



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place
 Harrisburg, Pennsylvania 17101-1923
 (717) 783-5048
 800-684-6560 (in PA only)

RECEIVED

2008 APR 11 AM 9:19

FAX (717) 783-7152
 consumer@paoca.org

INDEPENDENT REGULATORY
REVIEW COMMISSION

IRWIN A. POPOWSKY
 Consumer Advocate

April 9, 2008

James J. McNulty, Secretary
 PA Public Utility Commission
 Commonwealth Keystone Bldg.
 400 North Street
 Harrisburg, PA 17120

Re: 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 and

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

Dear Secretary McNulty:

Enclosed please find for filing an original and fifteen (15) copies of the Office of
 Consumer Advocate's Comments in the above-captioned proceeding.

Copies have been served upon all parties of record as shown on the attached
 Certificate of Service.

Sincerely,

Joel H. Cheskis
 Assistant Consumer Advocate
 PA Attorney I.D. #81617

Enclosures

cc: All parties of record
 Michael A. Totino, Esq./IRRC
 *98813

RECEIVED

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

2008 APR 11 AM 9:19

INDEPENDENT REGULATORY
REVIEW COMMISSION

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

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

COMMENTS OF THE
OFFICE OF CONSUMER ADVOCATE

Joel H. Cheskis
Assistant Consumer Advocate
PA Attorney I.D. #81617
E-Mail: jcheskis@paoca.org
Barrett C. Sheridan
Assistant Consumer Advocate
PA Attorney I.D. #61138
E-Mail: bsheridan@paoca.org

Counsel for:
Irwin A. Popowsky
Consumer Advocate

Office of Consumer Advocate
555 Walnut Street, 5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152

DATED: April 9, 2008

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	THE PROPOSED REGULATIONS SHOULD BE WITHDRAWN.....	9
A.	<u>Introduction</u>	9
B.	<u>Applications For Issuance Of A Certificate Of Public Convenience May Not Be “Deemed” To Be In The Public Interest And Approved In Law And Fact Without Following The Requirements Of Section 1103</u>	9
C.	<u>Expanding The Rulemaking Proceeding To Include ILECs Fails To Recognize ILECs’ Provider Of Last Resort Obligations As Eligible Telecommunications Carriers And Their Obligations To Provide Universal Broadband Availability Under Chapter 30</u>	13
D.	<u>The Proposed Rulemaking Order Violates Affected Parties’ Due Process Rights Because It Does Not Provide Adequate Notice Of Transfer Proceedings And Does Not Allow Sufficient Time To Adjudicate Material Issues Of Fact</u>	15
E.	<u>The Proposed Rulemaking Order Does Not Provide The Necessary Due Process Rights To Protests Filed By Non-statutory Advocates</u>	22
F.	<u>The Proposed Rulemaking Does Not Require The Commission To Make The Necessary Findings In A Commission Order That Are Required To Support Approval Of A Transfer Of Control Proceeding</u>	24
G.	<u>The Proposed “Reclassification Process” Is Inappropriate And Difficult To Implement</u>	26
H.	<u>Conclusion</u>	28
III.	IF THE COMMISSION DETERMINES TO MODIFY ITS TRANSFER OF CONTROL PROCEEDINGS, IT SHOULD LIMIT THE RELIEF TO COMPETITIVE CARRIERS AND INCLUDE THE MODIFICATIONS DISCUSSED BELOW.....	29

IV. SUGGESTED SPECIFIC TECHNICAL CHANGES33

A. Section 63.323 Applicability.....33

B. Section 63.324 – Requirements for a telecommunications public utility seeking Commission approval of a general rule transaction subject to 66 Pa.C.S. § 1102(a)(3) and 1103.....34

 1. Subsection 63.324(a) – Description of General Rule Transactions34

V. CONCLUSION36

I. INTRODUCTION

The Office of Consumer Advocate (“OCA”) respectfully opposes the Proposed Rulemaking Order in its entirety. The Proposed Rulemaking arose from a Petition of Level 3 Communications, LLC (“Level 3”) filed on May 31, 2006. According to Level 3, the need for regulatory approval of transfer of control transactions is inconvenient and unnecessary for non-dominant telecommunications carriers. To remedy this problem, Level 3 asked the Public Utility Commission (“PUC” or “Commission”) to adopt regulations to streamline Commission approval under Section 1103 of the Public Utility Code of transfers of control involving *competitive* carriers. Level 3 based its proposal on the Federal Communications Commission’s (“FCC’s”) streamlined review process for transfers of control by interstate carriers and the Commission’s regulations governing registration of securities at Chapter 19 of the Public Utility Code.

The Commission issued this Proposed Rulemaking Order, tentatively agreeing with part of the Level 3 proposal, and going several steps further.¹ The proposed regulations of the Commission would apply to *all* telecommunications companies, including incumbent local exchange carriers (“ILECs”), and would create alternative timelines for review of certain transfer of control transactions.² Abbreviated review and approval would apply to “General Rule” transactions and “Pro Forma” transactions. General Rule transactions involve, among other things, the transfer of 10% or more of the assets of a carrier, or of the direct or indirect control of 10% of the assets of a carrier. “Pro Forma” transactions include internal corporate restructurings that, among other things, do not involve a change in conditions of service or rates. At the end of the abbreviated review period (60 days for General Rule transactions and 30 days for Pro Forma transactions), the transfer of control transaction would be “deemed in the public interest, as a

¹ Abbreviated Procedure for Review of Transfer of Control and Affiliate Filings for Telecommunications Carriers, 38 Pa.B. 758 (entered Oct. 17, 2007; published Feb. 9, 2008) (“Proposed Rulemaking Order”).

² Proposed Rulemaking Order, 38 Pa.B. at 759.

matter of fact and law, and approved.” Transactions that do not fit those parameters, such as major mergers, would continue to be subject to what the Commission describes as “traditional,” “standard,” or “open-ended review.”³

The OCA respectfully submits that the premise for the rulemaking, that Pennsylvania’s existing requirements for review and approval of transfer of control transactions do not meet the business needs of telecommunications carriers, is unsupported. Over the 15 years since the passage of the original Chapter 30 and rise of competition in the local, toll and access markets, the provisions of Chapter 11 have continued to apply to the telecommunications public utilities and their affiliates. Act 183 of 2004 explicitly retained the Commission’s authority and obligation to review mergers and other change of control transactions involving ILECs to ascertain that any approval is in the public interest.⁴

As shown in the Table below, the Commission timely reviews and enters orders approving uncontested Section 1102(a)(3) applications for approval of transfers of control filed by all manner of telecommunications carriers.⁵ The Commission’s record is one of promptness and efficiency. In recent years, for example, Level 3 has applied for and received Commission approval of four applications in three months or less, from the date of filing. This is in contrast to the “6-9 month period Level 3 laments in their pleadings” as noted by the Commission in the Proposed Rulemaking Order.⁶ Where no protests have been filed, the Commission generally reviews and rules on these applications in an expeditious fashion:

³ Proposed Rulemaking Order, 38 Pa.B. at 759.

⁴ 66 Pa. C.S. § 3019(b)(4).

⁵ 66 Pa. C.S. § 1102(a)(3).

⁶ Proposed Rulemaking Order, 38 Pa.B. at 760, “Summary of Rulemaking.”

<u>Applicants</u>	<u>Docket No.</u>	<u>Date Filed</u>	<u>PUC Order</u>	<u>Hearings</u>
Broadview Network Holdings, Inc., et al.	A-31093F0006	11/15/07	1/24/08	None
Zayo Bandwidth Northeast, LLC and Zayo Bandwidth Northeast Sub, LLC	A-311114F0003	10/29/07	01/10/08	None
Trinsic Communications, Inc., Touch 1 Communications, Inc., et al.	A-310706F0004, et al.	04/11/07	05/30/07	None
North Penn Telephone Company, Barch Corporation and Wagner Limited Partnership	A-312500	12/18/06	02/8/07	None
Level 3 Communications, Inc. and TelCove, Inc., et al.	A-310633F007	05/12/06	07/20/06	None
Level 3 Communications, Inc. and Looking Glass Networks, Inc.	A-310633F0008	06/15/06	07/20/06	None
Level 3 Communications, LLC, WilTel Communications Group, LLC, et al.	A-310633F0006, et al.	11/01/05	12/22/05	None
Level 3 Communications, Inc. and Level 3 Communications, LLC	A-310633F0005	09/29/05	12/21/05	None
Bentleyville Communications Corp, d/b/a Bentleyville Telephone Company, et al.	A-310250F0005 et al.	04/18/05	07/15/05	None
Laurel Highland Telephone Company, Laurel Highland Long Distance, et al.	A-311800F0005 et al.	09/30/05	12/21/05	None
Pymatuning Independent Telephone Company, P.T. Communications, Corp, et al.	A-312800F0005 et al.	02/17/05	04/21/05	None
Dominion Telecom, Inc., Dominion Fiber Ventures, Elantic Networks, Inc.	A-311102F0005	03/16/04	04/29/04	None
Adelphia Business Solutions, Inc. et al.	A-310470F0008, et al.	03/15/04	04/30/04	None
BridgeCom International, Inc. and MCG Capital Corporation	A-311052F0003	12/9/2003	02/17/04	None
NUI Telecom, Inc.	A-310395F0005	10/27/03	01/20/04	None
Lightwave Communications, Inc. and Looking Glass Network, Inc.	A-310996F0002	11/8/02	02/20/03	None

The Commission's existing review and approval process complies with the Public Utility Code and assures that approval is given only if the Commission determines that grant is in the public

interest. The Commission's existing review and approval process can be completed in an expedited manner when the application does not raise issues significantly impacting the public interest.

