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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Level 3 Communications, LLC	:	
To Amend the Public Utility Commission	:	
Regulations to Streamline Transfer of	:	Docket No. P-00062222
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	:	Docket No. L-00070188
Control and Affiliate Filings for	:	
Telecommunications Carriers	:	

REPLY COMMENTS OF THE
OFFICE OF CONSUMER ADVOCATE

RECEIVED

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INDEPENDENT REGULATORY
REVIEW COMMISSION

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I. INTRODUCTION

On February 9, 2008, the Public Utility Commission (Commission) published a Proposed Rulemaking Order which would create new regulations detailing whether and how applications filed by telecommunications companies pursuant to Section 1102(a)(3) of the Public Utility Code could be subject to abbreviated review and approval by the Commission under Section 1103.¹ In the Proposed Rulemaking Order, the Commission made clear that its traditional “open-ended” review and approval process” would continue to apply to “mergers or stock transactions that are complex, controversial or raise difficult questions.”² The Commission proposed criteria to allow applicants to classify whether their particular transaction fit the General Rule category or Pro Forma category and so would be eligible for abbreviated review.

Under the Proposed Rulemaking Order, an applicant’s initial classification of a transaction would not control the ultimate review and approval process. The Commission reserved the discretion to reclassify applications to protect the public interest. According to the Proposed Rulemaking Order, protests could be proof of the controversial nature of the transaction and mandate or support reclassification. The Commission indicated that if an application “involves a major acquisition or merger between firms with substantial market shares, or when the filing raises novel or important issues” reclassification out of abbreviated review would be appropriate.³ The Proposed Rulemaking Order imposed specific filing and publication of notice requirements on applications filed as eligible for abbreviated review. Under the proposed regulations, the Commission would allow incumbent local exchange carriers (ILECs) and all variety of competitive carriers to file applications for approval of transactions

¹ 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, Proposed Rulemaking Order, 38 Pa.B. 758 (Feb. 9, 2008); 66 Pa.C.S. §§ 1102(a)(3), 1103.

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

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

that fit the General Rule or Pro Forma classifications, subject to reclassification by the Commission.

Level 3 Communications LLC (Level 3) supports the Proposed Rulemaking but asks for some clarification and changes. Verizon,⁴ Windstream,⁵ and the Pennsylvania Telephone Association (PTA) support the Commission's efforts, but argue that competitive conditions require the Commission to revise the proposed regulations. The revisions proposed by Level 3 and the ILECs would provide for less information about the transaction, less notice to the public, less opportunity for the public to protest and be heard, and more certainty that applications for change of control transactions will be "deemed in the public interest" and approved. Under Verizon's proposal, all transactions would be presumptively eligible for abbreviated review. The PTA would impose barriers to opposition. Windstream would eliminate traditional review entirely and limit all applications to an abbreviated review process of no more than 90 days, after which time the application would be "deemed in the public interest" and approved.

Like the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA) opposes abbreviated review for applications which involve a transfer of control such as a merger or acquisition involving an ILEC.⁶ As noted in the OCA Comments and supported by the OSBA, there must be sufficient flexibility in the regulatory review process to assure that the statutory advocates and members of the public have a meaningful opportunity to receive notice and be heard regarding the merits or risks to the public interest presented by a proposed change of control transaction. As set forth in the comments of OSBA, the Broadband Cable Association of Pennsylvania (BCAP), and OCA, there are sound statutory and public policy reasons why the

⁴ Comments of Verizon Pennsylvania Inc., Verizon North Inc. and MCImetro Access Transmission Services LLC (collectively Verizon).

⁵ Comments of Windstream Pennsylvania, LLC and Windstream Communications, Inc. (collectively Windstream).

⁶ OSBA Comments at 2.

Commission should not allow applications for transfer of control involving ILEC be subject to abbreviated review, particularly if contested. BCAP's support for the Proposed Rulemaking Order is expressly conditioned on adoption of revisions so that, in the case of an application filed by or involving an ILEC, the filing of a protest would automatically reclassify the application to traditional review.⁷ Without these revisions, BCAP's Comments are consistent with the OCA position that the abbreviated review process would result in a denial of due process rights and should not be adopted.⁸

The OCA submits that the premise of the Proposed Rulemaking Order, that some applications could be "deemed in the public interest" and approved by the lapse of time and issuance of a Secretarial Letter, is contrary to the statutory framework of Chapter 11 of the Public Utility Code. The revisions proposed by Level 3 and the ILECs would further diminish or eliminate the reclassification and other procedural protections which the Commission proposed to identify applications which required full traditional review. As addressed in these Reply Comments, the revisions proposed by the ILECs and, to a lesser degree, Level 3, would worsen the proposed regulatory framework.

If the Commission does adopt some form of streamlined review, the Commission should base it on the OCA's alternative for competitive carriers only as set forth in the OCA Comments.⁹ Consistent with the concerns expressed by OSBA and BCAP, the OCA would limit streamlined review to certain Section 1102(a)(3) applications filed by competitive carriers.

⁷ BCAP Comments at 18-19.

⁸ BCAP Comments at 19; OCA Comments at 15-28.

⁹ OCA Comments at 29-33.

II. REPLY COMMENTS

A. The Public Utility Code And Public Policy Require The Commission To Review The Merits Of Each Application For Approval Of A Change Of Control Transaction And Issuance Of A Certificate Of Public Convenience.

