PROPOSED RULEMAKING

DEPARTMENT OF HEALTH

[28 PA. CODE CH. 23 AND 27]

Communicable and Noncommunicable Diseases

The Department of Health (Department), with the approval of the State Advisory Health Board (Board), proposes to amend 28 Pa. Code Chapter 23, Subchapter C (relating to immunization) and 28 Pa. Code § 27.77 (relating to immunization requirements for children in child care group settings). The proposed amendments are set forth in Annex A.

A. *Purpose of the Regulation*

The proposed amendments would revise § 23.83 (relating to immunization requirements) to combine immunization requirements for school entry into kindergarten or first grade with immunization requirements for school attendance in all grades; and to add two new immunization requirements for entry into the seventh grade. The Department has developed these proposed amendments following review of the recommendations of the Centers for Disease Control and Prevention's (CDC) Advisory Committee on Immunization Practices (ACIP). The Department has determined that certain of ACIP's recommendations would serve to meet the needs of the Commonwealth with respect to requirements for school immunizations. The proposed amendments would require that students before entering school be immunized with the hepatitis B vaccine (previously required for entry into either kindergarten or first grade and entry into the seventh grade); and would require that students entering the seventh grade be immunized with the tetanus, diphtheria and acellular pertussis (Tdap) vaccine, if at least 5 years has elapsed since their last tetanus and diphtheria immunization, and be immunized with the meningococcal conjugate vaccine (MCV).

Finally, the proposed amendments would institute ACIP recommendations regarding an additional dose requirement for mumps vaccine and for varicella vaccine. The proposed amendments would change the existing requirement for varicella immunity upon school entry and for entry into the seventh grade into an all-grades requirement, but would phase in the 2-dose requirement. Children entering school in kindergarten or first grade would be required to have 2 properly-spaced doses of the vaccine. The Department's requirement that children who are 13 years of age or older have 2 properly-spaced doses for entry into the seventh grade would become a requirement for school attendance for those children. The Department would then require 2 properly-spaced doses of the varicella vaccine for all grades beginning school year 2010/2011. The proposed amendments would not alter the existing option that varicella immunity may be proven by either a written history from a parent, guardian or physician or by laboratory confirmation of the disease.

Further, the proposed amendments are also intended to clarify what immunization requirements apply to children under the age of 5 years attending child care group settings located in a school. In addition, the proposed amendments are intended to clarify that children in a school district operated prekindergarten program, early intervention program operated by a contractor or subcontractor (this includes districts, intermediate units and private vendors), and in a private academic preschool are required to obtain appropriate immunizations as a condition of attending those programs.

Finally, the proposed amendments would also add a 4-day grace period for vaccine administration, also in accordance with recommendations of ACIP, and would revise the Department's requirements for school reporting of immunizations in § 23.86 (relating to school reporting).

B. *Requirements of the Regulation*

CHAPTER 23. SCHOOL HEALTH

Subchapter C. IMMUNIZATION

§ 23.82. Definitions.

The Department proposes to clarify the definition for "attendance at school." It proposes to add a sentence to that definition that clarifies that attendance at school does not include the attendance of children in child care group settings located in schools. The term "child care group setting," and the requirements for immunizations relating to those settings are included in the Department's regulations relating to communicable and noncommunicable diseases in § 27.1 (relating to definition) and § 27.77(d). Section 27.77(d) states that children attending kindergarten, elementary school or higher school and children known to the care giver to be 5 years of age or to attend a kindergarten are to follow the requirements in § 28.83. The Department promulgated these exceptions to § 27.77 because some immunizations required in § 27.77 are not age-appropriate for these children. Immunization requirements should be applied based on age, not on the location of the child. The requirements in § 23.83 are those that are appropriate for a child older than the age of 5 years, and are those recommended by ACIP for children in those age groups.

Although § 27.77 is clear on which immunizations are appropriate by age in a child care group setting, there is no comparable language in § 23.83. This has resulted in some confusion when a child care group setting is located in a school, or where a school has a K-4 class, that is, kindergartens that accept children at the age of 4 years. The Department is proposing to add a new subsection (d) to § 23.83 to clarify that children attending child care group settings located in schools are to follow the immunization requirements included in § 27.77. These requirements are specifically geared towards children under the age of 5 years. It would be medically inappropriate and contrary to the recommendations of ACIP for these children to be required to have some doses of certain immunizations listed in § 23.83. If a child attending that child care group setting is older than 5 years of age, the school immunization requirements would apply regardless of the child's location.

To take into account the attendance of children younger than 5 years of age in kindergarten classes, the Department is also proposing to make changes to § 27.77(d). Those revisions would reflect this change in the ages of children attending kindergartens, and ensure that the immunizations required to be given to children are age-appropriate, regardless of the setting in which the child is located.

§ 23.83. Immunization requirements.

Subsection (a). Duties of a school director, superintendent, principal or other person in charge of a public, private, parochial or nonpublic school.

The Department proposes to combine subsection (a), which addresses immunizations required for entry into kindergarten or first grade, with subsection (b), which addresses immunizations required for attendance in all grades. Because there should be no difference between the list of immunizations required for school entry, and those required for school attendance, there is no need for two separate subsections addressing those immunization requirements. The Department proposes to create a new subsection (a), relating to duties of a school director, superintendent, principal, or other person in charge of a public, private, parochial or nonpublic school. New subsection (a) would include the statutory requirement that a school director, the superintendent, principal, or other person in charge of public, private, parochial or other nonpublic schools within this Commonwealth must ascertain whether children are immunized in accordance with the list of immunizations developed by the Department. That list is set out in proposed subsection (b).

These amendments would make no change to the regulation that permits provisional enrollment of students who have received at least 1 dose of the required immunization for a disease. A child may enter school with 1 dose of a vaccine series, but is then required to obtain all the necessary doses to continue in attendance. See § 23.85 (relating to responsibilities of schools and school administrators).

Subsection (b). Required for attendance.

The Department proposes to revise subsection (b) of this section to add hepatitis B immunizations (see proposed paragraph (7)) and chickenpox (varicella) immunity (see proposed paragraph (8)), now required for entry into kindergarten or first grade, to those immunizations required for school attendance. The Department chose to phase in the requirements for hepatitis B immunizations and varicella immunity of all students attending school by requiring those immunizations first be obtained upon school entry into kindergarten or first grade and into the seventh grade, rather than requiring immediate compliance in all grade levels. This allowed schools to gradually require compliance of their student populations. In 1998, the hepatitis B immunization requirement and the 4th dose of tetanus/diphtheria immunization requirement were added to school entry into kindergarten or first grade. In 2002, the chickenpox (varicella) immunity requirement was added to school entry into kindergarten or first grade; and the hepatitis B immunization and varicella immunity requirements were added to entry into the seventh grade. Those children initially affected by the 1998 requirements are now in grade 8 and those children initially affected by the 2002 regulation are now in grades 4 and 11. Therefore, there are not many children that remain to "catch up" with one or both of these requirements.

In addition to making varicella immunity an all-grades requirement, the Department is proposing to revise the requirements for vaccination, in accordance with ACIP recommendations. ACIP recommends that children receive 2 doses of the varicella vaccine for them to be appropriately immunized. To meet this recommendation without placing undue burden on either parents and guardians, who must obtain these vaccinations for their children, or on schools, which must determine whether children have met these requirements to attend school, the Department has elected to phase in the 2 varicella dose requirement. The Department proposes that until the school year 2010/2011, in order to enter school in kindergarten or first grade, children must have 2 properly-spaced doses of varicella vaccine administered after 12 months of age. (See proposed paragraph (8)(i)(A).) Children 13 years of age or older would also be required to have 2 properly-spaced doses to attend school. This requirement had been in place solely for children entering the seventh grade; the proposed amendments would make it a requirement for school attendance for children 13 years of age or older. (See proposed paragraph (8)(i)(B).) At the beginning of school year 2010/2011, all children will be required to have 2 properly-spaced doses of varicella vaccine to attend school. (See proposed paragraph (8)(i)(C).)

Finally, the Department has not altered the provision allowing immunity to be proven by laboratory evidence or laboratory confirmation of the disease or by the statement from a physician, parent or guardian of a history of disease, rather than by evidence of a vaccination. (See proposed paragraph (8)(ii).)

The Department is also proposing to revise subsection (b), paragraphs (4) and (5), which state what is required to show a history of immunity from measles (rubeola) and from German measles (rubella). In both those paragraphs, a history of immunity may be shown by "serological evidence showing antibody determined by the hemagglutination inhibition test or any comparable test." Because of changing technology, however, the Department is reluctant to continue to require a specific test for this particular purpose. The Department, therefore, is proposing to replace the language in both paragraphs with the requirement that a history of immunity be shown by "laboratory testing." (See proposed subsection (b)(4) and (5).) This allows the most effective test for this purpose to be used, without dictating what test is being required.

Finally, the Department is also proposing to amend subsection (b), paragraphs (1), (2) and (6) to add new dosage requirements relating to diphtheria/tetanus and mumps. Paragraphs (1) and (2) currently only require 3 doses of diphtheria/tetanus; the Department proposes to require a 4th dose after the child's 4th birthday. Paragraph (6) currently requires only 1 dose of live attenuated mumps vaccine for children at 12 months of age or older for attendance at school. (28 Pa. Code § 23.83(b)(6).) In response to recent outbreaks of mumps in school-age children who had been previously vaccinated, ACIP recently revised recommendations for mumps immunizations to recommend 2 doses of mumps vaccine instead of 1 dose for school-aged children, that is, children attending school in kindergarten through the 12th grade. Observation of the recent mumps outbreaks in schools suggests that 1 dose of the mumps vaccine or MMR (measles, mumps, rubella) vaccine is not sufficient to prevent mumps outbreaks in school-age children. The Department is proposing to adopt ACIP's recommendation, and proposing to add the requirement of an additional dose of live attenuated mumps vaccine to prevent future outbreaks of mumps in schools in this Commonwealth.

Subsection (c). Required for entry into the 7th grade.

The Department proposes to revise subsection (c), which lists those immunizations required for entry into the seventh grade, to delete the hepatitis B immunization and varicella immunity requirements and to include tetanus and diphtheria toxoid and acellular pertussis

vaccine (Tdap) and meningococcal conjugate vaccine (MCV) immunizations. The proposed amendment would require 1 dose of Tdap vaccine, if at least 5 years have elapsed since the last dose of a vaccine containing tetanus and diphtheria toxoid, and 1 dose of MCV.

Pertussis is the most prevalent vaccine preventable disease among older children, adolescents and adults. The number of adolescents and adults diagnosed with pertussis has increased five-fold over the past 14 years. In 2003 in the United States, persons 11-18 years of age made up 36% of the total reported pertussis cases. In 2004, there were 342 cases of pertussis in this Commonwealth with 91 of those cases in the 10-14 year old age group. Children complete their routine series of tetanus/diphtheria/pertussis vaccine at 4 to 6 years of age; data suggest that immunity declines 5 to 10 years after the last childhood vaccination.

