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April 9, 2008

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2008 APR 17 PM 1:46

INDEPENDENT REGULATORY  
REVIEW COMMISSION

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APR - 9 2008

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**VIA HAND DELIVERY**

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
P.O. Box 3265  
400 North Street  
Harrisburg, PA 17105-3265

**COPY**

In 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 Carrier  
Docket No. L-00070188

Dear Secretary McNulty:

Enclosed for filing are an original and fifteen (15) copies of the Comments of Windstream Pennsylvania, LLC and Windstream Communications, Inc. in the above-referenced proceeding. Copies have been served in accordance with the attached Certificate of Service.

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

Very truly yours,

THOMAS, THOMAS, ARMSTRONG & NIESEN

By

  
Regina L. Matz

Enclosures

cc: Joseph K. Witmer (w/encl. and diskette, via hand delivery)

080409-McNulty Ltr re Comments to Petition of Level 3

Before The  
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 Regulations to Streamline : Docket No. P-00062222  
Transfer of Control and Affiliate Filing :  
Requirements for Competitive Carriers :  
:  
Rulemaking to Amend Chapter 63 :  
Regulations so as to Streamline :  
Procedures for Commission Review of : Docket No. L-00070188  
Transfer of Control and Affiliate :  
Filings for Telecommunications Carrier :

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CERTIFICATE OF SERVICE

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I hereby certify that I have this 9<sup>th</sup> day of April, 2008, served a true and correct copy of the foregoing Comments of Windstream Pennsylvania, LLC and Windstream Communications, Inc. upon the persons listed below by first class mail, postage prepaid:

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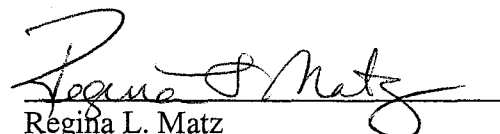
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**Before The  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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**COMMENTS OF  
WINDSTREAM PENNSYLVANIA, LLC AND  
WINDSTREAM COMMUNICATIONS, INC.**

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**I. INTRODUCTION**

On February 9, 2008, the Pennsylvania Public Utility Commission (PUC or "Commission") published in the *Pennsylvania Bulletin* a notice of proposed rulemaking (NPRM) to address changes to the PUC's regulations at 52 Pa. Code Chapter 63, with the goal of streamlining procedures applicable to review of transfer of control of telecommunications carriers.

Windstream Pennsylvania, LLC and Windstream Communications, Inc. (collectively herein, "Windstream") appreciate the Commission's continued willingness to address issues impacting the telecommunications sector and the opportunity to respond to this important aspect of Pennsylvania's current regulatory regime. While wireline companies are still subjected to a lengthy review of transactions in Pennsylvania, other companies providing similarly situated services in direct competition with wireline

companies, especially wireless, cable telephony, and Voice Over internet Protocol (VoIP), benefit substantially from being exempt from these requirements. Given that today's communications market is undeniably competitive it is reasonable, as the Commission is recognizing in this rulemaking, to remove market restrictions currently imposed on only one segment of the communications industry.

## **II. BACKGROUND AND OVERVIEW OF WINDSTREAM'S POSITION**

In May of 2006, Level 3 Communications LLC ("Level 3") filed a petition with the Commission requesting that the PUC open a rulemaking proceeding aimed at streamlining the Commission's process for issuance of Certificates of Public Convenience (CPC) related to the transfer of control and affiliate transactions. In its filing, Level 3 asked the Commission to streamline its review process for competitive local exchange carriers (CLECs) exclusively.

Both Verizon Pennsylvania Inc. and Verizon North Inc. ("Verizon") and the Pennsylvania Telephone Association (PTA) filed comments supporting a streamlined process for these types of proceedings. Additionally, both agreed that any reform should apply equally to both CLECs and incumbent local exchange carriers (ILECs). Windstream agrees.

Windstream applauds the Commission's willingness to address Level 3's proposal by applying the remedies outlined in this rulemaking equally to ILECs and CLECs. However, in order to level the regulatory playing field and still provide the Commission the tools it needs to perform its duties under Pennsylvania law, it should go further with its proposed new policies and create a two-track system with strict time limits.

