IRRC thought that the proposal that the Commission “may” reclassify a transaction on the filing of a protest “unless shown otherwise for good cause” was vague. IRRC was concerned that the regulation did not identify how a *General Rule Transaction* would be reclassified. IRRC suggested that the Commission develop criteria used in making a reclassification determination. This concern applied to similar provisions in the *Pro Forma* proposed regulation at Section 63.325(f)(2)(ii). *IRRC Comments*, p. 4 and 5.

Some comments, particularly those of the Statutory Advocates and BCAP, raised due process concerns. *OSBA Reply Comments*, p. 7; *OCA Reply Comments*, pp. 7-20; *BCAP Comments*, pp. 17-23. Other comments, particularly those of Level 3, PTA, and Verizon, supported the proposal. They thought the proposal was consistent with due process while reducing the filing of formal protests or complaint for ancillary purposes. They also thought the proposal was entirely consistent with the *Chester Water Authority* holding that the Commission need not have a formal hearing on every formal protest, particularly when there are no material factual issues in dispute. *Level 3 Reply Comments*, pp. 5-12; *PTA Comments*, pp. 5-10; *PTA Reply Comments*, pp. 17-20.

*Disposition.* After careful consideration of this controversial proposal, we conclude that, although the comments raised legitimate concerns, the suggested



modifications are unworkable. Accordingly, we will continue our existing practice. The final rules continue the existing practice that the filing of any formal protest or complaint will subject that application to the *Traditional Rule*. Section 63.324(f)(2)(iii) is deleted in the final rules given that any formal protest or complaint against a *Pro Forma* or *General Rule* transaction subjects the transaction to *Traditional Rule* review. At the same time, however, if the formal protest or complaint does not raise any material factual disputes, the *Traditional Rule* review need not include evidentiary hearings.

*Section 63.324(g). Telecommunications public utility notice to customers.* The proposed Section 63.324(g)(1) required the applicant to prepare and distribute a prior notice to consumers with the approval of the Commission's Bureau of Consumer Services (BCS). BCS involvement was deemed appropriate because the transaction involved changes in conditions of service or rates, items of particular interest to customers. BCS' involvement would ensure a notice understandable to consumers.

Sections 63.324(g)(2)(i)-(iv) would have distinguished between a general comment that did not involve a formal protest and formal protests. Section 63.324(g)(2)(iii)-(iv) distinguished between formal protests filed by a statutory advocate and the formal protests of others.

*Objections.* IRRC raised three concerns and recommended that the *Pro Forma Transaction* requirements of Section 63.325(g)(1)-(2) mirror those of a *General Rule Transaction*. First, IRRC asked why a *Pro Forma* application did not require additional customer notice. Second, a formal protest filed to a *Pro Forma* application would not reclassify a transaction but one filed under the *General Rule* does. Third, Statutory Advocates' rights to file formal protests is set out for *General Rule* transactions but is not discussed for a *Pro Forma Transaction*. IRRC suggested the rules for a *Pro Forma Transaction* mirror those of a *General Rule Transaction*. *IRRC Comments*, pp. 6-8.

IRRC asked the Commission to explain how the requirement for a verified statement affirming prior consumer notice in the filing requirements provision in Section 63.624(d) and Section 63.625(d) meshed with provisions dispensing with that same mandate in Sections 63.324(g) and 63.325(g). IRRC also asked if the applicant would have to secure BCS approval and, if so, how that would work. Finally, IRRC asked how disagreements would be solved. *IRRC Comments*, pp. 5-6.

*Disposition.* IRRC raises some valid points. The final rules in Section 63.324(g)(1) and (g)(2) and Section 63.325(g)(1)-(2) are consistent with each other. The final rules are revised so that the Commission's disposition of a Section 63.324(d)(13) mandate for a verified statement on prior notice meshes with Sections 63.324(g) and Section 63.325(g). The final rules now uniformly require prior notice to consumers. An applicant can seek a waiver under Section 1.2 of our rules, 52 Pa. Code § 1.2, if prior notice is not practical.

An issue arose about the management of consumer notices when there are transfers of a customer base. These transfers occur frequently but have been rarely addressed until now. These transfers often occur with no prior consumer notice let alone consent. The final regulations resolve this problem by reconciling notice with any pressing need for rapid approval. This reasoning applies with equal force to a *Pro Forma Transaction* in Section 63.325(g)(1)-(2).

Moreover, prior notice is consistent with current regulations governing abandonments of service at 52 Pa.Code § 63.301 et seq., particularly Section 63.305. A prior notice that is understandable to consumers will discourage formal filings and promote abbreviated review. Any disagreements on the notice between an applicant and staff can be resolved with an appeal to the Commission mirroring the rules in Section 5.44, 52 Pa.Code § 5.44. Consequently, the final form regulations will require customer notice for a transaction which transfers a customer base, even in the absence of a change in rates or terms of service.

*Section 63.324(h). Commission Review of Transactions Subject to the General Rule.* This provision formalized the Commission's discretionary authority under Sections 1102(a)(3) and 1103 of the Public Utility Code, particularly when the imposition of conditions for approval of the transactions is in the public interest. Discretion on the matter of conditions was consistent with due process.

*Objections.* The OCA expressed concern that the proposed rules did not make the requisite findings, did not provide time to review the applications, and did not differentiate between incumbent and competitive carriers. The OCA recommended using a process that is open and flexible enough to allow for protests. *OCA Comments*, pp. 15-19; *OCA Reply Comments*, pp. 1-23, esp. 4-6. Verizon proposed language revisions to clarify that it is the application, not the transactions, reviewed and approved by the Commission. *Verizon Comments*, Annex A, p. 9.

*Disposition.* We agree that revisions are appropriate for clarity. The final rules are revised to buttress the legal, due process, and notice determinations. The rule in Section 63.234(d)(11) lists the findings and allegations that an applicant must show to the Commission to facilitate a consideration of the legal *City of York* standard, reach findings required by Section 1103 for Certificates of Public Convenience, and comply with the consideration of competitive impact. The Commission's disposition of an application in Section 63.324(k) or Section 63.325(k) will be done based on a review conducted under Section 63.324(h)(1)-(4) or Section 63.325(h)(1)-(4), respectively. Any concern with due process is bolstered by revised rules which provide that the filing of a formal protest or complaint will subject the transaction to the unlimited time span of *Traditional Rule* review. The concern with notice is resolved with rule revisions that mandate publication in the Pennsylvania Bulletin and a fifteen day protest period.

The final rules in Sections 63.324(d)(11), Section 63.324(h)(1)-(4), and Section 63.324(k) require factual filings, Commission review, and issuance of

Commission approval sufficient to meet Sections 1102(a) and 1103(a), 66 Pa.C.S. §§ 1102, 1103(a). This abbreviated review is consistent with those legal standards.

*Section 63.324(i). Formal Protests to a General Rule Transaction.* This provision allowed the filing of a formal protest pursuant to the filing requirements set out in the Commission's Rule of Practice and Procedure.

*Objections and Disposition.* There were no objections to this section. However, the proposed regulation refers only to Formal Protests whereas the final regulations address formal protests and complaints based on filed comments. The revision here repeats that for consistency.

*Section 63.324(j). Reclassification of a Transaction from the General Rule.* This provision recognized that some transactions may be reclassified from the *General Rule* to either a *Pro Forma Transaction* or a *Traditional Rule* transaction. The provision also provided that the filing of a general comment or formal complaint or protest was not always tantamount to a formal protest requiring *Traditional Rule* review.

*Objections.* IRRC was concerned that the time periods in Section 63.324(j)(1) and 63.325(j)(1) were too short and would encourage formal protests to simply get more time for review. IRRC also questioned why as a matter of equity a different result should hold for the public compared to a Statutory Advocate. *IRRC Comments*, p. 4 and p. 6.

*Disposition.* We agree with IRRC. The final regulations retain the thirty and sixty day review periods for a *Pro Forma* and *General Rule* transaction, respectively, with four critical changes.

The final regulations will publish every application in the *Pennsylvania Bulletin*. This addresses concerns with notice and due process.

The notice establishes a fifteen day protest period for every application. This addresses concerns with an opportunity to be heard.

The filing of any formal protest or complaint will trigger *Traditional Rule* review. This addresses the concern with consistent and equitable treatment of any formal protest or complaint by any private or public entity.

Finally, the rules require prior consumer notice. This addresses concerns with consistency between *Pro Forma* and *General Review* applications but in a way that minimizes the filing of a formal protest or complaint that would derail that application.

Taken in total, these revisions reduce concerns about the time to review and approve applications while giving all public and parties equal treatment.

*Section 63.324(k). Commission Approval for a General Rule Transaction.* This provision established a sixty day review and approval period for *General Rule* transactions following publication in the *Pennsylvania Bulletin*.

*Objections.* OCA questioned whether the “deemed approved” status for sixty day *General Rule* transactions or even a thirty-day *Pro Forma Transaction* met the *City of York* standard or Sections 1102 and 1103(a). OCA was concerned that the approval would occur by Secretarial Letter issued within a certain time interval from the date of filing with the Commission. *OCA Comments*, pp. 1-12; *OCA Reply Comments*, pp. 1-15.

Level 3 read the “in law and fact” language in Section 63.324(k)1 and Section 63.325(k) as allowing an applicant to close a transaction on the 61<sup>st</sup> or 31<sup>st</sup> day, respectively. Level 3 was concerned about interpretations which could require issuance of a Commission approval and the accompanying Certificate of Public Convenience as preconditions to closing a transaction. *Level 3 Reply Comments*, pp. 10-11.

*Disposition.* We understand the concerns and addressed them. The final rule in Section 63.324(k) and Section 63.325(k) provides that the Commission will act by Secretarial Letter or Order following a review conducted under Section 63.324(h)(1)-(4) or Section 63.325(h)(1)-(4), respectively. However, although the Commission fully expects that these time frames for approval will be met, the Commission's time frames for review and approval are directory in nature; as such, in the absence of Commission approval within these time frames, the application is *not* deemed to be approved.

The rules publish an application, establish a fifteen day protest period, and hold that the filing of any formal protest or complaint will subject a *General Review* transaction to *Traditional Rule* review. This final rule timelines may be longer than the one envisioned in the proposed rule. However, the same timeline is also considerably shorter than the unlimited time span for *Traditional Rule* review.