Despite the Commission's ability to review telecommunications company's transfer of control proceedings in a timely manner, Level 3 requested streamlined treatment for transfers of control. Level 3 has made this request to a number of state utility commissions throughout the Nation and appears to be pursuing a broader national policy for the treatment of transfers of control, regardless of whether such treatment is necessary or appropriate in Pennsylvania. The OCA would note that Level 3 has not had unanimous success in its efforts to create a nationwide streamlined transfer of control process. In Colorado for example, the Colorado Public Utilities Commission rejected Level 3's Petition and adopted an Administrative Law Judge's finding that Level 3 failed to provide any examples where a non-dominant competitive local exchange carrier ("CLEC") was adversely affected by that state's transfer of control rules.⁷

Similarly, the Minnesota Public Utilities Commission denied Level 3's Petition and found "there is no suggestion in the record that either the Commission or the Department have at any point not moved forward on the requests with due speed and diligence, consistent with the public interest review required by Minnesota statutes."⁸ In Virginia, Level 3 pursued legislative reform. Such legislation, however, was ultimately vetoed by Governor Timothy Kaine who

⁷ In the Matter of the Petition of Level 3 Communications, LLC to Amend the Commission's Rules to Streamline Transfer of Control and Financing Requirements, Docket No. 06M-190T, Order Denying Exceptions (Adopted Aug. 9, 2006).

⁸ In the Matter of a Commission Investigation into Possible Modification of its Procedure for Reviewing Non-Dominant Carrier Acquisitions and Transfer of Control Transactions, Docket No. P-999/CI-07-192, Order Declining to Adopt Proposed Review Modifications and Approving Application Content Checklist (May 22, 2007).

stated the bill was a threat to consumer access to telephone service in Virginia “and it is imperative that we act reasonably to assure that this access is not diminished.”⁹

Any proposed changes to Pennsylvania’s regulations and procedures should be similarly rejected. As set forth in these Comments, the Proposed Rulemaking is unnecessary, overly broad in its inclusion of ILECs, and contrary to the requirements of Section 1102 and 1103 of the Public Utility Code.¹⁰ Section 1103(a), in particular, makes the issuance of a certificate of public convenience contingent on the entry of an order by the Commission and requires that “[i]n every case, the commission shall make a finding or determination in writing, stating whether or not its approval is granted.”¹¹

The OCA submits that the Commission’s existing review and approval process complies with Pennsylvania law and provides appropriate regulatory parity and flexibility. The Commission’s existing regulations in Chapter 5 of 52 Pa.Code governing applications and protests should continue to apply to applications that involve a transfer of control. Indeed, the Commission considered the interests of telecommunications carriers in revising Section 5.14 “Applications requiring notice” in the Chapter 1, 3 and 5 Final Rulemaking Order which took effect just two years ago.¹² The Commission kept a 15-day protest period as the general rule and reinstated the list of applications subject to publication and protest, as part of the revised and final Section 5.14.¹³ As the Commission explained in the Chapter 1, 3 and 5 Final Rulemaking Order:

⁹ “Virginia Briefings: Bill on Phone Companies Vetoed,” *Washington Post* at B05 (Mar. 27, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/28/AR2007032802144.html> (last viewed 04/07/08).

¹⁰ 66 Pa.C.S. §§ 1102 and 1103.

¹¹ 66 Pa.C.S. § 1103(a).

¹² Final Rulemaking for the Revision of Chapters 1, 3, and 5 of Title 52 Pa.Code of the Pennsylvania Code Pertaining to Practice and Procedure before the Commission, 36 Pa.B. 2097, 2109 (published Apr. 29, 2006)(“Ch. 1, 3 and 5 Final Rulemaking Order”).

¹³ 52 Pa. Code § 5.14.

A 15-day standard protest period is appropriate in situations where an applicant wants to implement a business plan or transportation service but needs Commission approval. This is often the case for telecommunications resellers or transportation providers. The § 5.14(b) list for telecommunications in the existing regulation is retained in the final § 5.14(d) regulation.¹⁴

Section 5.14(d)(7) and (8) extend the notice and protest requirements to change of control applications for all utility types.¹⁵

In the Chapter 1, 3, 5 Rulemaking, the Commission specifically balanced the interest of the public and telecommunications carriers, including competitive carriers such as resellers, in revising the procedural steps for notice and protest of applications pursuant to Sections 1102(a) and 1103(a) of the Public Utility Code. The OCA submits that the existing regulations should continue to apply. The Commission's process for determining whether an application for approval of a telecommunications carrier change of control transaction is in the public interest is not out-dated. It provides a sound continuing basis for Commission consideration of these types of proceedings.

Although the impetus of this rulemaking was Level 3's request for an expedited process for competitive carriers, the Commission has gone even further and proposed an abbreviated review for ILECs. The Commission proposal, however, fails to account for the specific statutory obligations imposed on ILECs under both federal and state law that make such abbreviated review procedures improper. First, ILECs have provider of last resort obligations pursuant to their status as Eligible Telecommunications Carriers ("ETCs") under Section 214 of the federal Telecommunications Act of 1996 ("TA-96").¹⁶ A transfer of control transaction which involves an ILEC must ensure that basic local service is protected so that consumers always have at least

¹⁴ Ch. 1, 3 and 5 Final Rulemaking Order, 36 Pa.B. at 2109.

¹⁵ 52 Pa. Code § 5.14(d)(7), (8).

¹⁶ 47 U.S.C. § 214(e).

one reliable source for their basic telecommunication needs. Second, ILECs are obligated under Section 3013(a) of the Public Utility Code to provide broadband availability to all customers in their respective service territories.¹⁷ Section 3019(b)(1) of the Public Utility Code requires the Commission to assess and, as necessary impose conditions, upon “the sale, merger, acquisition or other transaction... of a local exchange telecommunications company or any facilities used to provide telecommunications services to ensure that there is no reduction in the advanced service or broadband deployment obligations for the affected properties or facilities.”¹⁸ This statutory requirement applies to ILECs and ILEC facilities. Yet, the Proposed Rulemaking would allow transfers of control involving an ILEC to be subject to as little as a 30 day review period followed by a Secretarial Letter memorializing that the application was “deemed in the public interest and approved.”

The Commission’s Proposed Rulemaking Order, as published on February 9, 2008, raises a number of legal concerns. In particular, the OCA submits that the proposed Subchapter O regulations:

- **impose deadlines for Commission review, after which the application is “deemed in the public interest” and “approved,”** even though the Public Utility Code requires the Commission to issue an Order and make findings on a case-by-case basis regarding whether an application and grant of a certificate is in the public interest, whether to impose conditions, or to deny the application;
- **include transfer of control transactions involving ILECs as well as competitive carriers as eligible for abbreviated review and approval,** even though Commission review of ILEC applications require specific consideration and findings regarding continuation of basic local service and no diminishment in broadband deployment obligations;

¹⁷ 66 Pa. C.S. § 3013(a).

¹⁸ 66 Pa.C.S. § 3019(b)(4). Under Chapter 30, a “local exchange company” is defined as an ILEC. See 66 Pa.C.S. § 3012.

