

# Kennard Law Offices LLC

Attorneys At Law

116 Pine Street, 5<sup>th</sup> Floor, Harrisburg PA 17101

Tel: (717) 635-2320 Fax: (717) 238-2390

Email: [njk@kennard-law.com](mailto:njk@kennard-law.com)

**Norman J. Kennard**

Direct Dial: (717) 635-7372

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April 9, 2008

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APR - 9 2008

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street - Filing Room (2 North)  
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

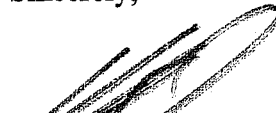
Rulemaking to Amend Chapter 63 Regulations so as to Streamline Procedures for Commission Review of Transfer of Control and Affiliate Filings for Telecommunications Carriers; Docket No. L-0070188

Dear Secretary McNulty:

Enclosed for filing please find an original and fifteen (15) copies of the Comments of the Pennsylvania Telephone Association in the above-captioned matter.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Norman J. Kennard

NJK:tlt

enclosures

cc: Joseph K. Witmer, Assistant Counsel

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REVIEW COMMISSION

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PENNSYLVANIA PUBLIC UTILITY COMMISSION

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PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Petition of Level 3 Communications, LLC :  
to Amend the Public Utility Commission : Docket No. P-00062222  
Regulations to Streamline Transfer of Control :  
and Affiliate Filing Requirements for Competitive :  
Carriers :  
  
Rulemaking to Amend Chapter 63 Regulations :  
so as to Streamline Procedures for Commission : Docket No. L-0070188  
Review of Transfer of Control and Affiliate :  
Filings for Telecommunications Carriers :

**COMMENTS OF THE PENNSYLVANIA TELEPHONE ASSOCIATION**

The Pennsylvania Telephone Association (“PTA”)<sup>1</sup> appreciates the opportunity to file these Comments in response to the Proposed Rulemaking Order entered by the Pennsylvania Public Utility Commission (“Commission”) on October 19, 2007 and published in the *Pennsylvania Bulletin* on February 9, 2008.

I. **BACKGROUND**

The genesis of this proceeding is a Petition filed by Level 3 Communications, LLC (“Level 3”) requesting that the Commission undertake a rulemaking proceeding to streamline the administrative process for Certificates of Public Convenience (“CPC”) involving the transfer of control and affiliate transactions. Specifically, Level 3 asked that the Commission reduce its review period and the paperwork involved for competitive local exchange carriers (“CLECs”)

In its Comments to Level 3’s Petition, the PTA fully agreed with the objective of a simplified process and requested that the reforms also apply to incumbent local exchange carriers (“ILEC”). Adopting a streamlined approval arrangement for both ILEC and CLEC transactions

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<sup>1</sup> The Pennsylvania Telephone Association is the state's oldest trade organization for the local exchange carrier industry. PTA represents more than 30 rural telecommunications companies that provide a full array of services over wire line networks. PTA members support the concept of universal service and are leaders in the deployment of advanced telecommunications capabilities.

is in keeping with Act 183's mandate to reduce regulation on "the incumbent local exchange telecommunications companies ... to levels more consistent with those imposed upon competing alternative service providers."<sup>2</sup> As the Commission's Order notes, the FCC's streamlined procedures do not distinguish between ILECs and CLECs or dominant and non-dominant carriers.<sup>3</sup>

Recognizing the adverse impacts of regulatory lag in a competitive and rapidly changing telecommunications marketplace, the Commission has agreed to revise both the procedure and substance of its current review process. The PTA respectfully submits these Comments to the Commission's proposal.

## II. STREAMLINED REVIEW

Following the FCC's Section 214 approval process, the Commission has proposed a "general rule" for review and approval within a sixty-day period, which would apply to "the vast majority of applications," and a thirty-day review and approval process for "*pro forma*" transactions comprised of those that do not involve changes in conditions of service or rates or reduce control by more than the threshold. The PTA heartily endorses a more rapid review period for transactions before the Commission.

There have been six merger/acquisition filings made by PTA members in the last two years (one is pending). Despite the commercial urgency of mergers and acquisitions, the approval process can drag on interminably. Even where the case is settled, the application case consumes six or more months. The last litigated proceeding before the Commission, the

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<sup>2</sup> 66 Pa. C.S. § 3011(13).

<sup>3</sup> See PTA Comments at 8, citing *In the Matter of Implementing Further Streamline Measures for Domestic Section 214 Authorizations*, CC Docket No. 01-150, Report and Order released March 21, 2002 at ¶¶ 35-36 (March 21, 2002).

acquisition of MCI by Verizon, took over ten months to accomplish. The following are the time elapsed in these cases from date of filing to final order:

<u>Companies</u>	<u>File Date/Final Order Date</u>	<u>Total Days</u>
Consolidated/NPSI (settled)	July 17, 2007 – December 5, 2007	142 Days
Citizens/CTE (settled)	Sept. 29, 2006 – Mar. 1, 2007	153 Days
Alltel/Windstream (settled)	Dec. 23, 2005 – June 12, 2006	171 Days
Sprint/Embarq (settled)	Aug. 26, 2005 – Apr. 7, 2006	224 Days
Verizon/MCI (litigated)	Mar. 7, 2005 – Jan. 11, 2006	310 Days

The PTA member company transactions listed above involved no changes to rates or services, but simply represented the sale of parent (or grandparent) company stock or a spin-off of ILEC properties to another entity, frequently a company owning other property in the Commonwealth or operating other local telephone companies elsewhere. There should be little controversy associated with these proceedings, since these consolidations and spin-offs are needed to improve the scale and scope or focus of the rural telephone company industry. The transaction is simply a parent-level stock transaction. There is no change any regulatorily significant aspect of the company's operations, including as to rates or service. Competent management of the existing company is being replaced by the equally competent and experienced management of the acquiring entity.