In the Proposed Rulemaking Order, the Commission proposed to subject change of control applications to traditional, open-ended review if the filing involved a “major acquisition or merger between firms with substantial market shares,” or was “controversial” or raised novel issues. As set forth in the OCA Comments, transfer of control applications involving ILECs should always be subject to traditional review, based on their provider-of-last-resort obligations and obligations to deploy broadband services.¹⁰

Verizon, Windstream and the PTA, however, contend that the Commission should subject all or most applications, including ILEC applications for change of control, to even less regulatory review and approval on an abbreviated track because, they argue, the competitive marketplace provides sufficient discipline so as to reduce the need for regulatory oversight.¹¹ Windstream contends that “granular review of applications” for a certificate of public convenience “is no longer appropriate or necessary.”¹² Traditional review, according to Windstream “is woefully outdated and should be eliminated.”¹³ Verizon recommends revisions which would reduce the likelihood of applications being subject to traditional review.¹⁴ The PTA contends that the competitive environment makes streamlined review for ILEC applications imperative.¹⁵ Windstream and the PTA contend that the Commission should accept whatever

¹⁰ OCA Comments at 13-15.

¹¹ Windstream Comments at 7-10; Verizon at 3-4; PTA at 4-6.

¹² Windstream Comments at 8.

¹³ Windstream Comments at 10.

¹⁴ Verizon Comments at 3-8. See discussion of Verizon’s revisions below.

¹⁵ PTA Comments at 4-5.

benefits from a proposed change of control transaction are identified by the applicant as sufficient to satisfy the City of York standard.¹⁶

The OCA submits that there significant, sound reasons why the Commission must maintain a process for the review and approval of applications filed under Section 1102(a)(3) which is open and flexible enough to allow for protests and development of a record, to test the claims of the proponents of a proposed merger, acquisition or other change of control transaction.¹⁷ Commission review and approval of change of control transactions are still required by Section 1103 the Public Utility Code.¹⁸ When the Commission issues a certificate of public convenience, the Commission is fixing the rights and obligations of the utility for the benefit of the public. Section 1103(a) requires the Commission to “find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.”¹⁹ As explained in the OCA Comments, the Commission’s exercise of this authority must be executed with sufficient formality, including findings and a written order, as required by law.²⁰ This is particularly true where questions of material fact are raised.²¹

The Commission should not accept the ILECs’ arguments that ILECs should be allowed to transfer assets, merge, and acquire other entities with little or no regulatory oversight because of competition. As noted by the OSBA, “Chapter 30 is based on the assumption that competition exists and will not be destroyed or significantly diluted through an acquisition or merger.”²² Mergers and other change of control transactions may affect not only the rights and interests of

¹⁶ Windstream Comments at 6-8; PTA Comments at 5-6. See, City of York v. Pa.P.U.C., 449 Pa. 136, 295 A.2d 825 (1972)(City of York).

¹⁷ 66 Pa.C.S. § 1102(a)(3).

¹⁸ 66 Pa.C.S. § 1103.

¹⁹ 66 Pa.C.S. § 1103.

²⁰ OCA Comments at 24-25.

²¹ OCA Comments at 15, 19-21, citing Chester Water Authority v. Pa.P.U.C., 581 Pa. 640, 868 A.2d 384 (2005).

²² OSBA Comments at 2.

customers but also employees, interconnected carriers and competitors.²³ The Commission continues to play an important role in the regulation of Pennsylvania's telecommunications industry for the benefit of the public.²⁴

Windstream and the PTA support abbreviated review as a means to receive approval of a merger or other change of control transaction without conditions.²⁵ Windstream and PTA propose revisions to make abbreviated review more certain, even for contested applications. The OCA submits that the Commission should not accept the arguments or revisions presented by Windstream and the PTA. Section 3019(b)(4) of the Public Utility Code permits the Commission to impose conditions on the sale, merger, acquisition or other transaction involving an ILEC or facilities used to provide telecommunications service if needed "to ensure that there is no reduction in the advanced services or broadband deployment obligations."²⁶ Based on Section 3019(b)(4), the OCA submits that it is clear that the Commission should not adopt a regulatory process for review of change of control applications involving ILECs which would operate on the presumption that only one outcome, approval without conditions, is possible. The substantive question of whether or when other conditions may be appropriate, so an application may satisfy the City of York standard, is otherwise beyond the scope of this Proposed Rulemaking.²⁷

The arguments presented by Windstream, Verizon and the PTA in support of less regulatory review and flexibility in approving applications for transfer of control of ILECs and

²³ OCA Comments at 23; BCAP Comments at 8-17.

²⁴ OCA Comments at 13-15.

²⁵ Windstream Comments at 5-8; PTA Comments at 5-6.

²⁶ 66 Pa.C.S. § 3019(b)(4).

²⁷ Windstream, for example, asks the Commission to codify in the proposed regulations for streamlined review that short-term concessions are not required if consolidation in the local telecommunications sector will provide benefits to end-users over the long-term. Windstream Comments at 15-16. The OCA notes that the Commission expressly preserved the open-ended, full review process described as traditional review for complex or novel transactions. The Commission should not adopt regulations which would foreclose the imposition of conditions, as allowed by Section 1103(a). The Commission should reserve this authority to exercise on a case-by-case basis.

other telecommunications carriers must be rejected. The fact that competition may exist for some services and/or areas cannot answer the statutory question posed by Section 1103(a) of whether approval, approval with conditions, or denial of a particular application will affirmatively promote the public interest in some substantial way, as required by the Pennsylvania Supreme Court in City of York. The traditional review process provides the Commission with sufficient flexibility to approve non-controversial transactions promptly and allow concerned parties to participate in development of the record in more complex and contested matters.