- **establish standards for notice and opportunity to be heard that are too minimal to satisfy due process requirements**, where the applications could be subject to abbreviated review without timely notice to customers or the public and would limit opportunities to file protests and keep contested applications on track for abbreviated review and approval;
- **improperly accord pleadings filed by non-statutory parties less due process than protests filed statutory advocates**, where protests by non-statutory advocates might not be afforded a hearing, even when material issues of fact are disputed;
- **rely on a Secretarial Letter procedure when the statute requires specific findings and determinations by the Commission**, where the Proposed Rulemaking Order suggests that applications and certificates of public convenience could be approved and issued through Staff issued Secretarial letters rather than by Commission action and written order; and
- **provide an inadequate method to determine which of the two approval processes will be used for a particular transfer**, where the Proposed Rulemaking Order allows for “reclassification” of a transfer of control proceeding, the Companies are given too much discretion to determine which process will apply and it is unclear how the reclassification process will work.

The OCA Comments set forth below address how the proposed Subchapter O regulations are contrary to the law and do not constitute appropriate public policy. The OCA recommends that the Commission withdraw the Proposed Rulemaking in its entirety.

To the extent the Commission wishes to pursue any streamlined form of transfer of control process for telecommunications providers in Pennsylvania, however, the OCA submits that the Commission should limit such streamlined review process to competitive carriers’ transfers whose impact on consumers and the public would be limited. This process should not apply to applications involving ILECs. The streamlined process must also afford proper notice, meaningful opportunity to be heard, and conclude with a Commission Order. The OCA outlines

a process below that would permit a more expedited review of competitive carrier applications, while also complying with due process requirements.

II. THE PROPOSED REGULATIONS SHOULD BE WITHDRAWN

A. Introduction.

The OCA submits that the Proposed Rulemaking represents a significant and unwarranted deviation from existing Section 1103 practice and should be withdrawn. The review called for under Chapter 11 and Chapter 30 of the Public Utility Code should be preserved, not reversed and revised by regulation, so that consumer interests and the public interest are protected as required by Pennsylvania law. Set forth below are the major concerns the OCA has identified with this rulemaking and an alternative for competitive carriers only that would comply with Pennsylvania law and due process, if the Commission determines to provide a separate streamlined review process for such carriers.

B. Applications For Issuance Of A Certificate Of Public Convenience May Not Be "Deemed" To Be In The Public Interest And Approved In Law And Fact Without Following The Requirements Of Section 1103.

In Proposed Section 63.324(k), the Proposed Rulemaking provides that for General Rule transactions, "A transaction subject to this subchapter will be deemed to be in the public interest and approved in law and fact 60 days after public notice in the Pennsylvania Bulletin unless the Commission determines otherwise for good cause shown." Similarly, Proposed Section 63.325(k) regarding Pro Forma transactions provides that "A transaction subject to this subchapter will be deemed to be in the public interest and approved in law and fact 30 days after filing with the Commission or posting on the Commission's website, whichever is longer, unless

the Commission determines otherwise for good cause shown.”¹⁹ The OCA submits that the Commission may not adopt regulations that would impose a fixed period for Commission action after which an application under Chapter 11 is “deemed to be in the public interest and approved in law and fact.”

Section 1103(a) specifically requires Commission findings and an order to grant a transfer of control application. Section 1103(a) provides, *in toto*:

Every application for a certificate of public convenience shall be made to the commission in writing, be verified by oath or affirmation, and be in such form, and contain such information, as the commission may require by its regulations. A certificate of public convenience shall be granted ***by order of the commission***, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience or safety of the public. The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable. In every case, the commission shall make a finding or determination in writing, stating whether or not its approval is granted. Any holder of a certificate of public convenience, exercising the authority conferred by such certificate, shall be deemed to have waived any and all objections to the terms and conditions of such certificate.²⁰

The OCA submits that the “deemed approved” language included in both Proposed Sections 63.324(k) and 63.325(k) in the Proposed Regulations fails to recognize the General Assembly’s requirement that the Commission issue an Order granting a certificate of public convenience and consider conditions, if necessary. The Commission may not substitute by regulation a presumption that an application as filed is in the public interest when Section 1103(a) requires the Commission to make certain findings and determinations and issue a written order.

¹⁹ Proposed Section 63.325(k) uses the filing date or date that notice is posted on the Commission’s website as the start date for the Pro Forma review period. The Proposed Rulemaking Order acknowledges that notice by web posting is “not yet available at the Commission” yet the Commission includes this as an element of the proposed regulation. Proposed Rulemaking Order, 38 Pa.B. at 767. The OCA submits that, consistent with the concerns of the Independent Regulatory Review Commission comments in the Ch. 1, 3 & 5 Final Rulemaking, the Commission should not adopt regulations based on electronic filing where the capability is not yet implemented. Ch. 1, 3 & 5 Final Rulemaking, 36 Pa.B. at 2098.

²⁰ 66 Pa. C.S. § 1103(a)(emphasis added).

The Commission appears to rely on Chapter 19 of the Public Utility Code for support of its proposed regulations. This reliance is misplaced. Chapter 11 does not operate like Chapter 19 of the Public Utility Code as the Commission presumes in the Proposed Rulemaking Order. In particular, Section 1903(a) explicitly provides that if the Commission has not entered an order of rejection within the time fixed “such certificate shall be deemed, in fact and law, to have been registered.”²¹ Section 1903(a) provides, in pertinent part:

General rule. Upon the submission or completion of any securities certificate, as provided in this part, the commission shall register the same if it shall find that the issuance or assumption of securities in the amount, of the character, and for the purpose therein proposed, is necessary or proper for the present and future capital needs of the public utility filing such securities certificate; otherwise it shall reject the securities certificate. ... If, at the end of 30 days after the filing of a securities certificate, no order of rejection has been entered, such certificate ***shall be deemed, in fact and law, to have been registered.*** The commission may, by written order, giving reason therefore, extend the 30-day consideration period.²²

The language of Section 1903(a) explicitly permits the “deemed approved” procedure. Such a procedure, however, is ***not*** permitted under Section 1103. In contrast, the operative language of Section 1103 is “shall be granted by order of the commission only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience or safety of the public.”²³

Had the General Assembly determined that applications filed under Section 1103 would be “deemed approved” if the Commission did not act on them within a certain time-period, the General Assembly could have provided for such possibility as was provided in Section 1903. Instead, Chapter 11 proceedings are held to a higher standard. The OCA submits the language in

²¹ 66 Pa.C.S. § 1903(a).

²² 66 Pa.C.S. § 1903(a)(emphasis added).

²³ 66 Pa.C.S. § 1103(a).

both Proposed Section 63.324(k) and 63.325(k), that the application shall be “deemed to be in the public interest and approved in law and fact” after a fixed period of time would be contrary to the Commission’s statutorily charged duties and obligations and should not be adopted as a regulation.

The provision that the application would be “deemed to be in the public interest... unless the Commission determines otherwise for good cause shown” effectively reverses the burden and presumption established by the Public Utility Code. There is no statutory presumption that an application is in the public interest. The Commission should not adopt a regulation that would effectively create such a presumption. This is contrary to Section 1103 of the Public Utility Code.

The time required for Commission review and entry of a written order on the merits should be determined based on the particular facts of each application. The question of whether an application is in the public interest cannot be answered simply by the lapse of time and a regulatory presumption. The Commission must make necessary findings and issue a written order in compliance with Section 1103(a).

As such, the Proposed Regulations fail to meet the statutory requirements governing transfer of control proceedings. The General Assembly specifically directed that applications under Section 1103(a) be approved only after the Commission makes findings and issues an order, not after the lapse of time. The Proposed Regulations are inconsistent with this statutory requirement and must not be adopted.

C. Expanding The Rulemaking Proceeding To Include ILECs Fails To Recognize ILECs' Provider Of Last Resort Obligations As Eligible Telecommunications Carriers And Their Obligations To Provide Universal Broadband Availability Under Chapter 30.

The Commission should withdraw the Proposed Rulemaking Order and continue to review and rule upon applications for approval of a transfer of control involving telecommunications carriers as the Commission traditionally has. The Commission's existing practices apply to both ILECs and CLECs. However, even if the Commission concludes that some CLEC transfer of control transactions should be eligible for abbreviated review under a new streamlined process, ILEC applications must continue to be subject to traditional review.

There are fundamental reasons why abbreviated review of ILEC applications is unsound public policy. Of particular importance, ILECs have provider of last resort obligations as a result of their designation as an Eligible Telecommunications Carrier ("ETC") under Section 214(e) of the federal Telecommunications Act of 1996.²⁴ Pursuant to this section, ILECs are required to "offer the services that are supported by Federal universal service support mechanisms under section 254(c)."²⁵ These services include voice grade service and local calling through the public switched network and access to emergency services, interstate toll service, operators, and directory assistance.²⁶ Section 214(e) further requires ETCs to advertise such availability.²⁷ ETC's have obligations to ensure that, at a minimum, all members of the public have an affordable connection to the public switched telephone network. CLECs that have not been designated as ETCs do not have such an obligation.²⁸

²⁴ 47 U.S.C. § 214(e).