Many other states, but not all, are more prompt in the review and approval of merger transactions involving telephone companies. No approval process whatsoever for a parent level change of control is the rule in many states:

- Alabama
- Arkansas
- Connecticut
- Indiana
- Kansas
- Mississippi
- Montana

- New Mexico
- North Carolina
- Oregon
- South Carolina
- Tennessee
- Texas
- Wisconsin

Other states with an approval process, also have a “shot clock,”<sup>4</sup> including:

- Arizona (120 days)
- Colorado (45 days)
- Kentucky (60 days)
- Nevada (180 days)
- North Carolina (30 days)
- Ohio (30 days)
- Oklahoma (30 days)
- South Dakota (120 days)
- Utah (30 days notice)
- Virginia (180 days)

The FCC’s § 214 process, of course, is 30-60 days.

More expedited treatment is needed in Pennsylvania for several reasons, including employee uncertainty and frustration; customer uncertainty; the delay of new services; and adverse effect on the companies’ stock price and attraction of capital. Once a sale is announced, all persons affected, employees, customers and shareholders, have lingering questions that cannot be resolved until the transaction is closed and new management become legally effective.

Reduced and streamlined oversight is appropriate, even necessary for the ILECs. The telephone industry is no longer a monopoly, and the Commission is not the exclusive, or even dominant, influence over rates and services. The diversity and availability of fungible alternatives means that rates and revenues are not set on a “cost plus” basis anymore. The disciplines of a competitive marketplace much more effectively and thoroughly control the local

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<sup>4</sup> In most cases, if the state commission does not act within this time frame, then the transaction is deemed approved.

exchange telephone industry than is the case for other utility industries, such as electric and natural gas distribution, water, and sewer, which continue to be exclusive service providers.

Despite these seismic industry changes, little has changed, unfortunately, in the area of CPC application practice before the Commission. It can be expected, upon publication of a merger application in the *Pennsylvania Bulletin*, that numerous parties will protest the application, all advancing a broad array of individual interests. In addition to the three statutory advocates – the Office of Consumer Advocate, the Office of Small Business Advocate, and the Office of Trial Staff – regular participants include competitors, interconnecting carriers, trade unions, low-income advocates, large customers, and others.

Merger opponents, including the statutory parties, typically seek to extract some gain from their participation, regardless of whether the issues they raise relate to the transaction or even fall with the PUC's jurisdiction. Thus, merger proceedings have become a forum in which interest groups pressure the applicant and Commission to award special benefits to their constituencies in the form of "merger concessions;" consisting of commitments to provide, for example, artificially low regulated prices (even freezes), employment guarantees, favorable network interconnection terms, competitive concessions, video TV roll-out, bandwidths beyond Act 183, dividend restrictions, and the like. Applicants are compelled, unless they opt to engage in lengthy litigation of their time-sensitive commercial transaction, to negotiate a resolution. Many of these settlements have included concessions well beyond what is necessary to satisfy 66 Pa. C.S. § 1103 and the Supreme Court's decision in *City of York*.<sup>5</sup>

The PTA believes that this indiscriminate "piling on" needs to be ended. Sections 1102 and 1103 and *City of York* require only that the Commission determine that a proposed merger will affirmatively benefit the public as a whole. The Commission can reach that determination

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<sup>5</sup> *City of York v. Pennsylvania Pub. Util. Comm'n*, 449 Pa. 136, 295 A.2d 825 (1972) ("*City of York*").

based on a finding that a merger will generate operating efficiencies that, in a competitive market, will inure to the benefit of consumers in the form of, among other things, new or expanded products and services.

As the Supreme Court recently ruled, the Commission need not impose mandatory conditions requiring concessions beyond the benefits of the merger/acquisition itself. As stated by Justice Saylor in the recent Supreme Court interpretation of the *City of York* rule:

The OCA and others suggested various conditions, including: a five-year freeze on non-competitive services; provision of stand-alone, as opposed to bundled, digital subscriber line (or DSL) services; submission of a modernization plan to accelerate broadband deployment; and development of company-specific service quality measures.<sup>6</sup>

In the Court's opinion, *City of York* does not condone such practices:

In conducting the underlying inquiry, the Commission is not required to secure legally binding commitments or to quantify benefits where this may be impractical, burdensome, or impossible; rather, the PUC properly applies a preponderance of the evidence standard to make factually-based determinations (including predictive ones informed by expert judgment) concerning certification matters.<sup>7</sup>

Therefore, the Commission should not allow the filing of any protest, including one filed by a statutory advocate, to automatically derail the "general rule" process of sixty days. The statutory parties are as forceful (or more so) in pursuing and obtaining "merger concessions" as part of the CPC application process. For the most part, protests filed in application proceedings, including those filed by the statutory entities, contain vague allegations of "concerns" or allegation that an adverse impact "may occur," without alleging any facts or basis (other than this speculation) that the alleged harm should actually be of concern.

