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OFFICE OF SMALL BUSINESS ADVOCATE
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INDEPENDENT REGULATORY
REVIEW COMMISSION

William R. Lloyd, Jr.
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April 4, 2008

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HAND DELIVERED

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

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**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-00070188**

Dear Secretary McNulty:

I am delivering for filing the original plus fifteen copies of the Comments on behalf of the Office of Small Business Advocate on the Proposed Rulemaking.

Copies of the comments in MS Word format have been served on joswitmer@state.pa.us via electronic mail. If you have any questions, please contact me.

Sincerely,

William R. Lloyd, Jr.
Small Business Advocate
Attorney ID No. 16452

Enclosures

cc: joswitmer@state.pa.us

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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 : Docket No. L-00070188
for Commission Review of Transfer of :
Control and Affiliate Filings for :
Telecommunications Carriers :

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**COMMENTS OF THE
OFFICE OF SMALL BUSINESS ADVOCATE
ON THE PROPOSED RULEMAKING**

Procedural History

On May 31, 2006, Level 3 Communications, LLC ("Level 3") filed a petition ("Level 3 Petition") at Docket No. P-00062222, asking the Pennsylvania Public Utility Commission ("Commission") to initiate a rulemaking to streamline the process by which competitive local exchange carriers ("CLECs") may effectuate transfers of control and affiliate transactions.

Both Verizon Pennsylvania Inc. ("Verizon") and the Pennsylvania Telephone Association ("PTA") filed responses which urged the Commission to apply any streamlining of the process to incumbent local exchange carriers ("ILECs") as well as to CLECs.

By Proposed Rulemaking Order entered October 19, 2007, the Commission initiated the process of considering changes in regulations along the lines requested by the Level 3 Petition and the responses thereto. Ordering Paragraph No. 7 invited

interested parties to file comments within 60 days of publication in the *Pennsylvania Bulletin*. The proposed regulations were published in the February 9, 2008, *Pennsylvania Bulletin*, 38 Pa.B. 758.

The Office of Small Business Advocate (“OSBA”) hereby submits the following comments in response to the Commission’s invitation.

General Comments

The essence of the Commission’s proposal is to establish three different deadlines for reviewing transactions. The general rule would be a 60-day limit on review of most transactions, including transactions involving changes in service or rates. There would be two exceptions to the general rule. First, there would be a 30-day limit on review of most transactions which do not involve changes in service or rates and which do not reduce the applicant’s ownership interest by more than 10%. Second, there would be an unspecified deadline on review of transactions if a statutory advocate (*e.g.*, the OSBA) files a protest, the transaction involves local exchange carriers (“LECs”) with substantial market shares, the filing raises novel or important issues, and the Commission determines that a review period of longer than 60 days is necessary.

The OSBA recognizes that streamlined review may be appropriate in instances in which a proposed transaction is unopposed. However, Chapter 30 is based on the assumption that competition exists and will not be destroyed or significantly diluted through an acquisition or merger. Therefore, the OSBA recommends that all mergers, acquisitions, and similar transactions involving LECs with substantial market shares be subjected to the traditional review process unless the transaction is unopposed. Adhering

to the traditional process is especially critical when an ILEC is acquiring, or merging with, a CLEC or another ILEC.

The OSBA appreciates that a protest by the OSBA will be a strong factor in favor of requiring that a proposed transaction undergo traditional review. However, the fact that the classification or reclassification of a proposed transaction will be discretionary could easily result in “a case to decide if there should be a case,” *i.e.*, the filing of pleadings and briefs to determine the degree of review to which a proposed transaction should be subjected.

Finally, the OSBA is concerned that 60 days will rarely be enough time for review of a proposed transaction unless the 60 days begins to run only when the applicant *serves* the application on the statutory advocates and the application includes the information which is routinely requested in discovery.

Specific Comments

The following are the OSBA’s recommended changes in the language of the proposed regulations. The OSBA recommends the addition of the language which is underlined and the deletion of the language which is in brackets.