Section 63.324(l). *Limitations on general rule transactions.* This concluding provision addresses bankruptcy and the possible misuse of a *Pro Forma Transaction*.

*Objections and Disposition.* There were no objections to this provision.

*Section 63.325. Requirements for a telecommunications public utility seeking Commission approval of a Pro Forma Transaction subject to 66 Pa.C.S. § 1102(a)(3) and 1103.* This provision addresses *pro forma* changes when a carrier or public utility undergoes restructurings that also require a certificate of public convenience.

*Section 63.325(a). Pro Forma Transactions.* This provision provided that *Pro Forma* review and approval applied to an application that did not change conditions of service or rates or did not reduce an applicant's control by more than 10%. Since there is no change in rates or service conditions, the public interest in these applications is typically far less than an application involving rates or conditions of service.

*Section 63.325(b). Reclassification of a Pro Forma transaction.* This provision mirrored the Section 63.324(b) provision addressing reclassification of a *General Rule Transaction*. In this case, however, the reclassification would have been to either the *General Rule* classification or *Traditional* review.

*Objections.* IRRC recommended that the Statutory Advocates be given notice of any reclassification. *IRRC Comments*, p. 5.

*Disposition.* As discussed earlier, the final rules will publish applications for transfers of control in the *Pa. Bulletin* to provide notice. That notice informs the public, the Statutory Advocates, and the applicant of the transaction and any reclassification. That notice also provides any entity an opportunity to file a formal protest or complaint.

We conclude that any challenge to the reclassification should be filed during the fifteen day protest period established in the notice. The Commission will address challenges to reclassification during consideration of the application based on whether or not a formal protest or complaint has been filed by any entity.

A challenge to the Commission's reclassification of an unprotested application will not automatically subject the application to *Traditional Rule* review. In those cases, the Commission or staff will address any reclassification challenge during review and approval of the application. But, a challenge to a protested application will be reviewed during consideration of the application under *Traditional Rule* review. This is consistent with our determination that a protested *Pro Forma* or *General Rule* application will subject the protested application to *Traditional Rule* review.

*Section 63.325(c). Notification Requirements for Pro Forma Transactions.* This provision mirrored the provision in Section 63.324(c) for notification. The reasoning here was similar to the reasoning there. A simultaneous notice requirement to the Commission and the Statutory Advocates or others was considered to be a cost-effective

way to keep interested parties informed while keeping a transaction on track. This was expected to minimize formal protests to an application just to stay informed.

*Objections.* OSBA recommended that the application be served on the Statutory Advocates. *OSBA Comments*, Annex A, p. 16. Verizon advocated deletion of most of the filing requirements. *Verizon Comments*, pp. 12-13. PTA suggested replacing the list in Section 63.325(c) with a cite to Section 63.624(c). *PTA Comments*, p 13.

*Disposition.* For the reason discussed above, we agree that the Statutory Advocates should be provided copies of the application and any updates. We do not agree that service is required. That unnecessarily increases costs since service is a legal requirement whereas providing a copy is a notice requirement.

We disagree that substantial revision in the information update requirements is necessary. The purpose of the update mandate is to discourage the filing of formal complaints and protests to get updates on a proceeding. This is even more important now that the filing of any formal protest or complaint will reclassify an abbreviated *Pro Forma* application to *Traditional Rule* review. This keeps the public updated while discouraging a formal protest or complaint to get information.

*Section 63.325(d). Content of notification for Pro Forma Transaction.* This provision mirrored Section 63.324(d) on filing requirements. This provided the same list of filing information for abbreviated review, albeit as a *Pro Forma Transaction*. The final rules adopt the revisions set forth in Section 63.325(d) similar to Section 63.324(d).

*Objections and Disposition.* The objections to Section 63.325(d) were like those to Section 63.324(d). The final rules for Section 63.325(d) mirror Section 63.324(d).

*Section 63.325(e). Continuing obligations for notification of Pro Forma Transactions.* This provision mirrored the Section 63.324(e) provisions for General Rule



transactions. This provision essentially required an applicant to keep the Commission informed about subsequent developments in other jurisdictions pertaining to the transaction pending at the Commission.

*Objections and Disposition.* The final rules for Section 63.325(e) mirror those for Section 63.324(d) for similar reasons.

*Section 63.325(f). Commission publication of Pro Forma Transaction.* This provision addresses Commission publication about *Pro Forma Transactions*. The proposed requirements were different from those for *General Rule* review in Section 63.324(f). *Pro Forma Transactions* are more mundane and involve no changes in conditions of service or rates compared to *General Rule* transactions.

Section 63.325(f)(1)-(3) no longer required publication in the *Pennsylvania Bulletin* nor was there a formal protest period. The Secretary had the discretion, not the obligation, to post a transaction on the Commission's website. The Secretary also had the discretion to solicit general comments.

*Objections.* IRRC suggested that the word "may" be replaced by the word "will" to promote certainty. IRRC thought this would remove uncertainty on how the Commission and the regulated community would know when the thirty period expired. IRRC also thought that posting on the Commission's website would further notice. *IRRC Comments*, p. 7. The objections to Section 63.325(f) mirror those set out and addressed in Section 63.324(f).

*Disposition.* We agree with IRRC's concerns, particularly about posting some applications on the website while publishing others in the *Pa. Bulletin*. The final rules address that concern by publishing every application in the *Pa. Bulletin* and establishing a uniform fifteen day protest period. The final rules for Section 63.325(f) are similar to those set out in Section 63.324(f) for similar reasons.

*Section 63.325(g). Telecommunications public utility notice to customers.* This provision addressed information the applicant provided to customers. These transactions, unlike their counterpart in Section 63.324(g), did not involve changes in service conditions or rates. The proposed regulation authorized the applicant to prepare and distribute a prior notice to the customers but need not do so if it were not practical. This approach ensured public notice in a way that did not undermine abbreviated review.

*Objections and Disposition.* IRRC was concerned about the differences in the notice requirements and the treatment of formal protests or complaint for a *Pro Forma Transaction* compared to *General Rule* transactions. IRRC suggested that the requirements for *Pro Forma Transactions* mirror those for General Rule transactions review the reference to Section 5.14. *IRRC Comments*, p. 8.

*Disposition.* We agree with IRRC. The final rules in Section 63.325(g) mirror those for Section 63.324(g). We also note that the reference to Section 5.14 includes Section 5.14(c) and 5.14(d). The rules in Section 5.14(c) on protests contain a reference to Section 5.53, a section that sets a 60 day default period for filing a protest unless the notice determines otherwise. Section 5.14(d) establishes a fifteen day default period for filing a formal complaint. The final rules require a uniform fifteen day period to file a formal protest or complaint. This meshes Sections 5.14(c), 5.14(d), and 5.53.

*Section 63.325(h). Commission Review of Pro Forma Transactions.* This provision formalized the Commission's discretionary authority under Sections 1102(a)(3) and 1103 of the Public Utility Code, particularly regarding the imposition of conditions when they are needed to justify approving a transaction as in the public interest.

*Objections and Disposition.* The objections to Section 63.325(h) mirror those already raised and addressed in Section 63.324(h). The major concerns were compliance with the *City of York* standard and Sections 1102(a) and 1103(a), sufficient notice

provided to consumers, and ensuring the Commission's authority to impose conditions when necessary. These issues arose here even though the rules address transfers when there was no change in rate or conditions of service. Other concerns focused on due process and notice. The final rules contain changes similar to Section 63.324(h).

Section 63.325(i). *Protests to a Transaction Subject to the General Rule.* This provision explains how to file a formal protest or complaint. There were no objections.

Section 63.325(j)(1)-(2). *Removal of a transaction as a Pro Forma Transaction.* This provision recognized that some transactions may be reclassified.

*Objections and Disposition.* The objections to Section 63.325(j)(1)-(2) mirrored those in Section 63.324(j)(1)(2). Although that section addressed applications with changes in rates or service conditions and this provision did not, IRRC's concern with consistency warrants rules that are consistent even if these transactions have no changes in rates or conditions of service. The final rules of Section 63.324(j)(1)-(2) do that.

Section 63.325(k). *Commission approval for a Pro Forma Transaction.* This provision established the process for reviewing and approving *pro forma* transactions.

Sections 63.325(k)(1)-(3) detailed the mechanics. Section 63.325(k)(1) provided that the Commission will issue a Secretarial Letter or order approving a transaction. Section 63.325(k)(2) recognized that staff may need a longer review period, reclassify a transaction, or take other action deemed appropriate. Section 63.325(k)(3) provided that final staff action shall be taken in writing and be subject to an appeal of staff which shall be stated in the writing informing the applicant of the decision.

*Objections and Disposition.* The objections in this provision mirror similar objections for Section 63.324(k)(1)-(3). The final rules for Section 63.325(k)(1)-(3) mirror disposition of the objections to Section 63.324(k)(1)-(3).

*Section 63.325(l). Limitations on Pro Forma transactions.* This concluding provision addresses bankruptcy and the possible misuse of a *Pro Forma Transaction*.

Section 63.325(l)(1) excludes bankruptcy proceedings from *Pro Forma* treatment. Bankruptcy filing requirements are addressed in the Commission's regulations at Sections 1.61 and 1.62. There is no compelling reason to revisit that provision.

*Objections and Disposition.* There were no objections to these provisions.

Section 63.325(l)(2) prohibits a carrier or public utility from using this *Pro Forma* provision to abandon existing conditions of service, like payment dates and penalty provisions, or embed a rate change in an otherwise seamless transaction. This is consistent with the FCC's *Streamlined Regulation Order*.<sup>9</sup>

*Objections.* IRRC noted that this provision is lacking in the accompanying provision at Section 63.324(l) for *General Review* transactions. *IRRC Comments*, p. 8.

*Disposition.* IRRC is correct. The proposed rule contained this provision to prevent misuse of a *Pro Forma Transaction* as compared to a *General Rule* transaction. *Pro Forma* transactions do not involve changes in rates or conditions of service. This provision ensures that an applicant with a transaction involving a change in rates or conditions of service cannot file that transaction as a *Pro Forma Transaction* instead of filing it as a *General Rule* or *Traditional Rule* transaction. If that were to occur and the filing were approved, this provision provides a backstop for subsequent action.