In its rulemaking the Commission stated that the “proposed regulation establishes a strong presumption in favor of the 60-day general review” proceeding, and that “a reclassification of a transaction from the 60-day general review would occur only in very limited circumstances.”<sup>1</sup> Yet, by continuing provisions that compel a “traditional review” process, such as allowing a formal protest by a statutory advocate to automatically prompt a prolonged traditional review, the rulemaking effectively circumvents the intended relief by perpetuating a significant inequity in the current system, namely forcing applicants to seek negotiated settlements focused on short-term benefits with intervenors in exchange for a relatively expedited conclusion. In lieu of an automatic reversion to the traditional review process under the circumstances preserved in the proposed regulations, the PUC should provided instead the option of extending the general review period for an additional 30 days. This course of action would bring much needed regulatory parity and certainty to the process while preserving the Commission’s authority to more extensively examine an application. The certainty of timely regulatory action is crucial for companies seeking a CPC as well as for their customers, employees, and shareholders. While accomplishing the dual goals of ensuring parity and certainty, this proposal has the added benefit of providing the necessary framework for the Commission and the statutory advocates to perform their duty under Pennsylvania law.

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<sup>1</sup> *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; 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 Nos. P-0006222, L-00070188, Order entered October 19, 2007 (“*Proposed Rulemaking Order*”) at 6.

### III. COMMENTS

#### A. Reform Should Recognize Market Realities

The communications market is competitive, and any resulting Commission rules should reflect this reality and anticipate that the transformation occurring in the market will only accelerate.<sup>2</sup> The Commission's proposal to streamline procedures for a variety of transactions that fall under the aegis of Sections 1102 and 1103 of the Public Utility Code partially reflects such considerations and proposes a three-tiered review process for Chapter 11 applications:

- Pro-forma Review: 30-day review and approval process for transactions that do not involve changes in conditions of service or rates and those that do not reduce an applicant's control by more than 10%;
- General Review: 60-day review process for applications seeking approval for transactions under Sections 1102 and 1103 of the Pennsylvania Public Utility Code involving acquisitions, diminutions in control, mergers, stock sales or transfers, and transfers of assets or control of a telecommunications company;
- Traditional Review: The Commission's current open-ended review process.

Windstream supports the Commission's intent to codify its current practice of streamlining filings the Commission has already recognized as pro-forma, for example, where there will be no change in control of utility services, such as changes in a business

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<sup>2</sup> For example, the FCC's March 2008 Local Telephone Competition Report estimates that as of June 2007 wireless customers in Pennsylvania outnumber wireline customers by almost 4 million. Even taking into account the potential for overlap between wireline and wireless services, these numbers demonstrate the pressure wireline providers face from wireless substitution. Moreover, since 2001, ILECs in the Commonwealth have experienced a loss of approximately 2 million customers which does not include customer growth that also is lost as more competitors vie for the same customer base. CLECs in Pennsylvania accounted for 20% of all end-user access lines in Pennsylvania – at least 10 CLECs are currently authorized to offer end user services to Windstream's customers in Pennsylvania exclusive of cable and VoIP providers. Further, cable companies directly compete with wireline services as demonstrated by the fact that as of 2005, according to the Television and Cable Factbook (Cable Volume, 2005), a cable company that can provide both entertainment content and broadband services passes ninety-six percent (96%) of homes in Pennsylvania.

entity from a C corporation to a limited liability company.<sup>3</sup> Windstream also supports the Commission's interest in "establishing a strong presumption in favor of the 60-day general rule given the significant changes in the telecommunications industry and regulation since 1994."<sup>4</sup> However, in retaining by regulation the traditional review process under certain circumstances, the reform proposed in the NPRM, while a significant step forward, falls short of comprehensively addressing the inequities inherent in the current review regime for companies applying for a CPC under Sections 1102 and 1103.