²⁵ 47 U.S.C. § 214(e)(1)(A).

²⁶ 47 C.F.R. § 54.101 "Supported Services for rural, insular and high cost areas."

²⁷ 47 U.S.C. § 214(e)(1)(B).

²⁸ The Commission in Pennsylvania has designated only a small number of CLECs as ETCs.

As an ETC, ILECs are obligated to advance federal and state universal service principles and goals, such as stated in Section 3011(2) and (3) in the Public Utility Code.²⁹ Section 3011(2) requires maintenance of “universal telecommunications service at affordable rates while encouraging the accelerated provision of advanced services and deployment of a universally available, state-of-the-art, interactive broadband telecommunications network in rural, suburban and urban areas.”³⁰ Similarly, Section 3011(3) requires that “customers pay only reasonable charges for protected services which shall be available on a nondiscriminatory basis.”³¹ Rates for protected services provided by ILECs are determined primarily by each ILEC’s Chapter 30 Plan price stability formula.

Pursuant to these individual Chapter 30 Plans and the provisions of Act 183 of 2004, ILECs are obligated to deploy broadband services. For example, most rural ILECs have committed to deploy broadband services to 100% of the customers in their designated service territories by December 31, 2008.³² All other ILECs in Pennsylvania have committed to deploy broadband services to 100% of the customers in their designated service territories by either December 31, 2013 or December 31, 2015.³³ Section 3019(b)(1) charges the Commission with the authority and obligation to assure that, as part of any merger or sale involving an ILEC or the ILEC’s facilities, “there is no reduction in the advanced service or broadband deployment obligations for the affected property or facilities.”³⁴

Given these important obligations of ILECs, the OCA submits that transfer of control applications can have a significant impact on the public interest. The proposed regulations,

²⁹ 66 Pa. C.S. §§ 3011(2) and (3).

³⁰ 66 Pa. C.S. § 3011(2).

³¹ 66 Pa.C.S. § 3011(3).

³² 66 Pa.C.S. § 3013(b)(1). “Broadband” is defined for Chapter 30 purposes as “a communication channel using any technology and having a bandwidth equal to or greater than 1.544 megabits per second (Mbps) in the downstream direction and equal to or greater then 128 kilobits per second (Kbps) in the upstream direction.” 66 Pa. C.S. § 3012.

³³ 66 Pa.C.S. § 3013(b)(3).

³⁴ 66 Pa.C.S. § 3019(b)(1).

however, would provide reduced notice and a restricted opportunity for the customers of the ILEC and interested members of the public to be heard. The Commission's traditional review process has not been shown to be inflexible or to cause undue delay. Rather, it provides adequate notice and time for the necessary review of the significant issues that concern ILECs in Pennsylvania. Indeed, the Proposed Rulemaking Order states that "traditional and more extensive review" would continue to apply where "the filing involves a major acquisition or merger between firms with substantial market shares."³⁵ There is little question but that ILECs have a substantial share of the local service market. The OCA recommends that if any regulations that provide for abbreviated review are promulgated, that applications filed by or involving ILECs or their facilities should not be subject to the abbreviated review procedure.³⁶

The Proposed Rulemaking Order should be rejected to the extent that it applies to Pennsylvania ILECs. ILEC obligations as provider of last resort and the provider of universal broadband availability warrant a continuation of the traditional standards and methods of Commission review in these types of cases.

D. The Proposed Rulemaking Order Violates Affected Parties' Due Process Rights Because It Does Not Provide Adequate Notice Of Transfer Proceedings And Does Not Allow Sufficient Time To Adjudicate Material Issues Of Fact.

The Pennsylvania Supreme Court has recognized that "as a matter of constitutional due process, an evidentiary hearing is most often implicated where there are material facts in dispute."³⁷ The OCA is concerned that the Proposed Rulemaking would limit by regulation the notice provided for transfer of control applications which could deny consumers and the public

³⁵ Proposed Rulemaking Order, 38 Pa.B. at 762.

³⁶ This is not to say that all applications for approval of a change of control involving an ILEC require a lengthy contested review process. In the past, the Commission has entered written orders approving uncontested applications involving small ILECs such as North Penn Telephone Company, Laurel Highland Telephone Company, and others on a 3 month or so timeline. See, page 3, *supra*.

³⁷ Chester Water Authority v. Pa.P.U.C., 581 Pa. 640, 653-654, 868 A.2d 384, 392 (2005)("Chester Water").

meaningful notice and an opportunity to be heard. For example, the Proposed Regulations require the companies to provide notice to their customers “prior to Commission approval unless circumstances make distribution prior to approval impractical or unnecessary.”³⁸ As such, there may be some circumstances where customers get no notice of the transfer prior to Commission approval.

Additionally, the Proposed Regulations allow for approval of “Pro Forma” transactions in as little as 30 days.³⁹ The OCA submits that the Commission should, at a minimum, preserve the standards for notice and filing of protests established in Chapter 5 of the Commission’s Rules of Practice and Procedure regulations. Given that Section 1103(a) requires the Commission to consider whether an application for transfer of control is “necessary or proper for the service, accommodation, convenience or safety of the public,” the OCA submits that it is the public that must have both notice and an opportunity to be heard. These basic requirements of due process could be unduly compromised by the Proposed Regulations.

The fundamental right to due process, recognized by both the Pennsylvania and United States Constitutions, protects the life, liberty, and property interests of individuals. This constitutional right is also fully applicable in proceedings before administrative tribunals.⁴⁰ If an agency proceeding involves substantial property interests and is adjudicatory in nature, then due process requires that those whose interests are affected receive notice of government action, a timely opportunity to challenge that action, and fair and impartial proceedings.⁴¹

³⁸ See, Proposed Section 63.324(g)(1).

³⁹ See, Proposed Section 63.325(k).

⁴⁰ Lawson v. Pa. Dept. of Public Welfare, 744 A.2d 804 (Pa. Cmwlth. 2000); see also, 2 Pa. C.S. § 504 and, Schneider v. Pa.P.U.C., 83 Pa. Cmwlth. 306, 479 A.2d 10 (1984)(“Administrative agencies such as the Commission are required to provide due process to the parties appearing before them”).

⁴¹ Barasch v. Pa. P.U.C., 119 Pa. Cmwlth. 81, 546 A.2d 1296, 95 P.U.R. 4th 528 (1988), *modified on denial of reargument by*, 119 Pa. Cmwlth. 81, 550 A.2d 257 (1988) (Barasch); Pittsburgh Press Co. v. Commission on Human Relations, 4 Pa. Cmwlth. 448, 287 A.2d 161, 166 (1972).

Section 504 of the Administrative Agency Law, 2 Pa. C.S. § 504, provides that “[n]o adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard.”⁴² It is well settled that due process requirements of fair trials before impartial tribunals extend to administrative tribunals.⁴³ The essential elements of due process are evident under 2 Pa.C.S. § 504; the fundamental requirements are sufficient notice and opportunity to be heard based on the nature of the proceedings.⁴⁴

A general principle can be derived from Pennsylvania cases on due process.⁴⁵ A determination of the precise nature of the government function involved as well as of the private interest that has been affected by that government action must be made first.⁴⁶ When agency action is adjudicatory in nature and involves substantial property interests, due process of law requires that those whose interests are affected receive notice of the agency action and an opportunity to challenge that action, generally before the administrative action takes place.⁴⁷

The Proposed Regulations fail to satisfy these fundamental due process requirements because, among other things, there may be instances where consumers are never given notice of the transfer of control proceeding until after it has been approved. As mentioned above, Proposed Section 63.324(g)(1) provides:

(1) General rule transactions involving a change in conditions of service or rates. A telecommunications public utility shall prepare and distribute 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

⁴² 2 Pa.C.S. § 504.

⁴³ See, e.g., *W.J. Dillner Transp. Co. v. Pa.P.U.C.*, 107 A.2d 159, 163 (Pa. Super. 1954).

⁴⁴ See, *First Nat’l Bank of Pike County v. Dep’t of Banking*, 300 A.2d 823 (Pa. Cmwlth. 1973).