Most of the OSBA’s recommended language changes are intended to implement the OSBA’s General Comments, above. However, some of the changes are technical and are intended simply for clarification or for the purpose of aligning the language with the rationale provided by the Commission in the Proposed Rulemaking Order.

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 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)(relating to enumeration of acts requiring certificate) or approval of a contract between telecommunications 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 10% 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. A contingent right may not be included.

Diminution of control – A reduction in the controlling interest of 10% or more held by a person or group acting in concert, which reduces the beneficial 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%.

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 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)(relating to enumeration of acts requiring certificate) 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 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.
- (4) A transaction requiring a certificate of public convenience issued pursuant to 66 Pa.C.S. § 1102(a).
- (5) A transaction subject to evaluation under the statement of policy on transfer of control, 52 Pa. Code § 69.901.
- (6) A transaction that transfers the customer base of a telecommunications public utility or carrier and involves a change in conditions of service or rates.
- (7) 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 **as a pro forma transaction**, the transaction shall be subject to the requirements of a *pro forma* transaction in § 63.325 (relating to Commission approval of a pro forma transaction subject to 66 Pa.C.S. §§ 1102(a)(3) and 1103) unless determined otherwise for good cause shown.

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

(2) *Review of a general rule transaction reclassified as other than a pro forma transaction.* The review and approval of a general rule transaction [not] reclassified as **other than** 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] **reclassified as other than a pro forma transaction** shall be reviewed within the time governing review and approval under 66 Pa.C.S. §§ 1102 and 1103 (relating to enumeration of acts requiring certification; and procedure to obtain certificates of public convenience).

(3) *Right of appeal for reclassification of a transaction.* When a telecommunications public utility is notified in writing by staff that a general rule transaction will be reclassified, the determination shall be subject to appeal as an appeal from an action of staff. The provisions governing an appeal shall be those governing appeals from an action of staff under 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. (See §§ 5.11—5.14 (relating to applications.)) **In addition to filing an application with the Commission, the telecommunications public utility shall serve the application on the statutory advocates.** A telecommunications public utility shall provide an updated copy 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 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 § 5.12 (relating to contents of applications) of the Commission's rules of practice and procedure, **an application for approval as 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% 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 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 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 Commonwealth tariffs. [If applicable or in response to a request from staff, a] A telecommunications public utility shall provide a red-line document identifying changes in existing Commonwealth tariffs before and after the transaction for which the telecommunications public utility seeks approval from the Commission.

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

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

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

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

(20) A copy of the application filed at the FCC or a notice filed with the DOJ, if any.

(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.

(f) *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, require additional publication in a newspaper of general circulation serving the geographic territory affected by the general rule transaction unless the Commission determines otherwise for good cause shown.

(2) Any notice 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 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 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 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 Commission determines otherwise for good cause shown.

(iii) A formal protest objecting to a general rule transaction involving a change in conditions of service or rates by a statutory advocate shall constitute a formal protest under § 5.14 of the Commission's rules of practice and procedure and shall reclassify a general rule transaction as **other than a pro forma transaction [or a transaction] and shall subject the transaction** to the review and approval for transactions under §§ 1102 and 1103, unless the Commission determines otherwise for good cause shown. **The Commission shall reclassify a general rule transaction as other than a pro forma transaction if the transaction involves a carrier with dominant market power or if approval of the transaction will result in a carrier's having dominant market power.**

(g) *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 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 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 § 5.14 of the Commission's rules of practice and procedure and shall reclassify a general rule transaction as [either] **other than a pro forma** transaction [or a transaction] **and shall** subject **the transaction** to the review and approval for transactions under 66 Pa.C.S. §§ 1102 and 1103.

(h) *Commission review of transactions subject to the general rule.* The Commission retains the discretion to make inquiries and, after notice and opportunity to be heard, take action to protect the public interest, including the imposition of conditions on approval of the transaction when deemed necessary or proper under 66 Pa.C.S. § 1103 [and] , **including** to establish affirmative public benefit as required by law of the Commonwealth.