B. Verizon's And Other Parties' Proposed Revisions To The Lines Drawn Between Transactions Eligible For Pro Forma Review And General Rule Review Would Make Abbreviated Review An Even More Unreasonable Process.

1. The Commission's Tiers For Abbreviated Review.

Proposed Section 63.324(a) sets forth the description and criteria for General Rule transactions that would be eligible for a 60 day review and approval process. Proposed Section 63.325(a) addresses the same factors for Pro Forma transactions eligible for faster review on a 30 day track. In the Proposed Rulemaking Order, the Commission specified that some transactions would be ineligible for abbreviated review and approval. If an applicant to such a transaction nonetheless would file for abbreviated review, the Commission reserved the right to reclassify the application to the appropriate track, including traditional review.

As noted in the OCA Comments, the lines drawn by the Proposed Rulemaking Order between the two categories of transactions eligible for abbreviated review are inadequate and would give the applicant utilities too much discretion.²⁸ The reclassification process is not sufficiently clear or adequate to protect against harm from the abbreviated review process.²⁹

²⁸ OCA Comments at 8.

²⁹ OCA comments at 8, 26-28.

Other parties also found the Commission's classification of General Rule and Pro Forma transactions ambiguous and difficult to apply. Applying the Commission's criteria to its own situation, Level 3 found it difficult to determine whether to apply benchmarks based on its in-state or national holdings or business activities. Level 3 asks for clarification and revision of some of the thresholds that would determine whether a transfer of some assets or changes in ownership of publicly traded stock would require an application and if so, under which abbreviated track.³⁰

The PTA proposes to eliminate the "more than 10%" or "below 10%" criteria used to distinguish between General Rule and Pro Forma transactions based on how much control is transferred.³¹ The PTA interprets the Commission's use of the 10% criteria as expanding the Commission's jurisdiction over stock transactions, contrary to the Commission's Utility Stock Transfer under Section 1102(a)(3) Statement of Policy.³² However, the PTA's revisions would effectively make more transactions eligible for 30 day Pro Forma review and approval than under the Proposed Rulemaking Order.³³ BCAP correctly notes that the Proposed Rulemaking Order describes Pro Forma transactions as subject to a two-part or conjunctive test, while "the proposed regulations extend the pro forma rules beyond this limited circumstance."³⁴

The OCA agrees the lines drawn by the Proposed Rulemaking Order between Pro Forma and General Rule, and General Rule and traditional review change of control transactions are not

³⁰ Level 3 Comments at 4-7.

³¹ PTA Comments at 10-1; PTA Revisions to Annex A at 4 and 11-12, deletion of Subpart (a)(1) to (3) of both proposed Sections 63.324 and 63.325.

³² PTA Comments at 10-12, citing 52 Pa.Code § 69.901.

³³ Under the PTA's proposal, a Pro Forma transaction could include transfer of 100% of control of the telecommunications utility and/or a transfer of the utility's customer base, so long as the transaction does not involve a change in conditions of service or rates. PTA Revisions to Annex A at 11-12, revisions to proposed Section 63.325(a).

³⁴ BCAP Comments at 26.

clear.³⁵ However, the Commission should reject revisions which would make more applications eligible for abbreviated review in General Rule and Pro Forma review in particular.

2. Verizon's Proposal To Make All Transactions Which Do Not Fit The Pro Forma Category Eligible For General Rule Review Must Be Rejected.

Verizon proposes a change to the descriptions of General Rule transactions that is simple, but should not be adopted. Verizon's Comments suggest:

rather than try to enumerate a list of transactions that might qualify as "general rule transactions," the Commission merely refer to the transactions covered by 66 Pa. C.S. § 1102(a)(3) or (4) and preserve its right to reclassify particular transactions as pro forma applications or as falling outside the scope of the streamlined procedure "for good cause."³⁶

In addition to requiring the Commission to find "good cause" to reclassify a General Rule application to traditional review, Verizon argues that:

The Commission must act to remove a general rule application from the streamlined procedures of this subchapter within twenty-five days of the filing of the application or the application shall be treated as a general rule transaction.³⁷

The OCA opposes Verizon's revisions to both the classification and reclassification process. In the Proposed Rulemaking Order, the Commission envisioned that some applications for approval of change of control transactions would not be eligible for abbreviated review and would be subject to traditional review procedures from start to finish. Under Verizon's revised version, applications for approval of any and all types of change of control transactions, including a merger of large ILECs or the transfer of control to a foreign company, would be

³⁵ OCA Comments at 27.

³⁶ Verizon Comments at 5-6. Verizon would revise Section 63.323 "Applicability" so that "all filings made by telecommunications carrier seeking a certificate of public convenience pursuant to 66 Pa. C.S. §1102(a)(3) or (4)" shall be subject to streamlined review "unless the Commission for good cause and as set forth herein determines that an application should not be subject to the streamlined procedures of this subchapter." Verizon Att. A, revisions to proposed Section 63.323.