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<sup>6</sup> *Popowsky v. Pa. PUC*, Nos. 71 and 72 MAP 2007, Opinion dated December 27, 2007 at 3.

<sup>7</sup> *Id.* at 26-27.

The Commission has previously dismissed protests that lack specificity and has been affirmed by the Supreme Court in doing so.<sup>8</sup> The FCC delegates a similar function to the staff to decide whether or not to use the “streamline” procedures under Section 214.

There needs to be a Staff process for review of protests to determine whether they contain any real averments of potential harm. The PTA would propose that the guidelines used by the Commission Staff to make such decisions would include the following:

1. A recognized interest in the application. Pennsylvania law requires “[a]n interest which may be directly affected and which is not adequately represented by existing participants and as to which the petitioner may be bound by the action of the Commission in the proceeding.”<sup>9</sup> “Direct” means “that the person claiming to be aggrieved must show causation of the harm to its interest by the matter of which he complains.”<sup>10</sup>
2. A specific fact-basis allegation upon which a protest can be maintained. The Commission has previously summarily dismissed protests that lack a factual basis.<sup>11</sup>

This requirement is analogous to the Rules of Civil Procedure requirement that “the

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<sup>8</sup> See discussion of *Chester Water Authority*, *infra*.

<sup>9</sup> 52 Pa. Code § 5.72(a)(2).

<sup>10</sup> *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (1975).

<sup>11</sup> *Re: Distribution Freight Systems, Inc.*, 66 Pa. PUC 231, 233 (1988); *Re: Ketron, Inc.*, 67 Pa. PUC 394, 400 (1988) (“This type of generalized pleading in [an application] proceeding is not helpful to either the Commission or the public.”). As stated by the Commission in *Southern Union*:

[T]he OCA’s protest is defective because it does not plead specific facts showing why the merger should not be approved or why it otherwise will not be in the public interest. The matters complained of in the Protest, for example, do not affect whether this merger will have an anticompetitive effect or will impair the technical, managerial or financial fitness of PEI, PG Energy, and Honesdale to continue to provide adequate natural gas service to Pennsylvania customers at just and reasonable rates. See e.g., *Montague v. Philadelphia Elec. Co.*, 66 Pa. P.U.C. 24 (1988) (pursuant to 52 Pa. Code §5.101(a)(3), the Commission found that a moving party is entitled to judgment in its favor where it is clearly warranted and free from doubt that the filing does not state a basis for relief).

*Application Of PG Energy, Inc., Honesdale Gas Company And Southern Union Company For All Approvals Required Under The Public Utility Code Due To The Merger Of Pennsylvania Enterprises, Inc. Into Southern Union Company, The Merger Of Honesdale Gas Company Into PG Energy Inc., And The Merger Of PG Energy Inc. Into Southern Union Company As The Surviving Corporation*, Docket Nos. A-120011F0002, A-121200F2000 and A-122150F2000 (Order entered September 15, 1999) at 7-8.



material facts on which a cause of action or defense is based shall be stated in a concise and summary form.”<sup>12</sup>

3. A demonstrated, causal nexus of the claimed harm to the application. The protest should not raise issues that are not related to the proposed transaction. The Commonwealth Court has defined “immediate interest” as one that “involves the nature of the causal connection between the action complained of and the injury to the party challenging it and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question.”<sup>13</sup> Relatedly, the protest must raise genuine issues of material fact.<sup>14</sup>
4. Novel or important issues. The PTA agrees with the Commission that some flexibility may be appropriate where the merger is unique or raises particularly important issues. It would appropriate, therefore, to recognize cases that involve novel or important issues such that the public interest requires a hearing.<sup>15</sup>

A hearing is not absolutely required in a CPC application case. Where a protest raises matters either not relevant or immaterial to the transaction itself, formal on-the-record hearings need not be held, as the Commission argued to the Supreme Court:

The Commission acknowledges that fundamental principles of due process require notice and an opportunity to be heard where an administrative agency makes a fact-based adjudication affecting property rights; however, like the Commonwealth Court panel and the en banc dissent, its position is that the authority’s protest and the certification determination implicated solely questions of law, policy, and/or discretion, which do not require a trial-type proceeding. Thus, the PUC deems the due notice afforded, as well as the corresponding

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<sup>12</sup> Pa. R. Civ. P. 1019(a); See also *City of Philadelphia v. Kane*, 438 A.2d 1051, 1052 (Pa. Cmwlth. 1982) (in contrast to “notice pleading” jurisdictions, Pennsylvania is a fact pleading state).

<sup>13</sup> *George v. Pa. Pub. Util. Comm’n*, 735 A.2d 1282, 1286 (Pa. Cmwlth. 1999) (quoting *South Whitehall Twp. Police Service v. South Whitehall Twp.*, 555 A.2d 793, 795 (Pa. 1989)).