(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.

(j) *Reclassification of a transaction from the general rule.* The Commission shall reclassify a general rule transaction **as other than a pro forma transaction** in the following circumstances:

(1) The filing involves a carrier which has dominant market power or, if approved, the filing will result in a carrier's having dominant market power;

(1) 2) 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) 3) The filing involves a major acquisition or merger between telecommunications firms with substantial market shares[.] ;

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

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

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

(l) *Limitations on general rule transactions.*

(1) *Bankruptcy proceedings.* General rule transactions related to bankruptcy remain subject to 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.

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

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

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

(7) 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 in § 63.324 (relating to Commission approval of a general rule transaction subject to 66 Pa.C.S. §§ 1102(a) and 1103) unless the Commission determines otherwise for good cause shown. **The Commission shall reclassify a**

pro forma transaction as a general rule transaction if a formal protest objecting to the transaction is filed.

(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 that a *pro forma* transaction will be reclassified, the determination shall be subject to appeal as an appeal from an action of staff. The provisions governing an appeal shall be those governing appeals from an action of staff under 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. **In addition to filing an application with the Commission, the telecommunications public utility shall serve the application on the statutory advocates.** A telecommunications public utility shall provide an updated copy 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 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 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% 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 Commonwealth tariffs. [When applicable or in response to a request from staff, a] A telecommunications public utility shall provide a red-line document identifying changes in existing Commonwealth 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.

(21) A verified statement setting forth the expected effect of the transaction on the capital structure of the telecommunications public utility over the next five years.

(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.

(f) *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 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 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 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.

(ii) A formal protest objecting to a transaction 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 and may reclassify the general rule transaction, unless the Commission determines otherwise for good cause shown.

(iii) A formal protest objecting to a transaction not involving a change in conditions of service or rates by a statutory advocate 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.

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

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

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

(i) A *pro forma* transaction transferring a customer base not involving a change in conditions of service or rates or not reducing an applicant's control by more than 10% 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].

(h) *Commission review of pro forma transactions.* The Commission retains the discretion to make inquiries and, after notice and opportunity to be heard, take action to protect the public interest, including the imposition of conditions on approval of the transaction when deemed necessary or proper under 66 Pa.C.S. § 1103 [and] **including** to establish affirmative public benefit as required by law of the Commonwealth.

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

(j) *Removal of a transaction as a pro forma transaction.* The Commission will remove a transaction as a *pro forma* transaction and reclassify the 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[.] ;

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

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

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

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

(l) *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 public utility and an affiliated interest under 66 Pa.C.S. Ch. 21 and §§ [2101(a),] 3016(f)(1) and 3019(b)(1).

(a) A written or oral contract or transaction between a telecommunications utility and an affiliated interest is governed by **66 Pa.C.S. Ch.**

21, 66 Pa.C.S. § 3016(f)(1) and 66 Pa.C.S. § 3019(b)(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 carrier or public utility shall file a copy and written summary of a written contract or transaction between a carrier or public utility and an affiliated interest with the Commission. A written contract or transaction shall remain subject to examination, audit, or other action to ensure compliance with 66 Pa.C.S. § 3016(f)(1) and other applicable sections of the 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.

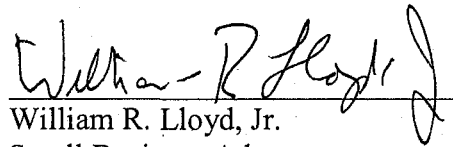
(d) *Retention of contract or transaction.* A public utility or carrier shall retain and make available copies or summaries of the contract or transaction and shall file the copies or summaries at the request of the Commission.

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

Conclusion

The OSBA respectfully requests that the Commission revise the proposed regulations in accordance with the foregoing comments before publishing the regulations in final form.

Respectfully submitted,



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