³⁷ Verizon Comments, Att. B Redlined Version of Annex A at p. 5, revision of proposed Section 63.324(b)(2)(i).

eligible to be filed as a General Rule application and be subject to review and approval on a 60 day track.³⁸

While Verizon's comments suggest that the Commission would retain discretion to reclassify applications to a more in-depth review process,³⁹ Verizon's revisions would impose both a "good cause" requirement and a deadline for Commission action. If the Commission misses the "within 25 days of filing" deadline,⁴⁰ the applicant gets the benefit of abbreviated review and the public gets shortchanged with insufficient time and process to be heard in a meaningful way during the 60 day General Rule review process. Or, alternatively, anyone aggrieved by the Commission's failure to act to reclassify a transfer of control application to traditional review would be forced to appeal either Staff action under Section 5.44 or the Commission's action to Commonwealth Court.⁴¹

The OCA submits that these and other modifications proposed by Verizon to inject certainty into the abbreviated review process must be rejected as unreasonable and contrary to the purpose of Section 1102 and 1103 which require applications to be filed and Commission review to be undertaken to serve the public interest. An abbreviated review process which vests the applicants with great discretion to select what tier of abbreviated review to file under and then imposes hurdles and time restrictions to any effort on the part of the public or Commission to reclassify the application to allow for more time for review of the merits is unreasonable.

³⁸ As discussed below, Verizon would also subject this broader group of General Rule applications to even less notice and opportunity to be heard than proposed by the Commission.

³⁹ Verizon Comments at 2.

⁴⁰ The OCA notes that Verizon's revisions adopt many deadlines which would count the day of the triggering event as day 1, contrary to the Commission's rule at Section 1.12 "Computation of Time." 52 Pa.Code § 1.12. For example, Verizon would require the Commission to publish notice of General Rule transactions "[w]ithin 10 days of the filing of a general rule application." Verizon Comments, Att. B at 8, revised proposed Section 63.324(f)(1).

Section 1.12 of the Commission's Rules provides: "Except as otherwise provided by statute, in computing a period prescribed or allowed by this title or statute, the day of the act, event or default after which the designated period of time begins to run is not included." While the OCA opposes Verizon's attempt to impose mandatory deadlines for Commission action as a matter of principal, Verizon's "10 days" or "25 days" are actually shorter time periods when the day of filing is counted as day 1, rather than day zero as provided by Section 1.12.

⁴¹ 52 Pa.Code § 5.44.

C. Verizon, Windstream And The PTA Would Make Reclassification Unlikely Or Unavailable, Rendering The Abbreviated Review Process Even More Unreasonable And Unfair.

1. Introduction.

In the Proposed Rulemaking Order, the Commission establishes specific circumstances when an application for approval of a transfer of control transaction would be reclassified to a longer review process.⁴² The Commission proposed that it “shall reclassify a general rule transaction” under any of four possible circumstances identified in proposed Section 63.324(j):

- (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 is necessary to protect the public interest.⁴³

With regard to the treatment of protests, the OCA Comments explained that the Commission should not, as a matter of law, subject protests filed by parties other than the OCA to a stricter standard before the Commission would reclassify an application.⁴⁴ Overall, the OCA found the reclassification standards and process inadequate to protect the public against applications being subject to abbreviated review and being “deemed” approved. The OCA submits that the revisions proposed by the ILECs would make the proposed process even worse.

In its Comments, Level 3 requests minor modification of the second condition, finding the Commission’s “substantial market share” and “major” language subjective and ambiguous.⁴⁵

⁴² As noted in the OCA Comments, the Commission also would allow for reclassification of a General Rule transaction to the shorter Pro Forma process. OCA Comments at 28, fn. 73.

⁴³ Proposed Section 63.324(j). See also the companion provision for reclassification of Pro Forma applications at proposed Section 63.325(j).

⁴⁴ OCA Comments at 22-24.

⁴⁵ Level 3 Comments at 12-13.

Verizon opposes automatic reclassification of an application based solely on the filing of a protest by a statutory advocate or any other single factor.⁴⁶ The PTA opposes allowing any protest, including a protest by a statutory advocate, to “automatically derail the ‘general rule’ process of sixty days.”⁴⁷ Windstream also opposes reclassification based on a protest filed by a statutory advocate as granting “in inordinate amount of leverage to an intervening party.”⁴⁸

2. The OCA Opposes Adoption Of The ILECs’ Revisions To The Reclassification Process.

Singly or in some combination, the revisions to the tiers of review and the reclassification process proposed by Verizon, the PTA, and Windstream, are unreasonable and provide further support for why the Commission should not adopt regulations establishing any form of abbreviated review. Verizon would allow all applications to be filed as eligible for abbreviated review, allow parties to file protests and then require the Commission, on a case-by-case basis and within a fixed time period, to reclassify the application for “good cause” or the application would proceed under abbreviated review. The OCA submits that this proposal reverses the traditional review process, whereby the Commission reviews the application itself on a case-by-case basis and only approves the application if good cause is found, *i.e.* that the Commission finds that the City of York substantial affirmative public benefit standard is met.

Like Level 3 and Verizon, the PTA would also make Commission Staff⁴⁹ assess the content and merits of protests and the standing of intervenors. The OCA submits that the use of regulations and Commission Staff as a substitute for motions practice in a proceeding before the

⁴⁶ Verizon Comments at 8.

⁴⁷ PTA Comments at 6.

⁴⁸ Windstream Comments at 5-6.