<sup>14</sup> *Chester Water Authority v. Pa. PUC*, No. 2967 C.D. 2001, Opinion dated September 18, 2002 at 5.

<sup>15</sup> Proposed Regulations at § 63.324(j)(2).

opportunity to make written submissions of which the authority advantaged itself, to represent adequate process.<sup>16</sup>

The Supreme Court affirmed the Commission:

In this setting, while due process concerns implicating hearings certainly may arise in the course of particular certification proceedings, we do not regard the act of regulatory approval itself as the type of government activity that inherently requires a hearing to comport with constitutional doctrine.

Further, we do not read the other statutory provisions and regulations cited by the authority as requiring a hearing on every application for regulatory certification.<sup>17</sup>

In summary, the PTA supports the notion of a thirty and sixty day review process, but objects to the proposal that the filing of a Protest by one of the statutory advocates is automatic grounds for removal of the application from the streamline process for consideration in the traditional litigated forum. The PTA proposes instead that the statutory advocates' protest be first reviewed to determine whether legitimate, relevant and material issue have been raised.

### III. FILING REQUIREMENTS

The Commission's current filing requirements for application proceedings are established and well understood within the regulatory community. The requirements already address the identity of the parties, the proposed transaction, public benefits, financial details and other relevant information.

The proposed regulations would increase the size, scope and complexity of the required filings as to telephone utilities only. These application forms would, it appears, continue to be used by other utility groups including electric and gas. The PTA does not support the expansion of additional information with the initial filing and does not believe that the current filing

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<sup>16</sup> *Chester Water Authority v. Pennsylvania Public Utility Commission*, No. 108 MP 2004, Opinion dated February 23, 2005 at 8.

<sup>17</sup> *Id.* at 12.

requirements have ever been criticized as being inadequate. The amount of required paperwork should be reduced, not expanded.

#### IV. SUBSTANTIVE CHANGES IN FILING REQUIREMENTS

The Commission Order proposes to change the substantive definitions of events for which approval is required in two important respects:

- The redefinition of controlling interest from the current 20% to a lower 10% standard; and
- The requirement of filing affiliated interest agreements for approval.

##### A. Revised Definition of Change of Control

Pennsylvania statute does not expressly require a CPC for the transfer of a sale of stock, only for transfers of assets. The ambiguities inherent in § 1102(a)(3), historically, created uncertainty and conflicting precedent over the Commission's authority to regulate a change in control. In 1993, the Commission definitively put the controversy to rest in a Policy Statement interpreting the certification requirements for a stock transactions resulting in a change of control of a public utility.<sup>18</sup> The Commission determined that:

- A transaction or series of transactions which results in the new "controlling interest" requires approval when the transaction results in a different entity becoming the beneficial holder of a large voting interest in the utility company, parent or higher;
- A transaction or series of transactions which results in the eliminating of a "controlling interest" requires approval when the transaction or transaction result in the dissipation of the largest voting interest in the utility or parent; and

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<sup>18</sup> 52 Pa. Code § 69.901.

- The term “controlling interest” is defined to be any interest held by a person or group acting in concert which enables the beneficial holder to control at least 20% of the voting interest in the utility or its parent.

These rules have been consistently followed by all public utilities operating in Pennsylvania, including electric, gas, water and telephone. The PTA is not aware of any challenge to the Commission’s interpretation of § 1102(2)(3) or any instance where a company has not followed these rules. The Policy Statement rules have been applied for a considerable period of time, and they are well known and understood by the regulatory community.

The PTA believes it is a mistake for the Commission to jettison its own rules in favor of simple uniformity with the FCC’s 10% rule for regulated telecommunications companies, while the rest of Pennsylvania utilities continue to follow the 20% rule of the Policy Statement. There is no evidence that the threshold should be lowered to 10% for the telecommunications industry. Nor is the PTA aware of any circumstance where the 20% rule failed to disclose to the Commission a significant corporate change. Simply stated, a stand-alone 10% interest is insufficient to rise to the level of Commission concern.

Frankly stated, the PTA believes that a decrease in the threshold and the resulting expansion of the certificate filings by the telecommunications industry is a step backwards and inconsistent with Act 183, which seeks to reduce the regulatory burden upon the telecommunications industry. Picking out that same industry for increased regulatory oversight, as compared to other industries which remain monopolistic, such as electricity, gas and water, does not serve this objective.

Nor does reducing the telephone industry’s threshold to 10% change in control enhance regulatory “predictability” or “uniformity.” The current Policy Statement is clear, provides a complete statement of what is expected and, thus, is completely “predictable.” As to

“uniformity,” the Commission should not increase the requirement upon the telecommunications industry without some compelling reason for the lack of uniformity among Pennsylvania regulated companies.

B. Affiliated Interests

Act 183 codified a provision, which had been included in most local exchange company Chapter 30 plans for some time, namely that:

The telecommunications carrier shall file affiliated interest and affiliated transaction agreements unless such agreements involve services declared to be competitive. The filing shall constitute notice to the Commission only which shall not require approval by the Commission.<sup>19</sup>

The Commission has not formally approved an affiliated interest agreement for a regulated incumbent telecommunications company for many years.