*Section 63.326. Approval of contracts between a carrier or public utility and an affiliated interest under sections 2101(a) and 3019(b) and 3106(f)(1) of Chapter 30.*

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<sup>9</sup> *Streamlined Regulation Order*, paragraph 52.

The proposed regulation was intended to codify the Commission's residual authority over affiliated interest agreements to ensure that they do not cross-subsidize competitive services in violation of Section 3016(f)(1), 66 Pa.C.S. § 3016(f)(1), as well as the Commission residual authority over utility contracts.

*Objections.* There was substantial opposition to this provision as contrary to Section 3019(b)(1), 66 Pa.C.S. § 3019(b)(1). Section 3019(b)(1) limits the Commission's review and approval authority over affiliated interest agreements to noncompetitive services. Moreover, Section 3019(b)(1) provides that any filing must be for notice only and that the Commission is not authorized to approve the agreement.

*Disposition.* Although the provision was intended to implement other provisions of residual Commission authority to prevent cross-subsidization, we delete the provision in its entirety.

Accordingly, under Sections 501, 1102-03, 2101-07, and 3019 of the Public Utility Code, 66 Pa. C.S. §§ 502, 1102-03, 2101-07 and 3019; the Commonwealth Documents Law, 45 P.S. §§ 1201-1202, and the regulations promulgated hereunder; Section 204(b) of the Commonwealth Attorneys Act, 71 P.S. § 732.204(b); and Section 745.5 of the Regulatory Review Act, 71 P.S. § 745.5; the Commission adopts as final the regulations set forth in Annex A, attached hereto; **THEREFORE,**

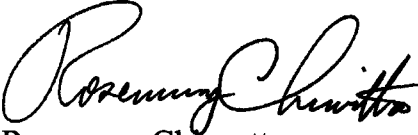
**IT IS ORDERED:**

1. That the Secretary shall submit this Order and Annex A to the Office of the Attorney General for review as to form and legality and to the Governor's Budget Office for review of fiscal impact.
2. That the Secretary shall certify this Order and Annex A for review by the Independent Regulatory Review Commission and Legislative Standing Committees.

3. That the Secretary shall certify this Order and Annex A with the Legislative Reference Bureau to be published in the *Pennsylvania Bulletin* as final following review and approval by the Independent Regulatory Review Commission and Legislative Standing Committees.

4. That, upon final approval by IRRC, the Bureau of Fixed Utility Services shall have delegated authority (a) to reclassify transactions when publishing notice of a submitted application and review; and (b) to review and act on an uncontested *Pro Forma* transaction subject to 52 Pa.Code § 5.44 of the Commission's Rules of Administrative Practice and Procedure.

**BY THE COMMISSION**



Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: April 22, 2010

ORDER ENTERED: **April 29, 2010**

**Annex A**

**TITLE 52. PUBLIC UTILITIES**

**PART I. PUBLIC UTILITY COMMISSION**

**Subpart C. FIXED SERVICE UTILITIES**

**CHAPTER 63. TELEPHONE SERVICE**

**Subchapter O. ABBREVIATED PROCEDURES FOR REVIEW AND APPROVAL OF TRANSFER OF CONTROL AND ~~AFFILIATE FILINGS~~ FOR TELECOMMUNICATIONS PUBLIC UTILITIES ~~CARRIERS~~**

**§ 63.321. Purpose.**

This subchapter establishes cost-effective review and approval periods that abbreviate the traditional UNLIMITED time for approving AN APPLICATION SEEKING COMMISSION APPROVAL OF ~~transactions involving an acquisition, diminution in control,~~ merger, stock sales or transfers, transfer of assets or transfer of control of a telecommunications public utility requiring a certificate of public convenience under 66 Pa.C.S. § 1102(a)(3) (relating to enumeration of acts requiring certificate) ~~or approval of a contract between public utilities and affiliates.~~

**§ 63.322. Definitions.**

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

~~*Affiliated interest*—An entity associated with a public utility as set forth in 66 Pa.C.S. § 2101(a) (relating to definition of affiliated interest).~~

*APPLICANT*— A CARRIER, INCUMBENT LOCAL EXCHANGE CARRIER, OR TELECOMMUNICATIONS PUBLIC UTILITY SEEKING COMMISSION REVIEW AND APPROVAL OF A TRANSACTION UNDER SECTIONS 1102 AND 1103 OF THE PUBLIC UTILITY CODE, 66 PA.C.S. §§ 1102 and 1103 (RELATING TO ENUMERATION OF ACTS REQUIRING CERTIFICATE AND PROCEDURE TO OBTAIN CERTIFICATES OF PUBLIC CONVENIENCE).

*ASSETS*— PROPERTY OF ALL KINDS, REAL AND PERSONAL, TANGIBLE AND INTANGIBLE, INCLUDING PATENTS AND CAUSES OF ACTION WHICH BELONG TO AN APPLICANT AS DEFINED IN THIS SECTION UNDER STATE AND FEDERAL LAW.

*Carrier*--An entity defined as a "public utility" in 66 Pa.C.S. 102 (relating to definitions) or defined as a "public utility" in 66 Pa.C.S. § 102 and certificated by the Commission under 66 Pa.C.S. § 1102(a).

~~*Competitive carrier*—An entity that provides information service or telecommunications service as defined in section 3 to the Federal Telecommunications Act of 1934 (47 U.S.C.A. § 153), or an alternative service provider as defined in 66 Pa.C.S. § 3012 (relating to definitions) including a certificated carrier under 66 Pa.C.S. § 1102(a).~~

*Controlling interest*--An interest, held by a person or group acting in concert, which enables the beneficial holder or holders to control 20% 10% or more, EITHER WITHIN PENNSYLVANIA OR NATIONWIDE, WHICHEVER IS LARGER, of the voting interest in the telecommunications public utility or its parent, regardless of the remoteness of the holder or holders or the transaction. A contingent right may not be included.

*CUSTOMER BASE* – AN ASSET OF AN APPLICANT CONSISTING OF ALL OR A PORTION OF THE CUSTOMERS SERVED BY THE APPLICANT.

~~*Diminution of control*—A reduction in the controlling interest of 10% or more held by a person or group acting in concert, which reduces the beneficial holders ability to control a telecommunications public utility through the voting interest in the telecommunications public utility or its parent, regardless of the remoteness of the holder or the transaction. A contingent right may not be included.~~

~~*Dominant market power*—A carrier that has or will have a moderately concentrated or concentrated market using the Herfindal-Hirschman Index (HHI) utilized by the United States Department of Justice Antitrust Division in any service following Commission approval of a merger under 66 Pa.C.S. § 1102(a) or as otherwise alleged or documented by a party or the Commission in a proceeding seeking Commission approval under 66 Pa.C.S. 1102(a).~~

*Formal complaint*--The term as defined in § 1.8 (relating to definitions) of the Commission's rules of practice and procedure.

*Formal investigation*--The term as defined in § 1.8 of the Commission's rules of practice and procedure.

*Formal proceeding*--The term as defined in § 1.8 of the Commission's rules of practice and procedure.

*GENERAL RULE TRANSACTION*--A TRANSACTION RESULTING IN A CHANGE IN RATES OR CONDITIONS OF SERVICE OR WHICH, TAKEN TOGETHER WITH ALL PREVIOUS INTERNAL CORPORATE RESTRUCTURINGS, CHANGES THE APPLICANT'S CONTROLLING INTEREST GREATER THAN 20%.

~~*Herfindahl-Hirschman Index*—The commonly accepted measure of market concentration utilized by the United States Department of Justice in which market concentration is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers.~~

*Incumbent local exchange carrier*--A local exchange carrier as defined in section 3(26) of the federal Telecommunications Act of 1934 or a local exchange telecommunications company as defined in 66 Pa.C.S. § 3012 including a certificated carrier under 66 Pa.C.S. § 1102(a).



*Informal complaint*--The term as defined in § 1.8 of the Commission's rules of practice and procedure.

*Informal investigation*--The term as defined in § 1.8 of the Commission's rules of practice and procedure.

*Informal proceeding*--The term as defined in § 1.8 of the Commission's rules of practice and procedure.

*Party*--The term as defined in § 1.8 of the Commission's rules of practice and procedure.

*Pennsylvania legal counsel*--The attorney of record appearing before the Commission as required under §§ 1.21 and 1.22 (relating to appearance; and appearance by attorney or certified legal intern) of the Commission's rules of practice and procedure.

*Person*--The term as defined in § 1.8 of the Commission's rules of practice and procedure.

~~*Predominant market presence*--A utility that could or would possess market power in any service following approval of a Commission merger under 66 Pa.C.S. § 1102(a) using the nonhorizontal merger guidelines of the United States Department of Justice Antitrust Division or as otherwise alleged or documented by a party or the Commission in a proceeding seeking Commission approval under 66 Pa.C.S. § 1102(a).~~

*Pro forma Transaction*--A transaction that is seamless to the customer and does not result in a change in rates or conditions of service which, taken together with all previous internal corporate restructurings, does not change the APPLICANT'S telecommunications public utility's controlling interest, or result in a diminution of control greater than 20% 40%.

*Staff*--The term as defined in § 1.8 of the Commission's rules of practice and procedure.

*Statutory Advocate*--The term as defined in § 1.8 of the Commission's rules of practice and procedure.

*Telecommunications public utility*--An entity that provides information service or telecommunications service as defined in section 103 of the federal Telecommunications Act of 1934 or 66 Pa.C.S. § 3012 or as a carrier.

*Verification*--The term as defined in § 1.8 of the Commission's rules of practice and procedure.

### 63.323. Applicability.

This subchapter applies to AN APPLICANT ~~a telecommunications public utility~~ AND THE AFFILIATE OF AN APPLICANT seeking Commission approval for an acquisition, ~~diminution in control~~, merger, stock sales or transfers, transfer of assets or transfer of control of AN APPLICANT ~~a telecommunications public utility~~ requiring a certificate of public convenience under 66 Pa.C.S. § 1102(a)(3) (relating to enumeration of acts requiring certificate) or approval of a contract between public utilities and affiliates.