Windstream appreciates the Commission's statutory obligations under Chapter 11 of the Public Utility Code to protect the public interest, as well as the interests of statutory advocates<sup>5</sup> to collectively represent ratepayers, or in the case of the Office of Trial Staff, the broader public interest. However, retention of the "traditional review" is anachronistic in today's competitive communications market and does not serve these interests.

As an initial concern, the rules should not provide for automatic reclassification of an application from a general review to a traditional review proceeding merely upon the filing of any statutory party protest. Such action unnecessarily grants an inordinate amount of leverage to an intervening party which, as has been demonstrated in recent application proceedings before the Commission, may result in applicants being pressured to negotiate short-term rate or other concessions simply as a means of ending the protest to truncate the proceeding and complete the proposed transaction. As currently proposed,

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<sup>3</sup> See *Joint Application of Frontier Communications of Breezewood, Inc. et al.*, Docket Nos. A-310400F0004 *et al.*, Order entered October 17, 2003, 2003 WL 22917026.

<sup>4</sup> *Proposed Rulemaking Order* at 6.

however, the amended regulations continue to promote short-term, traded-for-benefits that have been the hallmark of the traditional review. Placing the focus on long-term benefits, including the enhancement of services to customers, is appropriate in today's competitive telecommunications market. Indeed, the Supreme Court affirmed this view in its decision in *Popowsky*, finding that "the *City of York* does not support the requirements advanced by the OCA, and implicit in the Commonwealth Court's decision, that the Commission must secure legally binding commitments to assure public benefit from a merger."<sup>6</sup>

Protests by statutory advocates (as well as other parties to the extent their protest should be deemed to trigger a reclassification to traditional review) should not per se be sufficient to warrant an automatic 6 to 9 month review process. This is particularly so if their protests do not specifically detail substantive, factual concerns of actual adverse consequences likely to result from the proposed transaction. Rather than automatically reclassify an application to a traditional review process upon receipt of a statutory party's protest, the Commission should instead extend the general review process by an additional 30 days to accommodate a hearing, if necessary, but on an abbreviated schedule. This abbreviated schedule would provide a "90-day process" similar to the abbreviated procedures adopted for regulatory filings under ILECs' alternative regulation plans authorized under the original Chapter 30,<sup>7</sup> and continued without reformation as to abbreviated review under Act 183.<sup>8</sup>

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<sup>5</sup> The Office of Consumer Advocate ("OCA"), Office of Small Business Advocate ("OSBA"), and the Office of Trial Staff ("OTS").

<sup>6</sup> *Popowsky v. Pennsylvania Public Utility Commission*, 937 A.2d 1040, 1055 (Pa. 2007) ("*Popowsky*").

<sup>7</sup> Act 67 of 1998, 66 Pa.C.S. §§3001-3009 (repealed) ("Chapter 30").

<sup>8</sup> Act 183 of 2004, 66 Pa.C.S. §§3011-3019 ("Act 183").



The Supreme Court in *Popowsky* affirmed this new approach and the emphasis on long-term benefits. The Court accepted the Commission's position that "nothing in Section 1103 of *City of York* requires that the essential public benefits must necessarily arise in the short term" and recognized the Commission's vigorous defense of "the validity of a longer-term approach to public benefit in the present price-cap regulatory environment."<sup>9</sup> The Court specifically cited to the Commission's position that there was "no requirement in *City of York* that the merged company make special concessions or rate reductions as a *quid pro quo* for regulatory approval" and that the Commission's discretion to impose conditions was not a "mandate to extract short-term rate concessions to the exclusion of any consideration of a longer-term approach to public benefit."<sup>10</sup> Thus persuaded, the Court concluded:

Indeed, the Commission's opinion makes it clear that its decision to accept a likelihood of longer-term benefits in lieu of more immediate price concessions is grounded in the same philosophy as the General Assembly's decision to move from cost-based to price-cap regulation – both decisions appear to incorporate the underlying understanding that, in a competitive environment, market forces will constrain price and encourage valuable innovation. ... [This] policy is entirely rational.<sup>11</sup>

Time is of the essence for all companies undertaking a merger or acquisition and a critical concern in the traditional review process. For example, the sooner a company can complete the regulatory review process, the sooner it can achieve estimated synergies, provide certainty to customers and transitioning employees, and seek funding in capital markets. Further, as the Commission is well aware, the traditional review process was

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<sup>9</sup> *Popowsky*, 937 A.2d at 1051-52.