Pertussis is easily transmitted and carries risks in older age groups, as well as for unimmunized or partially immunized infants. In older age groups, risks include prolonged coughing, vomiting and missed school or work. The clinical presentation of pertussis in adolescents ranges from mild cough illness to serious and prolonged coughing lasting for weeks to months. Pertussis outbreaks in schools with adolescents are disruptive and lead to significant public health control efforts. Studies have reported that parents lose an average of 6 days of work to care for an ill child with pertussis. This translates to an average cost of $767 in lost productivity. Adolescents miss an average of 5.5 days of school with pertussis. When pertussis is transmitted to unimmunized or partially immunized infants, the complications can be serious.

The Federal Food and Drug Administration (FDA) licensed two Tdap vaccines in 2005 to provide protection against these diseases in adolescents and adults. On June 30, 2005, ACIP recommended the routine use of Tdap vaccine in adolescents 11-18 years of age. ACIP's preferred age for the Tdap immunization is 11-12 years of age. The Department is proposing to follow these recommendations by making the Tdap immunization required for entry into the 7th grade or at 12 years of age in an ungraded class if at least 5 years have elapsed since the last dose of a vaccine containing tetanus and diphtheria toxoid has been received.

The proposed amendments would also require 1 dose of MCV for entry into the 7th grade or at 12 years of age in an ungraded class. (See proposed subsection (c)(2).) This newly licensed meningococcal conjugate vaccine, licensed as of January 14, 2005, by the FDA for use in persons 11-55 years of age, offers longer protection against meningococcal disease than previous meningococcal vaccines.

Meningococcal disease strikes up to 3,000 Americans, killing approximately 300 people every year. Ten to 12% of people with meningococcal disease die and among survivors up to 15% may suffer long-term permanent disabilities including hearing loss, limb amputation or brain damage. Meningococcal disease is particularly dangerous because it progresses rapidly and can kill within hours. Although the incidence of invasive meningococcal disease is highest in infants, the case fatality rate is highest in adolescents. The incidence of invasive meningococcal disease peaks in infants younger than 12 months, but a second peak occurs during adolescence.

The General Assembly has recognized the dangers of meningococcal disease. In response to these concerns, it passed the College and University Student Vaccination Act (35 P. S. §§ 633.1—633.3), which prohibits a student from residing in a college or university dormitory or housing unit unless the student has a one-time vaccination against meningococcal disease. (See 35 P. S. § 633.3.)

ACIP has recommended routine vaccination of adolescents (defined as persons 11-12 years of age) at a preadolescent health-care visit. For those adolescents who have not previously received MCV, ACIP recommends vaccination before high school entry (at approximately 15 years of age) and for college freshmen living in dormitories. The Department has reviewed ACIP's recommendations relating to MCV, and has determined that they are acceptable to meet the needs of this Commonwealth. Therefore, the Department is basing its proposed amendment on ACIP's recommendations.

Subsection (d). Child care group settings.

This subsection is new. It is intended to clarify questions raised because some child care group settings are located in schools, and some schools now have kindergarten classes including children who are younger than 5 years of age. Because the ACIP recommendations for children younger than 5 years of age differ from those recommended for most children of the ages attending kindergarten, elementary school or higher school, only a child in a child care group setting who is 5 years of age or older should receive the immunizations included in § 23.83. Children younger than 5 years of age should still continue to receive the immunizations included in § 27.77, regardless of where their child care group setting is located, or whether they are in a kindergarten class.

By proposing to add subsection (d), the Department is proposing to clarify that children younger than 5 years of age attending child care group settings located in schools are not to follow the immunization requirements for school attendance, but are to follow the requirements for immunizations in child care group settings included in the Department's regulations relating to communicable and noncommunicable diseases. (See § 27.77.) These regulations are specifically directed at children younger than the age of 5 years, and require immunizations appropriate to those younger age groups. The Department is also proposing changes to § 27.77(d) to reflect that children younger than 5 years of age are now attending kindergartens, and to ensure that age appropriate immunizations are provided to children regardless of the location of their setting.

Subsection (e). Prekindergarten programs, early intervention programs and private academic preschools.

This subsection is new. It would make it clear that children in prekindergarten programs, early intervention programs and private academic preschools are required to comply either with the immunization requirements for school attendance, or those required for attendance at child care group settings, depending upon the age of the child. This clarification is important because children who are not yet attending kindergarten or first grade but who are still surrounded by other children, both older and younger, may contract disease as easily as those who are attending school in kindergarten or the first grade. It is important for the health of the child and the health of this Commonwealth that the spread of potentially dangerous and debilitating disease be prevented or at least contained through the use of immunization in educational settings.

It is equally important that the immunizations received by the child be age-appropriate, as mentioned previously. Therefore, the Department is proposing that children

younger than 5 years of age would be required to comply with the Department's regulation in § 27.77. Children 5 years of age or older would be required to comply with the requirements of subsection (b) of the proposed amendments.

Subsection (f). Grace period.

This subsection is new. The Department is proposing to include a 4-day grace period for the administration of required vaccines in accordance with ACIP recommendations and with the notice of its intention to amend its regulations published at 32 Pa.B. 1305 (March 9, 2002).

There is no scientific basis for concluding that if a vaccine is not given with a strict interval between doses or at an exact age, the vaccine is ineffective or unsafe. The CDC published recommendations in the February 8, 2002, Morbidity and Mortality Weekly Report (MMWR) which would allow vaccines to be given at a time less than or equal to 4 days prior to the recommended minimal interval between dosages and before the appropriate age for vaccine is reached and still be counted as a valid dose of vaccine. The Pennsylvania Chapter of the American Academy of Pediatrics supported ACIP's recommendations of allowing a 4-day grace period for dose interval and age limit. The recommendation, however, conflicts with the Commonwealth's school immunization requirement in this section for measles, mumps, rubella and varicella vaccines, which states that these vaccines must be administered on or after a child turns 12 months old for the vaccine to be accepted as a valid dose. With respect to varicella, the Department's regulations for entry into seventh grade require either 1 dose of vaccine at 12 months of age or older, or 2 doses of vaccine at 13 years of age or older. (See current subsection (c)(2)(i) and (ii).)

After consideration of ACIP's February 8, 2002, recommendation and review of the relevant information relating to that recommendation, the Department agreed with ACIP's determination that administering a vaccine dose 4 days earlier than the minimum interval or age limit would be unlikely to have a significant negative effect on the immune response to that dose. After discussion with and agreement from the Pennsylvania Department of Education (PDE), the Department published a notice at 32 Pa.B. 1305 (March 9, 2002) to that effect. That notice stated that the Department intended to amend its regulations to reflect this ACIP recommendation. The Department now proposes to do so.

§ 23.86. School reporting.

The Department is proposing to revise this section to address requirements for reporting immunization data placed on the Department by the CDC. The CDC requests annual school immunization coverage reports from the Department as part of the Federal Immunization Grant process. In the last few years, the CDC has requested that the Department provide to the CDC information relating to individual vaccine dose coverages. To comply with this request, the Department has been estimating individual vaccine dose coverage by schools' self-reports and validation audits for up-to-date status for all required vaccines. The CDC may not accept the Commonwealth's estimated vaccine coverage rates in the future. The Department is proposing to amend this section to allow it to meet the CDC's reporting requirements and to ensure that the Department continues to receive grant funding for immunizations.

CHAPTER 27. COMMUNICABLE AND NONCOMMUNICABLE DISEASES

Subchapter C. QUARTINE AND ISOLATION

Communicable Diseases in Children and Staff Attending Schools and Child Care Group Settings

§ 27.77. Immunization requirements for children in child care group settings.

The Department is proposing to amend subsection (d) of this section. Subsection (d) excludes children 5 years of age and older attending kindergarten, elementary school or higher school and children known to the care giver to attend a kindergarten from the immunization requirements of § 27.77, and requires them to follow the school immunization requirements in § 28.83. Because more children are now attending school based settings under the age of 5 years, this language will work to require children younger than 5 years of age that are in child care group settings located in schools to obtain immunizations appropriate for their age. The Department, therefore, is proposing to revise this subsection to ensure that those children younger than 5 years of age in school based settings such as prekindergarten, are required to obtain immunizations that are age appropriate.

C. *Affected Persons*

The proposed amendments would affect children attending school in this Commonwealth and entering the seventh grade or at 12 years of age in an ungraded class who have not received tetanus and diphtheria toxoid immunizations within the last 5 years or who have not received the MCV immunization. The proposed amendments would also affect those students who missed the school entry requirement for hepatitis B vaccination, varicella immunity and the 4th dose of the tetanus and diphtheria vaccinations. In addition, the proposed amendments would affect those students who missed the seventh grade entry requirements for hepatitis B vaccination and varicella immunity. Finally, the proposed amendments would affect those children who need to receive a second dose of varicella and mumps vaccines.

The proposed amendments would also affect the parents or guardians of these students, since they would have to ensure that the children receive these vaccinations, and may be required to pay out-of-pocket for them. However, because requiring these immunizations would protect children from contracting tetanus, diphtheria, pertussis and meningitis, chickenpox and mumps, their parents or guardians would not have to miss work, worry, or pay medical bills related to these diseases. Physicians and health care providers would not have to treat sick children. Department staff would not need to become involved in the prevention of outbreaks as they do now.

Those children who suffer the rare adverse reaction to a required immunization and their parents or guardians would also be affected. Conversely, children who might otherwise have become ill, or perhaps died, from meningitis, pertussis, diphtheria, tetanus, hepatitis B, chickenpox or mumps, are also affected beneficially by these proposed amendments.

The proposed amendments would affect school districts and their employees, since school districts are required to ensure that children attending school have the appropriate vaccinations, and to report that information to the Department according to the Department's revised reporting requirements. The impact would be slight, however, in that school districts already have systems in place to document immunization status of students, and because

the recommendation by ACIP that a grace period be provided in determining the immunization status of students was initially made in 2002.

D. *Cost and Paperwork Estimate*

1. *Cost*

a. *Commonwealth*

The Commonwealth would incur some costs for the purchase of Tdap and meningococcal conjugate vaccines, as well as additional hepatitis B and varicella vaccines; and the MMR, through the expenditure of Federal immunization grant funds. The Commonwealth would also incur costs through the Medical Assistance Program, which pays for administering the vaccines for eligible persons. The Department makes vaccines available at no cost to private providers enrolled in the Vaccines For Children (VFC) Program for children through 18 years of age who have no insurance, who are Medicaid eligible or who are Alaskan Native or American Indian. In addition, VFC Program vaccine is also made available to other public clinic sites (Federally Qualified Health Centers and Rural Health Clinics) for the same population but also for underinsured children through 18 years of age. Vaccines are made available to schools at no cost through the Department's School Based Catch-Up Program for those students who have no medical home or are unable to seek the immunization through a public clinic site. The Commonwealth should realize savings, at the same time, based on the amount of funds that would not be needed to control the outbreak of the disease the vaccine prevents.