### § 63.324. Commission approval of a general rule transaction subject to 66 Pa.C.S. §§ 1102(a)(3) and 1103.

(a) *General rule transactions.* The following transactions of a AN APPLICANT ~~telecommunications public utility~~ involving a change in conditions of service or rates that SEEK ~~seeks~~ Commission approval for acquisition, ~~diminution in control~~, merger, stock sales or transfers, transfer of assets or transfer of control of AN APPLICANT ~~a telecommunications public utility~~ REQUIRE ~~requires~~ notification to the Commission and approval by the Commission as a general rule transaction:

(1) A transaction resulting in the transfer of 20% ~~10%~~ or more of the assets of AN APPLICANT ~~a carrier~~.

(2) A transaction resulting in the transfer of 20% ~~10%~~ or more of the direct or indirect control of AN APPLICANT ~~a carrier~~.

~~(3) A transaction resulting in the diminution of 10% or more in the control of a carrier.~~

~~(4) A transaction requiring a certificate of public convenience issued under 66 Pa.C.S. § 1102(a) (relating to enumeration of acts requiring certification).~~

~~(5)~~ (4) A transaction subject to evaluation under the statement of policy on transfer of control. See 52 PA. CODE § 69.901 (relating to utility stock transfer under 66 Pa.C.S. § 1102(a)(3)).

~~(6)~~ (5) A transaction that transfers the customer base of AN APPLICANT ~~a telecommunications public utility or carrier~~ and involves a change in conditions of service or rates.

~~(7)~~ (6) A transaction subjected to this subchapter by decision of the Commission, including a transaction no longer classified as a GENERAL RULE ~~pro forma~~ transaction by the Commission.

(b) *Reclassification of a general rule transaction.* When AN APPLICANT ~~a telecommunications public utility~~ seeks review and approval of a transaction as a general rule transaction and the Commission reclassifies the general rule transaction, the COMMISSION WILL NOTIFY THE APPLICANT OF THE RECLASSIFICATION BY NOTICE PUBLISHED IN THE *PENNSYLVANIA BULLETIN*. AN APPLICANT MAY FILE A

CHALLENGE TO THE RECLASSIFICATION DURING THE PROTEST PERIOD ESTABLISHED BY THE NOTICE. IF A FORMAL PROTEST OR COMPLAINT TO THE TRANSACTION IS FILED, THE CHALLENGE SHALL BE REVIEWED AS PART OF A TRADITIONAL RULE REVIEW PROCEEDING. IF NO FORMAL PROTEST OR COMPLAINT TO THE TRANSACTION IS FILED, THE CHALLENGE SHALL BE REVIEWED BY THE COMMISSION AS PART OF THE REVIEW OF THE TRANSACTION. ~~transaction shall be subject to the requirements of a pro forma transaction in § 63.325 (relating to Commission approval of a pro forma transaction subject to 66 Pa.C.S. §§ 1102(a)(3) and 1103) unless determined otherwise for good cause shown.~~

~~(1) *Review of a general rule transaction reclassified as a pro forma transaction.* The 30-day review and approval period for a general rule transaction reclassified as a pro forma transaction shall begin on the date that the telecommunications public utility is notified in writing that the general rule transaction is reclassified.~~

~~(2) *Review of a general rule transaction reclassified as other than a pro forma transaction.* The review and approval of a general rule transaction not reclassified as a pro forma transaction shall begin on the date that the telecommunications public utility is notified in writing that the transaction is reclassified. A transaction classified under this section shall be reviewed within the time governing review and approval under 66 Pa.C.S. §§ 1102 and 1103 (relating to enumeration of acts requiring certification; and procedure to obtain certificates of public convenience).~~

~~(3) *Right of appeal for reclassification of a transaction.* When a telecommunications public utility is notified in writing by staff that a general rule transaction will be reclassified, the determination shall be subject to appeal as an appeal from an action of staff. The provisions governing an appeal shall be those governing appeals from an action of staff under § 5.44 (relating to petitions for appeal from actions of the staff) of the rules of practice and procedure. The writing will inform the telecommunications public utility of the right of appeal.~~

(c) *Notification requirements for general rule transactions.* Notification OF A GENERAL RULE TRANSACTION shall be filed with the Commission on the date of filing with a Federal regulatory agency seeking Federal approval of a general rule transaction or no later than 60 days prior to the closing of a transaction subject to this subchapter, whichever is longer. The APPLICANT ~~telecommunications public utility~~ filing the notification shall comply with the Commission's rules of practice and procedure governing applications. (See §§ 5.11--5.14 (relating to applications.)). THE APPLICANT SHALL CLEARLY STATE THAT THE APPLICATION IS A GENERAL RULE TRANSACTION AND PROVIDE A COPY OF THE APPLICATION TO THE COMMISSION AND THE STATUTORY ADVOCATES. AN APPLICANT ~~A telecommunications public utility~~ shall provide an updated copy OF ANY SUBSEQUENT FILINGS to the Commission and the statutory advocates ~~of filings~~ in the following circumstances:

(1) Filing with the Federal Communications Commission (FCC) of an application seeking approval of the transaction (FCC application).

(2) Filing of a notice with the United States Department of Justice (U.S. DOJ) under the Hart-Scott-Rodino Antitrust Improvements Act (15 U.S.C.A. §§ 15c-15h, 18a and 66) (HSR Filing).

(3) Filing by AN APPLICANT a ~~telecommunications public utility~~ of a pleading responding to a formal or informal complaint, investigation, or proceeding undertaken by the FCC or the U.S. DOJ or other State or Federal regulatory agency involving the transaction.

(4) Filing required by the Commission from AN APPLICANT a ~~telecommunications public utility~~ in response to a notification by the Commission that simultaneous notification is appropriate to protect the public interest.

(5) Filing required by the Commission from AN APPLICANT a ~~carrier~~ in response to a request by any of the following:

(i) A request by a statutory advocate.

(ii) A request by a carrier with a certificate of public convenience obtained under 66 Pa.C.S. 1102(a) for a copy.

(iii) A request by the Commission or staff for a copy.

(iv) A request by a person or party for a copy.

(d) *Content of notification for general rule transactions.* In addition to the information required by § 5.12 (relating to contents of applications) of the Commission's rules of practice and procedure, a general rule transaction must contain the following information:

(1) The name, address and telephone number of each party or applicant to the transaction.

(2) The government, state or territory under the laws of which each corporate or partnership applicant to the transaction is organized.

(3) The name, title, post office address and telephone number of the officer or contact point, including legal counsel in this Commonwealth, to whom correspondence concerning the transaction is to be addressed.

(4) The name, address, citizenship and principal place of business any person, party or entity that directly or indirectly owns more than 20% ~~10%~~ of the equity of the applicant, and the percentage of equity owned by each of those entities (to the nearest 1%).

(5) A summary description of the transaction.

(6) A SUMMARY OF THE SERVICES AND THE SERVICE TERRITORIES IN THE COMMONWEALTH OF PENNSYLVANIA THAT WILL BE AFFECTED BY THE TRANSACTION. ~~description of the geographic areas subject to the transactions and what services are provided in the geographic area.~~

(7) A verified statement as to how the transaction fits into one or more of the categories subject to the general rule for notification.

(8) Identification of other transactions related to the transaction.

(9) A verified statement whether the transaction warrants special consideration because either party to the transaction is facing imminent business failure.

(10) Identification of a separately filed waiver request sought in conjunction with the transaction.

(11) A verified statement CONTAINING FACTS AND ALLEGATIONS ESTABLISHING showing:

~~(i) How the transaction will serve the public interest, convenience and necessity.~~

~~(ii) A description of the general and specific affirmative public benefit to this Commonwealth and its consumers warranting approval of the transaction.~~

~~(iii) Additional information that may be necessary to address the effect of the transaction on dominant market power or predominant market presence.~~

(I) FOR A MERGER OR SIMILAR TRANSACTION, HOW THE TRANSACTION WILL AFFIRMATIVELY PROMOTE THE SERVICE, ACCOMMODATION, CONVENIENCE, OR SAFETY OF THE PUBLIC IN SOME SUBSTANTIAL WAY AS REQUIRED BY PENNSYLVANIA LAW.

(II) FINDINGS THAT APPROVAL FOR A TRANSACTION SUBJECT TO § 1103(A) OF THE PUBLIC UTILITY CODE IS NECESSARY OR PROPER FOR THE SERVICE, ACCOMMODATION, CONVENIENCE, OR SAFETY OF THE PUBLIC.

(III) THE IMPACT OF THE TRANSACTION ON COMPETITION.

(12) A verified statement affirming that the ~~utility~~ APPLICANT is in compliance with Commission obligations and filings AND A LISTING OF ALL STATE AND FEDERAL PROCEEDINGS WHEN:-

(I) WITHIN THE 3-YEAR PERIOD PRIOR TO FILING THE APPLICATION, THE APPLICANT WAS FOUND TO HAVE VIOLATED EITHER STATE OR FEDERAL REQUIREMENTS.

(II) WITHIN THE 3-YEAR PERIOD PRIOR TO FILING THE APPLICATION, THE APPLICANT IS ALLEGED TO HAVE VIOLATED EITHER STATE OR FEDERAL REQUIREMENTS.

(13) A verified statement affirming that customers received PRIOR notice. NOTICE SHALL BE ACCOMPLISHED USING A NOTICE APPROVED BY THE COMMISSION'S BUREAU OF CONSUMER SERVICES. ANY DISAGREEMENT BETWEEN THE APPLICANT AND BCS SHALL BE ADDRESSED BY AN APPEAL FROM AN ACTION OF

STAFF MIRRORING THE PROCESS SET OUT IN § 5.44 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE.

(14) A verified statement containing a copy of any Commonwealth utility certificates held by the APPLICANT ~~telecommunications public utility~~.

(15) A verified statement on the effect of the transaction on existing Commonwealth tariffs. If applicable or in response to a request from staff, AN APPLICANT a ~~telecommunications public utility~~ shall provide a red-line document identifying changes in existing Commonwealth tariffs before and after the transaction for which the APPLICANT ~~telecommunications public utility~~ seeks approval from the Commission.

(16) A verified statement on the transaction's effect on the existing affiliate interest agreements of the APPLICANT ~~utility~~.