<sup>10</sup> *Id.* at 1052, note 13.

<sup>11</sup> *Popowsky*, 937 A.2d at 1059.

developed at a time when companies in the communications sector were monopolies and at a time when consumers' interests were served through the state regulators conducting granular reviews of applications for a CPC. Today, markets have evolved, and the granular review that arose from monopoly regulation is no longer appropriate or necessary. Consumers are now in a position to evaluate whether services offered by a new company are sustainable in the marketplace, because, as the Court agreed, "in a competitive environment, market forces will constrain price and encourage valuable innovation."<sup>12</sup>

Closing a transaction expeditiously provides certainty for employees and customers and enhances the seamlessness of the transaction by allowing the company to quickly implement billing, customer service and operational transitions. In today's hyper-competitive communications market, the speed with which companies bring new or enhanced services to the market is critical. This, the Commission recognized and the Supreme Court affirmed, serves the public interest better than short-term concessions made merely to secure a relatively prompt closing to a transaction that often already has been scrutinized by federal authorities for any anti-trust or general marketplace concerns.

Federal agencies like the Federal Communications Commission (FCC), Department of Justice (DOJ), and Federal Trade Commission (FTC) evaluate the impact of proposed transactions on competition. Their reviews are concurrent, and their focus in reviewing mergers is stated in Section 0.1 of the Horizontal Merger Guidelines: "The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise." Per section 1 of the Horizontal

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<sup>12</sup> *Popowsky*, 937 A. 2d at 1059.

Merger Guidelines, “[a] merger is unlikely to create or enhance market power or to facilitate its exercise unless it significantly increases concentration and results in a concentrated market, properly defined and measured. Mergers that either do not significantly increase concentration or do not result in a concentrated market ordinarily require no further analysis.” When Windstream Corporation acquired Concord Telephone in North Carolina these agencies scrutinized Concord’s CLEC service in the Windstream North Carolina ILEC service territory to ensure that the overlap did not create an advantage in the market that could be exploited to the detriment of average consumers in that service area. The review process by these federal entities usually requires 30 to 60 days from filing. The state review processes are largely duplicative of the exhaustive review that occurs at the federal level and more susceptible to the special interests of intervening parties as discussed previously.

The regulatory process known as traditional review was developed in 1994, two years before the passage of the Telecommunications Act of 1996 (“TCA-96”), which many experts contend is outdated given its failure to anticipate the revolution in communications technology in which we are currently in the midst. In light of this revolution, the Commission should avoid an approach that codifies automatic triggers and favors instead an abbreviated approval process that provides a controlled exception to the 60-day general review process only where circumstances truly require it.

This transformation in the telecommunications market is on par with other seminal events in human history, most particularly the Industrial Revolution. Today, Sprint, Clearwire, AT&T, and Verizon are all developing plans for national WiMax networks which could be utilized for both broadband and voice communications.

Wireless companies are providing broadband in addition to voice and electronic communications. Energy companies are exploring and deploying broadband capability over their electric facilities. Satellite companies now have the ability to provide not only entertainment content but broadband service as well. Access to broadband is all one needs to take advantage of a VoIP service like Vonage. Very simply, in 1994 when the traditional review process was developed, few anticipated the transformation that would occur in the market or the competition it would spawn. While the proposed general rule review takes great strides toward recognizing these changes, it continues to provide for a traditional review, which has become woefully outdated and should be eliminated.

In today's competitive market, public policy should enhance a company's ability to gain efficiencies and add scale to its operations through acquisition and mergers. Telecommunications companies should not be singled out from their competitive counterparts and subjected to the expense of protracted CPC review proceedings. Rather, public policy should encourage companies to seek innovative ways to enhance their operations. Any required review policy should reflect that consumers benefit when regulation is not duplicative, seeks parity among providers, and levels the playing field so that consumers can have choices of products and services from myriad providers based upon the quality and quantity of their services, and not regulatory disparities that favor one technology or provider over another. Ultimately, because survival in the current communications market depends on consolidation in order to achieve scale and scope in operating efficiencies, resulting in the ability to offer a wider array of service offerings at competitive prices, the traditional 6 to 9 month regulatory review process should be eliminated altogether.