The inclusion of a grace period into the regulations should add no cost for the Commonwealth, including either the Department or PDE. The 4-day grace period is intended to allow a vaccine dose administered 4 days before the minimum interval between doses or before the appropriate age is reached to be counted as a valid dose. Since there is no scientific basis for taking a position that a vaccine must be given with a strict interval between doses or at an exact age or the vaccine is ineffective or unsafe, the grace period would merely allow schools to accept vaccines provided within this period for purposes of determining compliance with the Department's regulations relating to school attendance.

b. *Local Government*

There would be no fiscal impact on local governments. Local governments could see a slight cost savings, since local governments do bear some of the cost of disease outbreak investigations and control measures. (The Department addresses the potential impact of these proposed amendments on school districts, which may be considered to be local government, under the heading of "Regulated Community.")

c. *Regulated Community*

Families whose children's vaccinations are covered by their insurance plans (public or private) under State law should not see any out-of-pocket cost for the added vaccines. Families whose insurance plans do not cover these vaccinations, or who do not have insurance, will need to seek other assistance to pay for the vaccines, or pay out-of-pocket. In general, there is other assistance provided for vaccinations from the Department, if no third party payer is available. The Department, through its State health centers, provides vaccinations. The Department also provides vaccines to providers for certain eligible children through the VFC Program, and to schools through its Catch-Up Program. The savings in prevention of childhood illness would outweigh the minimal cost of the vaccine.

The inclusion of a grace period should not add cost for school districts. School districts currently decide which children are appropriately immunized, and which are not appropriately immunized and so should be excluded from attendance. The inclusion of a 4-day grace period, which is intended to allow a vaccine dose administered 4 days before the minimum interval between doses or before the appropriate age is reached to be counted as a valid dose, would now have to be taken into consideration in making this determination. This proposed amendment should not add significantly to the cost of determining whether children are appropriately immunized, since this recommendation has been in place since the Department published its notice in 2002.

These proposed amendments would add 2 additional immunizations for school officials to review, 2 additional vaccine doses to account for (2 doses of varicella and 2 doses of mumps), and could increase the amount of follow-up needed to ensure that provisionally enrolled students in all grades receive the necessary doses in the series for all required immunizations prior to the expiration of the 8-month provisional enrollment deadline. Provisional enrollment allows for a child who has not had all the required vaccine doses described in § 23.83 to continue attendance at school if the child has had at least 1 dose of each required vaccine and there is a plan for that child obtaining all required immunizations. (§ 23.85(e).) A child provisionally admitted to school must have completed the immunizations required by § 23.83 within an 8-month period from the date of the child's provisional admission, or the school administrator may neither admit the child to school, nor permit the child's continued admission. Again, the savings in the prevention of an outbreak of a childhood illness in a school district should outweigh the minimal cost in staff time to review two additional immunizations and to follow-up on provisional enrollments.

No additional cost should be added to the regulated community by the Department's proposal to delete the requirements that the hemagglutination test or a comparable test be used to show a history of immunity to measles or German measles, and to replace that requirement with a more current test. Even without any amendment to the regulations, there would be a cost associated with choosing this particular method of showing immunity—the cost of the hemagglutination test. Since the amendment would not prohibit that particular test from being used in the future, no cost beyond that of the hemagglutination test would be incurred, and the cost of the regulations in this regard should remain stable. Future tests may, in fact, decrease in price, which could provide a cost savings for affected persons. Further, use of this method of proving immunity is not required.

Lastly, no additional cost should be added by the Department's clarification regarding children in child care group settings located in schools. The requirements for attendance at school and school reporting should not apply to those children. The regulations that would apply are those immunization requirements that are already in place that deal with child care group settings in § 27.77.

d. *General Public*

The general public should not see an increase in cost. The general public should see a decrease in costs resulting from a reduction in medical treatment needed to treat the disease and a reduction in the loss of work in order to stay home with a sick child. The general public may see a benefit in the reduction of vaccine preventable diseases, such as pertussis, chickenpox, mumps and meningitis. Since the school environment is conducive to the contracting and transmission of diseases among children with no immunity, failure to immunize properly not only puts children at risk for contracting these debilitating diseases, it also places the public at risk since these diseases are then easily spread by staff and children outside the school setting and into the general public.

2. *Paperwork Estimates*

a. *Commonwealth and the Regulated Community*

Schools would need to report in accordance with the new reporting requirements, which would require them to report the number of doses of individual antigens that have been administered to students. The Department would need to review and include those new reported numbers in its report to the CDC. Schools are currently required to report immunization coverage status for their students to the Department for the Department to satisfy CDC requirements relating to reporting of immunizations. The additional paperwork requirements for the Commonwealth, including both the Department and PDE, and the regulated community would be minimal, however, since school districts already complete this annual report regarding the number of immunizations and follow up on provisional enrollment. School nurses, who perform recordkeeping and reporting requirements in the schools, currently maintain and report this information. The CDC, however, is in the process of changing these requirements. The Department would provide reporting forms to schools, as it currently does, and the reports would be sent to the same Department office as the current reports. Schools also have the option of electronic reporting.

b. *Local Government*

There is no additional paperwork requirement for local government. (The Department has included school districts, which may be considered to be local government, under the heading of "Regulated Community.")

c. *General Public*

There is no additional paperwork requirement for the general public.

E. *Statutory Authority*

The Department obtains its authority to promulgate regulations relating to immunizations in schools from several sources. Generally, the Disease Prevention and Control Law of 1955 (35 P. S. §§ 521.1—521.21) (act) provides the Advisory Health Board (Board) with the authority to issue rules and regulations on a variety of matters relating to communicable and noncommunicable diseases, including what control measures are to be taken with respect to which diseases, provisions for the enforcement of control measures, requirements concerning immunization and vaccination of persons and animals, and requirements for the prevention and control of disease in public and private schools. (See 35 P. S. § 521.16(a).) Section 16(b) of the act (35 P. S. § 521.16(b)) gives the Secretary of Health (Secretary) the authority to review existing regulations and make recommendations to the Board for changes the Secretary considers to be desirable.

The Department also finds general authority for the promulgation of its regulations in The Administrative Code of 1929 (Administrative Code) (71 P. S. § 51—732). Section 2102(g) of The Administrative Code (71 P. S. § 532(g)) gives the Department this general authority. Section 2111(b) of the Administrative Code (71 P. S. § 541(b)) provides the Board with additional authority to promulgate regulations deemed by the Board to be necessary for the prevention of disease, and for the protection of the lives and the health of the people of this Commonwealth. That section further provides that the regulations of the Board shall become the regulations of the Department.

The Department's specific authority for promulgating regulations relating to school immunizations is found in The Administrative Code and in the Public School Code of 1949 (Code) (24 P. S. §§ 1-101—27-2702). Section 2111(c.1) of The Administrative Code (71 P. S. § 541(c.1)) provides the Board with the authority to make and revise a list of communicable diseases against which children are required to be immunized as a condition of attendance at any public, private or parochial school, including kindergarten. The section requires the Secretary to promulgate the list, along with any rules and regulations necessary to insure the immunizations are timely, effective, and properly verified.

Section 1303a of the Code (24 P. S. § 13-1303a) provides that the Board will make and review a list of diseases against which children must be immunized, as the Secretary may direct, before being admitted to school for the first time. The section provides that the school directors, superintendents, principals, or other persons in charge of any public, private, parochial, or other school including kindergarten, shall ascertain whether the immunization has occurred, and certificates of immunization will be issued in accordance with rules and regulations promulgated by the Secretary with the sanction and advice of the Board.

F. *Effectiveness/Sunset Dates*

The proposed amendments will become effective upon their publication in the *Pennsylvania Bulletin* as final rulemaking. No sunset date has been established. The Department will continually review and monitor the effectiveness of these regulations.

G. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (act) (71 P. S. § 745.5(a)), the Department submitted a copy of this proposed rulemaking on January 24, 2008, to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Health and Human Services Committee and the Senate Public Health and Welfare Committee. In addition to submitting the proposed amendments, the Department has provided IRRC and the Committees with a copy of a Regulatory Analysis Form. A copy of this material is available to the public upon request.

If IRRC has any objections to any portion of the proposed amendments, it will notify the Department by April 9, 2008. The notifications shall specify the regulatory review criteria which have not been met by that portion. The act specifies detailed procedures for review, prior to final publication of the regulations by the Department, the General Assembly and the Governor, of objections raised.

H. *Contact Person*

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed regulation to Heather Stafford, Director, Division of Immunization, Department of Health, 7th and Forster Streets, Harrisburg, PA 17120, (717) 787-5681, by March 10, 2008. Persons with a disability who wish to submit comments, suggestions or objections regarding the proposed rulemaking may do so by using the previous number or address. Speech or hearing, or both, impaired persons may use V/TT (717) 783-6514 or the Pennsylvania AT&T Relay Service at (800) 654-5984 (TT). Persons who require an alternative format of this document may contact Heather Stafford so that necessary arrangements may be made.

CALVIN B. JOHNSON, M. D., M.P.H.,
Secretary

Fiscal Note: 10-181 proposed. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 28. HEALTH AND SAFETY

PART III. PREVENTION OF DISEASES

CHAPTER 23. SCHOOL HEALTH

Subchapter C. IMMUNIZATION

§ 23.82. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Attendance at school—The attendance at a grade, or special classes, kindergarten through 12th grade, including public, private, parochial, vocational, intermediate unit and home education students. **The term does not include the attendance of children at a child care group setting, defined in § 27.1 (relating to definitions), located in a public, private or vocational school, or in an intermediate unit**.

* * * * *

§ 23.83. Immunization requirements.

(a) **[** ***Required for entry.*** **]** ***Duties of a school director, superintendent, principal or other person in charge of a public, private, parochial or nonpublic school.*** **[The following immunizations are required for entry into school for the first time at the kindergarten or first grade level, at public, private or parochial schools in this Commonwealth, including special education and home education programs:**

(1) ***Hepatitis B.*** **Three properly-spaced doses of hepatitis B vaccine or a history of hepatitis B immunity proved by laboratory testing.**

(2) ***Diphtheria.*** **Four or more properly-spaced doses of diphtheria toxoid, which may be administered as a single antigen vaccine, in combination with tetanus toxoid or in combination with tetanus toxoid and pertussis vaccine. One dose shall be administered on or after the 4th birthday.**

(3) ***Tetanus.*** **Four or more properly-spaced doses of tetanus toxoid, which may be administered as a single antigen vaccine, in combination with diphtheria toxoid or in combination with diphtheria toxoid and pertussis vaccine. One dose shall be administered on or after the 4th birthday.**

(4) ***Poliomyelitis.*** **Three or more properly-spaced doses of any combination or oral polio vaccine or enhanced inactivated polio vaccine.**

(5) ***Measles (rubeola).*** **Two properly-spaced doses of live attenuated measles vaccine, the first dose administered at 12 months of age or older, or a history of measles immunity proved by serological evidence showing antibody to measles as determined by the hemagglutination inhibition test or a comparable test. Each dose of measles vaccine may be administered as a single antigen vaccine.**

(6) ***German measles (rubella).*** **One dose of live attenuated rubella vaccine, administered at 12 months of age or older or a history of rubella immunity proved by serological evidence showing antibody to rubella determined by the hemagglutination inhibition test or any comparable test. Rubella vaccine may be administered as a single antigen vaccine.**

(7) ***Mumps.*** **One dose of live attenuated mumps vaccine, administered at 12 months of age or older or a physician diagnosis of mumps disease indicated by a written record signed by the physician or the physician's designee. Mumps vaccine may be administered as a single antigen vaccine.**

(8) ***Chickenpox (varicella).*** **One of the following:**

(i) One dose of varicella vaccine, administered at 12 months of age or older.