⁴⁹ As defined by Section 1.8, “Staff” includes “The Commission’s Office of Trial Staff prosecutor or Law Bureau staff counsel and other Commission employees participating in a proceeding before the agency.” 52 Pa.Code § 1.8.

Office of Administrative Law Judge is unwarranted and unreasonable.⁵⁰ The OCA Comments explain that protests by statutory advocates and other parties must receive due process in any proceeding under Sections 1102(a) and 1103(a).⁵¹ BCAP also presents a strong argument that requiring abbreviated review, even when a protest is filed, would violate the due process rights of parties to have a fair and meaningful opportunity to be heard when evaluating the application and record against the City of York standard.⁵²

If a protest or a notice of intervention is filed, the applicant has sufficient tools under Chapters 1, 3, and 5 of the Commission's Rules to file the appropriate motion. As BCAP notes, the Commission ruled that BCAP had standing to participate in Commonwealth Telephone and Citizens Communications merger application proceeding, after the applicants filed pleadings opposing BCAP's participation.⁵³ The Commission already follows a rule of construction "to secure the just, speedy and inexpensive determination of every action or proceeding."⁵⁴ The ILECs' demand for speed, however, should not come at the expense of just treatment of other parties' interests.⁵⁵

⁵⁰ The PTA's and Verizon's demand for specificity in protests overlooks the great information gap between the applicants' knowledge of the details of the proposed change of control transaction and that of parties outside of the deal. News black outs before the deal is struck, claims of proprietary and highly confidential information asserted when the application is filed with Commission, and the complexity of some of the financial transactions make Verizon's and the PTA's demand unreasonable. The shorter the time between the filing date and the end of the protest period, the less likely it is that key information has been available and assimilated. The ILECs' demand for speed should not come at the expense of just treatment of other parties' interests.

⁵¹ OCA Comments at 15-24. See also, Chester Water Authority, *supra*.

⁵² BCAP Comments at 19-20. BCAP is also skeptical of the reclassification conditions, noting that ILECs and other carriers may disclaim that they fit within the "major" or "substantial market share" criteria. BCAP Comments at 13. If ILECs are permitted to file applications for approval under abbreviated review, BCAP proposes that any protest filed against a proposed ILEC transaction should automatically be subject to reclassification to traditional review "without further discretionary consideration by staff." BCAP Comments at 18.

⁵³ BCAP Comments at 18, 20.

⁵⁴ 52 Pa.Code § 1.2.

⁵⁵ See BCAP Comments at 17.

Under Windstream's proposal, a protest, which would otherwise have triggered reclassification, would only delay by 30 days the time until the protested application could be "deemed in the public interest" and approved under the proposed Subchapter O regulations.⁵⁶

The OCA submits that this period of time is simply insufficient for the Commission to review and hear from interested parties in the type of proceedings which the Commission determined in the Proposed Rulemaking Order should be subject to open-ended traditional review. Just as the OCA explained in Comments that a mandatory 60 day review period would be unreasonable for some General Rule transactions, a maximum 90 day review period is equally unreasonable for transactions of more complexity, broader competitive impact, or otherwise presenting novel issues.⁵⁷ There must be sufficient time to obtain and conduct discovery of the terms of the merger or other change of control deal, including access to confidential and proprietary information.⁵⁸ The Commission's open-ended traditional review provides flexibility to assure that complex change of control transactions are only ruled upon after due process has been provided.⁵⁹

The Commission should not adopt the revisions proposed by Verizon or Windstream which would make all applications eligible to be filed on a track to be "deemed in the public interest" and approved simply by the lapse of time. The Commission should reject the comments of Verizon, Windstream, the PTA and Level 3 which would require Staff to review the merits of protests before allowing notice and opportunity to be heard. The Commission should not adopt

⁵⁶ Windstream Comments at 2-3.

⁵⁷ OCA Comments at 15-22.

⁵⁸ The OCA Alternative for streamlined review would apply only to transactions which could be reviewed based on the application and information available for public inspection. OCA Comments at 32.

⁵⁹ Windstream's 90 day limit is not workable. Although Verizon and MCI entered into the merger agreement on February 14, 2005 and filed for Commission approval on March 7, 2005, the final terms for review and approval were not presented to the Commission until the filing of the Amended Joint Application on May 17, 2005. The OCA submits that it would be error to adopt regulations which presume the starting point and information upon which the Commission must rule is fixed and not subject to change.

regulations which would largely remove the public from the Section 1103 review process which expressly requires the Commission to determine what is in the public interest.

D. The Conflict With Due Process Inherent In The Proposed Rulemaking Order Would Be Made Worse Under The ILECs' Proposed Revisions.

1. Introduction.

In addition to making more transactions eligible to be filed as a General Rule or Pro Forma application, Level 3, Verizon, and Windstream propose to decrease the amount of information provided at the time of filing, reduce notice to the public, and reduce the opportunity to be heard. The OCA submits that these proposed revisions would make the proposed regulatory process even worse and cause greater harm to the due process rights of consumers, competitors, and other members of the public.

2. Abbreviated Review Would Require More Information, Not Less As Proposed By The ILECs.

In the Proposed Rulemaking Order, the Commission would require applicants to file specific information subject to verification and copies of filings, pleadings and other information related to parallel proceedings before the Federal Communications Commission (FCC) and Department of Justice (DOJ). OSBA asks that the same information be served on the statutory advocates.⁶⁰ OSBA would also require information which would normally be obtained in discovery to be included as part of an application eligible for abbreviated review.⁶¹ Neutral Tandem-Pennsylvania, LLC (Neutral Tandem) asks that the Commission require applicants for abbreviated review to disclose information about the applicant's regulatory compliance and a three year history of any violations of federal or state law.⁶² According to Neutral Tandem, such

⁶⁰ OSBA Comments at 3.