## B. Other Pennsylvania Agencies Have Adapted Their Procedures

Other Commonwealth agencies have review processes of mergers and acquisitions that are more reflective of marketplace realities.

Regulation by the state Department of Banking (“Department”) over the mergers, consolidations and certain other transactions of banking institutions (generally a bank, a bank and trust company, a trust company, a savings bank or a private bank)<sup>13</sup> is addressed in Chapter 16 of Title 7 of Pennsylvania’s statutes.<sup>14</sup> Under these regulations, mergers or consolidations that result in a national or interstate bank do *not* require the approval of the Department.<sup>15</sup> Instead, they may be accomplished upon notice to the Department and filing of a certificate of approval by the U.S. Comptroller of the Currency.<sup>16</sup> Additionally, in mergers or consolidations that result in a state banking institution which may require approval by the Department, such approval is accomplished in approximately 60 days (plus an additional 30 days under limited circumstances). With the exception of an additional advertising requirement, a proposal to *convert* a national or interstate bank to a “Pennsylvania banking institution” follows similar substantive and procedural processes as mergers/consolidations and takes approximately 30 days to review.<sup>17</sup> To the extent any process is addressed in the statute or regulations, it appears to be very abbreviated. The outermost time frame for review by the Department is 90 days, and that is only if

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<sup>13</sup> 7 P.S. §102(q), (r).

<sup>14</sup> 7 P.S. §§1601-1610. The provisions of section 1609 in particular govern transactions involving savings banks, which provisions appear to mirror substantially the provisions governing the transactions of other banking institutions.

<sup>15</sup> Broadly speaking, if a national bank is involved, state law defers to federal law and is implicated only in the absence of an applicable federal provision. To the extent federal law may be implicated by the involvement of a national bank in a banking transaction, these comments address only the applicable state regulatory processes.

<sup>16</sup> 7 P.S. §1604(g).

<sup>17</sup> See generally 7 P.S. §§1701-1711.

there has been an amendment to the initial application. Without amendment, the Department conducts its review and issues an order approving or disapproving the application within 60 days.

Licensing of health care facilities (including hospitals) falls under the jurisdiction of the Department of Health (DOH), and is addressed in the Health Care Facilities Act, 35 P.S. §§448.101–448.904b (HCFA). The DOH is charged with “review[ing] activities [that] foster competition and promote cost efficiency, quality and access to care.”<sup>18</sup> Prior to 1996, the DOH operated under statutory provisions that required the issuance of “certificates of need.” The certificate of need process appears to have followed a regulatory practice and procedure similar to what is in place currently for utility CPCs.<sup>19</sup> However, statutory provisions regarding certificates of need were subject to periodic sunset review,<sup>20</sup> and in 1996, all provisions related to the issuance of certificates of need were allowed to sunset without reenactment.<sup>21</sup> There is little justification to burden local telephone companies with greater regulatory oversight of mergers or acquisitions than the

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<sup>18</sup> 35 P.S. §448.202.