(ii) A history of chickenpox immunity proved by laboratory testing or a written statement of a history of chickenpox disease from a parent, guardian or physician.]

Each school director, superintendent, principal or other person in charge of a public, private, parochial or nonpublic school in this Commonwealth, including vocational schools, intermediate units, and special education and home education programs, shall ascertain that a child has been immunized in accordance with subsections (b), (c) and (e) prior to admission to school for the first time.

(b) *Required for attendance.* The following immunizations are required as a condition of attendance at school in this Commonwealth **[if the child has not received the immunizations required for school entry listed in subsection (a)]**.

(1) *Diphtheria.* **[Three] Four** or more **[properly spaced] properly-spaced** doses of diphtheria toxoid, which may be administered as a single antigen vaccine, in combination with tetanus toxoid or in combination with tetanus toxoid and pertussis vaccine. **One dose shall be administered on or after the 4th birthday.**

(2) *Tetanus.* **[Three] Four** or more **[properly spaced] properly-spaced** doses of tetanus toxoid, which may be administered as a single antigen vaccine, in combination with diphtheria toxoid or in combination with diphtheria toxoid and pertussis vaccine. **One dose shall be administered on or after the 4th birthday.**

* * * * *

(4) *Measles (rubeola).* Two **[properly spaced] properly-spaced** doses of live attenuated measles vaccine, **the first dose** administered at 12 months of age or older or a history of measles immunity proved by **[serological evidence showing antibody to measles as determined by the hemagglutination inhibition test or a comparable test] laboratory testing**. Each dose of measles vaccine may be administered as a single antigen vaccine.

(5) *German measles (rubella).* One dose of live attenuated rubella vaccine, administered at 12 months of age or older or a history of rubella immunity proved by **[serological evidence showing antibody to rubella determined by the hemagglutination inhibition test or any comparable test] laboratory testing**. Rubella vaccine may be administered as a single antigen vaccine.

(6) *Mumps.* **[One dose] Two properly-spaced doses** of live attenuated mumps vaccine, administered at 12 months of age or older or a physician diagnosis of mumps disease indicated by a written record signed by the physician or the physician's designee. Mumps vaccine may be administered as a single antigen vaccine.

(7) *Hepatitis B.* Three properly-spaced doses of hepatitis B vaccine, unless a child receives a vaccine as approved by the Food and Drug Administration for a 2-dose regimen, or a history of hepatitis B immunity proved by laboratory testing.

(8) *Chickenpox (varicella).* One of the following:

(i) *Varicella vaccine.*

(A) Required for school entry in kindergarten or the first grade until the school year 2010/2011, 2 properly-spaced doses of varicella vaccine, the first dose administered at 12 months of age.

(B) Required for school attendance until the school year 2010/2011, 2 properly-spaced doses of varicella vaccine for children 13 years of age or older.

(C) Required for school attendance as of the school year 2010/2011, 2 properly-spaced doses of varicella vaccine.

(ii) *Evidence of immunity.* Evidence of immunity may be shown by one of the following:

(A) Laboratory evidence of immunity or laboratory confirmation of disease.

(B) A written statement of a history of chickenpox disease from a parent, guardian or physician.

(c) *Required for entry into 7th grade.* In addition to the immunizations listed in subsection (b), the following immunizations are required at any public, private, parochial or **[vocational] nonpublic** school in this Commonwealth, including **vocational schools, intermediate units and** special education and home education programs, as a condition of entry for students entering the 7th grade; or, in an ungraded class, for students in the school year that the student is 12 years of age:

(1) **[*Hepatitis B.* Three properly-spaced doses of hepatitis B vaccine or a history of hepatitis B immunity proved by laboratory testing.**

(2) *Chickenpox (varicella).* One of the following:

(i) One dose of varicella vaccine, administered at 12 months of age or older.

(ii) Two properly-spaced doses of varicella vaccine for children 13 years of age and older.

(iii) A history of chickenpox immunity proved by laboratory testing, or a written statement of history of chickenpox disease from a parent, guardian, emancipated child or physician.]

***Tetanus and diphtheria toxoid and acellular pertussis vaccine (Tdap).* One dose if at least 5 years have elapsed since the last dose of a vaccine containing tetanus and diphtheria as required in subsection (b).**

(2) *Meningococcal Conjugate Vaccine (MCV).* One dose of Meningococcal Conjugate Vaccine.

(d) *Child care group setting.* Attendance at a child care group setting located in a public, private or vocational school, or in an intermediate unit is conditional upon the child's satisfaction of the immunization requirements in § 27.77 (relating to immunization requirements for children in child care group settings), unless the child is 5 years of age or older. Attendance of a child who is 5 years of age or older at a child care group setting is conditional upon the child's satisfaction of the immunization requirements in this subchapter.

(e) *Prekindergarten programs, early intervention programs and private academic preschools.* Attendance at a prekindergarten program operated by a school district, an early intervention program operated by a contractor or subcontractor including intermediate units, school districts and private vendors, or at private academic preschools is conditional upon the child's satisfaction of the immunization requirements in § 27.77. If a child is 5 years of age or older, the child's attendance shall be conditional upon the child's satisfaction of the immunization requirements set out in subsection (b).

(f) *Grace period.* A vaccine dose administered within the 4-day period prior to the minimum age for the vaccination or prior to the end of the minimum interval between doses shall be considered to be a valid dose of the vaccine for purposes of this chapter.

§ 23.86. School reporting.

(a) A public, private **[or],** parochial **or nonpublic** school **in this Commonwealth, including vocational schools, intermediate units and special education and home education programs,** shall report immunization data to the Department by October 15 of each year, using forms provided by the Department.

(b) The school administrator or the administrator's designee shall forward the reports to the **[Immunization Program, Bureau of Communicable Diseases, Post Office Box 90, Harrisburg, Pennsylvania 17108] Department as indicated on the reporting form provided by the Department**.

* * * * *

(d) **The school administrator or the administrator's designee shall ensure that the school's identification information, including the name of the school, school district, county and school address, is correct, and shall make any necessary corrections, prior to submitting the report.**

(e) [Content] The content of the reports **[shall] must** include the following information:

(1) **[The identification of the school including the name of the school, the school district, the county, the intermediate unit and the type of school.**

(2)] The month, day and year of report.

[(3)] (2) The number of students attending school **[by] in each** grade-level**, or in an ungraded school, in each age group, as indicated on the reporting form**.

[(4) The number of students attending school by grade-level who were completely immunized.]

(3) The immunization status by doses of individual antigens of every enrolled student in each grade-level, or in an ungraded school, in each age group, as indicated on the reporting form.

[(5)] (4) The number of students attending school **[by grade-level]** who were classed as medical exemptions **in each grade-level, or in an ungraded school, in each age group, as indicated on the reporting form**.

[(6)] (5) The number of students attending school **[by grade-level]** who were classed as religious exemptions **in each grade-level, or in an ungraded school, in each age group, as indicated on the reporting form**.

[(7)] (6) The number of students provisionally admitted **to any grade or, in an ungraded school, in any age group**.

[(8)] (7) The number of **[children] students in any grade level** who were denied admission because of **[their] the student's** inability to qualify for provisional admission **or, in an ungraded school, in any age group**.

[(9)] (8) Other information **[as]** required by the Department.

[(e) For purposes of reporting the immunization status of a school's students to the Department, the following grade-levels will be used: kindergarten, grades 1-6, 7-9, 10-12 and special education.]

CHAPTER 27. COMMUNICABLE AND NONCOMMUNICABLE DISEASES

Subchapter C. QUARANTINE AND ISOLATION

COMMUNICABLE DISEASES IN CHILDREN AND STAFF ATTENDING SCHOOLS AND CHILD CARE GROUP SETTINGS

§ 27.77. Immunziation requirements for children in child care group settings.

* * * * *

(d) *Exemptions.*

(1) This section does not apply to the following:

(i) **[Kindergarten] Children attending kindergarten**, elementary school or higher school **who are 5 years of age or older**. These caregivers shall comply with §§ 23.81—23.87 (relating to immunization).

(ii) Children who are known by the caregiver to be **[6] 5** years of age or older or known to attend a kindergarten, elementary school or high school.

* * * * *

[Pa.B. Doc. No. 08-217. Filed for public inspection February 8, 2008, 9:00 a.m.]

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 63]

[L-00070188/57-260]

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

The Pennsylvania Public Utility Commission (Commission) on September 27, 2007, adopted a proposed rulemaking order which sets forth amendments to Chapter 63 to streamline transfer of control and affiliate filings by telecommunications carriers.

Executive Summary

On October 19, 2007, the Commission entered an order initiating a rulemaking aimed at streamlining the review and approval process for mergers and stock transactions under sections 1102 and 1103(a) of the Public Utility Code (*The October Rulemaking Order*). *The October Rulemaking Order* also proposed regulations implementing the affiliate transaction provisions of 66 Pa.C.S. (Chapter 30) (relating to alternative form of regulation of telecommunications services).

The *October Rulemaking Order* responded to the Petition of Level 3, a Pennsylvania Competitive Local Exchange Carrier, seeking abbreviated review of CLEC applications seeking Commission approval under 66 Pa.C.S. §§ 1102 and 1103(a) (relating to enumeration of acts requiring certificate; and procedure to obtain certificates of public convenience). The *October Rulemaking Order* also addressed comments of Verizon, Inc. and the Pennsylvania Telephone Association seeking similar streamlined review for incumbent local exchange carriers.

The Commission initiated the rulemaking because of concerns about the current review and approval process given the pace of technological and corporate change in the telecommunications industry. Currently, the Commission reviews applications seeking approval of acquisitions,

diminutions in control, mergers, stock sales or transfers, and transfers of assets or control of a telecommunications public utility as transactions involving issuance of a certificate of a public convenience under 66 Pa.C.S. §§ 1102 and 1103.

The Public Utility Code provisions do not require a decision by a date certain. Although the Commission is generally able to review and approve most transactions in a reasonable period of time, the increase in their number and the rapid pace of technological change in the telecommunications market warrants consideration of another approach. The Commission is considering the feasibility of shortening the review and approval period to something much less than the current 6-to-9 month period.

The proposed regulations establish a three-tier timeline for Commission review and approvals for mergers and stock transactions for telecommunications public utilities.