(17) A verified statement establishing that no State or Federal regulatory agency is expected to undertake an informal or formal investigation, complaint or proceeding relating to the transaction.

(18) ~~A verified statement that no State or Federal regulatory undertaking is appropriate regarding the transaction because the telecommunications public utility lacks dominant market power or predominant market presence.~~

(19) Organizational charts showing the effect on the applicant's organization before and after the transaction.

~~(20)~~ (19) A copy of the application filed at the FCC or a notice filed with the U.S. DOJ, if any, INCLUDING THE ELECTRONIC LOCATION ON THE AGENCY'S WEBSITE.

(20) A VERIFIED STATEMENT SETTING FORTH THE EXPECTED PUBLIC EFFECT OF THE TRANSACTION ON THE CAPITAL STRUCTURE OF THE APPLICANT OVER THE NEXT 5 YEARS.

(21) FOR AN APPLICANT SUBJECT TO A BROADBAND DEPLOYMENT COMMITMENT UNDER FEDERAL OR PENNSYLVANIA LAW, A VERIFIED STATEMENT AFFIRMING THAT THE APPLICANT IS IN COMPLIANCE WITH THAT COMMITMENT.

(22) FOR AN APPLICANT WITH ELIGIBLE TELECOMMUNICATIONS CARRIER STATUS UNDER FEDERAL AND PENNSYLVANIA LAW, A VERIFIED STATEMENT AFFIRMING THAT THE APPLICANT IS IN COMPLIANCE WITH THE LAW AND THAT APPLICANT WILL CONTINUE TO BE IN COMPLIANCE WITH THE LAW.

(23) A VERIFIED STATEMENT AFFIRMING THAT THE TRANSACTION COMPLIES WITH THE PROHIBITION AGAINST CROSS-SUBSIDIZATION IMPOSED UNDER STATE AND FEDERAL LAW.

(e) *Continuing obligations for notification of general rule transactions.* When a Commission or Federal proceeding related to A TRANSACTION THAT IS THE SUBJECT OF the general rule transaction is pending, the APPLICANT ~~telecommunications public utility~~ to the transaction shall file with the Commission AND PROVIDE TO THE STATUTORY ADVOCATES copies of all procedural motions, public responses to discovery, and orders or other actions addressing or terminating the proceeding. The APPLICANT ~~telecommunications public utility~~ shall supplement the APPLICATION ~~notification filing~~ with any FCC or U.S. DOJ public notice issued concerning the transaction.

(f) *Commission publication AND RECLASSIFICATION of general rule transactions.*

(1) The Secretary will publish notice of a general rule transaction in the *Pennsylvania Bulletin* under § 5.14(a) and (b) ~~(relating to applications requiring notice) of the Commission's rules of practice and procedure.~~ THE SECRETARY MAY POST NOTICE OF THE GENERAL RULE TRANSACTION ON THE COMMISSION'S WEB SITE. ~~and, as directed by the Secretary, require additional publication in a newspaper of general circulation serving the geographic territory affected by the general rule transaction unless the Commission determines otherwise for good cause shown.~~

(2) Any notice will contain a 15-day ~~general comment period and a formal protest period~~ established under § 5.14(d) of the Commission's rules of practice and procedure, ~~unless the Commission determines otherwise for good cause shown.~~

(i) ~~A general comment addressing the general rule transaction involving a change in conditions of service or rates does not constitute a formal protest under § 5.14 of the Commission's rules of practice and procedure nor reclassify the general rule transaction, unless the Commission determines otherwise for good cause shown.~~

~~—(ii) A formal protest OR COMPLAINT objecting to the general rule transaction involving a change in conditions of service or rates shall constitute a formal protest under § 5.14 of the Commission's rules of practice and procedure and may reclassify the general rule transaction SUBJECT THE TRANSACTION TO TRADITIONAL RULE REVIEW, unless the Commission determines otherwise for good cause shown.~~

~~—(iii) A formal protest objecting to a general rule transaction involving a change in conditions of service or rates by a statutory advocate shall constitute a formal protest under § 5.14 of the Commission's rules of practice and procedure and shall reclassify a general rule transaction. as a pro forma transaction or a transaction subject to the review and approval for transactions under 66 Pa.C.S. §§ 1102 and 1103, unless the Commission determines otherwise for good cause shown.~~

(g) *Telecommunications public utility APPLICANT notice to customers.*

(1) *General rule transactions involving a change in conditions of service or rates.* AN APPLICANT A ~~telecommunications public utility~~ shall prepare and distribute PRIOR notice to the customers of a general rule transaction involving a change in conditions of service or rates with the approval of the Commission's Bureau of Consumer Services. Notice to the customers shall occur prior to Commission approval unless circumstances make distribution

prior to approval impractical or unnecessary. ANY DISAGREEMENT BETWEEN THE APPLICANT AND BCS SHALL BE ADDRESSED BY AN APPEAL FROM AN ACTION OF STAFF MIRRORING § 5.44 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE.

(2) *Transfers of customer base subject to the general rule.*

(i) A transaction transferring a customer base involving a change in conditions of service or rates shall require PRIOR ~~additional~~ notice to the customer base prepared with the approval of the Commission's Bureau of Consumer Services. ANY DISAGREEMENT BETWEEN THE APPLICANT AND BCS SHALL BE ADDRESSED BY AN APPEAL FROM AN ACTION OF STAFF MIRRORING § 5.44 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE.

(ii) A TIMELY FORMAL PROTEST OR COMPLAINT TO ~~general comment~~ addressing the transfer of a customer base involving a change in conditions of service or rates SHALL ~~does not~~ constitute a formal protest under § 5.14 of the Commission's rules of practice and procedure ~~nor reclassify the general rule transaction, unless the Commission determines otherwise for good cause shown.~~

~~(iii) A formal protest objecting to transfer of a customer base involving a change in conditions of service or rates shall constitute a formal protest under § 5.14 of the Commission's rules of practice and procedure and may reclassify the general rule transaction, unless the Commission determines otherwise for good cause shown.~~

~~(iv) A formal protest objecting to a general rule transaction involving a change in conditions of service or rates by a statutory advocate shall constitute a formal protest under § 5.14 of the Commission's rules of practice and procedure and shall reclassify a general rule transaction as either a pro forma transaction or a transaction subject to the review and approval for transactions under 66 Pa.C.S. §§ 1102 and 1103.~~

(h) *Commission review of transactions subject to the general rule.* The Commission retains the discretion to make inquiries and, after notice and opportunity to be heard, take action to protect the public interest, including:

(I) FOR A MERGER OR SIMILAR TRANSACTION, ENSURING THAT THE TRANSACTION WILL AFFIRMATIVELY PROMOTE THE SERVICE, ACCOMMODATION, CONVENIENCE, OR SAFETY OF THE PUBLIC IN SOME SUBSTANTIAL WAY AS REQUIRED BY PENNSYLVANIA LAW.

(II) FINDINGS THAT A TRANSACTION SUBJECT TO § 1103(A) OF THE PUBLIC UTILITY CODE IS NECESSARY OR PROPER FOR THE SERVICE, ACCOMMODATION, CONVENIENCE, OR SAFETY OF THE PUBLIC.

(III) ADDRESSING THE IMPACT OF THE TRANSACTION ON COMPETITION.



(IV) ~~the~~ THE imposition of conditions on approval of the transaction when deemed necessary or proper under 66 Pa.C.S. § 1103. ~~and to establish affirmative public benefit as required by law of the Commonwealth.~~

(i) *Formal protests AND COMPLAINTS to a general rule transaction.* A protest filed to a GENERAL RULE transaction ~~subject to the general rule~~ must comply with the Commission's rules of practice and procedure. (See Subpart A (relating to general provisions).)

(j) *Reclassification of a transaction from the general rule.* The Commission will reclassify AN APPLICATION ~~a general rule~~ FOR APPROVAL OF A GENERAL RULE transaction in the following circumstances:

(1) The filing of a formal protest OR COMPLAINT ~~by a statutory advocate or the filing of a formal protest warranting reclassification for good cause shown, including competitive impact.~~

(2) ~~The filing involves a major acquisition or merger between telecommunications firms with substantial market shares.~~

~~—~~(3) The filing involves an acquisition, merger or other transaction that raises novel or important issues.

(3) ~~(4)~~ The Commission determines that reclassification is necessary to protect the public interest.

(k) *Commission approval for a general rule transaction.* THE COMMISSION WILL ISSUE A SECRETARIAL LETTER OR ORDER AFTER REVIEW OF AN UNPROTESTED APPLICATION ~~A transaction~~ subject to this subchapter DETERMINING IF THE APPLICATION IS ~~will be deemed to be~~ in the public interest and CONSISTENT WITH §§ 1102(A) AND 1103(A) NO LATER THAN ~~approved in law and fact~~ 60 days after EXPIRATION OF THE PROTEST PERIOD ESTABLISHED IN THE public notice in the *Pennsylvania Bulletin* ~~unless the Commission determines otherwise for good cause shown.~~

(1) The Commission will DETERMINE ~~issue a Secretarial letter or order,~~ FOR A MERGER OR SIMILAR TRANSACTION, WHETHER THE TRANSACTION AFFIRMATIVELY PROMOTES THE SERVICE, ACCOMMODATION, CONVENIENCE, OR SAFETY TO THE PUBLIC IN SOME SUBSTANTIAL WAY. ~~approving a general rule transaction and~~

(2) THE COMMISSION WILL MAKE FINDINGS WHETHER A TRANSACTION SUBJECT TO § 1103(A) OF THE PUBLIC UTILITY CODE IS NECESSARY FOR THE SERVICE, ACCOMMODATION, CONVENIENCE, OR SAFEETY OF THE PUBLIC AND STATE WHETHER THE COMMISSION WILL issue a certificate of public convenience authorizing the transaction under 66 Pa.C.S. §§ 1102(a) and 1103.

(3) THE COMMISSION WILL ADDRESS THE IMPACT OF THE GENERAL RULE TRANSACTION ON COMPETITION.

(4) THE COMMISSION WILL DETERMINE WHETHER TO IMPOSE CONDITIONS DEEMED NECESSARY OR PROPER UNDER 66 PA.C.S. § 1103 IN CONJUNCTION WITH A DETERMINATION ON APPROVING A GENERAL RULE TRANSACTION.