The proposed regulation violates this provision where it states that:

A written or oral contract between a telecommunications utility and affiliate requires approval by the Commission....<sup>20</sup>

The Order does not explain the incompatibility of this provision with the Public Utility Code and the PTA proposes that it be removed.

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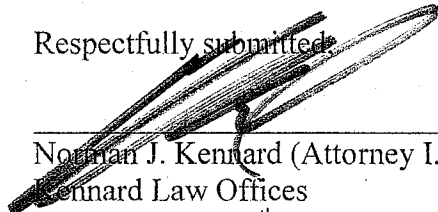
<sup>19</sup> 66 Pa. C.S. § 3019(b)(1).

<sup>20</sup> Proposed Regulations at § 63.326.

V. CONCLUSION

The PTA asks that the Commission undertake the changes to the proposed regulations suggested in these Comments.

Respectfully submitted,



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Norman J. Kennard (Attorney I.D. 29921)

Kennard Law Offices

116 Pine Street, 5<sup>th</sup> Floor

Harrisburg, PA 17101

Telephone: (717) 635-2320

Facsimile: (717) 238-2390

[njk@kennard-law.com](mailto:njk@kennard-law.com)

Counsel for the Pennsylvania Telephone Company

Dated: April 9, 2008

## ANNEX A

### Title 52. Public Utilities Part I. Public Utility Commission Subpart C. Fixed Service Utilities Chapter 63. Telephone Service

**Subchapter O. Abbreviated filing procedures for a telecommunications public utility seeking Commission approval under sections 1102(a) and 1103 of the public utility code 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.**

#### § 63.321. Purpose.

This regulation establishes a cost-effective review and approval periods that abbreviate the traditional time for approving 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) 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).

~~*Carrier* – An entity defined as a public utility by 66 Pa.C.S. 102 or defined as a public utility by 66 Pa.C.S. § 102 and certificated by the Commission pursuant to 66 Pa.C.S. § 1102(a).~~

~~*Competitive carrier* – An entity that provides information service or telecommunications service as defined by 47 U.S.C. §153, or an alternative service provider as defined by 66 Pa.C.S. § 3012 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 ~~40%~~20% or more of the voting interest in the telecommunications public utility or its parent, regardless of the

remoteness of the holder or holders or the transaction. Voting power arising from a contingent right shall be disregarded~~A contingent right may not be included.~~

~~*Diminution of control* – A transaction or series of transactions resulting in the elimination of a controlling interest when the transaction or transactions result in the dissipation of the largest voting interest in the utility or parent, regardless of the tier. A reduction in the controlling interest of 10% or more held by a person or group acting in concert, which reduces the beneficial holder or 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 holders 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 section 1.8 of the Commission's rules of practice & procedure or hereinafter amended.

*Formal investigation* – The term as defined in section 1.8 of the Commission's rules of practice & procedure or hereinafter amended.

*Formal proceeding* – The term as defined in section 1.8 of the Commission's rules of practice & procedure or hereinafter amended.

*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 47 U.S.C. § 153(26) or a local exchange telecommunications company as defined by 66 Pa.C.S. § 3012 including a certificated carrier under 66 Pa.C.S. § 1102(a).

*Informal complaint* – The term as defined in section 1.8 of the Commission's rules of practice & procedure or hereinafter amended.

*Informal investigation* – The term as defined in section 1.8 of the Commission's rules of practice & procedure or hereinafter amended.



*Informal proceeding* – The term as defined in section 1.8 of the Commission’s rules of practice & procedure or hereinafter amended.

*Party* - The term as defined in section 1.8 of the Commission’s rules of practice & procedure or hereinafter amended.

*Pennsylvania legal counsel* – The attorney of record appearing before the Commission as required by sections 1.21 and 1.22 of the Commission’s rules of practice & procedure or hereinafter amended.

*Person* - The term as defined in section 1.8 of the Commission’s rules of practice & procedure or hereinafter amended.

*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 non-horizontal merger guidelines of the U.S. 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 telecommunications public utility’s controlling interest, ~~or result in a diminution of control greater than 10% as defined at 52 Pa. Code § 69.901.~~

*Staff* – The term as defined in section 1.8 of the Commission’s rules of practice & procedure or hereafter amended.

*Statutory Advocate* – The term as defined in section 1.8 of the Commission’s rules of practice & procedure or hereafter amended.

*Telecommunications public utility* – An entity defined as a public utility by 66 Pa.C.S. 102 or defined as a public utility by 66 Pa.C.S. § 102 and certificated by the Commission pursuant to 66 Pa.C.S. § 1102(a). ~~An entity that provides information service or telecommunications service as defined by 47 U.S.C. § 153 or 66 Pa.C.S. § 3012 or as a carrier.~~

*Verification* – The term as defined in section 1.8 of the Commission’s rules of practice & procedure or as hereafter amended.

**63.323. Applicability.**

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 telecommunications public utilities and affiliates.