Mergers or stock transactions that do not affect rates or conditions of service would be reviewed and approved within 30 days as *pro forma transactions* provided the utility files with the Commission no later than 30 days before the expected closing date. This includes customer transfers.

Mergers or stock transactions that affect rates or conditions of service would be reviewed and approved within 60 days as *general rule transactions* provided the utility files no later than 60 days before the closing date. This includes transfers of customers that involve rates or changes in conditions of service.

The "open ended" review and approval process, currently applied to all review and approvals for any transaction regardless of its complex or routine nature, will be confined to mergers or stock transactions that are complex, controversial or raise difficult questions. The Commission retains the discretion to "reclassify" a *pro forma* transaction as a *general rule* transaction or open-ended transaction, and vice versa.

The proposed regulations also remove a transaction from the 60-day general rule if a statutory advocate (the Office of Consumer Advocate, the Office of Small Business Advocate, or the Office of Trial Staff) files a formal protest, the filing involves a major acquisition or merger between firms with substantial market shares, or when the filing raises novel or important issues. The filing of a general comment or formal protest by a person other than a statutory advocate does not typically reclassify a transaction.

Under the proposed regulations, the applicant files information identical to that sought by the FCC regardless of the nature of the transaction. There are additional Pennsylvania-specific filing requirements which reflect Pennsylvania law and Commission practice. These include the obligation to show the general public benefit in a transaction as required by judicial precedent, appending diagrams illustrating the applicant's organizational structure before and after the transaction to facilitate faster staff review, and confirming that the applicant is complying with Commission rules and regulations. An applicant must keep the Commission informed of any developments while approval is pending, particularly the actions of other state or federal regulators.

Finally, the proposed regulation in § 63.326 implements the minimal affiliate filing requirements under 66 Pa.C.S. § 2101(a) (relating to definition of affiliated interest) for telecommunications public utilities in 66 Pa.C.S. §§ 3016(f)(1) and 3019(f)(1) (relating to competitive services; and additional powers and duties).

Public Meeting held
September 27, 2007

Commissioners Present: Wendell F. Holland, Chairperson; James H. Cawley, Vice Chairperson; Tyrone J. Christy, Statement attached; Kim Pizzingrilli

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; Doc. No. P-00062222

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

Proposed Rulemaking Order

By the Commission:

Before the Commission for disposition is a Petition by Level 3 Communications, LLC (Level 3 Petition). The Level 3 Petition seeks revision to the Commission's rules and procedures governing the transfer of control and affiliate filing requirements under 66 Pa.C.S. §§ 1102(a)(3) and 1103, including the issuance of a Certificate of Public Convenience evidencing Commission approval. The Commission's regulations governing these transfers are set out as application filing requirements in §§ 5.1, 5.11 and 5.43 of our regulations, 52 Pa. Code §§ 5.1, 5.11 and 5.43. Those regulations were recently revised although acquisitions, mergers, and transfers of control or assets were not addressed in detail. Moreover, there has been considerable change in the technology and marketplace for public utility service involving communications. Indeed, the telecommunications industry continues to undergo rapid changes both for incumbent carriers and new competitors, and there appears to be need to update our regulations to allow for more rapid review of proposed transactions, provided that the public interest remains protected. Under these circumstances, we agree that a review and possible revision of our procedures for transfers of control and affiliate transactions is appropriate.

The Level 3 Petition was filed on May 31, 2006. Level 3 provided copies to the Office of Consumer Advocate (OCA), Office of Trial Staff (OTS), and the Office of Small Business Advocate (OSBA) consistent with § 5.41(c) of the Commission's regulations. Level 3 also provided a copy to Verizon Pennsylvania Inc. (Verizon) and the Pennsylvania Telephone Association (PTA) as persons affected, consistent with § 5.41(c).

The Level 3 Petition asks the Commission to initiate a rulemaking to streamline the administrative process by which certificated competitive carriers may complete transfers of control and affiliate transactions. The Level 3 petition proposes revisions to the Commission's current review and approval process that allegedly impose unnecessary and burdensome requirements on non-dominant, competitive carriers. Level 3 contends that the public interest in a competitive environment does not require strict scrutiny of nondominant carriers' transactions as they do not wield control over bottleneck facilities, possess market power, or exercise control over local exchange bottleneck facilities.

Level 3 contends that comments or protests are rarely filed with respect to nondominant carrier transactions. Level 3 also contends that a 3 to 6-month process for securing regulatory approval or a 6-month process following referral to an Administrative Law Judge is untenable in an era of real-time transactions. Level 3 concludes that

revisions are necessary because non-dominant carriers facing important commercial needs have no procedural means to avoid these protracted review periods and notes that even with the proposed revisions the Commission would still retain discretion over the administrative process.

Verizon and PTA filed response comments that support revision of our regulatory procedures governing transfers of control and affiliate transactions. However, both entities contend that any revision apply equally to incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs), including Level 3.

Verizon disputes the Level 3 assertion that any abbreviated procedures should only apply to CLECs because they are non-dominant carriers. Verizon notes that the Federal Communication Commission's (FCC) recent order, *Streamlining Measures for Section 214 Authorizations*, CC Docket No. 01-150 (March 21, 2002) (*Streamlined Regulation Order*) did not prohibit ILEC use of the Federal streamlined procedures. Verizon also notes that in today's telecommunications environment, traditional monopoly wireline services are only one portion of the total market. Verizon agrees with Level 3 that our transfer approval processes have not changed in response to technological change, including the proliferation of wireless communications and voice over internet protocol (VoIP) service. Verizon also filed a Motion for Admission Pro Hac Vice of Leigh A. Hyer, Esquire.

The PTA filed comments nunc pro tunc. The PTA stated that it had expected the Commission to publish the Level 3 Petition, in the *Pennsylvania Bulletin*, for comment.

The PTA's comments agree with Verizon that a streamlined procedure should be applied to all carriers given the proliferation of wireless service, cable company plans to provide communications services, and satellite competition. The PTA notes, in particular, that CLECs currently service over 23% of all wireline access lines in Pennsylvania. PTA argues that such concentration is sufficient to warrant a close examination of the Level 3 request for differential treatment of "nondominant" service providers in this Commonwealth. Finally, the PTA claims that Chapter 30 warrants a streamlined approval process for all carriers given 66 Pa.C.S. § 3011(13)'s goal of reducing regulation on incumbent carriers' similar to that imposed on competitive carriers.

The Commission's last action addressing these issues focused on utility stock transfers reflected in our adoption on October 24, 1994 of a Policy Statement under 66 Pa.C.S. §§ 1102(a), in 52 Pa. Code § 69.901. Although this nonbinding policy statement proved useful in the intervening years in addressing the transactions that require Commission approval, we agree that the evolution of utility regulation since 1994, including the recently reenacted Chapter 30 of the Public Utility Code, warrants a reexamination of our procedures regarding the nature, extent and rapidity of the Commission's approval process.

Upon consideration, we agree that examination of our rules and procedures should include acquisitions, diminution in control, mergers, stock sales or transfers, and transfers of assets or control of a telecommunications public utility, requiring a certificate of public convenience. We also agree that it is necessary to examine affiliate filing requirements.

Consequently, we issue this Proposed Rulemaking Order and seek Comments on our proposed revisions.

Summary of Rulemaking.

The current Commission practice reviews applications seeking approval of acquisitions, diminutions in control, mergers, stock sales or transfers, and transfers of assets or control of a telecommunications public utility as transactions involving issuance of a certificate of a public convenience under 66 Pa.C.S. §§ 1102 and 1103. Our approval lacks a specific mandate for a decision by a date certain. Although the Commission is proficient at reviewing and approving most of these transactions in a reasonable period of time, the increase in their number and the rapid pace of technological change in the telecommunications market warrants serious consideration of whether it is feasible to shorten the Commission's review and approval period for issuing a certificate of public convenience for most transactions to less than the current 6-to-9 month period Level 3 laments in their pleadings.

The proposed regulation retains the discretion to subject some transactions to the traditional review procedures currently associated with 66 Pa.C.S. §§ 1102 and 1103 applications. However, the proposed regulation would make this traditional review procedures an exception instead of the general rule.

The proposed regulation would create a general rule for review and approval within a 60-day period for the vast majority of applications seeking approval for transactions under 66 Pa.C.S. §§ 1102(a)(3) and 1103 of the Public Utility Code involving acquisitions, diminutions in control, mergers, stock sales or transfers, transfers of assets or control of a telecommunications public utility. This general rule commits the Commission to completing review and approval within 60 days of publication in the *Pennsylvania Bulletin*. This general rule would apply to most transactions that also involve changes in conditions of service or rates.

The Commission also proposes to create an even more rapid 30-day review and approval process for pro forma transactions. Pro forma transactions are those 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%. The filing would be made 30 days before closing and Commission approval would issue no more than 30-days after filing or posting on the Commission website.

This proposed regulation establishes a strong presumption in favor of the 60-day general rule given the significant changes in the telecommunications industry and regulation since 1994. For that reason, a reclassification of a transaction from the 60-day general rule would occur only in very limited circumstances. Reclassification is limited because reclassification of a transaction means either a pro forma review period (30 days) or the current traditional review and approval process, which may be considerably longer than 60 days.

A transaction will be removed from the 60-day general rule proposed herein if a statutory advocate files a formal protest, the filing involves a major acquisition or merger between firms with substantial market shares, and where the filing raises novel or important issues. The filing of a general comment or formal protest by persons other than a statutory advocate would not, in most instances, reclassify a transaction. Of course, the Commission retains the discretion to decide otherwise depending on the circumstances.

Moreover, the Commission also reserves the discretion to reclassify transactions in those circumstances where the more extensive review period has competitive impact. In such instances, the Commission prefers to keep the formal protest within the abbreviated 60-day general rule or the shorter pro forma review period to minimize competitive impact, the consumption of scarce resources, and the use of our process for purposes other than addressing the merits of a transaction and determining if the transaction is in the public interest.

Pro forma transactions are transactions that require a certificate of public convenience but are seamless to the customer and do not involve any change in conditions of service or rates as well as transactions that do not reduce an applicant's ownership by more than 10%. The Commission expects that the vast majority of these types of transactions will concern transfers of customer bases, name changes, or de minimus changes in utility stock transfers that do not dilute the controlling interest, and other similarly routine but not complex transactions. In those cases, the applicant will file for approval 30 days before closing a transaction. The Commission will review the transaction within 30 days after the applicant's notice and issue a Secretarial Letter approving the transaction.

The Commission did consider the alternative of allowing a telecommunications public utility to file for approval 30 days after the transaction as at the FCC. The Commission tentatively rejects that approach because it creates a narrow exception to the Commission's longstanding rule that nunc pro tunc filings for approval after a closing do not comply with the Public Utility Code. Those nunc pro tunc filings in the past could, and did, result in penalties. By allowing a filing after a closing, the Commission effectively endorses filings that violate precedent without a compelling reason to do so.