<sup>19</sup> See e.g. *Overlook Medical Clinic v. Dept. of Health*, 560 A.2d 268 (Pa. Cmwlth. 1989), *reconsideration granted*, 565 A.2d 834 (Pa. Cmwlth.), *appeal denied* 577 A.2d 545 (Pa.) (reference to “affected person’s” involvement in competitor’s proceedings and right to appeal); *Hickory House Nursing Home, Inc. v. Dept. of Health*, 496 A.2d 921 (Pa. Cmwlth. 1985) (reference to operator of a private for profit nursing home qualifying as “affected person” entitled to notice of hearing on certificate of need application of proposed competitor nonprofit home). Pursuant to DOH regulations still on the books (but not enforced because their enabling legislation has expired), “persons directly affected” by a certificate of need application included not only the applicant, but also any person potentially served by the applicant, as well as any existing health care facilities and health maintenance organizations providing or intending on providing similar services in the same general area. 28 Pa. Code §401.2 (definitions). Acquisitions were subject to notice to the DOH, which, *inter alia*, conducted a review to determine the extent of changes resulting from the acquisition (which could be as simple as changing bed capacity by as few as 10 beds), and whether a certificate of need would be required. 28 Pa. Code §401.3. The substantive standards justifying certification were substantial, as were the procedures (including the right to a public hearing, including the presentation of testimony and development of an evidentiary record, if requested by any “affected person”). See 28 Pa. Code §§401.4-401.5. Decisions of the DOH were subject to appeal to the DOH’s Hearing Board, and subsequently to the courts if necessary.

<sup>20</sup> 38 P.S. §448.904a.

DOH imposes on the facilities charged with providing health care to ratepayers. Nevertheless, wireline providers continue to be subjected to lengthy and costly regulatory review processes.

Details applicable to licensing are addressed in the DOH's regulations at Title 28 of the Pennsylvania Code. Licensing issues are implicated when there is a change in ownership or transfer of control. A licensed health care facility must notify the DOH in writing at least 30 days *prior* to any transfer involving 5% of the stock or equity of the facility or any change in ownership or change in the form of ownership or name of the facility, including a transfer of a controlling interest. Notice of a change in the management of the facility must be made within 30 days *after* such change.<sup>22</sup> Pursuant to other regulations, a "hospital shall advise the Department no *later* than 90 days *prior* to an intended change of ownership or control of the hospital" and licenses shall be transferred to new owners or controlling parties only after the DOH's finding that they are responsible persons.<sup>23</sup> Health care licenses are now processed by the DOH "upon forms prepared and furnished by it, containing such information, as the department considers necessary to determine" that the applicant meets the requirements of HCFA.<sup>24</sup> Available on the DOH's website ([www.health.state.pa.us](http://www.health.state.pa.us)), is a series of change of ownership inquiries that must be completed and provided to the DOH at least 30 days in advance of the proposed transfer. Upon receipt of the information, the DOH conducts a review, follows up with any further inquiries as necessary, and issues a letter response.

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<sup>21</sup> See e.g. Chapter 7 of HCFA, 38 P.S. §§448.701-448.712, as well as all other sections of HCFA that reference a "certificate of need."

<sup>22</sup> 28 Pa. Code §51.4.

<sup>23</sup> 28 Pa. Code §101.52 (applicable to continuing operations) (emphasis added).

<sup>24</sup> See *generally* Chapter 8 of HCFA, 38 P.S. §§448-801a-448-821, and specifically 38 P.S. §§448.807(a) and 448.808.

The DOH's formerly applicable certificate of need process was very burdensome and often time consuming, with evidentiary hearings to address objections to applications from competing interests very common. Since the sunset of that process, however, the process for review of corporate transfers of health care facilities by the DOH has been streamlined. Similarly, the PUC's procedures for the traditional review process should be eliminated or streamlined.

#### **IV. ADDITIONAL ISSUES**

The Commission requested that parties commenting in this instant proceeding address four additional issues:

- Whether the FCC's *Streamlined Order* distinguishing transactions as either "presumptively streamlined" or "eligible for Streamlining";
- Whether there should be an opportunity for comments and reply comments in response to an application;
- Review and approval procedures – should the PUC charge the staff with making reclassification decisions or should staff conduct a review and prepare a recommendation for disposition at a public meeting;
- How rural carrier issues should be handled under the new proposed procedures.

Ultimately, these questions are secondary to the paramount issue of a timely review by the Commission. This timely review could be accomplished by the creation of a two-track system with strict time limits in the interest of regulatory certainty and parity. All applications would then be judged simply on whether they meet the guidelines in Annex A for a pro-forma review or a general rule review. The Commission staff could make a determination at some point if initial protests are filed whether the application warrants an additional 30-day review. Further, as to treatment of rural carriers, Windstream believes that the procedures it is proposing would benefit rural carriers in particular as



they seek to add scale and scope to their operations to remain competitive in the current communications market.