**§ 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.**

(a) *General rule transactions.* The following transactions of a telecommunications public utility involving a change in conditions 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 shall require notification to the Commission and approval by the Commission as a general rule transaction:

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

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

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

(41) A transaction requiring a certificate of public convenience issued pursuant to 66 Pa.C.S. § 1102(a).

(52) A transaction subject to evaluation under the statement of policy on transfer of control, 52 Pa. Code § 69.901.

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

(74) A transaction subjected to this subchapter by decision of the Commission, including a transaction no longer classified as a *pro forma* transaction by the Commission.

(b) *Reclassification of a general rule transaction.* When 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 transaction shall be subject

to the requirements of a *pro forma* transaction set forth at Section 63.325 of the rules 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 Sections 1102 and 1103 of the Public Utility Code.

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

(c) *Notification requirements for general rule transactions-* Notification 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 telecommunications public utility filing the notification shall comply with the Commission's rules of practice and procedure governing applications. A telecommunications public utility shall provide an ~~updated copy~~ notice 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 (DOJ) pursuant to the Hart-Scott-Rodino Antitrust Improvements Act (HSR Filing).

(3) ~~Filing by a telecommunications public utility of a pleading responding to a~~ A formal or informal complaint, investigation, or proceeding undertaken by the FCC or the DOJ or other state or federal regulatory agency involving the transaction.

(4) Filing required by the Commission from 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 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 Section 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 section 5.12 of the Commission's rules of practice and procedure,~~ A general rule transaction shall 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, to whom correspondence concerning the transaction is to be addressed.

(4) The name, address, citizenship, and principal place of business of any person, party, or entity that directly or indirectly owns more than ~~10~~20% 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 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 showing:

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

(ii) A description of the general and specific affirmative public interest benefits to Pennsylvania and Pennsylvania consumers warranting supporting 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.~~

(12) A verified statement affirming that the utility is in compliance with Commission obligations and filings.

(13) A verified statement affirming that customers received notice, if required by the Secretary's Office.

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

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

(15) A verified statement on the transaction's effect on the existing affiliate interest agreements of the utility, if known.

~~(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.~~

(1916) Organizational charts showing the effect on the applicant's organization before and after the transaction.

(2017) A copy of the application filed at the FCC or a notice filed with the DOJ, if any, or the electronic location at the FCC's web site.

~~(e) Continuing obligations for notification of general rule transactions. When a Commission or federal proceeding related to the general rule transaction is pending, the telecommunications public utility to the transaction shall file with the Commission copies of all procedural motions, public responses to discovery, and orders or other actions addressing or terminating the proceeding. The telecommunications public utility shall supplement the notification filing with any FCC or DOJ public notice issued concerning the transaction.~~

~~(e)~~ *Commission publication of general rule transactions.*

(1) The Secretary shall publish notice of a general rule transaction in the *Pennsylvania Bulletin* under sections 5.14(a) and (b) of the Commission's rules of practice and procedure and, as directed by the Secretary, may require additional publication in a newspaper of general circulation serving the geographic territory affected by the general rule transaction unless the Secretary~~Commission~~ determines otherwise for good cause shown.

(2) Any notice shall contain a 15-day general comment period and a formal protest period established under section 5.14(d) of the Commission's rules of practice & procedure, unless the Secretary~~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~~ shall not constitute a formal protest under section 5.14 of the Commission's rules of practice and procedure nor reclassify the general rule transaction, unless the Secretary~~Commission~~ determines otherwise for good cause shown.

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

(iii) A formal protest objecting to a general rule transaction that does not involve~~ing~~ a change in conditions of service or rates or the transfer of a

~~customer base by a statutory advocate shall constitute a formal protest under section 5.14 of the Commission's rules of practice and procedure only in the event that it meets the requirements for a valid protest identified elsewhere in this subpart and shall reclassify a general rule transaction as a *pro forma* transaction or a transaction subject to the review and approval for transactions under Sections 1102 and 1103 of the Public Utility Code, unless the Commission determines otherwise for good cause shown.~~

(gf) *Telecommunications public utility notice to customers.*

(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-cooperation~~ 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.

(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 additional notice to the customer base prepared with the ~~approval-cooperation~~ of the Commission's Bureau of Consumer Services.

~~(ii) A general comment addressing the transfer of a customer base involving a change in conditions of service or rates shall not constitute a formal protest under section 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 section 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 section 5.14 of the Commission's rules of practice and procedure and shall reclassify a general rule transaction as either as a *pro forma* transaction or a transaction subject to the review and approval for transactions under sections 1102 and 1103 of the Public Utility Code.~~

(hg) *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 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 Pennsylvania law.

~~(i) *Formal protests to a general rule transaction.* A protest filed to a transaction subject to the general rule shall comply with the Commission's rules of practice and procedure.~~

(jh) *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, but only where such protest is found by the Staff to demonstrate on its face:-

a) A recognized interest in the application. A protest must meet the requirements of 52 Pa. Code § 5.72(a)(2). The protest must state an interest that is substantial, direct and immediate. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975); *South Whitehall Twp. Police Service v. South Whitehall Twp.*, 555 A.2d 793 (Pa. 1989).

b) Specific factual allegations upon which the protest can be maintained. The protest must plead specific facts demonstrating why the transaction will not be in the public interest. *Chester Water Authority v. Pennsylvania Public Utility Commission*, No. 108 MP 2004 (Pa. 2005); Pa. R. Civ. P. 1019(a).

c) A demonstrated, causal nexus between the claimed harm and the application. A protest shall set forth explicitly the alleged causal connection by which the proposed transaction for which certification is sought is will directly harm the protestant's interests. The protest may not raise issues that are not related to the proposed transaction. Matters that are or should be the subject of a different proceeding may not be the basis of a protest.