⁶¹ OSBA Comments at 3.

⁶² Neutral Tandem Comments at 2-4.

information is necessary to assure that applications which should be subject to more thorough review do not slip through under abbreviated review.⁶³

Windstream proposes to delete definitions related to issues of market power and delete the requirement that applicants provide information assessing market power impacts.⁶⁴ Windstream would eliminate the requirement that General Rule and Pro Forma applicants update the Commission and statutory advocates regarding developments in the FCC's or DOJ's review.⁶⁵ The PTA objects to the more detailed and specific filing requirements which would not apply to Section 1102(a) applications filed by electric or natural gas utilities.⁶⁶ The PTA would reduce the notice and filing requirements to a similar extent.⁶⁷

According to Verizon, the regulations proposed by the Commission are overly complex and "may inadvertently slow down" the abbreviated review process.⁶⁸ Verizon proposes to provide only notice of related filings made with the FCC or DOJ, not copies or updates of information related to such federal proceedings. Verizon would also eliminate identification of other related proceedings, statements related to market impact, confirmation that customers received notice, copies of certificates of public convenience already issued, corporate organizational charts and other information.⁶⁹

The OCA agrees with OSBA that an application for abbreviated review would have to compensate for the lack of time to conduct discovery by being more inclusive and detailed.⁷⁰ The OCA agrees with the Commission and Neutral Tandem that the applicant for abbreviated

⁶³ Neutral Tandem Comments at 2.

⁶⁴ Windstream Comments, Windstream Revised Annex A, revisions to proposed Section 63.322, 63.324(d)(11)(iii), (18), 63.325(d)(11)(iii), (18).

⁶⁵ Windstream Comments, Windstream Revised Annex A, deletion of proposed Section 63.324(e), 63.325(e).

⁶⁶ PTA Comments at 9-10.

⁶⁷ PTA Comments, redlined Annex A, revisions to proposed Sections 63.324(c), (d), and 63.325(c), (d).

⁶⁸ Verizon Comments at 5.

⁶⁹ Verizon Comments, Att. B Redlined Annex A, deletions/revisions to proposed Sections 63.324(d) and 63.325(d).

⁷⁰ OSBA Comments at 3.

review should have to supply information which would otherwise be searched for by Staff or opponents, such as existing certificates of public convenience or proof of regulatory compliance and good standing.⁷¹ The ILEC interests would, however, strip the filing requirements of many of these elements of information. Additionally, Windstream, the PTA, and Verizon would eliminate any preliminary assessments by the applicant of market power or market impact issues,⁷² contrary to the Commission's clearly stated intent that mergers and acquisitions involving carriers with substantial market shares would be subject to traditional, not abbreviated, review.⁷³

The ILECs' proposed revisions to broaden the scope of transactions subject to abbreviated review and also deny the Commission and interested parties detailed information at the start of the expedited review process are unreasonable and should be rejected.

3. Level 3 And The ILECs Would Reduce Notice To The Public And Reduce The Window For Protests Or Comments.

In the Proposed Rulemaking Order, the Commission described proposed Section 63.324(f)(1) and (2) as establishing "the minimum publication requirements" for General Rule applications.⁷⁴ Subpart (f)(1) would require publication in the Pennsylvania Bulletin and in a newspaper of general circulation in the geographic territory affected, "unless the Commission determines otherwise for good cause shown."⁷⁵ A 15-day protest period would apply, absent good cause to do otherwise.⁷⁶ Subpart (g) would require the applicant to provide notice of some transactions to customers, but as the OCA Comments note, the notice could be excused if

⁷¹ Neutral Tandem Comments at 2-4.

⁷² See e.g. Windstream's Revised Version Annex A. Windstream proposes to delete definitions related to market power from proposed Section 63.322. Windstream would also delete proposed Section 63.324(d)(11)(iii) and (d)(18). The PTA and Verizon propose similar revisions.

⁷³ Proposed Rulemaking Order, 38 Pa.B. at 759, 760-61.

⁷⁴ Proposed Rulemaking Order, 38 Pa.B. at 765.

⁷⁵ Proposed Section 63.324(f)(1), 38 Pa.B. at 772.

⁷⁶ Proposed Section 63.324(f)(2), 38 Pa.B. at 772.

“circumstances make distribution prior to approval impractical or unnecessary.”⁷⁷ For Pro Forma applications, the Commission would leave publication notice or posting on the Commission’s website to the discretion of the Secretary. A general comment period might be allowed, but a protest period for Pro Forma applications would only occur if the Commission would find good cause shown. The requirements for notice to customers for Pro Forma applications are also excusable if “impractical or unnecessary.”