⁴⁵ See, *Trippls Park Civic Ass’n v. Pa. P.U.C.*, 52 Pa. Cmwlth. 317, 415 A.2d 967 (1980); see also, *Barasch*, *supra*.

⁴⁶ *Id.*, 546 A.2d at 1303.

⁴⁷ *Id.* at 1305.

approval *unless circumstances make distribution prior to approval impractical or unnecessary.*⁴⁸

As a result, even where a transfer of control proceeding affects a customer's conditions of service and rates, the telecommunications companies involved have no specific deadline to provide notice to their customers of such a proceeding. The only requirement is that such notice be provided "prior to Commission approval." Even then, if notice prior to Commission approval is impractical or unnecessary, then such notice is not required at that time. Therefore, a customer's telephone service provider can be changed, and their rates or conditions of service affected, without customers ever even knowing about the proceeding. The "Pro Forma" transaction rule, "does not require additional notice to the customer base beyond the general notice in this subchapter."⁴⁹ Such regulations do not provide consumers with adequate notice and an opportunity to be heard as due process requires.

Proposed Section 63.324(c) governing General Rule transactions requires that the notification be filed as late as 60 days before the planned date for closing. Under proposed Section 63.324(c) an application, or "notification," requesting Commission approval should be filed on the earlier date of a) the day as an application for Federal regulatory approval, or b) 60 days before the closing date for the proposed transaction. A notification that is filed 60 days before the closing of a transaction could prove unworkable and could, in fact, delay the closing of the very transaction the Proposed Regulations seek to streamline. After notification, the Commission would submit notice of the filing for publication in the Pennsylvania Bulletin.⁵⁰ This publication date would start both the run of the 15-day protest period and the 60-day period after which the transaction could "be deemed to be in the public interest and approved," based on

⁴⁸ Proposed Section 63.324(g)(1)(emphasis added).

⁴⁹ See, Proposed Section 63.325(g)(2)(i).

⁵⁰ Proposed Section 63.324(f)(1) establishes that, at a minimum, notice would be provided through *both* publication in the Pennsylvania Bulletin and in a newspaper in the area affected.

Subparts (f)(2) and (k) of proposed Section 63.324. Since the Pennsylvania Bulletin is only published every Saturday, there would always be some lag between the filing date and publication date. The 60 days to closing timeframe could already be compromised.

Even if customers are provided with notice of the process, the 30 or 60 days in which the Commission has to review the application, or else it is deemed approve, does not provide consumers with an opportunity to be heard on any issues they may raise in a protest. According to the Proposed Rulemaking Order, “an abbreviated 60-day review process is appropriate in most circumstances.”⁵¹ Further, the Proposed Rulemaking Order concludes that a 60-day review period would provide the Commission “with the time needed to examine a transaction’s impact and to ensure that appropriate information and customer responses are factored into the Commission’s deliberation.”⁵² The OCA submits, though, that even if the Commission concludes that it could address many transactions in 60 days, having a mandatory time period of this length is unsound policy. A mandatory time-period does not allow for consideration of difficult issues, possible delays in responding to inquiries and consideration of protests that may be presented in some proceedings. Of course, the Commission can always issue its order as soon as it is ready when no substantial issues are presented.

Additionally, the OCA respectfully disagrees with the Commission’s conclusion that regulations should be adopted which *commit* to review and approval of transactions on a fixed 60 day period when issues may be raised by the protests that require full development. Based on the description of General Rule transactions, the grant of an application could result in increased rates or a change in the conditions and quality of service provided to customers after closing of the transfer of control transaction. Having 30 or 60 days in which to raise issues and have them

⁵¹ Proposed Rulemaking Order, 38 Pa.B. at 761.

⁵² Id.

resolved by the Commission is not sufficient for discovery, testimony, hearings, briefing, and possible exceptions and reply exceptions to be conducted in which contested issues may be properly presented to the Commission. In fact, the discovery process alone allows for 20 days in non-rate case proceedings for answers to discovery.⁵³ Clearly, a 30 or 60 day review process does not allow for an opportunity to be heard on contested issues.

The OCA is mindful that, in Chester Water Authority v. Pa.P.U.C., 581 Pa. 640, 868 A.2d 384 (Pa. 2005)(Chester Water), the Pennsylvania Supreme Court addressed the issue of what process is due to a Protesting party in response to an application filed under Section 1103. The Supreme Court in Chester Water determined that “due process of law does not require a hearing on every application for a certificate of public convenience.”⁵⁴ The Supreme Court specifically noted that the Protest at issue in the Chester Water did not raise any factual averment that would warrant a hearing.⁵⁵ The Supreme Court held: “we discern no abuse of Commission discretion in the grant of a certificate of public convenience to Philadelphia Suburban without a hearing, where the uncontested averments of the company’s application were sufficient to reflect a demand and need for the service.”⁵⁶ Chester Water, however, does not support the approach in the Proposed Regulations where contested factual issues are raised and it does not support the establishment of mandatory time-periods for review.

The Commission’s Proposed Rulemaking would not allow for adequate notice or for the process due in response to Protests that raise substantial disputed facts. Instead, the Proposed Rulemaking Order would limit affected parties’ ability to Protest proposed transfers of control

⁵³ See, 52 Pa.Code § 5.342(d).

⁵⁴ Chester Water at 651.

⁵⁵ Id.

⁵⁶ Id. at 655. See also, Chester Water Authority v. Pa.P.U.C., 822 A.2d 146 (Pa. Cmwlth. 2003); citing, Dee-Dee Cab, Inc. v. Pa.P.U.C., 817 A.2d 593 (Pa. Cmwlth 2003); see also, Diamond Energy, Inc. v. Pa.P.U.C., 653 A.2d 1360 (Pa. Cmwlth 1995); see also, Schneider, supra, 479 A.2d at 12 (“due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard”).

and then have their Protest adjudicated even when issues of material fact are raised before the expiration of a 30 or 60 day review period, a portion of which is already consumed by the period for protest.⁵⁷ While Chester Water addresses those situations where a Protest is filed that does not raise a disputed issue of material fact, where such disputes are raised, further due process and an opportunity to be heard are required.

The OCA would also note that the Proposed Rulemaking permits carriers to time their filings so close to the proposed closing date that due process, particularly the right to be heard, will be compromised. The very type of transactions that the Commission would allow as General Rule transactions, such as a transaction that would transfer all ILEC assets and customers to another carrier, are the sort that may trigger the filing of a protest. Sufficient time for both notice and a meaningful opportunity to be heard must be included in the estimate of what constitutes a reasonable, probable time for the Commission to complete its review and approve, or approve with conditions, the Section 1102(a)(3) application. The timing provisions of the proposed Subchapter O regulations are unworkable.⁵⁸

The Proposed Rulemaking violates affected parties' due process rights because it does not provide adequate notice of transfer proceedings and does not allow sufficient time to adjudicate issues of material fact or public importance.

⁵⁷ The regulations allow for reclassification in Sections 63.324(b) and 63.325(b). This reclassification process, however, is not adequate because the same lack of notice to consumers and opportunity for disputed facts to be heard exists in both the General Rule and Pro Forma transaction processes.

⁵⁸ Similar to Proposed Section 63.324(c), Proposed Section 63.325(c) would use the date of any filing with the FCC or other federal agency "or no later than 30 days prior to the closing of a *pro forma* transaction...." The OCA submits that a 30 day period for review of Pro Forma applications does not recognize that the transaction may have been improperly categorized by the applicant or could draw a protest, once an interested party becomes aware of the transaction. If the Commission completes its review and is ready to rule in the 30 day period, it can do so. But the regulations should not establish such a requirement.

E. The Proposed Rulemaking Order Does Not Provide The Necessary Due Process Rights To Protests Filed By Non-statutory Advocates.

The Proposed Rulemaking Order provides that Protests by statutory advocates will reclassify an application to a longer review period, but that a Protest by other members of the public or affected interests will not necessarily have such an impact. The OCA appreciates the Commission's desire to afford the statutory advocates, including the OCA, this status. Giving the statutory advocates' Protests this status in this instance, however, should not come at the expense of denying non-statutory advocates their legal due process rights. All affected parties must have the ability to raise their unique concerns.

The OCA submits that the proposed regulations limit the effectiveness of pleadings filed by non-statutory parties. Proposed Section 63.324(f)(2)(iii) provides that:

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 review and approval under 66 Pa.C.S. § 1102 and 1103, unless the Commission determines otherwise for good cause shown.⁵⁹

In contrast, Proposed Section 63.324(f)(2)(ii) provides that a formal protest that is not filed by a statutory advocate "*may*" reclassify the general rule transaction.⁶⁰ As such, the Proposed Regulation limits the right of non-statutory parties.