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

(32) 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.~~

(ki) *Commission approval for a general rule transaction.* A transaction subject to this subchapter shall 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.

(1) The Commission will issue a Secretarial letter or order approving a general rule transaction and issue a certificate of public convenience authorizing the transaction pursuant to sections 1102(a) and 1103 of the Public Utility Code, 66 Pa.C.S. §§ 1102(a) and 1103.

(2) The Commission or ~~staff~~ 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) A ~~S~~ staff action shall be in writing and inform the telecommunications public utility of the right of appeal. An appeal from an action of ~~S~~ staff shall be governed by the procedures governing appeals from an action of ~~staff~~ Staff under Section 5.44 of the Commission's rules of practice and procedure.

(li) *Limitations on general rule transactions.*

(1) *Bankruptcy proceedings.* General rule transactions related to bankruptcy remain subject to sections 1.61 and 1.62 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 to circumvent an obligation by doing or refraining from doing anything that a telecommunications public utility must do or cannot do.

**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.**

(a) *Pro forma transactions.* The following transactions of a telecommunications public utility not involving a change in conditions 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 shall 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 10% of the assets of a carrier.~~

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

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

(41) A transaction requiring a certificate of public convenience issued pursuant to 66 Pa.C.S. § 1102(a).

(53) A transaction subject to evaluation under the statement of policy on transfer of control, 52 Pa. Code § 69.901.

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

(78) A transaction subjected to this subchapter by decision of the Commission, including a general rule transaction reclassified as a *pro forma* transaction.

(b) *Reclassification of a pro forma transaction.* When 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 *pro forma* transaction shall be subject to the requirements of a general rule transaction set forth at Section 63.324 -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 Section 1102 and 1103 of the Public Utility Code.

(3) *Right of appeal for reclassification of a pro forma transaction.*

When a telecommunications public utility is notified in writing by ~~staff~~ Staff that a *pro forma* transaction will be reclassified, the determination shall be subject to appeal as an appeal from an action of ~~S~~ staff. The provisions governing an appeal shall be those governing appeals from an action of ~~S~~ staff under Section 5.44 of the Commission's rules of practice and procedure. The writing shall 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 filing the notification shall comply with the Commission's rules of practice and procedure governing applications. A telecommunications public utility shall provide an updated copy to the Commission and the statutory advocates of filings in the following circumstances set forth at § 63.324 (c):

~~(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 (DOJ) pursuant to the Hart-Scott-Rodino Antitrust Improvements Act (HSR Filing).~~

~~(3) Filing by a telecommunications public utility of a pleading responding to a formal or informal complaint, investigation, or proceeding undertaken by the FCC or the DOJ or other state or federal regulatory agency involving the transaction.~~

~~(4) Filing required by the Commission from 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 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 Section 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 section 5.12 of the Commission's rules of practice and~~

~~procedure, a~~ *pro forma* transaction shall contain the same information set forth at § 63.324 (d), 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, 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 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 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 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 Pennsylvania and Pennsylvania 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.~~

~~(12) A verified statement affirming that the utility is in compliance with Commission obligations and filings.~~

~~(13) A verified statement affirming that customers received or will receive notice.~~

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

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

~~(16) A verified statement on the effect of the transaction on the existing affiliate interest agreements of the 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 carrier 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) A copy of the application filed at the FCC or a notice filed with the DOJ, if any.~~

~~(e) Continuing obligations for notification of pro forma transactions. When a Commission or federal proceeding related to the pro forma transaction is pending, a telecommunications public utility seeking approval of a pro forma transaction shall file with the Commission copies of all procedural motions, public responses to discovery, and orders or other actions addressing or terminating the proceeding. The telecommunications public utility shall supplement the notification filing with any FCC or DOJ public notice issued concerning the transaction.~~

(fe) *Commission publication of pro forma transactions.*

(1) The Secretary 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 website, unless the ~~Secretary~~ Commission determines otherwise for good cause shown.

(2) A notice posted on the Commission website may contain a general comment period established according to section 5.14(d) of the Commission's rules of practice.

