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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

June 9, 2008

Honorable Wendell Holland, Chairman
Pennsylvania Public Utility Commission
Keystone Building, 3rd Floor
400 North Street
Harrisburg, PA 17105

Re: Regulation #57-260 (IRRC #2673)
Pennsylvania Public Utility Commission
Abbreviated Procedure for Review of Transfer of Control and Affiliate Filings for
Telecommunications Carriers

Dear Chairman Holland:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director

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Enclosure

cc: Honorable Robert M. Tomlinson, Chairman, Senate Consumer Protection and Professional
Licensure Committee
Honorable Lisa M. Boscola, Minority Chairman, Senate Consumer Protection and
Professional Licensure Committee
Honorable Joseph Preston, Jr., Majority Chairman, House Consumer Affairs Committee
Honorable Robert W. Godshall, Minority Chairman, House Consumer Affairs Committee

Comments of the Independent Regulatory Review Commission



Pennsylvania Public Utility Commission #57-260 (IRRC #2673)

Abbreviated Procedure for Review of Transfer of Control and Affiliate Filings for Telecommunications Carriers

June 9, 2008

We submit for your consideration the following comments on the proposed rulemaking published in the February 9, 2008 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Pennsylvania Public Utility Commission (Commission) to respond to all comments received from us or any other source.

1. Proposed Procedures. - Consistency with statute; Reasonableness; Need; Feasibility; Economic impact.

Consistency with statute

In its preamble the Commission cites Sections 1102 and 1103(a) of the Public Utility Code (66 Pa. C.S.A. §§ 1102 and 1103(a)) as the statutory authority for this regulation. Section 1103(a) states, in part:

...A certificate of public convenience shall be **granted by order of the commission**, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience or safety of the public....
(Emphasis added.)

Under the statute, when the Commission grants a certificate of public convenience, it is required to do it "by order." Section 63.324(k)(1) of the proposed regulation states:

The Commission will issue a **Secretarial letter** or order approving a general rule transaction and issue a certificate of public convenience authorizing the transaction under 66 Pa.C.S. §§ 1102(a) and 1103. (Emphasis added.)

Section 63.325(k)(1) is similar and also allows certificates of public convenience to be granted by secretarial letter. We find both Sections 63.324(k)(1) and 63.325(k)(1) to be inconsistent with the statute, which requires an order to grant a certificate of public convenience. We recommend that the Commission amend these provisions to require an order. Alternatively, the Commission should explain how granting certificates of public convenience by secretarial letter is consistent with the Public Utility Code.

Need for the regulation

The Commission has described the compelling public interest that justifies the regulation as follows: “The proposed regulation addresses the real need for a more predictable and timely review and approval period for Commission disposition of mergers and stock transactions under the Public Utility Code.” The material submitted with the proposal does not provide any documentation that supports the statement above. In its comments, the Office of Consumer Advocate provides documentation to support its claim that the proposed rulemaking is not needed. We ask the Commission to provide more detailed information to support the need for the rulemaking and explain how the proposed procedure is an improvement over the existing procedure. The number of transactions reviewed each year, the average length of time it takes to review each transaction and the number of transactions that would have been classified as either pro forma or general rule transactions would help us determine if there is a need for the rulemaking.

Complexity of procedures

The regulation is complex in that it addresses multiple avenues of review for transfer of control and affiliate filings. The regulation includes provisions for:

- Classification of filings into general and pro forma transactions;
- Reclassification of a general rule transaction;
- Review of a general rule transaction reclassified as a pro forma transaction;
- Review of a general rule transaction reclassified as other than a pro forma transaction;
- Right of appeal for reclassification of a transaction;
- Reclassification of a pro forma transaction;
- Review of a pro forma transaction reclassified as a general rule transaction;
- Review of a pro forma transaction reclassified as other than a general rule transaction; and
- Right of appeal for reclassification of a pro forma transaction.

These classifications and reclassifications carry with them different requirements for review, review periods and notification. Given this complexity, important details such as notices and time for review are difficult to determine when actions such as reclassifications and appeals occur. As an example, what notice is required if a reclassification is appealed? How does this impact the 30 and 60-day timeframes?

Commentators provided a wealth of input, including complaints about the complexity of the regulation and suggested changes to the regulation. We agree with commentators and question whether the complexity of these classifications, reclassifications, appeals and differing procedures could compromise the Commission's objective of "streamlining the review and approval process for mergers and stock transactions under sections 1102 and 1103(a) of the Public Utility Code." Commentators also believe some filing requirements should be added and some deleted.

One commentator offered to participate in a stakeholder group to work on simplifying the regulation. We recommend that the Commission consider convening a stakeholder group to take advantage of the experience, expertise and input of the commentators, which include Incumbent Local Exchange Carriers (ILECs), Competitive Local Exchange Carriers (CLECs) and statutory advocates, to develop a simplified final-form regulation that adequately protects the public interest.