(2)(5) The Commission or staff may extend the review and approval period, reject the filing or transaction, remove a transaction from the general transaction rule or take other action deemed appropriate to protect the public interest.

(3)(6) A staff action will be in writing and inform the APPLICANT ~~telecommunications public utility~~ of the right of appeal. An appeal from an action of staff shall be governed by the procedures governing appeals from an action of staff under § 5.44 (relating to petitions to appeal from actions of the staff) of the Commission's rules of practice and procedure.

(l) *Limitations on general rule transactions.*

(1) *Bankruptcy proceedings.* General rule transactions related to bankruptcy remain subject to §§ 1.61 and 1.62 (relating to matters before other tribunals) of the Commission's rules of practice and procedure.

(2) *Scope of general rule transactions.* A general rule transaction may not operate to permit a ~~telecommunications public utility~~ AN APPLICANT to circumvent an obligation by doing or refraining from doing anything that AN APPLICANT a ~~telecommunications public utility~~ must do or cannot do.

**§ 63.325. Commission approval of a pro forma transaction subject to 66 Pa.C.S. §§ 1102(a)(3) and 1103.**

(a) *Pro forma transactions.* The following transactions of AN APPLICANT a ~~telecommunications public utility~~ not involving a change in conditions of service or rates that ~~seeks~~ SEEK Commission approval for acquisition, ~~diminution in control~~, merger, stock sales or transfers, transfer of assets or transfer of control of AN APPLICANT a ~~telecommunications public utility~~ ~~requires~~ REQUIRE notification to the Commission and approval by the Commission as a pro forma transaction:

(1) A transaction resulting in the transfer of less than 20% ~~10%~~ of the assets of AN APPLICANT a ~~carrier~~.

(2) A transaction resulting in the transfer of less than 20% ~~10%~~ of the direct or indirect control of AN APPLICANT a ~~carrier~~.

~~(3) A transaction resulting in the diminution of less than 10% in the control of a carrier.~~

(4) A transaction requiring a certificate of public convenience issued under 66 Pa.C.S. § 1102(a) (relating to enumeration of acts requiring certificate).

~~(5)~~(4) A transaction subject to evaluation under the statement of policy on transfer of control, § 69.901 (relating to utility stock transfer under 66 Pa.C.S. § 1102(a)(3)).

~~(6)~~ (5) A transaction that transfers the customer base of AN APPLICANT a telecommunications public utility and does not involve a change in conditions of service or rates.

~~(7)~~ (6) A transaction subjected to this subchapter by decision of the Commission, including a general rule PRO FORMA transaction NO LONGER reclassified CLASSIFIED as a pro forma transaction BY THE COMMISSION.

(b) *Reclassification of a pro forma transaction.* When AN APPLICANT a telecommunications public utility seeks review and approval of a transaction as a pro forma transaction and the Commission reclassifies the pro forma transaction, the COMMISSION WILL NOTIFY THE APPLICANT OF THE RECLASSIFICATION BY NOTICE PUBLISHED IN THE PENNSYLVANIA BULLETIN. AN APPLICANT MAY FILE A CHALLENGE TO THE RECLASSIFICATION DURING THE PROTEST PERIOD ESTABLISHED BY THE NOTICE. IF A FORMAL PROTEST OR COMPLAINT TO THE TRANSACTION IS FILED, THE CHALLENGE SHALL BE REVIEWED AS PART OF A TRADITIONAL RULE REVIEW PROCEEDING. IF NO FORMAL PROTEST OR COMPLAINT TO THE TRANSACTION IS FILED, THE CHALLENGE SHALL BE REVIEWED BY THE COMMISSION AS PART OF THE REVIEW OF THE TRANSACTION. ~~pro forma transaction shall be subject to the requirements of a general rule transaction in § 63.324 (relating to Commission approval of a general rule transaction subject to 66 Pa.C.S. §§ 1102(a) and 1103) unless the Commission determines otherwise for good cause shown.~~

~~—(1) Review of a pro forma transaction reclassified as a general rule transaction. The 60-day review and approval period for a pro forma transaction reclassified as a general rule transaction shall begin on the date that the telecommunications public utility is notified in writing that the pro forma transaction is reclassified.~~

~~—(2) Review of a pro forma transaction reclassified as other than a general rule transaction. The review and approval of a pro forma transaction reclassified as other than a general rule transaction shall begin on the date that the telecommunications public utility is notified in writing that the pro forma transaction is reclassified but not as a general rule transaction. A pro forma transaction reclassified under this section shall be reviewed within the period governing review and approval under 66 Pa.C.S. §§ 1102 and 1103 (relating to enumeration of acts requiring certificate; and procedure to obtain certificates of public convenience).~~

~~—(3) Right of appeal for reclassification of a pro forma transaction. When a telecommunications public utility is notified in writing by staff that a pro forma transaction will be reclassified, the determination shall be subject to appeal as an appeal from an action of staff. The provisions governing an appeal shall be those governing appeals from an action of staff under § 5.44 (relating to petitions for appeal from actions of the staff) of the Commission's rules of practice and procedure. The writing will inform the telecommunications public utility of the right of appeal.~~

(c) *Notification requirements for pro forma transactions.* Notification of a pro forma transaction shall be filed with the Commission on the date of filing with a Federal regulatory

agency seeking Federal approval of a pro forma transaction or no later than 30 days prior to the closing of a pro forma transaction subject to this subchapter, whichever is longer. The ~~utility~~ APPLICANT filing the notification shall comply with the Commission's rules of practice and procedure governing applications. THE APPLICANT SHALL CLEARLY STATE THAT THE APPLICATION IS A PRO FORMA TRANSACTION AND PROVIDE A COPY OF THE APPLICATION TO THE COMMISSION AND THE STATUTORY ADVOCATES. AN APPLICANT ~~A telecommunications public utility~~ shall provide an updated copy OF ANY SUBSEQUENT FILINGS to the Commission and the statutory advocates of filings in the following circumstances:

(1) Filing with the Federal Communications Commission (FCC) of an application seeking approval of the transaction (FCC application).

(2) Filing of a notice with the United States Department of Justice (U.S. DOJ) pursuant to the Hart-Scott-Rodino Antitrust Improvements Act (15 U.S.C.A. §§ 15c-15h, 18a and 66) (HSR Filing).

(3) Filing by AN APPLICANT ~~a telecommunications public utility~~ of a pleading responding to a formal or informal complaint, investigation, or proceeding undertaken by the FCC or the U.S. DOJ or other State or Federal regulatory agency involving the transaction.

(4) Filing required by the Commission from AN APPLICANT ~~a telecommunications public utility~~ in response to a notification by the Commission that simultaneous notification is appropriate to protect the public interest.

(5) Filing required by the Commission from AN APPLICANT ~~a carrier~~ in response to a request by any of the following:

(i) A request by a statutory advocate.

(ii) A request by a carrier with a certificate of public convenience obtained under 66 Pa.C.S. § 1102(a) for a copy.

(iii) A request by the Commission or staff for a copy.

(iv) A request by a person or party for a copy.

(d) *Content of notification for pro forma transactions.* In addition to the information required by § 5.12 (relating to contents of applications) of the Commission's rules of practice and procedure, a pro forma transaction must contain the following information:

(1) The name, address and telephone number of each party or applicant to the transaction.

(2) The government, state or territory under the laws of which each corporate or partnership applicant to the transaction is organized.

(3) The name, title, post office address and telephone number of the officer or contact point, including Pennsylvania legal counsel IN THIS COMMONWEALTH, to whom correspondence concerning the transaction is to be addressed.

(4) The name, address, citizenship and principal place of business any person, party or entity that directly or indirectly owns more than 20% 10% of the equity of the applicant, and the percentage of equity owned by each of those entities (to the nearest 1%).

(5) A summary description of the transaction.

(6) A SUMMARY OF THE SERVICES AND THE SERVICE TERRITORIES IN THE COMMONWEALTH OF PENNSYLVANIA THAT WILL BE AFFECTED BY THE TRANSACTION. ~~A description of the geographic areas subject to the transactions and what services are provided in the geographic area.~~

(7) A verified statement as to how the transaction fits into one or more of the categories subject to the pro forma rule.

(8) Identification of other transactions related to the transaction.

(9) A verified statement whether the transaction warrants special consideration because either party to the transaction is facing imminent business failure.

(10) Identification of a separately filed waiver request sought in conjunction with the transaction.

(11) A verified statement OF FACTS AND ALLEGATIONS ESTABLISHING:  
showing:

~~(i) How the transaction will serve the public interest, convenience and necessity.~~

~~(ii) A description of the general and specific affirmative public benefit to this Commonwealth and its consumers warranting approval of the transaction.~~

~~(iii) Additional information that may be necessary to address the effect of the transaction on dominant market power or predominant market presence.~~

(I) FOR A MERGER OR SIMILAR TRANSACTION, HOW THE TRANSACTION WILL AFFIRMATIVELY PROMOTE THE SERVICE, ACCOMMODATION, CONVENIENCE, OR SAFETY OF THE PUBLIC IN SOME SUBSTANTIAL WAY AS REQUIRED BY PENNSYLVANIA LAW.

(II) FINDINGS THAT APPROVAL FOR A TRANSACTION SUBJECT TO § 1103(A) OF THE PUBLIC UTILITY CODE IS NECESSARY OR PROPER FOR THE SERVICE, ACCOMMODATION, CONVENIENCE, OR SAFETY OF THE PUBLIC.

(III) THE IMPACT OF THE TRANSACTION ON COMPETITION.

(12) A verified statement affirming that the ~~utility~~ APPLICANT is in compliance with Commission obligations and filings AND A LISTING OF ALL STATE AND FEDERAL PROCEEDINGS WHEN:-

(I) WITHIN THE 3-YEAR PERIOD PRIOR TO FILING THE APPLICATION, THE APPLICANT WAS FOUND TO HAVE VIOLATED EITHER STATE OR FEDERAL REQUIREMENTS.

(II) WITHIN THE 3-YEAR PERIOD PRIOR TO FILING THE APPLICATION, THE APPLICANT IS ALLEGED TO HAVE VIOLATED EITHER STATE OR FEDERAL REQUIREMENTS.