As the Commission explained, "§ 63.324(f)(iii) recognizes that the legal authority of those advocates warrants a more considered approach that would most likely require formal proceedings and a reclassification to accommodate that."⁶¹ The OCA respectfully submits that it would be inappropriate for the Commission to treat protests differently based solely on whether

⁵⁹ See, Proposed Section 63.324(f)(2)(iii)(emphasis added); see also, Proposed Section 63.324(g)(2)(iii).

⁶⁰ Proposed Section 63.324(f)(2)(ii)(emphasis added).

⁶¹ Proposed Rulemaking Order, 38 Pa.B. at 765.

the protest is filed by the OCA or a member of the public.

The OCA submits that the interests represented by the OCA and the other statutory parties may not always be the same as those of non-statutory parties. Nor do the OCA and the other statutory parties have access to the exact same base of experience on which to shape their participation in a transfer of control proceeding as do non-statutory parties with different interests. For example, the Communications Workers of America (“CWA”) frequently participate in Section 1102 proceedings involving Pennsylvania’s telecommunications companies to protect the interests of their union employees. The job impact of a transfer of control can have significant impact on workers and the Pennsylvania economy that the CWA is uniquely positioned to address. Additionally, competitors of the applicants may also have unique interests that are not congruent to the interests of the statutory advocates. Likewise, a consumer with particular service quality problems may also have unique issues to raise. The OCA’s determination to file a Protest in response to a transfer of control application may not address all of the interests that non-statutory parties may seek to raise by filing a Protest. It is unlikely that the participation of non-statutory parties and the OCA would be completely duplicative.

Non-statutory parties have participated in recent telecommunications proceedings filed pursuant to Section 1102 of the Public Utility Code before this Commission. By treating protests by these parties as presumptively insufficient to warrant a broader review, the proposed regulations limit the consideration of the public interest in the Commission’s determination. It

also suggests that a non-statutory advocate may have a higher initial burden, indeed a burden of proof generally not required of protests.⁶²

Statutory and case law are clear that the participation of the OCA in any proceeding cannot be used to preclude participation of any consumer. Specifically, Section 309-6 of the Consumer Advocate's authorizing statute states that: "Nothing contained herein shall in any way limit the right of any consumer to bring a proceeding before either the commission or a court."⁶³

The Proposed Regulations deny non-statutory parties the necessary due process rights by failing to give their Protests the appropriate review afforded under the Public Utility Code. The Proposed Regulations should treat all Protests filed by affected parties that raise material issues of fact with the appropriate process that is due under the law.

F. The Proposed Rulemaking Does Not Require The Commission To Make The Necessary Findings In A Commission Order That Are Required To Support Approval Of A Transfer Of Control Proceeding.

Proposed Sections 63.324(k) and 63.325(k) provide that "the Commission will issue a Secretarial Letter or order approving a general rule transaction."⁶⁴ Section 1103 of the Public Utility Code, however, does not contemplate approving a transfer of control application by a Secretarial Letter. Instead, Section 1103 provides, in pertinent part:

a certificate of public convenience shall be granted *by order of the commission*, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience or safety of the public. ... In every case, the commission shall make a finding or determination in writing, stating whether or not its approval is granted.⁶⁵

⁶² The Company has the burden of proof. 66 Pa.C.S. § 332(a). A protesting party may have an initial burden of persuasion, Reidel v. County of Allegheny, 633 A.2d 1325, 1329 n. 11 (Pa. Cmwlth. 1993), but the burden of persuasion should not be higher for a non-statutory advocate than it is for a statutory advocate.

⁶³ 71 P.S. §309-6; *see also*, Barasch, supra (notice to the Office of Consumer Advocate does not constitute notice to the customers of a utility); South River Power Partners, L.P., v. Pa. P.U.C., 673 A.2d 422 (Pa. Cmwlth. 1996) (Commonwealth Court rejected arguments that sought to limit participation of other parties based on OCA involvement).

⁶⁴ Proposed Sections 63.324(k) and 63.325(k).

⁶⁵ 66 Pa. C.S. § 1103(a)(emphasis added).

As such, the Proposed Rulemaking contradicts the express legislative intent of the General Assembly that requires that the Commission take certain actions and make specific findings before approving a Section 1102 transaction.

Furthermore, Section 703(e) of the Public Utility Code provides that the Commission's findings "shall be in sufficient detail to enable the court on appeal to determine the controverted question presented by the proceeding and whether proper weight was given to the evidence."⁶⁶ Additionally, Section 704 of the Administrative Law and Procedure Act provides that any findings of fact made by the Commission necessary to support its adjudication must be supported by substantial evidence.⁶⁷

The Pennsylvania Supreme Court has provided that:

An agency opinion needs to contain sufficiently detailed findings of fact, together with a coherent legal discussion, so that the Commonwealth Court can perform a meaningful review. Any less would frustrate the legislative intent, in addition to providing agency panels with a means of nullifying the effect of legislation, because it would enable an agency to shield its decisions from review by drafting opinions in generalized and conclusory terms.⁶⁸

The Proposed Rulemaking must comply with these fundamental precepts of agency law. The Proposed Rulemaking does not require that necessary findings form the basis of a Commission decision regarding a transfer of control application. In essence, the Proposed Rulemaking is too

⁶⁶ 66 Pa.C.S. § 703(e).

⁶⁷ 2 Pa.C.S. § 704.

⁶⁸ Bowman v. Com. Dept. of Environmental Resources, 549 Pa. 65, 73, 700 A.2d 427, 431 (1997); *see also*, Popowsky et al. v. Pa. P.U.C., 550 Pa. 449, 466, 706 A.2d 1197, 1205 (1997) (Cappy, J., concurring); Peak v. Unemployment Compensation Bd. of Review, 509 Pa. 267, 278, 501 A.2d 1383, 1389 (1985) (Board was "required to explain its decision in sufficient detail to permit meaningful appellate review"); *see also*, Mobilefone of Northeastern Pennsylvania, Inc. v. Pa.P.U.C., 73 Pa. Cmwlth. 340, 458 A.2d 1030 (1983) (findings of fact must be "sufficient for [an appellate court] to review as long as they are detailed and specific enough to enable this court to determine the controverted question presented on the appeal to ensure that the conclusions follow from the facts.") and, Purolator Courier Corp., v. Pa.P.U.C., 51 Pa. Cmwlth. 377; 414 A.2d 450 (1980) ("an order granting a certificate of public convenience need not contain specific or numbered findings so long as facts are set forth which support the conclusions drawn.").

streamlined to meet the requirements of Administrative Law that the Commission must follow as part of the transfer of control process.

The OCA submits that the proposed regulations' inclusion of a Secretarial Letter procedure to approve an application under Section 1102 and 1103 of the Public Utility Code cannot withstand scrutiny. Only an order of the Commission, after adequate notice and meaningful opportunity to be heard, can be utilized to approve such transactions.

G. The Proposed "Reclassification Process" Is Inappropriate And Difficult To Implement.

The Proposed Regulations discuss the possible "reclassification" of a transfer of control proceeding from "General Rule" transaction to "Pro Forma" transaction, and vice versa, in two separate regulations. Section 63.324(b) describes reclassification of a General Rule transaction to a Pro Forma transaction, including the applicable appeal period and the right of appeal for reclassification.⁶⁹ Additionally, Section 63.324(j) deals with "reclassification of a transaction from the general rule" and discusses circumstances under which the Commission will make the reclassification.⁷⁰ The proposed reclassification process has fundamental flaws and demonstrates why these Proposed Regulations must be withdrawn.

Proposed Section 63.324(j) provides, *in toto*:

(j) Reclassification of a transaction from the general rule. The Commission shall reclassify a general rule transaction in the following circumstances:

(1) The filing of a formal protest 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.

⁶⁹ See also, Section 63.325(b) (reclassification of a pro forma transaction).

⁷⁰ See also, 63.325(j) (removal of a transaction as a pro forma transaction).

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

(4) The Commission determines that reclassification is necessary to protect the public interest.⁷¹

The OCA submits that proposed Section 63.324(j) exemplifies why the better course of action is for the Commission to withdraw the Proposed Rulemaking Order and continue to review applications for Section 1102(a)(3) authority on a case-by-case basis.