Other transactions, including transfers of a customer base that will result in a change in conditions of service or rates as well as transactions that reduce an applicant's control by more than 10%, will be subject to the 60-day general review and approval period. This provides the Commission with the time needed to examine a transaction's impact and to ensure that appropriate information and customer responses are factored into the Commission's deliberation. This also allows a transaction to proceed apace even if there are some general comments filed that object to the transaction because of changes in the conditions of service or rates. On the other hand, there may be times when a more detailed analysis is appropriate. This 60-day general rule period allows the Commission time to consider both alternatives far better than a 30-day pro forma review period. The 30-day pro forma review period is reserved for transfers of customers that do not involve changes in conditions of service or rates as well as a transaction that does not reduce an applicant's control by more than 10%.

Under the proposed regulations, the applicant files information identical to that sought by the FCC regardless of the nature of the transaction. There are additional Pennsylvania-specific filing requirements which reflect Pennsylvania law and Commission practice. These include the obligation to detail the general public benefit in a transaction, appending diagrams illustrating the applicant's organizational structure before and after the transaction, and confirming that the applicant is complying with Commission rules and regulations. An applicant is also required to keep the Commission informed about federal developments by filing copies of information provided to the FCC and the DOJ.

Importantly, the proposed regulation requires the filing of the same information regardless of the review and approval period. That way, if the Commission would have to reclassify a transaction, the applicant would not experience more delay because of new information filing requirements or incur additional cost to compile new information.

Discussion

The Commission is undertaking this rulemaking because it has been several years since the last revision. Our § 69.901 (relating to Utility Stock Transfer Policy Statement) was issued in 1994. The time since then has brought significant changes to the Commission's jurisdiction and responsibilities, as well as within the utility industry itself. The Commission agrees that the intervening time, changes in technology, and legislative enactments warrant examination of our current rules and practices. The Commission also agrees that streamlining our rules on transfers of control and affiliate filing requirements should be considered.

Level 3 provided a copy of the Level 3 Petition to the Office of Consumer Protection (OCA), Office of Small Business Advocate (OSBA), and the Office of Trial Staff (OTS) consistent with § 5.41(b) of the Commission's recently revised procedural rules. The statutory advocates filed no response to the Level 3 Petition.

The comments received to date, however, reflect considerable disagreement with the scope of the Level 3 Petition even though there is agreement on the need for substantive revisions. The Level 3 Petition seeks revisions in our regulations for competitors but not for incumbents. The Verizon and PTA Comments, on the other hand, support revisions for all providers.

The Reply Comments of Level 3, Verizon, and the PTA demonstrate disagreement in other areas as well. The parties disagree on the intent of Chapter 30 and the impact of the FCC's March 21, 2002 *Streamlined Regulation Order*. The parties also disagree on the meaning and measurement of competition. They further disagree on what role competition should play in determining the scope and content of the Commission's review and approval of transfers of control and affiliated interest requirements.

We agree with Level 3, Verizon, and the PTA that the Commission should address this request to revise our rules and streamline procedures governing the transfers of control and affiliate filing requirements. However, to date, we have limited comment from others.

Upon consideration of comments received to date, we conclude that a proposed rulemaking is appropriate. However, we also want to solicit input from others. Other parties may have different suggestions or subjects that should be included in the proposed rulemaking. Of course, any comments should contain proposed text as well.

The proposed regulation in Annex A, reflects our tentative agreement with the Level 3 Petition proposing a shortened but uniform period of time governing transfers of control and affiliate filing requirements. Unlike the Level 3 Petition, however, we also agree with Verizon and the PTA that the requirements should apply equally to incumbent and competitive carriers.

In addition, Annex A incorporates provisions of the FCC's *Streamlined Order* with due regard for Pennsylvania law and policies. Annex A reflects our conclusion that an abbreviated 60-day review process is appropriate in most circumstances, and that a shorter 30-day review

period is appropriate in certain other circumstances where: (1) the transaction is seamless to the customer and does not involve any change in conditions of service or rates; and (2) the transaction does not reduce an applicant's ownership by more than 10%. Those transactions that do involve changes in conditions of service or rates, as well as transactions involving a reduction in the applicant's control of more than 10%, would get a longer review period with approval coming 60 days after filing.

Nevertheless, these proposed rules would retain the traditional and more extensive review where (1) a protest is filed by a statutory advocate; (2) the filing involves a major acquisition or merger between firms with substantial market shares; (3) the filing raises novel or important issues; and (4) the Commission, in its sole discretion, determines that the traditional review is necessary to protect the public interest.

Given the limited comments received to date, we are discussing our tentative conclusions in order to explain why Annex A deviates from the suggestions provided to date. We also provide a more detailed discussion to better inform parties that may wish to submit comments to this proposed rulemaking.

Extended Discussion of Annex A.

Section 63.321. Purpose. This provision details the types of transactions for which a telecommunications public utility can ask for approval from the Commission. This provision reflects the Commission's statutory authority to issue certificate of public convenience evidence the type of transactions in this section.

Section 63.322. Definitions. The definitions for "affiliated interest," "formal complaint," "formal investigation," "formal proceeding," "incumbent local exchange carrier," "informal complaint," "informal investigation," "informal proceeding," "party," "Pennsylvania counsel," "person," "staff," "statutory advocate" and "verification" reflect definitions contained in the Public Utility Code or the Commission's existing regulations at 52 Pa. Code §§ 1.1, 3.1 and 5.1, et seq. These are not new definitions.

The definitions for "controlling interest" and "diminution in control" are modified versions of definitions set out in the Commission's Policy Statement on Utility Stock Transfers in 52 Pa. Code § 69.901. These are not new definitions either.

The definitions for "carrier," "certificated carrier," and "competitive carrier" reflect existing State and Federal law. The proposed definitions reflect the evolving legal classification and regulatory structures for telecommunications service and information service in particular.

The definitions for "dominant market power," the "Herfindahl-Hirschman Index" ("HHI"), and "predominant market presence" reflect current merger guidelines of the FCC and the DOJ. The "dominant market power" and "HHI" definitions reflect DOJ guidelines on vertical mergers. The "predominant market presence" definition reflects current DOJ merger guidelines on nonvertical mergers.

This approach reflects the view that vertical or nonvertical jurisdictional merger review under 66 Pa.C.S. §§ 1102(a) and 1103 would benefit by Federal law. This approach also reflects the real differences between any service provided by an incumbent compared to a competitor and, equally important, differences between "any service" provided by one competitive carrier or public utility compared to another competitor.[1]

The definition of "pro forma" transactions reflects the FCC's *Streamlined Regulation Order* and the Commission Policy Statement on Utility Stock Transfers. There is a new provision addressing diminutions of the controlling interest of stock based on the 10% rule followed at the FCC. This definition encompasses mundane and repetitive transactions that require a certificate of public convenience but do not involve changes in conditions of service or rates.

Section 63.323. Applicability. The proposed regulation formalizes the scope of relief sought in the Level 3 Petition as well as the Comments and Reply Comments of Level 3, Verizon, and the PTA. This provision is consistent with the Commission's authority to issue a certificate of public convenience granting an application to approve an acquisition, diminution in control, mergers, stock sales or transfers, and transfers of assets or control of a telecommunications public utility under 66 Pa.C.S. §§ 1102(a) and 1103 and Chapter 30.

Section 63.324. Requirements for a telecommunications public utility seeking approval of a general rule transaction under 66 Pa.C.S. §§ 1102(a)(3) and 1103. This proposed section addresses filings seeking approval for the acquisitions, diminutions in control, mergers, stock sales or transfers, and transfers of assets or control of a telecommunications public utility for which Level 3 seeks a different regulatory structure. This provision establishes the 60-day general rule in which Commission review and approval will be completed within 60-days of publication in the *Pennsylvania Bulletin*.

Section 63.324. General rule transaction. The proposed regulation incorporates the parties' suggestion that Commission review mirror Federal review by the FCC and DOJ. The Commission will complete review and approval of a transaction within 60-days notice of publication in the *Pennsylvania Bulletin*. This reduces the current review and approval period.

This is modeled on the FCC practice of dating the FCC's review period from posting at the FCC. In this case, however, web posting is not legal notice. The Commission concluded because these kinds of transactions involve changes in conditions of service or rates, legal notice is preferable because if provides for a quicker review on transactions with issues that are typically of concern to the public: conditions of service and rates.

Section 63.324(a)(1)—(7). The proposed regulation lists the transactions eligible for review under the 60-day general rule. The list is greater than that proposed by the parties. More transactions are included so the Commission can refocus scarce resources on complex, novel, or controversial transactions.

Section 63.324(a)(3) includes any dilution in control greater than 10%. This addresses situations in recent mergers in which there was a significant dilution in a public utility's ownership of stock in the merged or spun-off entity even if there was no loss of control. In those instances, stock ownership was diluted but it never fell below a 51% ownership. In these situations, dilution in voting percentage transfers utility property by reducing but not changing public utility control. These kinds of transactions are included within the regulation because they are transfers of assets even if control is retained.

[1] *Streamlined Regulation Order*, paragraph 28. The FCC carefully distinguishes between applicants that are not dominant with regard to "any service" compared to those that are dominant in one service and not another. This approach apparently reflects federal definitions of service set out in 47 USC 153.

Currently, utility stock transfers in excess of 20% are addressed in the Commission's *Policy Statement on Utility Stock Transfers*, 52 Pa. Code § 69.901 (*Control Policy Statement*). However, a policy statement is not a binding regulation. Moreover, the earlier *Control Policy Statement* uses a 20% threshold compared to the 10% threshold used by the DOJ and the FCC.

The proposed regulation includes telecommunications utility stock transfers within the scope of the regulation as opposed to the 20% reflected in the nonbinding Policy Statement. The 10% threshold is based on the 10% relied on by the FCC in the *Streamlined Regulation Order*[2] and cited by Level 3 in their petition. The proposal also reflects similar decisions by other state regulators on affiliate transactions as well.[3]

Given these considerations, the Commission tentatively concludes that a 10% threshold is consistent with federal law and practice in other states. The Commission also tentatively concludes that use of a uniform standard may be appropriate here because it enhances regulatory predictability and uniformity.

The Commission recognizes that the definition of "affiliated interest" in 66 Pa.C.S. §§ 1102(a)(4) and 2101 in the Public Utility Code rely on a 5% threshold. The *Utility Stock Transfer Policy Statement* uses a 20% threshold. Given this difference in the treatment of threshold percentages, the Commission seeks comment on whether or not the Commission could, and should, implement a uniform 10% threshold for telecommunications transactions.

Section 63.324(a)(4) reflects Verizon's suggestion that any transaction requiring issuance of a certificate of public convenience under 66 Pa.C.S. §§ 1102(a)(3) and 1103 be included within the general rule. Section 63.324(a)(5) incorporates the *Utility Stock Transfer Policy Statement* as well.