Chapter 30

Several commentators cited 66 Pa.C.S.A. Chapter 30 (Chapter 30), titled "Alternative Form of Regulation of Telecommunications Services." ILECs and statutory advocates presented several arguments that the regulation is not consistent with Chapter 30. ILECs argue that the regulation does not properly take into account provisions such as 66 Pa.C.S.A. § 3019(b)(1), which states that affiliated interest and transaction agreements filings are not needed for services declared competitive. A statutory advocate commented that this same statutory provision is not properly reflected in the regulation because the statute requires the Commission to do more detailed reviews. We ask the Commission to explain how the final-form regulation is consistent with Chapter 30.

Standard for review

Recent caselaw has reiterated that substantial evidence must support the Commission's finding "that a merger will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way." *Popowsky v. PUC*, 594 Pa. 583, 937 A.2d 1040 (2007); *City of York v. PUC*, 49 Pa. 136, 295 A.2d 825 (1972). A commentator is concerned that the streamlined review process disregards the evidentiary standard demanded by

City of York and its progeny. The Commission should explain how the *City of York* standard is met by the regulation.

Review periods

A general rule transaction is reviewed for 60 days and a pro forma transaction is reviewed for 30 days. Are these time periods sufficient for interested parties to review the filings? We are concerned that if these periods are too short, formal protests will be filed under Sections 63.324(j)(1) and 63.325(j)(1) simply to allow more time for review. The Commission should explain how the 30 and 60-day review periods are sufficient for parties to review the filings.

ILEC vs. CLEC Responsibilities

Although the regulation treats filings from an ILEC the same as those from a CLEC, their responsibilities are not the same. ILECs are subject to requirements such as network modernization under 66 Pa. C.S. Chapter 30 and provider of last resort obligations. The impact of a transaction on these ILEC obligations is not directly included in the content of notification provisions in Subsections (d) of Sections 63.324 and 63.325. We recommend that the Commission include consideration of the effect of a transaction on an ILEC's responsibilities, such as network modernization and provider of last resort obligations.

2. Section 63.322. Definitions. – Consistency with statute; Clarity.

The definitions of “controlling interest” and “diminution of control” both make reference to 10 percent. According to the Preamble, both definitions are based on an existing Statement of Policy pertaining to utility stock transfers found at 52 Pa. Code § 69.901. That policy statement references 20 percent. Why is the Commission using 10 percent in the proposed regulation?

The term “information service” is used in several of the definitions in this section. A commentator believes it is inappropriate to include this term in the definitions because that term is not used in the corresponding definitions of the Public Utility Code. Why has the Commission included this term in the definitions?

The term “pro forma transaction” is defined in this section. We recommend that the term “general rule transaction” also be defined in this section.

3. Section 63.323. Applicability. – Consistency with statute.

To be consistent with § 1102(a)(3) of the Public Utility Code, the regulation should be amended to include a reference to a telecommunications public utility’s “affiliated interest.”

4. Section 63.324. Commission approval of a general rule transaction subject to 66 Pa.C.S. §§ 1102(a)(3) and 1103. – Implementation procedures; Clarity.

Subsection (a) General rule transactions.

The terms “assets” and “customer base” are used in this section, but are not defined. To improve clarity, we suggest that both terms be defined. We have the same concern with § 63.325 (a).

Subsection (b) Reclassification of a general rule transaction.

Under this subsection, the Commission can reclassify a general rule transaction as either a pro forma transaction or a transaction other than a pro forma transaction. Any reclassification requires the Commission to notify the telecommunications public utility that the transaction will be reclassified. We recommend that the Commission also notify the statutory advocates of any reclassifications that take place under this subsection. We offer the same recommendation on § 63.325 (b).

Subsection (f) Commission publication of general rule transactions.

Subsection (f)(2)(ii) states that if a formal protest is filed, a general rule transaction “may” be reclassified, “unless the Commission determines otherwise for good cause shown.” This provision is vague and does not identify how the Commission will determine if a general rule transaction should be reclassified. We recommend that the final-form regulation provide specific criteria that the Commission will use in determining when a general rule transaction will be reclassified. The same recommendation applies to the reclassification of pro forma transactions under Section 36.325(f)(2)(ii).

Subsection (g) Telecommunications public utility notice to customers.

Subsection (g)(1) requires a telecommunications public utility to provide notice to customers of a general rule transaction involving a change in conditions of services or rates with the approval of the Commission’s Bureau of Consumer Service (Bureau). Subsection (g)(2)(i) requires additional notice when the transaction involves the transfer of a customer base. This additional notice also requires approval of the Bureau. We have four questions. First, how will these provisions work with the requirement for a telecommunications public utility to provide a verified statement affirming that customers received notice of the transaction found at § 63.324(c)(13)? Second, would a telecommunications public utility have to secure the approval of the Bureau before it provided notice of the transaction to the Commission? Third, what procedures are involved with securing approval of the Bureau for the notices?

Finally, how will disagreements between the utility and the Bureau be resolved?