As an initial matter, the Proposed Regulations do not provide clear guidance as to how transactions should be classified, thus allowing companies great latitude in whether to file under the General Rule (60 day consideration) or Pro Forma Rule (30 day consideration). This latitude makes reclassification a more necessary and likely occurrence to assure proper review of the proposed transaction and its impact on the public interest.⁷²

Rather than try to create a regulatory construct or norm that certain transactions, filed by any type of telecommunications public utility, are subject to abbreviated review – unless reclassified – the OCA submits that the Commission should continue to review all such transactions in accord with Sections 1102(a) and 1103 and the Commission’s general Chapter 5

⁷¹ Proposed Section 63.325(a) mirrors the structure of proposed Section 63.324(a) regarding General Rule transactions. The difference is the qualifying provision in the first paragraph of proposed Section 63.325(a) which states “[t]he following transactions of a telecommunications public utility *not* involving a change in conditions of service or rates ... shall require ... approval by the Commission as *pro forma* transaction...” (emphasis added). The first three examples of Pro Forma transactions presented in Section 63.325(a)(1), (2), and (3) are also the complement of the provisions of General Rule Section 63.324(a)(1), (2), and (3), where Pro Forma transactions would be transfers of control of “less than 10%.”

⁷² Indeed, Proposed Section 63.324(b)(1) provides that if a Pro Forma transaction is reclassified to General Rule, then the clock for abbreviated review starts anew, “on the date that the telecommunications public utility is notified in writing that the pro forma transaction is reclassified.” This start-over requirement would be necessary to provide appropriate due process not provided when the application was framed as eligible for Pro Forma rule review. Under traditional review, such backtracking would not be necessary.

regulations governing applications. The Commission, not the applicant, should determine the length of the review required depending on the nature of the transaction.⁷³

The OCA submits that the reclassification procedures would require the Commission to devote resources to the procedural questions of how much process and time review of a particular application may require, when the same resources would be better applied to addressing the substance of the application. The OCA submits that no change from the current traditional review process is warranted.

H. Conclusion.

The Proposed Rulemaking Order should be withdrawn in its entirety. The Proposed Rulemaking Order inappropriately expands the original Level 3 Petition to include ILECs, not just CLECs, despite the significantly different regulatory obligations between ILECs and CLECs. The Proposed Rulemaking Order also violates fundamental due process rights because of the lack of notice provided to affected parties as well as the lack of an opportunity to be heard regarding issues of material fact. The Proposed Rulemaking Order does not require the Commission to make the necessary legal findings that the General Assembly requires for Section 1103 proceedings.

The Proposed Rulemaking Order represents a significant deviation from existing Section 1103 practice. This deviation is unwarranted given the lack of any indication that such regulations are needed and given that there is currently little, if any, delay for CLEC transfer of control processes that the Proposed Regulations seek to remedy.

⁷³ The OCA also questions what purpose would be served by reclassifying an application for transfer of control filed as a General Rule transaction to a shorter 30-day review period. The requirements stated in the first paragraph of Section 63.324(b) are triggered if the Commission reclassifies an application for any of the four reasons stated in proposed Section 63.324(j). The first reason for reclassification is "the filing of a formal protest by a statutory advocate or the filing of a formal protest warranting reclassification for good cause shown, including competitive impact." Based on Section 63.324(j)(1) combined with Section 63.324(b), a protest would not only have to oppose the merits of the proposed transfer of control application, the protest would also have to argue why the transaction should not be reclassified to a shorter 30-day review period.

III. IF THE COMMISSION DETERMINES TO MODIFY ITS TRANSFER OF CONTROL PROCEEDINGS, IT SHOULD LIMIT THE RELIEF TO COMPETITIVE CARRIERS AND INCLUDE THE MODIFICATIONS DISCUSSED BELOW.

While the OCA submits that the Proposed Rulemaking Order should be withdrawn in its entirety, the OCA suggests an alternative proposal if the Commission wishes to provide some streamlined review process for competitive carriers only. The OCA would propose a streamlined review process for a limited category of transactions by competitive carriers which require Commission review and approval under Sections 1102(a)(3) and 1103 of the Public Utility Code.

The OCA proposes that a streamlined review process include the following elements:

1. Direct notice shall be provided to customers, both retail and wholesale, at the time the application is filed with the Commission, whenever the transaction involves a change of ownership or control of the CLEC, interexchange carrier ("IXC"), or Competitive Access Provider ("CAP"). Such notice shall advise customers of the proposed transaction, whether it will change the conditions of service and rates and, if so, describe how. The notice will be approved by the Commission's Bureau of Consumer Services ("BCS") and identify how to contact the Commission to comment or protest the transaction.
2. Notice shall be provided to all carriers that have an interconnection agreement with the applicant or an affiliate of the applicant, unless individual interconnection agreements waive this type of notice. Notice to interconnected carriers shall also be provided on the date of filing with the Commission.
3. The application will be filed with the Commission and served on OCA, OSBA and other affected parties on the same day, including.
4. The content of the applications should be substantially the same as set forth in proposed Section 63.324(d) "Content of notification" The application content and form may be maintained and revised by the Commission as necessary.
5. Publication in the Pennsylvania Bulletin will provide for a 15 day Protest period. Late protests may still be considered,

consistent with Section 1.2, 52 Pa.Code § 1.2 "Liberal Construction."

6. If no protests are filed in opposition to the application, Commission staff shall prepare and present to the Commission a recommendation, with necessary findings proposed, for disposition of the application.

7. If a protest is filed, the Commission will determine whether material issues of fact are raised or important public interest issues are identified that require further consideration at hearing.

8. If the Commission votes to deny the application, the Commission shall issue a tentative order and offer the applicant a hearing, consistent with Section 1103(d).

9. If the Commission votes to approve the application, with or without conditions, the Commission shall enter a written order, consistent with Section 1103, which makes the necessary findings and grants the applicant a permanent certificate of public convenience. If the applicant proceeds to closing before the Commission order is entered, the applicant waives its right to object to the order.

10. The Commission or Commission staff shall have the authority to remove any application which is incomplete from streamlined review and proceed to review the application under traditional or open-ended review.

11. The Commission or Commission staff shall have the authority to extend the time for streamlined review or remove any application from streamlined review to allow for more time for review, investigation, and hearings, consistent with the Commission's authority and obligations under Section 1103(b).

The OCA alternative would allow streamlined review for transactions involving a transfer of 100% or less of the assets or control of any competitive telecommunications carrier, unless that carrier is designated as a competitive ETC or is an ILEC affiliate.

The streamlined process proposed by OCA conforms with the Pennsylvania Public Utility Code. The OCA has sought to protect the interests of consumers who should have notice of changes which impact their carrier of choice and the interests of the other interested parties

and the public who can be impacted by such transactions. If an application is uncontested, then a prompt target date for Commission action may be appropriate, subject to Commission discretion. The fact that the OCA would exclude some transactions from this streamlined review provision, however, should not be misinterpreted as preventing expeditious review and ruling on the merits of all applications where there is little controversy, or few or no issues raised through protests to an application.

The OCA's alternative proposal would allow for streamlined review for transactions involving competitive carriers that already hold a certificate of public convenience in Pennsylvania to offer competitive local exchange services, intrastate interexchange services, and/or competitive access service. Complex transfer of control transactions that are contingent upon Commission approval of joint or separately filed applications for entry under Section 1102(a)(1) and/or abandonment under Section 1102(a)(2) would not be eligible for streamlined review. Additionally, the Commission has already established procedures for review of applications for entry or expansion of service territory by telecommunications carriers, based on consideration of federal requirements.⁷⁴ Furthermore, the Commission has adopted regulations at Subchapter N to 52 Pa.Code, Chapter 63 which provide consumers with specific protections in the event that a telecommunications carrier seeks to abandon service pursuant to Section 1102(a)(2). Transfer of control transactions that involve compliance with these consumer protections should not be subject to streamlined review.

⁷⁴ See, In re: Implementation of Telecommunications Act of 1996, Docket No. M-00960799, Order (June 3, 1996), affirmed and modified through Order upon Reconsideration (Sept. 9, 1996) ("Implementation of TA 96 Reconsideration Order"). The OCA submits that the information required for applications for approval to enter or expand the carrier's authorized service territory is different than for an application for transfer of control. Indeed, the Commission has a proceeding underway to revise the information required from prospective CLECs. See, Proposed Modifications to the Applications Form for Approval of Authority to Offer, Render, Furnish or Supply Telecommunications Services to the Public in the Commonwealth of Pennsylvania, Docket No. M-00960799, Tentative Order (Jan. 10, 2007), 37 Pa.B. 486 (Jan. 27, 2007). Comments and reply comments are pending before the Commission.