Verizon’s proposed revisions related to publication notice, protest period, and the running of the 60 day approval period for General Rule transactions are the most extreme and would make the Commission’s proposed regulations patently unreasonable and violative of due process.⁷⁸ As noted above, Verizon would make all transactions not eligible for Pro Forma review eligible for General Rule review, including major mergers. Unless the Commission acted within 25 days of the filing date to reclassify the application, the application would be guaranteed General Rule review and approval under Verizon’s plan. Verizon would require that “[w]ithin 10 days of the filing” the Secretary shall publish notice of the application in the Pennsylvania Bulletin.⁷⁹ To add “more certainty” to the comment process, Verizon would mandate that comments or protests “shall be filed within 10 days of publication in the Pennsylvania Bulletin and shall be served upon counsel for the applicant by hand delivery or overnight mail.”⁸⁰ Under Verizon’s plan, customers might receive notice of General Rule

⁷⁷ OCA Comments at 15-16, citing proposed Section 63.324(g)(1), 38 Pa.B. at 772.

⁷⁸ The OCA also opposes Verizon’s similar revisions to the mechanics for notice and opportunity to be heard regarding Pro Forma applications.

⁷⁹ Verizon Comments, Att. B, Redlined Annex A, revisions to proposed Section 63.324(f)(1). Under Verizon’s approach, an application filed on a Monday, Tuesday or Wednesday would have to be published in the immediately following Saturday Pennsylvania Bulletin. The Proposed Rulemaking Order provides no basis to believe that such rapid publication is feasible.

⁸⁰ Verizon Comments at 6, Att. B, Redlined Annex A, revisions to proposed Section 63.324(f)(2). For Pro Forma applications, Verizon would limit interested parties to the filing of only comments which “must be filed within 5 days of the posting of the notice on the Commission’s website” and have to serve the applicant in hand or by overnight service. Id., revisions to proposed Section 63.325(f)(1) and (2).

transactions, but only if the transaction involves the transfer of customers or a change in rates or conditions of service, and only to the extent notice is “required by Commission regulations.”⁸¹

Verizon’s approach illustrates the impossibility of creating a 60 day, or shorter, review and approval process for applications which require the Commission to engage in one of the fundamental activities of public utility regulation – issuance of a certificate of public convenience. Verizon’s revisions would allow a wider variety of change of control transactions to be eligible for abbreviated review and would make it more difficult and unlikely that such applications would be removed from General Rule review.

Many of Verizon’s revisions mandate that the Commission undertake specific tasks by dates certain.⁸² If the Commission fails to timely publish notice in the Pennsylvania Bulletin or fails to reclassify a transaction out of General Rule review, the public interest and parties are harmed because the application would remain on track to be “deemed in the public interest” and approved 60 days after the date of filing. The 10 day protest period is even less than the 15 day period which the Commission considered appropriate for change of control transactions involving telecommunications resellers.⁸³ Yet Verizon would limit the public and consumers to a 10 day protest period even for major mergers involving ILECs or the transfer of ILEC assets and customers to another carrier. Reclassification of an application to traditional review would not necessarily repair the harm from the initial minimal publication notice and unreasonably short protest period.

While Verizon would deny the public reasonable notice and time to be heard regarding the merits of transactions that could include mergers of ILECs or carriers with substantial market

⁸¹ Verizon Comments, Att. B, Redlined Annex A, revisions to proposed Section 63.324(g).

⁸² Verizon’s measurement of time is not consistent with Commission practice that starts the count after the day or event, in this case the filing date of the application or the date of publication in the Pennsylvania Bulletin. See footnote 40 *supra*.

⁸³ OCA Comments at 5-6.

shares, Verizon would impose an obligation that any parties filing a protest or comments directly serve Verizon in hand or by overnight service. The OCA submits that the costs and burden of such specialized service may deter the filing of protests or comments.

Verizon's addition of an answer or reply comment opportunity should also be rejected as unreasonable and unnecessary. As noted above, regulations and Commission Staff should not be required to test the merits of protests. If an applicant disagrees with the standing or sufficiency of a protest, the applicant has legal process available to assert and protect its particular interests. The appropriate pleadings to file in response to a protest are motions as provided by the Commission's Chapter 1, 3 and 5 Rules, not an answer.

The concerns and revisions proposed by Level 3, Windstream, and the PTA are more modest in comparison to Verizon's Comments, but should be similarly rejected.⁸⁴ Level 3 asks for prompt publication of notice in the Pennsylvania Bulletin for General Rule transactions.⁸⁵ Windstream would require publication no later than two weeks after the filing date. Level 3 questions the need for notice to customers, based on the belief that the trade press or the applicant's sales team will inform customers of pending changes in corporate control. The PTA would revise the publication and notice requirements to specify that the Secretary, rather than the Commission, will make decisions regarding publication and the merits and procedural consequence of any protests or comments.⁸⁶ The OCA submits that the revisions proposed by Level 3, Windstream, and the PTA should be rejected, where they would each result in a regulatory framework which does not provide for sufficient due process protection.⁸⁷

⁸⁴ Windstream's revisions are not as detailed as Verizon's, but Windstream supports adoption of abbreviated review with "strict time limits in the interest of regulatory certainty and parity." Windstream Comments at 14.

⁸⁵ Level 3 Comments at 8-9.

⁸⁶ PTA Comments, Redlined Annex A, revisions to proposed Section 63.324(f).

⁸⁷ OCA Comments at 5-8, 15-24. The Commission's Subchapter N to Chapter 63, 52 Pa.Code include notice and other consumer protections which should also continue to apply. OCA Comments at 31, 35-36.

As set forth in the OCA Comments and above, the Commission should continue to review and provide notice of applications for transfers of control filed by telecommunications carriers consistent with the Commission's Chapter 1, 3, and 5 Rules. The Commission should reject the revisions to the process for publication and provision of notice and the restrictions on the opportunity to be heard incorporated in the revisions proposed by Verizon, Windstream, the PTA, and Level 3.