(13) A verified statement affirming that customers received PRIOR ~~or will receive~~ notice. NOTICE SHALL BE ACCOMPLISHED USING A NOTICE APPROVED BY THE COMMISSION'S BUREAU OF CONSUMER SERVICES. ANY DISAGREEMENT BETWEEN THE APPLICANT AND BCS SHALL BE ADDRESSED BY AN APPEAL FROM AN ACTION OF STAFF MIRRORING § 5.44 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE.

(14) A verified statement containing a copy of any Commonwealth utility certificates held by the APPLICANT ~~telecommunications public utility~~.

(15) A verified statement on the effect of the transaction on existing Commonwealth tariffs. If applicable or in response to a request from staff, AN APPLICANT a ~~telecommunications public utility~~ shall provide a red-line document identifying changes in existing Commonwealth tariffs before and after the transaction for which the APPLICANT ~~utility~~ seeks approval from the Commission.

(16) A verified statement on the transaction's effect on the existing affiliate interest agreements of the APPLICANT ~~utility~~.

(17) A verified statement establishing that no State or Federal regulatory agency is expected to undertake an informal or formal investigation, complaint or proceeding relating to the transaction.

~~(18) A verified statement that no State or Federal regulatory undertaking is appropriate regarding the transaction because the telecommunications public utility lacks dominant market power or predominant market presence.~~

(19) Organizational charts showing the effect on the applicant's organization before and after the transaction.

~~(20)~~ (19) A copy of the application filed at the FCC or a notice filed with the U.S. DOJ, if any, INCLUDING THE ELECTRONIC LOCATION ON THE AGENCY'S WEBSITE.

(20) A VERIFIED STATEMENT SETTING FORTH THE EXPECTED PUBLIC EFFECT OF THE TRANSACTION ON THE CAPITAL STRUCTURE OF THE APPLICANT OVER THE NEXT 5 YEARS.

(21) FOR AN APPLICANT SUBJECT TO A BROADBAND DEPLOYMENT COMMITMENT UNDER FEDERAL OR PENNSYLVANIA LAW, A VERIFIED STATEMENT AFFIRMING THAT THE APPLICANT IS IN COMPLIANCE WITH THAT COMMITMENT.

(22) FOR AN APPLICANT WITH ELIGIBLE TELECOMMUNICATIONS CARRIER STATUS UNDER FEDERAL AND PENNSYLVANIA LAW, A VERIFIED STATEMENT AFFIRMING THAT THE APPLICANT IS IN COMPLIANCE WITH THE LAW AND THAT THE APPLICANT WILL CONTINUE TO BE IN COMPLIANCE WITH THE LAW.

(23) A VERIFIED STATEMENT AFFIRMING THAT THE TRANSACTION COMPLIES WITH THE PROHIBITION AGAINST CROSS-SUBSIDIZATION IMPOSED UNDER STATE AND FEDERAL LAW.

(e) *Continuing obligations for notification of pro forma transactions.* When a Commission or Federal proceeding related to A TRANSACTION THAT IS THE SUBJECT OF the pro forma transaction is pending, the APPLICANT a ~~telecommunications public utility~~ seeking approval of a pro forma transaction shall file with the Commission AND PROVIDE TO THE STATUTORY ADVOCATES copies of all procedural motions, public responses to discovery, and orders or other actions addressing or terminating the proceeding. The APPLICANT ~~telecommunications public utility~~ shall supplement the APPLICATION ~~notification filing~~ with any FCC or U.S. DOJ public notice issued concerning the transaction.

(f) *Commission publication AND RECLASSIFICATION of pro forma transactions.*

(1) The Secretary WILL ~~may~~ publish notice of a pro forma transaction in the *Pennsylvania Bulletin*. The Secretary may post notice of the pro forma transaction on the Commission's web site, ~~unless the Commission determines otherwise for good cause shown.~~

(2) A NOTICE SHALL CONTAIN A 15-DAY FORMAL PROTEST PERIOD ESTABLISHED UNDER § 5.14(D) OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE.

(i) A FORMAL PROTEST OR COMPLAINT SHALL CONSTITUTE A FORMAL PROTEST UNDER § 5.14 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE AND SHALL SUBJECT THE TRANSACTION TO TRADITIONAL RULE REVIEW.

~~(2) A notice posted on the Commission web site may contain a general comment period established according to § 5.14(d) (relating to applications requiring notice) of the Commission's rules of practice.~~

~~(3) There shall be no formal protest period under § 5.14(d) of the Commission's rules of practice and procedure, unless the Commission determines otherwise for good cause shown.~~

~~—(4) A pro forma transaction subject to publication in the *Pennsylvania Bulletin*, in addition to any additional publication or posting on the Commission's web site, shall be subject to a general comment period and a formal protest period established under § 5.14(d) of the Commission's rules of practice and procedure, unless the Commission determines otherwise for good cause shown.~~

~~—(i) A general comment addressing a transaction not involving a change in conditions of service or rates will not constitute a formal protest under § 5.14 of the Commission's rules of practice and procedure nor reclassify the general rule transaction, unless the Commission determines otherwise for good cause shown.~~

~~—(ii) A formal protest objecting to a transaction not involving a change in conditions of service or rates constitutes a formal protest under § 5.14 of the Commission rules of practice and procedure and may reclassify the general rule transaction, unless the Commission determines otherwise for good cause shown.~~

~~—(iii) A formal protest objecting to a transaction not involving a change in conditions of service or rates by a statutory advocate constitutes a formal protest under § 5.14 of the Commission's rules of practice and procedure and reclassify a general rule transaction either as a general rule transaction or as a transaction subject to the review and approval for transactions under 66 Pa.C.S. §§ 1102 and 1103.~~

~~(g) *Telecommunications public utility APPLICANT notice to customers.*~~

~~(1) *Pro forma transactions not involving a change in conditions of service or rates.* A telecommunications carrier shall prepare and distribute notice of a pro forma transaction not involving a change in conditions of service or rates to the customers of a telecommunications carrier. Notice and distribution may also be required for transactions that do not reduce an applicant's control by more than 10%. Notice shall be distributed prior to Commission approval of a pro forma transaction unless the circumstances make distribution prior to approval impractical or unnecessary.~~

~~—(2) *Notice of pro forma transfers of customer base.*~~

~~—(i) A pro forma transaction transferring a customer base not involving a change in conditions of service or rates or not reducing an applicant's control by more than 10% does not require additional notice to the customer base beyond the general notice in this subchapter.~~

~~—(ii) A general comment addressing the transfer of a customer base not involving a change in conditions of service or rates will not constitute a formal protest under § 5.14 of the Commission's rules of practice and procedure nor reclassify the pro forma transaction, unless the Commission determines otherwise for good cause shown.~~

~~—(iii) A formal protest objecting to transfer of a customer base not involving a change in conditions of service or rates constitutes a formal protest under § 5.14 of the Commission rules of practice and procedure but does not reclassify the pro forma transaction, unless the Commission determines otherwise for good cause shown.~~



(1) *PRO FORMA TRANSACTIONS WITH NO CHANGE IN CONDITIONS OF SERVICE OR RATES.* AN APPLICANT SHALL PREPARE AND DISTRIBUTE PRIOR NOTICE TO THE CUSTOMERS OF A PRO FORMA TRANSACTION INVOLVING NO CHANGE IN CONDITIONS OF SERVICE OR RATES WITH THE APPROVAL OF THE COMMISSION'S BUREAU OF CONSUMER SERVICES. ANY DISAGREEMENT BETWEEN THE APPLICANT AND BCS SHALL BE ADDRESSED BY AN APPEAL FROM AN ACTION OF STAFF MIRRORING § 5.44 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE.

(2) *TRANSFERS OF CUSTOMER BASE SUBJECT TO THE PRO FORMA RULE.*

(I) A TRANSACTION TRANSFERRING A CUSTOMER BASE INVOLVING NO CHANGE IN CONDITIONS OF SERVICE OR RATES SHALL REQUIRE PRIOR NOTICE TO THE CUSTOMER BASE PREPARED WITH THE APPROVAL OF THE COMMISSION'S BUREAU OF CONSUMER SERVICES. ANY DISAGREEMENT BETWEEN THE APPLICANT AND BCS SHALL BE ADDRESSED BY AN APPEAL FROM AN ACTION OF STAFF MIRRORING § 5.44 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE.

(II) A TIMELY FORMAL PROTEST OR COMPLAINT TO THE TRANSFER OF A CUSTOMER BASE INVOLVING NO CHANGE IN CONDITIONS OF SERVICE OR RATES SHALL CONSTITUTE A FORMAL PROTEST UNDER § 5.14 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE.

(h) *Commission review of pro forma transactions.* The Commission retains the discretion to make inquiries and, after notice and opportunity to be heard, take action to protect the public interest, including:

(I) FOR A MERGER OR SIMILAR TRANSACTION, ENSURING THAT THE TRANSACTION WILL AFFIRMATIVELY PROMOTE THE SERVICE, ACCOMMODATION, CONVENIENCE, OR SAFETY OF THE PUBLIC IN SOME SUBSTANTIAL WAY AS REQUIRED BY PENNSYLVANIA LAW.

(II) FINDINGS THAT A TRANSACTION SUBJECT TO § 1103(A) OF THE PUBLIC UTILITY CODE IS NECESSARY OR PROPER FOR THE SERVICE, ACCOMMODATION, CONVENIENCE, OR SAFETY OF THE PUBLIC.

(III) ADDRESSING THE IMPACT OF THE TRANSACTION ON COMPETITION.

(IV) ~~the~~ THE imposition of conditions on approval of the transaction when deemed necessary or proper under 66 Pa.C.S. § 1103 ~~and to establish affirmative public benefit as required by law of the Commonwealth.~~

(i) *Formal protests AND COMPLAINTS to a pro forma transaction.* A protest filed to a PRO FORMA transaction ~~subject to the general rule~~ must comply with the Commission's rules of practice and procedure.