(3) There shall be no formal protest period under section 5.14(d) of the Commission's rules of practice & procedure, unless the ~~Commission~~ Secretary 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 website, shall be subject to a general comment period ~~and a formal protest period established under section 5.14(d) of the Commission's rules of practice & 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 or transferring a customer base shall not constitute a formal protest under section 5.14 of the Commission's rules of practice and procedure nor reclassify the general rule transaction, ~~unless the~~ Secretary ~~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 or transferring a customer base shall not constitute a formal protest under section 5.14 of the Commission rules of practice and procedure and may reclassify the general rule transaction, unless the ~~Commission~~ Secretary 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 shall constitute a formal protest under section 5.14 of the Commission's rules of practice and procedure and shall reclassify a general rule transaction either as a general rule transaction or as a transaction subject to the review and approval for transactions under sections 1102 and 1103 of the Public Utility Code.~~

(gf) *Telecommunications public utility notice to customers.*

(1) *Pro forma transactions not involving a change in conditions of service or rates.* A telecommunications carrier-public utility shall prepare and distribute notice of a *pro forma* transaction not involving a change in conditions of service or rates to the its customers of a telecommunications carrier as required by the Secretary. Notice and distribution may also be required for transactions that do not reduce an applicant's control by more than 10%. Notice, if required, 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% shall 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 shall not constitute a formal protest under section 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 shall constitute a formal protest under section 5.14 of the Commission rules of practice and procedure but may not reclassify the *pro forma* transaction, unless the Commission determines otherwise for good cause shown.~~

(hg) *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 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 Pennsylvania law.

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

(jh) *Removal of a transaction as a pro forma transaction.* The Commission shall remove a transaction as a *pro forma* transaction and reclassify the transaction in the following circumstances:

(1) The filing of a protest by a statutory advocate or the filing of a formal protest warranting reclassification for good cause shown, including competitive impact, but only where such protest is found by the Staff to demonstrate on its face:

(a) A recognized interest in the application. A protest must meet the requirements of 52 Pa. Code § 5.72(a)(2). The protest must state an interest that is substantial, direct and immediate. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975); *South Whitehall Twp. Police Service v. South Whitehall Twp.*, 555 A.2d 793 (Pa. 1989).

(b) Specific factual allegations upon which the protest can be maintained. The protest must plead specific facts demonstrating why the transaction will not be in the public interest. *Chester Water Authority v. Pennsylvania Public Utility Commission*, No. 108 MP 2004 (Pa. 2005); Pa. R. Civ. P. 1019(a).

(c) A demonstrated, causal nexus between the claimed harm and the application. A protest shall set forth explicitly the alleged causal connection by which the proposed transaction for which certification is sought will directly harm the protestant's interests. The protest may not raise issues that are not related to the proposed transaction. Matters that are or should be the subject of a different proceeding may not be the basis of a protest.

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

(32) Novel or important issues. 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.~~

(ki) *Commission approval for a pro forma transaction.* A transaction subject to this subchapter shall 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.

(1) The Commission will issue a Secretarial letter or order approving a *pro forma* transaction and issue a certificate of public convenience authorizing the



transaction pursuant to sections 1102(a) and 1103 of the Public Utility Code, 66 Pa.C.S. §§ 1102(a) and 1103.

(2) The Commission or Sstaff 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) A Sstaff action shall be in writing and inform the telecommunications public utility of the right of appeal. An appeal from an action of Sstaff shall be governed by the procedures governing appeals from an action of Sstaff under Section 5.44 of the Commission's rules of practice and procedure.

(h) *Limitations on pro forma transactions.*

(1) *Bankruptcy proceedings.* Pro forma changes related to bankruptcy remain subject to sections 1.61 and 1.63 of the Commission's rules of practice and procedure.

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

**§ 63.326. Approval of contracts between a carrier or telecommunications public utility and an affiliated interest under sections 2101(a), 3019(b)(1) and 3016(f)(1).**

(a) A written or oral contract or transaction between a telecommunications utility and an affiliated interest is governed by 66 Pa.C.S. § 3019(b)(1) and 66 Pa.C.S. § 3016(f)(1). ~~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 telecommunications carrier or public utility shall file a copy and written summary of a written contract or transaction between a carrier or telecommunications public utility and an affiliated interest with the Commission unless the the agreement involves services declared to be competitive. 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 Public Utility 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 Public Utility Code.

(d) *Retention of contract or transaction.* A telecommunications public utility ~~or carrier~~ shall retain and make available copies or summaries of the affiliated 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.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the participants, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by participant).

Service by First Class Mail

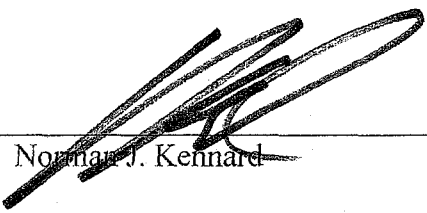
Daniel Delaney, Esquire  
Kirkpatrick & Lockhart Preston  
Gates Ellis LLP  
17 North Second Street, 18th Floor  
Harrisburg, PA 17101-1507

Suzan Paiva, Esquire  
Verizon Pennsylvania  
1717 Arch Street, 32N  
Philadelphia, PA 19103

Irwin A. Popowsky, Esquire  
Office of Consumer Advocate  
555 Walnut Street  
Forum Place, 5th Floor  
Harrisburg, PA 17101-1921

Johnnie Simms, Esquire  
PA Public Utility Commission  
Office of Trial Staff  
PO Box 3265  
Harrisburg, PA 17105-3265

William Lloyd, Esquire  
Office of Small Business Advocate  
Commerce Building, Suite 1102  
300 North Second Street  
Harrisburg, PA 17101

  
\_\_\_\_\_  
Norman J. Kennard

Date: April 9, 2008