Section 63.324(a)(6) brings transfers of a limited class of customer base within the general rule. The class consists only of customer base transfers that contain a change in conditions of service or rates. Otherwise, a transfer of a customer base is treated as a pro forma transfer under § 63.325.

The Commission takes this approach for several reasons. First, the Commission is often concerned with transfers of customer base from a customer impact and education perspective, particularly when there is a change in conditions of service or rates. Although the Commission does not regulate every rate involved in every transfer of a customer base, a service provider's change inevitably triggers a considerable amount of customer inquiries that could be reduced by transparent information.

Our approach is consistent with the FCC's *Streamlined Regulation Order*. The FCC concluded that review of transfers of control that did not involve an acquisition of control, which in Pennsylvania's case includes a transfer of a customer base, should be abbreviated. The FCC no longer treats these kinds of transfers as a "discontinuance of service" but, instead, treats them like a transfer of control.

Our approach also reflects the FCC's concern that transfers of control not be used to circumvent conditions of service or attempt to do indirectly that which cannot be done directly.[4] Customers must be aware of a customer base transfer. However, the filing of a customer comment which is not a formal protest should not automatically remove a transaction from the general rule. That would occur if every negative general comment filed by a customer were treated as a formal protest, regardless of the transaction.

The proposed regulation differentiates between general comments, formal protests that reclassify a general rule transaction, and formal protests that may, but do not automatically, warrant reclassification. General comments should not delay review or reclassify a general rule transaction. Formal protests by a statutory advocate would automatically reclassify a general transaction to either traditional review or, when appropriate, the even shorter-term pro forma review. Formal protests by others could, but will not automatically, reclassify a transaction.

Formal protests trigger formal administrative proceedings. In turn, this results in traditional review under the Public Utility Code. By keeping a transaction within the general rule even if there is a formal protest, the Commission can more quickly ascertain the nature of the protest and whether the protest warrants traditional review or a 60-day review. Of course, § 63.324(a)(7) codifies the Commission's discretion when a formal protest warrants reclassification as being in the public interest.

Unlike our proposal, the FCC includes all transfers of customer base within the pro forma rule. The FCC does not differentiate between transfers of control where there are changes in conditions of service or rates and where there is no such change. The FCC took this approach because the FCC identified "other means to track and contact carriers" regarding such transfers.

The Commission lacks other means to track and contact carriers regarding such transfers, particularly when they involve a transfer of a customer base. For that reason, the Commission's proposed regulation differentiates between transfers of a customer base involving a change in conditions or rates and those that do not. For those that do not involve changes, the proposed regulation takes the FCC approach and subjects the transaction to pro forma review. For those that involve changes, the proposed regulation deviates from the FCC rule but still provides an abbreviated review period. The proposed regulation takes this approach because, in the case of transfers with no changes, the transaction is seamless to the customer.

The Commission agrees with Verizon that seamless transfers requiring a certificate of public convenience without substantive changes should not be subjected to our standard review procedures. The Commission agrees with Verizon that such transactions should be subject only to some kind of pro forma review.

Section 63.324(a)(7) contains a provision that allows the Commission to implement the 60-day rule for other transactions. This allows the Commission to apply this provision to transactions that arise in the future and that do not require the time and resources of an extended proceeding. This also includes pro forma transactions that staff or the Commission reclassified as a general transaction after more closely reviewing the filing.

[2] *Streamlined Regulation Order*, paragraph 30 and n. 65.

[3] *In the Matter of the Review of Chapter 4901:1-6, Ohio Administrative Code*, Case No. 06-1345-TP-ORD (June 6, 2007), Proposed Rule 4901:1-6-09(D) Affiliate Transactions, p. 48.

[4] *Streamlined Regulation Order*, paragraphs 51 and 52.

Section 63.324(b). Reclassification of a general rule transaction. This provision addresses reclassification of a general rule transaction when reclassification is appropriate. There are three issues here.

Section 63.324(b) plainly states that reclassification would favor reclassification to a pro forma classification. The purpose of the proposed regulation is to shorten review not lengthen it unless there is a good reason for doing otherwise. Section 63.324(b)(1)—(3) governs the new "trigger date" for review if a transaction is reclassified. In all instances, the "trigger date" would be the date the Commission informs the applicant of a reclassification. Importantly, these provisions also provide an applicant with a right of appeal directly to the Commission mirroring procedures in § 5.44 of our rules for delegated authority if staff makes a reclassification decision and the applicant disagrees.

Section 63.324(c). Notification requirements for general rule transactions. The proposed regulation contains a revised version of proposals presented by Level 3, Verizon, and the PTA. In some instances, the Commission agrees with Verizon while in others the Commission agrees with Level 3.

Section 63.324(c) establishes that a filing must be submitted no later than 60 days before the closing of any transaction. The Commission agrees with Verizon on the need for a viable period to trigger review. The Commission also recognizes that an applicant seeks approval on or right at the closing, not significantly after. By allowing a filing to occur 45, 30 or 15 days before a closing, the 60-day review period would extend beyond the closing. This seems counter to what the applicants seek and for that reason the proposed regulation contains a "trigger date" for filing 60 days before closing a transaction. That way, barring some unforeseen event, an applicant will have Commission approval on or shortly near the anticipated closing date that drove the filing in the first place.

Sections 63.324(c)(1)—(4) reflect the suggestion of Level 3 and Verizon that a simultaneous filing be made at the time that any filing is made with the FCC or the DOJ. This makes sense from a consistency perspective although the Commission seeks comment on the proposal.

The provision also implements additional notification requirements on updating filings different from those proposed by Level 3 and Verizon in three instances. The Commission requires the applicant to provide notice to the statutory advocates as well as the Commission.

That is because Pennsylvania, unlike the FCC, has autonomous institutions legally charged with representing the interests of discrete customer classes or the public interest. Consequently, notification to those advocates when a filing is made with the Commission seems advisable so that the concerns they might have are quickly presented and not presented very late in a proceeding and then only after they learn about a transaction.

Section 63.324(c)(1)—(3) requires notification if there are other Federal or State proceedings involved. Section 63.324(c)(4) requires simultaneous notification of any filing made by a party in response to regulatory action by other State or Federal regulators at the suggestion of others. This provision keeps the proceeding in Pennsylvania informed about the transaction's progress before other regulatory bodies. Depending on developments in those jurisdictions, the Commission may conclude that reclassification of a transaction from this subchapter is appropriate as a matter of public interest. An updated information filing requirement makes is easier for the Commission to conduct abbreviated review while staying informed of developments.

Section 63.324(c)(5) requires notification if the Commission requires it in response to a request. The first would be at the request of a statutory advocate. The second would be at the request of another telecommunications public utility. The third and fourth are at the request of staff or a person or party with a stake in the transaction other than mere curiosity.

These provisions collectively allow simultaneous notification when a party does not file a protest or delay a proceeding but wants to keep abreast about a transaction. This provision provides an alternative to a formal adjudicatory proceeding in response to every protest, particularly if there is a desire just for updates.

This would include cases where reclassification is not in the public interest, particularly when there is competitive impact. This also reduces the temptation to misuse traditional review. Consequently, we propose this viable and less expensive way of keeping a proceeding on track without reclassifying a transaction to accommodate every formal protest and general objection, particularly when doing so invites concessions that are later removed in response to antitrust concerns of other regulators like the DOJ.[5]

Section 63.324(d). Contents of notification for general rule transactions. This provision details the filing requirements for abbreviated review. The proposed regulation is more extensive than that proposed by Level 3, Verizon, or the PTA. It incorporates the filing requirements in § 5.14 of the Commission's Rules of Administrative Practice and Procedure, which promotes regulatory consistency.

This provision reflects the more detailed information requirements the FCC imposed on applicants for streamlined review in the *Streamlined Regulation Order*.[6] The Commission's review of the *Streamlined Regulation Order* identified significant information requirements beyond those identified by Level 3, Verizon, and the PTA. The Commission agrees that regulatory uniformity and predictability warrants requiring at a minimum the same information required by the FCC because it expedites review.

Section 63.324(c)(11) contains a list of affirmative benefits that an applicant must describe to the Commission. This requirement facilitates the Commission's compliance with the obligation under Pennsylvania law, set out in *City of York v. Pennsylvania Public Utility Commission*, 295 A.2d 825 (Pa. 1972), requiring that a transaction under 66 Pa.C.S. § 1102 demonstrate an affirmative public benefit. This provision also allows the Commission to effectively determine what, if any, conditions may be appropriate under 66 Pa.C.S. § 1103 in order to meet this requirement.

Section 63.324(e). Continuing obligations for notification of general rule transactions. This provision reflects the Commission's agreeing with Verizon that updates are necessary and appropriate. This proposed revision also supplements the Verizon suggestions by including notice of orders or subsequent actions by the FCC or DOJ. This

[5] *Telephone Company in Pennsylvania Eliminates Provisions Restricting Competition to Address Justice Department Concerns, Procompetitive Changes to Rural Incumbent Telephone Company's Settlements with New Entrants Will Deter Misuse of Regulatory Challenges and Benefit Rural Pennsylvania Telephone Customers*, United States Department of Justice, Antitrust Division, Press Release 07-448, June 25, 2007 (*Pennsylvania Telco Release*).

[6] 52 Pa. Code § 5.14(a); *Streamlined Regulation Order*, paragraphs 16 and 17.

approach maximizes information that should be provided to the Commission given the abbreviated review compared to the standard review procedures.

Section 63.324(f). Commission publication of general rule transactions. This provision incorporates current publication requirements for applications under § 5.14 of the Commission's Rules of Administrative Practice and Procedure. The provision requires notice to consumers for transfers of a customer base.

Section 63.324(f)(1) and (2) establish the minimum publication requirements. The rules would draw a distinction between a general comment and a formal protest following notice to the public. This distinction allows the Commission to consider whether simultaneous notice under § 63.324(c) may be a better approach. This distinction also allows the Commission to consider some pleadings more in the nature of a general comment than a formal protest, particularly if that means an adjudicatory proceeding and traditional review.

Moreover, § 63.324(f)(2)(ii) provides that even if the pleading is a formal protest, it will not necessarily reclassify a transaction and result in an adjudicatory proceeding and traditional review. Depending on the circumstances, the formal proceeding could be abbreviated. However, in instances where the statutory advocate files a formal protest, § 63.324(f)(2)(iii) recognizes that the legal authority of those advocates warrants a more considered approach that would most likely require formal proceedings and a reclassification to accommodate that.

Section 63.324(g). Telecommunications public utility notice to customers. Section 63.324(g)(1) requires the applicant to prepare and distribute a public notice with the approval of the Commission's Bureau of Consumer Services (BCS). BCS' involvement is appropriate because the transaction involves changes in conditions of service or rates, items of probable interest to customers. Moreover, BCS' involvement makes it more probable that a notice would be understandable to consumers. That, in turn, should encourage general comments as opposed to formal protests.