Subsection (g)(2)(iv) pertains to a formal protest to a general rule transaction filed by a statutory advocate. Subsection 63.324(f)(2)(iii) also pertains to formal protests filed by a statutory advocate and concludes with the phrase "...unless the Commission determines otherwise for good cause shown." Why doesn't Subsection (g)(2)(iv) include similar language? We have a similar concern with § 63.325(g)(2)(iii).

Subsection (j) Reclassification of a transaction from the general rule.

Subsection (j)(1) states:

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.

By the wording of this provision, it is not clear whether a reclassification occurs automatically upon a formal protest by a statutory advocate or whether the statutory advocate must demonstrate good cause. As a matter of equity, we see no reason why the burden for a protest would differ between the public and a statutory advocate. It would appear that both would need to demonstrate good cause for reclassification. The Commission should review and explain this provision. We have the same concern with § 63.325(j)(1).

5. Subsection 63.325. Commission approval of a pro forma transaction subject to 66 Pa.C.S. §§ 1102(a)(3) and 1103. – Protection of the public health, safety and welfare; Implementation procedures; Clarity.

Subsection (d) Content of notification for pro forma transactions.

Subsection (d)(13) requires a telecommunications public utility to provide a statement affirming that customers received *or will receive notice*. Under the section pertaining to general rule transactions, § 63.324(d)(13) requires a statement affirming that customers *received* notice. We recommend that the phrase "or will receive" be deleted from this subsection. This will provide customers of the telecommunications public utility notice of the transaction before it is completed.

Subsection (f) Commission publication of pro forma transactions.

As a general comment on this subsection, we believe the public interest would be best protected if the publication requirements for pro forma transactions mirrored the publication requirements of general rule transactions. Other concerns on this subsection are addressed below.

Subsection (f)(1) states the following:

The Secretary may publish notice of the pro forma transaction in the *Pennsylvania Bulletin*. The Secretary may post notice of the pro forma transaction on the Commission's web site, unless the Commission determines otherwise for good cause shown.

We have three concerns. First, the use of the word "may" makes this provision optional. However, the factors that would lead to publication or posting of the notice are not included in the rulemaking. In order to provide proper notice to all consumers, we recommend that word "may" be changed to "will."

Making the change suggested above would alleviate our second concern, which pertains to how the Commission and the regulated community will know when the 30-day time period for review of a pro forma transaction will expire. As indicated in Subsection (k), pertaining to Commission approval for a pro forma transaction, the 30-day period ends after the filing of a pro forma transaction with the Commission or posting on the Commission's website, whichever is longer. How would the regulated community, including the statutory advocates, know when the Commission received an initial filing or when it was posted to the Commission's website? If the Commission decides to retain the language noted in the concern above, it must establish a clearer standard for determining the expiration of the 30-day period.

Third, we believe posting notice on the Commission's website will provide greater notice to the regulated community and encourage the Commission to consider the same approach for general rule transactions.

Under Subsections (f)(2) and (f)(3), a notice posted on the Commission's website may or may not contain a general comment period and there will be no formal protest period. We do not believe it is in the public interest to exclude interested parties from commenting or filing formal protests of pro forma transactions and recommend that these provisions be deleted.

To be consistent with § 63.324(f)(2) we recommend that the phrase "general comment period" found under Subsection (f)(4) be changed to "15-day general comment period."

We raise two points of clarity pertaining to Subsection (f)(4)(iii). First, the first reference to "general rule transaction" should be changed to "pro forma transaction." A similar concern exists with § 63.325(i). Second, we question why this subsection does not include the following concluding statement that is found under § 63.324(f)(2)(iii): "...unless the Commission determines otherwise for good cause."

Subsection (g) Telecommunications public utility notice to customers.

Subsection (g)(2) pertains to notice of pro forma transfers of a customer base. It differs from similar provisions pertaining to the transfers of a customer base subject to general rule transactions found at § 63.324(g)(2) in three ways. First, it does not require additional notice to the customer base. Second, a formal protest filed under this subsection *will not* reclassify a pro forma transaction, but a formal protest filed under § 63.324(g)(2) *may* reclassify a general rule transaction. Third, § 63.324(g)(2) addresses the filing of a protest by a statutory advocate, but this subsection does not. We question why there are differences and how these differences adequately protect the public. As noted in our first comment on Subsection (f) of this section, we believe the public interest would be best protected if the requirements for pro forma transactions mirrored the requirements of general rule transactions.

Subparagraph (g)(2)(iii) references “§ 5.14 of the Commission rules of practice and procedure.” 52 Pa. Code § 5.14 is titled “Applications requiring notice.” The Commission should review the cross reference to § 5.14.

Subsection (l) Limitations on pro forma transactions.

Subsection (l)(2) begins with the following sentence: “A pro forma transaction may not operate to permit a telecommunications public utility to abandon a condition of service or rate.” We note that this sentence is not included in the corresponding section pertaining to general rule transactions found at § 63.324(l)(2). Is there a reason for this difference?