## V. CONCLUSION

It is reasonable for regulatory review of an application for a CPC in Pennsylvania as a result of a merger or acquisition to be accomplished in a 60 (or if extended, 90) day general review period. Complicating this process with the specter of the continued applicability of a typical traditional review would be a missed opportunity for the Commission to implement progressive public policy that mirrors the groundbreaking achievements that are changing the way people communicate globally.

Windstream acknowledges the Commission's intention to make traditional reviews an exception by establishing a strong presumption in favor of the general review process. However, this strong presumption for the proposed general review process is lost by the creation of automatic triggers for reclassification of an abbreviated process to a traditional, open-ended review. Abolishing the traditional review and providing for an additional 30 days for the Commission to review transactions would provide all parties – applicants, advocates, and consumers – sufficient time to review an application while providing the regulated entity the competitive parity and certainty that is absent in a traditional review proceeding. Authority to grant a CPC should be exercised with specific concern to those matters most within the state jurisdiction (rates and services) and within the boundaries of the current federal construct that is largely measured in weeks, but not an extended period of months.

The traditional review has outlived its effectiveness. So, too, has the notion of extracting short-term concessions from one segment of providers instead of taking a long-

term view of how benefits will accrue to Pennsylvania end-users from consolidation in the local telecommunications sector.

The Commission successfully argued this policy position to the Supreme Court, and it should continue to embrace this reform by codifying that policy in its proposed regulations.

Windstream's Revised Version

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 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) or approval of a contract between 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 or extension -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-Extension of a general rule transaction. reclassified as other than a pro forma transaction.*—The review and approval of a general rule transaction that has been extended by the Commission ~~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~~ is extended. A transaction ~~classified~~ extended under this section shall be reviewed and an order issued within 90 days of the date that the telecommunications public utility is notified in writing that the general rule transaction is being extended. ~~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 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 6090 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 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 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



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 Pennsylvania tariffs. If 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 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. Publication in the *Pennsylvania Bulletin* should be undertaken as soon as possible, and in no event later than 2 weeks, after the filing is made with the Commission.

(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 cause extension of ~~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~~ cause an extension of the general rule transaction by 30 days., ~~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 section 5.14 of the Commission's rules of practice and procedure and ~~shall~~ may cause the reclassification or extension of ~~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 requiring an additional 30 days for review., ~~unless the Commission determines otherwise for good cause shown.~~

(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 cause the reclassification or extension of 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 cause the reclassification or extension of 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 may cause the reclassification or the extension reclassify of a general rule transaction as a 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 requiring an additional 30-day review period by the Commission.

(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 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.

(j) Reclassification Extension of a transaction from the general rule. The Commission shall may reclassify extend for a 30 day period -a general rule transaction for which 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.~~

~~(4) The Commission determines that reclassification and an extension 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 has extended the review for an additional 30 day period, in which case the transaction shall be deemed to be in the public interest and approved in law and fact 90 days after public notice in the *Pennsylvania Bulletin*.

(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 by 30 days, reject the filing or transaction or, remove-reclassify a transaction from the general transaction rule to the pro forma 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 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 and extended for a 30 day period.* The additional 30 day review and approval of a *pro forma* transaction reclassified as ~~other than a general rule transaction~~ and extended for a 30 day period shall begin on the date that the telecommunications public utility is notified in writing that the *pro forma* transaction is reclassified and extended. ~~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. 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 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.

(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 pro forma transaction to a -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 may reclassify the pro forma transaction to 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 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.

(j) Removal of a transaction as a *pro forma* transaction. The Commission ~~shall~~ may remove a transaction as a *pro forma* transaction and reclassify the transaction as a general rule transaction if the ~~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.~~

(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.~~

(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~~ reclassifies the transaction as a general rule transaction..

(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, or reclassify ~~remove~~ a transaction from the *pro forma* rule to the general rule transaction, ~~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.~~

(1) *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 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 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.