The OCA also proposes that only those requests for Commission approval of a transfer of control that may be reviewed based on the Section 1102(a)(3) application and information available for public inspection should be eligible for streamlined review. Applications that are based on proprietary information and are accompanied by a request for a protective order would not be eligible for streamlined review. Similarly, applications that are contingent on Commission grant of a waiver or other request for ancillary relief would not be eligible for streamlined review.⁷⁵

Under the OCA's alternative proposal, applications for approval of transfer of control transactions filed by an ILEC or ILEC affiliate would not be eligible for streamlined review. Applications filed by a competitive carrier seeking to acquire control of or the assets of an ILEC or ILEC affiliate would also be excluded from streamlined review. Applications for approval of a transfer of control filed by or involving a CLEC that has been designated by the Commission as an ETC would also not be eligible for streamlined review.

As noted above, the OCA believes that the specific obligations of ILECs to provide basic local exchange service and fulfill other universal service and Chapter 30 broadband obligations require specific Commission consideration as part of the public interest determination under Section 1103(a). Similarly, the OCA submits that the control and ownership of CLECs that have accepted the benefits and obligations of ETC designation should be subject to more careful review. Again, this is not to say that applications for a change of control involving the interests of an ILEC, ILEC affiliate, or competitive ETC must be subject to a lengthy review and litigation process. Rather, the OCA submits that applications involving these utility interests are more likely to be of public interest and/or require specific findings and determinations before the

⁷⁵ For applications for entry, the Commission has required applicants to file petitions for waiver or ancillary relief separately. Implementation of TA 96 Reconsideration Order at 4-5.

Commission can decide whether to approve the application, approve with conditions, or deny the application.⁷⁶

The OCA submits that the proposed process set forth above for competitive carriers could substitute for the Proposed Rulemaking Order currently at issue in this proceeding, if the Commission determines that any streamlining of the process is necessary. Otherwise, the Proposed Rulemaking Order should be withdrawn in its entirety.

IV. SUGGESTED SPECIFIC TECHNICAL CHANGES

If the Commission chooses to go forward with the Proposed Regulations, the OCA would recommend the following technical changes:

A. Section 63.323 Applicability

Section 63.323 of the Proposed Rulemaking Order, "Applicability", states:

This subchapter shall apply to a telecommunications public utility seeking Commission approval for 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) or approval of a contract between public utilities and affiliates.

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 telecommunications company's affiliated interests as well.

Section 1102 enumerates certain requirements requiring a certificate of public convenience.⁷⁷ More specifically, Section 1102(a)(3) applies to "any public utility *or an affiliated interest of a public utility* as defined in section 2101 (relating to definition of affiliated

⁷⁶ As indicated in the chart provided in the Introduction, the Commission can promptly decide these applications if no protests are filed or if there is limited controversy.

⁷⁷ 66 Pa.C.S. § 1102.

interest).”⁷⁸ Section 63.323’s reference to “a telecommunications public utility seeking.”

Commission approval does not go far enough in that it make no reference to affiliates as does Section 1102(a)(3). Therefore, the Commission should modify the Proposed Regulations so that Section 63.323 applies to affiliated interests of telecommunications companies as well. Section 63.323 would thus read:

63.323 Applicability – This subchapter applies to a telecommunications public utility and an affiliated interest of a telecommunications public utility seeking Commission approval for 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.

This change will appropriately conform the applicability section to the Public Utility Code.

B. Section 63.324 – Requirements For A Telecommunications Public Utility Seeking Commission Approval Of A General Rule Transaction Subject To 66 Pa.C.S. § 1102(a)(3) And 1103.

1. Subsection 63.324(a) – Description of General Rule Transactions

Section 63.324(a) appears to require only notice to the Commission, not application to the Commission.⁷⁹ Proposed Section 63.324(a) would apply, however, to applications for transfer of control filed pursuant to Section 1102(a)(3) of the Public Utility Code. The OCA submits that Chapter 11 of the Public Utility Code clearly requires the public utility to *apply* to the Commission for approval of a transfer of control. The OCA submits that the proposed regulation should make clear that the public utility must file an application for approval, not just provide notification to the Commission. Section 63.324(a), in pertinent part, should thus read:

(a) General rule transactions. The following transactions of a telecommunications public utility involving a change in conditions

⁷⁸ 66 Pa. C.S. § 1102(a)(3) (emphasis added).

⁷⁹ These issues also apply to Proposed Section 63.325(a) as well.

of service or rates that seeks Commission approval for acquisition, diminution in control, merger, stock sales or transfers, transfer of assets or transfer of control of a telecommunications public utility requires application and notification to the Commission and approval by the Commission as a general rule transaction.

Furthermore, the OCA submits that the proposed regulations should make clear that applications for abandonment of service are not subject to the abbreviated review and approval process. The OCA submits that the Commission's existing regulations at 52 Pa. Code, Subchapter N, on "Local Service Abandonment Process,"⁸⁰ must continue to apply to ensure adequate consumer protections in abandonment situations. An application by a local service provider to abandon service triggers the obligation to file an abandonment plan and comply with Section 63.306 and other provisions in Subchapter N. Consumers must continue to receive the notice and other consumer protections set forth in Subchapter N where such abandonment occurs.

As such, the OCA proposes that the following be added as Subsection (a)(8) to Section 63.324:

(8) Nothing in this chapter will impair the application of the Commission's Local Service Provider Abandonment Process at 52 Pa.Code, Subchapter N, in situations involving a telecommunications company's abandonment of customers.

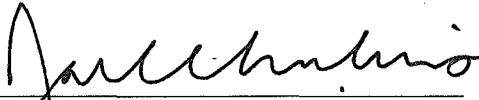
The Proposed Regulation 63.324(a) should be modified in the respects offered by the OCA above, if this Rulemaking moves forward.

⁸⁰ 52 Pa.Code §§ 63.301 to 63.310.

V. CONCLUSION

The Pennsylvania Office of Consumer Advocate respectfully submits that the above-referenced Commission Proposed Rulemaking Order be rejected in its entirety. The Commission's expansion of the Rulemaking in its Proposed Rulemaking Order creates significant new problems. In the alternative, to the extent the Commission determines to move forward with its Proposed Rulemaking Order, the OCA submits that it should be modified consistent with the Comments above or a very limited alternative provided as set forth in these Comments.

Respectfully submitted,



Barrett C. Sheridan, Assistant Consumer Advocate
Attorney I.D. No. 61138
Joel H. Cheskis, Assistant Consumer Advocate
Attorney I.D. No. 81617

For: Irwin A. Popowsky
Consumer Advocate

Office of Consumer Advocate
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, Pennsylvania 17101-1923
Telephone: (717) 783-5048
Fax: (717) 783-7152

Dated: April 9, 2008
98810

CERTIFICATE OF SERVICE

Re: 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 and

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

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Comments, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 9th day of April, 2008.

SERVICE BY E-MAIL & INTER-OFFICE MAIL

Robert V. Eckenrod, Esq.
Office of Trial Staff
PA Public Utility Commission
P.O. Box 3265
Harrisburg PA 17105-3265

Joseph K. Witmer
Law Bureau
PA Public Utility Commission
P.O. Box 3265
Harrisburg PA 17105-3265

SERVICE BY E-MAIL & FIRST CLASS MAIL, POSTAGE PREPAID

Alan C. Kohler, Esq.
Deanne M. O'Dell, Esq.
Wolf, Block, Schorr & Solis-Cohen LLP
213 Market Street, 9th Floor
P.O. Box 865
Harrisburg, PA 17108-0865

Sharon E. Webb, Esq.
Office of Small Business Advocate
Suite 1102, commerce Bldg.
300 North Second Street
Harrisburg, PA 17101

Norman Kennard, Esq.
Kennard Law Office LLC
116 Pine Street, 5th Fl.
Harrisburg, PA 17101

Suzan DeBusk Pavia, Esq.
Verizon Pennsylvania, Inc.
1717 Arch St., 32 NW
Philadelphia, PA 19103

Daniel P. Delaney, Esq.
Kirkpatrick & Lockhart
17 North Second St., 18th Fl.
Harrisburg, PA 17101



Joel H. Cheskis
Assistant Consumer Advocate
PA Attorney I.D.#81617
jcheskis@paoca.org

Barrett C. Sheridan
Assistant Consumer Advocate
PA Attorney I.D.#61138
bsheridan@paoca.org

Counsel for
Office of Consumer Advocate
555 Walnut Street 5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152
*98818