(j) ~~Removal~~ RECLASSIFICATION of a transaction as a ~~pro forma transaction~~. The Commission will RECLASSIFY ~~remove~~ AN APPLICATION FOR APPROVAL OF A PRO FORMA a transaction as a ~~pro forma transaction and reclassify the transaction~~ in the following circumstances:

(1) ~~The filing of a FORMAL protest OR COMPLAINT by a statutory advocate or the filing of a formal protest warranting reclassification for good cause shown, including competitive impact.~~

(2) ~~The filing involves a major acquisition or merger between telecommunications firms with substantial market shares.~~

~~—(3) The filing involves an acquisition, merger or other transaction that raises novel or important issues.~~

(3) ~~—(4) The Commission determines that reclassification is necessary to protect the public interest.~~

(k) *Commission approval for a pro forma transaction.* THE COMMISSION WILL ISSUE A SECRETARIAL LETTER OR ORDER AFTER REVIEW OF AN UNPROTESTED A transaction subject to this subchapter DETERMINING IF THE APPLICATION IS ~~will be deemed to be~~ in the public interest and CONSISTENT WITH §§ 1102(A) AND 1103(A) NO LATER THAN ~~approved in law and fact~~ 30 days after EXPIRATION OF THE PROTEST PERIOD ESTABLISHED IN THE PUBLIC NOTICE IN THE *PENNSYLVANIA BULLETIN* ~~filing with the Commission or posting on the Commission's web site, whichever is longer, unless the Commission determines otherwise for good cause shown.~~

(1) The Commission will DETERMINE ~~issue a Secretarial letter or order~~ FOR A MERGER OR SIMILAR TRANSACTION WHETHER THE TRANSACTION AFFIRMATIVELY PROMOTES THE SERVICE, ACCOMMODATION, CONVENIENCE, OR SAFETY OF THE PUBLIC IN SOME SUBSTANTIAL WAY. ~~approving a pro forma transaction and~~

(2) THE COMMISSION WILL MAKE FINDINGS WHETHER A TRANSACTION SUBJECT TO § 1103(A) OF THE PUBLIC UTILITY CODE IS NECESSARY FOR THE SERVICE, ACCOMMODATION, CONVENIENCE, OR SAFETY OF THE PULBIC AND STATE WHETHER THE COMMISSION WILL issue a certificate of public convenience authorizing the transaction under 66 Pa.C.S. §§ 1102(a) and 1103.

(3) THE COMMISSION WILL ADDRESS THE IMPACT OF THE PRO FORMA TRANSACTION ON COMPETITION.

(4) THE COMMISSION WILL DETERMINE WHETHER TO IMPOSE CONDITIONS DEEMED NECESSARY OR PROPER UNDER 66 PA.C.S. § 1103 IN CONJUNCTION WITH A DETERMINATION TO APPROVE A PRO FORMA TRANSACTION.

(2) (5) The Commission or staff may extend the consideration period, reject the filing or transaction, remove a transaction from the pro forma rule or take other action deemed appropriate to protect the public interest.

(3) (6) A staff action will be in writing and inform the ~~telecommunications public utility~~ APPLICANT of the right of appeal. An appeal from an action of staff shall be governed by the procedures governing appeals from an action of staff under § 5.44 of the Commission's rules of practice and procedure.

(1) *Limitations on pro forma transactions.*

(1) *Bankruptcy proceedings.* Pro forma changes related to bankruptcy remain subject to §§ 1.61 and 1.63 (relating to matters before other tribunals) of the Commission's rules of practice and procedure.

(2) *Scope on pro forma transactions.* A pro forma transaction may not operate to permit AN APPLICANT a ~~telecommunications public utility~~ to abandon a condition of service or rate. A pro forma transaction may not operate to permit AN APPLICANT a ~~telecommunications public utility~~ to circumvent an obligation by doing or refraining from doing anything that AN APPLICANT a ~~telecommunications public utility~~ must do or cannot do.

**~~§ 63.326. Approval of contracts between a carrier or public utility and an affiliated interest under 66 Pa.C.S. §§ 2101(a), 3016(f)(1) and 3019(b)(1).~~**

~~—(a) A written or oral contract or transaction between a telecommunications utility and an affiliated interest is governed by 66 Pa.C.S. §§ 3016(f)(1) and 3019(b)(1) (relating to competitive services; and additional powers and duties). A written or oral contract between a telecommunications utility and an affiliate requires approval by the Commission and may not violate the prohibition against subsidization of competitive services by noncompetitive services.~~

~~—(b) *Written contract or transaction.* The carrier or public utility shall file a copy and written summary of a written contract or transaction between a carrier or public utility and an affiliated interest with the Commission. A written contract or transaction shall remain subject to examination, audit or other action to ensure compliance with 66 Pa.C.S. § 3016(f)(1) and other applicable sections of the code.~~

~~—(c) *Oral contract or transaction.* The filing of a written summary of an oral contract or transaction shall be deemed compliant with this subchapter. An oral contract or transaction shall remain subject to examination, auditing or other action to ensure compliance with 66 Pa.C.S. § 3016(f)(1) and other applicable sections of the code.~~

~~—(d) *Retention of contract or transaction.* A public utility or carrier shall retain and make available copies or summaries of the contract or transaction and shall file the copies or summaries at the request of the Commission.~~

~~—(e) *Commission discretion.* The Commission retains discretion to make inquiries, audits and other investigations and, after notice and opportunity to be heard, take action to protect the public interest.~~

# **APPENDIX B**

**Summary of Final-Form Regulations for  
Telecom Applications under Section 1102/03**

|                             | <b>Traditional Review</b>  | <b>General Rule<br/>(new)</b>   | <b>Pro Forma Review<br/>(new)</b>   |
|-----------------------------|--|---|---|
| <b>Timeline for Action</b>  | No time limit  | 60 days after expiration of protest period established by publication in PA Bulletin                              | 30 days after expiration of protest period established by publication in Pa Bulletin  |
| <b>Eligible Matters</b>     | All applications under Sections 1102/03  | Applications for transfers of control (a) greater than 20% and (b) changes in rates/term of service <sup>10</sup> | Applications for name changes and transfers of control (a) equal or less than 10% and (b) with no changes in rates/terms of service |
| <b>Eligible Carriers</b>    | All ILECs/CLECs  | All ILECs/CLECs   | All ILECs/CLECs   |
| <b>Effect of Protests</b>   | Assigned to OALJ for evidentiary hearings (as needed) <sup>11</sup> and decision | Reclassify and transfer to OALJ for traditional review  | Reclassify and transfer to OALJ for traditional review  |
| <b>Method to Reclassify</b> | N/A  | By Staff via Notice in Pa. Bulletin   | By Staff via Notice in Pa. Bulletin   |
| <b>Method for Approval</b>  | Commission action on OSA draft order at Public Meeting                           | Commission action on FUS Secretarial Letter at Public Meeting <sup>12</sup>                                       | By Staff via Secretarial Letter   |

<sup>10</sup> Subject to Commission's right to reclassify any application for full traditional review if the issues raised are "new or novel" or if, in Commission's judgment, reclassification for traditional review would be "in the public interest".

<sup>11</sup> Per *Chester Water Authority*, 868 A.2d 384 (Pa. 2005), Commission need not hold evidentiary hearings under Section 1103(b), 66 Pa. C.S. § 1103(b), if there are no material factual issues in dispute.

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PENNSYLVANIA PUBLIC UTILITY COMMISSION  
COMMONWEALTH OF PENNSYLVANIA  
HARRISBURG, PENNSYLVANIA

May 6, 2010

JAMES H. CAWLEY  
CHAIRMAN

The Honorable Arthur Coccodrilli  
Chairman  
Independent Regulatory Review Commission  
14th Floor, Harristown II  
333 Market Street  
Harrisburg, PA 17101

Re: L-00070188/57-260  
Final Rulemaking  
To Streamline Procedures for Review of  
Transfer of Control and Affiliate Filings for  
Telecommunications Carriers  
52 Pa. Code Chapter 63

Dear Chairman Coccodrilli:

Enclosed please find one copy of the regulatory documents concerning the above-captioned rulemaking. Under Section 745.5(a) of the Regulatory Review Act, the Act of June 30, 1989 (P.L. 73, No. 19) (71 P.S. §§745.1-745.15) the Commission, on January 30, 2008, submitted a copy of the Notice of Proposed Rulemaking to the House Consumer Affairs Committee, the Senate Consumer Protection and Professional Licensure Committee, and the Independent Regulatory Review Commission (IRRC). This notice was published at 38 *Pa.B.* 758 on February 9, 2008. The Commission also provided the Committees and IRRC with copies of all comments received in compliance with Section 745.5(b.1).

In preparing this final form rulemaking, the Commission has considered all comments received from the Committees, IRRRC and the public.

Very truly yours,

A handwritten signature in black ink that reads "James H. Cawley" with a long horizontal flourish extending to the right.

James H. Cawley  
Chairman

Enclosures

cc: The Honorable Robert M. Tomlinson  
The Honorable Lisa Boscola  
The Honorable Robert Godshall  
The Honorable Joseph Preston, Jr.  
Legislative Affairs Director Perry  
Chief Counsel Pankiw  
Regulatory Coordinator DelBiondo  
Assistant Counsel Witmer  
Judy Bailets, Governor's Policy Office

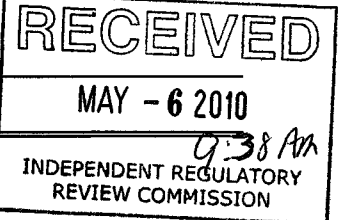


TRANSMITTAL SHEET FOR REGULATIONS SUBJECT  
TO THE REGULATORY REVIEW ACT

ID Number: L-00070188/57-260

Subject: To Streamline Procedures for Review of Transfer of  
Control and Affiliate Filings for Telecommunications  
Carriers

Pennsylvania Public Utility Commission



TYPE OF REGULATION

- Proposed Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted.
- Final Regulation
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor

FILING OF REPORT

| <u>Date</u> | <u>Signature</u> | <u>Designation</u>  |
|-------------|------------------|---|
| 5/6/10      | Marid Santoro    | HOUSE COMMITTEE (Preston)<br>Consumer Affairs                                     |
| 5/6/10      | Mary Walmer      | SENATE COMMITTEE (Tomlinson)<br>Consumer Protection and<br>Professional Licensure |
| 5/6/10      | K. Cooper        | Independent Regulatory<br>Review Commission<br>Attorney General                   |
|             |                  | Legislative Reference<br>Bureau   |