4. The Commission Should Not Allow Section 1102(A)(3) Applications To Be "Deemed In The Public Interest" By Regulation And Lapse Of Time.

In the Proposed Rulemaking Order, the Commission provides that General Rule transactions "will be deemed to be in the public interest and approved in law and fact 60 days after public notice in the Pennsylvania Bulletin unless the Commission determines otherwise for good cause shown."⁸⁸ The Commission left open the option to issue a Secretarial Letter or a Commission order as evidence of the approval, with the certificate of public convenience.

As set forth in the OCA Comments, the mechanism for approval proposed by the Commission is flawed. The Commission should not adopt regulations which would substitute the lapse of time and/or the issuance of a Secretarial Letter for the written order and determinations which Section 1103(a) of the Public Utility Code requires.⁸⁹ Nor should the Commission adopt the revisions proposed by other parties on this issue. For example, Windstream's discussion of regulatory changes in the Pennsylvania healthcare field⁹⁰ are inapplicable here where the General Assembly enacted new statutes for regulation of Pennsylvania ILECs and other telecommunications public utilities, without modifying Chapter

⁸⁸ Proposed Rulemaking Order, Annex A, proposed Section 63.324(k), 38 Pa.B. at 773. The Commission proposes a similar provision for approval of Pro Forma applications on a 30 day time frame.

⁸⁹ OCA comments at 8-12, 24-28.

⁹⁰ Windstream Comments at 12-14.

11.⁹¹ Indeed, the General Assembly expressly requires the Commission to consider the impact of a merger on an ILEC's commitment to deploy broadband as an element of the Commission's review of a merger application.⁹² Windstream's Comments do not provide sound statutory support for the Commission's adoption of regulation that would allow applications to be "deemed in the public interest and approved" simply by the lapse of time.

Additionally, the Commission should not adopt Level 3's request for clarification and amendment of proposed Subpart (k) so that Level 3 might close the merger or other change of control transaction on the day after the transaction would be "deemed in the public interest" even if a Secretarial Letter with the certificate of public convenience has not yet issued.⁹³ Verizon would also remove the Commission's express reservation of the right to extend the time for review and approval of a General Rule transaction, as proposed in Section 63.324(k)(2).⁹⁴ Windstream would revise proposed Subpart (k) to eliminate the Commission's discretion to extend the time for review beyond 90 days "or take other action deemed appropriate to protect the public interest."⁹⁵

The changes proposed by Level 3, Verizon, and Windstream should be rejected as they are based on the premise that applications could be "deemed in the public interest" by adoption of a regulation and simple lapse of time. Indeed, the revisions proposed by Verizon and Windstream to Subpart (k) would make it more possible for major transactions to be "deemed in the public interest" through timing rather than an exercise of Commission discretion and

⁹¹ 66 Pa.C.S. §§ 3011, et seq. (effective Dec. 1, 2004).

⁹² OCA Comments at 7, 14-15, citing 66 Pa.C.S. § 3019(b)(4).

⁹³ Level 3 Comments at 10-11. *See also*, Verizon Comments, Att. B Red-lined Annex A, revisions to proposed Section 63.324(k)(1); see also revisions to proposed Section 63.325(k)(1).

⁹⁴ Verizon Comments, Att. B at 10, revisions to proposed Section 63.325(k). To prevent an application from being "deemed" approved, Verizon would require the Commission to issue a written order "determining otherwise for good cause shown" before the end of "the 60 days after filing of the application" window. However, if deemed approved, Verizon would require the Commission to issue a Secretarial letter or order later, within 10 days.

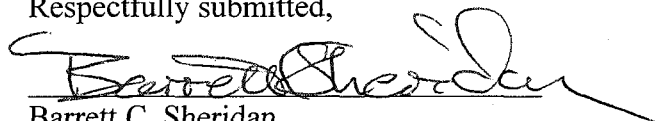
⁹⁵ Windstream Comments, Windstream's Revised Version Annex A, revisions to proposed Section 63.324(k).

expertise to protect the public interest. As set forth in the OCA Comments, the Commission should follow the requirements of Section 1103(a) and issue a written order making the necessary findings and determine whether the application should be approved, approved with conditions, or denied.⁹⁶

III. CONCLUSION

The Pennsylvania Office of Consumer Advocate respectfully requests that the Public Utility Commission reject the revisions to the Proposed Rulemaking Order proposed by Level 3, Verizon, Windstream and the PTA for the reasons set forth above. The OCA submits that the Commission and the public are best served by the withdrawal of the Proposed Rulemaking Order. In the alternative, the OCA requests that the Commission adopt a streamlined review process built on the OCA's proposal set forth in the OCA Comments for competitive carriers only.

Respectfully submitted,



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⁹⁶ OCA Comments at 5-10, 24-28.

CERTIFICATE OF SERVICE

Re: Petition of Level 3 Communications, LLC To Amend the Public Utility Commission Regulations to Streamline Transfer of Control and Affiliate Filing Requirements for Competitive Carriers
Docket No. P-00062222 and

Rulemaking to Amend Chapter 63 Regulations so as to Streamline Procedures for Commission Review of Transfer of Control and Affiliate Filings for Telecommunications Carriers
Docket No. L-00070188

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

Dated this 9th day of May, 2008.

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