Section 63.324(g)(2)(i)—(iv) takes an approach to pleadings in response to a telecommunications public utility's notice similar to that taken in response to a Commission publication of a transaction. The regulation distinguishes between a general comment that does not involve a formal protest and formal protests. Section 63.324(g)(2)(ii) provides that a general comment would not reclassify a transaction nor constitute a formal protest. Section 63.324(g)(2)(iii) and (iv) distinguishes between formal protests filed by a statutory advocate, which would probably require reclassification and a more formal adjudicatory proceedings, and the formal protests of others that might not.

Section 63.324(h). *Commission review of transactions subject to the general rule.* This provision formalizes the Commission's discretionary authority under 66 Pa.C.S. 1102(a)(3) and 1103, particularly regarding the imposition of conditions for approval of the transactions when such conditions are in the public interest. Discretion on the matter of conditions would also be consistent with due process because parties have notice and an opportunity to be heard notwithstanding the abbreviated review period.

Section 63.324(i). Formal protests to a general rule transaction. This provision allows the filing of a formal protest. The filing requirements are set out in the Commission's Rule of Practice and Procedure.

Section 63.324(j). Reclassification of a transaction from the general rule. This provision recognizes that some transactions may have to be reclassified from the general rule and reclassified as a pro forma transaction or a transaction subject to traditional review under 66 Pa.C.S. §§ 1102 and 1103. This provision recognizes that there are cases where a general comment or formal protest should warrant reclassification and traditional review. This also ensures that the mere filing of a general comment by a consumer is not tantamount to a formal protest requiring traditional review.

Section 63.324(j)(1) reflects the fact that the formal protest of a statutory advocate will usually result in reclassification but a formal protest by others could, but would not automatically, result in a reclassification. Section 63.324(j)(2) and (3) provide that major acquisitions by and mergers between telecommunications firms with substantial market share or those raising novel or important issues are likely candidates for reclassification. And, finally, subsection (j)(4) provides that the Commission may determine that a given application should be reclassified to provide for a more extensive traditional review when, in its sole discretion, it is necessary to protect the public interest.

Section 63.324(k). Commission approval for a general rule transaction. This provision establishes the 60-day review and approval period for general rule transaction triggered by publication in the *Pennsylvania Bulletin*. This reflects the concern of Level 3, Verizon, and the PTA that review beyond the federal time period must be reduced.

This provision is consistent with the approach taken in the FCC's *Streamlined Regulation Order*. Although the petitioners requested abbreviated review within 15 days after filing, the proposal rejects that suggestion. The *Streamline Regulation Order* proposed a 60-day review period for dominant carriers but adopted a uniform 30-day review period. The public is allowed to file comments and replies within the 30-day period. Comments and replies are not the same thing as a formal protest. For that reason, the Commission proposes a review period longer than that adopted by the FCC.

Moreover, the proposed regulation is consistent with the *Streamlined Regulation Order* which dates the review period from the time an application is posted for comment. The FCC does not use the application's filing day as the trigger for FCC review.[7] The proposed regulation established a 60-day review period dating from public notice in the *Pennsylvania Bulletin* in the way the FCC triggers review from posting at the FCC.[8]

The *Streamlined Regulation Order* established a 30-day review period for non-dominant carriers but retained a 60-day review period for dominant carriers. Level 3 wants a 15-day review period but only for competitors. Verizon wants an identical review and approval period.

Given these considerations, the 60-day period will apply equally to all carriers, incumbent or competitive. This period provides a less-costly alternative to a 6 to 9-month process if there is a formal protest. Finally, this gives the Commission a reasonable review period to address any formal protests and to conduct a more thorough analysis. This includes consideration of any conditions needed to meet the City of York standard and analysis of restrictions on market entry.

[7] *Streamlined Regulation Order*, paragraph 22.
[8] *Streamlined Regulation Order*, paragraph 19.

Section 63.324(l). *Limitations on general rule transactions*. This concluding provision addresses bankruptcy and the possible misuse of pro forma transactions.

Section 63.325(l)(1) excludes bankruptcy proceedings from pro forma treatment. Bankruptcy filing requirements are addressed in the Commission's regulations in §§ 1.61 and 1.62. The Commission sees no compelling reason to revisit that provision at this time. Section 63.325(l)(2) prohibits a carrier or public utility from using this pro forma provision to circumvent existing obligations consistent with the FCC's *Streamlined Regulation Order*.[9]

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. This provision addresses pro forma changes when a carrier or public utility undergoes restructurings that also require a certificate of public convenience. This provision reflects Verizon's suggestions on the matter as well as the *Streamlined Regulation Order* and more recent concerns with transfers of a customer base.

Section 63.325(a). Pro forma transactions. This provision provides that pro forma review and approval would apply to a transaction that does not involve changes in conditions of service or rates as well as transactions which do not reduce an applicant's control by more than 10%. Since there is no rate change or service conditions involved, the general public interest in these kinds of transactions is usually far less than a transaction involving rates or conditions of service.

Section 63.325(b). Reclassification of a pro forma transaction. This provision mirrors the § 63.324(b) provision addressing reclassification of a general rule transaction. In this provision, as there, reclassification can result in two possibilities. In this case, however, the results can be either a general rule classification or a traditional review and approval.

This provision requires a reclassification to be in writing. This provision also provides that any reclassification in writing by staff has a right of appeal using procedures for an appeal of staff in § 5.44 of our rules. This appeal, unlike a § 5.44 appeal however, operates independent of delegation although, like § 5.44, the process would be identical.

Section 63.325(c). Notification requirements for pro forma transactions. This provision mirrors the provision in § 63.324(c) for notification in general rule transactions. The reasoning here is similar to the reasoning there. A simultaneous notice requirement to the Commission and the statutory advocates or others constitutes a cost-effective way to keep informed while keeping a transaction on track. This should minimize the use of formal protests to reclassify a transaction just to stay informed or, possibly, misuse this process notwithstanding any competitive impact. This provision allows the Commission to keep a concerned party informed by means other than being a party to traditional review in a formal adjudicatory proceeding.

Section 63.325(d). Content of notification for pro forma transaction. This provision also mirrors the § 63.324(d) provision addressing the filing requirements for a general rule transaction. This provision provides the same detailed list of filing information that a telecommunications public utility must submit when seeking Commission approval. This list reflects current Federal requirements and information the Commission needs to help make a finding that a transaction will affirmatively benefit the public in some substantial way as required by Pennsylvania law. Finally, the list reflects staff information needs that greatly facilitate a prompt and cost-effective review.

Section 63.325(e). Continuing obligations for notification of pro forma transactions. This provision also mirrors § 63.325(e) provisions for general rule transactions. This provision essentially requires an applicant to keep the Commission informed about subsequent developments in other jurisdictions on the transaction if those developments related to the transaction pending at the Commission.

Section 63.325(f). Commission publication of pro forma transaction. This provision addresses Commission publication about these transactions. However, the publication requirements are markedly different from those for the general rule in § 63.324(f) because pro forma transactions are more mundane and involve no changes in conditions of service or rates that might be of interest to the general public.

Section 63.325(f)(1)—(3) does not require publication in the *Pennsylvania Bulletin* nor a formal protest period. The Secretary has the discretion, not the obligation, to post a transaction on the Commission's web site. Depending on the circumstances, the Secretary can solicit general comments but not formal protests unless the Commission determines otherwise for good cause shown. Typically, these kinds of transactions do not involve pressing issues of general public interest.

However, there may be exceptions. In those cases, § 63.325(f)(4) allows the Commission to exercise discretion and treat a pro forma transaction like a general rule transaction when it comes to publication. A pro forma transaction subject to general rule publication requirements will have to be published in the *Pennsylvania Bulletin* and solicit general comments or formal protests, in addition to any other requirements.

Section 63.325(f)(4)(i)—(iii) creates the same three categories of pleadings in response to a publication as in the provisions for a general rule transaction. There are general comments, formal protests that may not reclassify a transaction, and formal protests that will reclassify a transaction. General comments would not reclassify a transaction or constitute a formal protest because they are, typically, concerns of the public not related to rates or changes in conditions of service. Formal protests by a statutory advocate would reclassify a transaction and would constitute a formal protest given the statutory advocate's distinct legal authority and constituency representation obligations. Formal protests by entities other than the statutory advocates could, but in most cases would not, constitute a formal protest. The fact that it is a formal protest does not mean the transaction will be reclassified unless the Commission determines otherwise for good cause shown.

Section 63.325(g). Telecommunications public utility notice to customers. This provision addresses information the applicant provides to the public. Since these transactions do not involve changes in service conditions or rates, the regulation authorizes the applicant to prepare and distribute a notice to the customers. But, as with notice for a general rule transaction in § 63.324(g), the applicant must provide notice before the Commission approves the transaction unless that is not practical. This approach ensures that the Commission and the public are informed about a transaction in a way that does not undermine the abbreviated review and approval goals of this rulemaking.

[9] *Streamlined Regulation Order*, paragraph 52.

Section 63.325(h). Commission review of pro forma transactions. This provision formalizes the Commission's discretionary authority under 66 Pa.C.S. §§ 1102(a)(3) and 1103, particularly regarding the imposition of conditions when they are needed to justify approving a transaction as in the public interest. Conditions are consistent with due process. The parties expressly have notice and an opportunity to be heard notwithstanding the abbreviated review period.

Section 63.325(i). Protests to a transaction subject to the general rule. This provision allows the filing of a formal protest. The filing requirements are set out in the Commission's Rule of Practice and Procedure.

Section 63.325(j). Removal of a transaction as a pro forma transaction. This provision recognizes that some transactions may have to be reclassified from a pro forma transaction into either a general rule transaction or a transaction subject to traditional review under 66 Pa.C.S. §§ 1102 and 1103. This provision recognizes that there are cases where a general comment or formal protest might warrant reclassification into traditional review. Conversely, this ensures that the filing of a general comment is not tantamount to a formal protest.

Section 63.325(j)(1) reflects the fact that the formal protest of a statutory advocate will usually result in reclassification but a formal protest by others could, but would not automatically, result in a reclassification. Section 63.325(j)(2) and (3) provides that major acquisitions by and mergers between telecommunications firms with substantial market share or those raising novel or important issues are likely candidates for reclassification. Section 63.325(j)(4) codifies the Commission's discretion to reclassify a transaction when doing so is in the public interest. And, finally, subsection (j)(4) provides that the Commission may determine that a given application should be reclassified to provide for a more extensive traditional review when, in its sole discretion, it is necessary to protect the public interest.

Section 63.325(k). Commission approval for a pro forma transaction. This provision establishes the 30-day review and approval period for pro forma transaction following filing with the Commission or posting on the Commission's web site, whichever is longer. This responds to the concern of Level 3, Verizon, and the PTA that review beyond the Federal period must be reduced.

This provision tracks the approach taken in the FCC's *Streamlined Regulation Order*. Although the petitioners requested review within 15 days after filing, the proposal rejects that suggestion. The *Streamline Regulation Order* proposed a 60-day review period for dominant carriers but adopted a uniform 30-day review.

The FCC allows the public to file comments and replies within the 30-day period. Comments and replies are not the same thing as a formal protest. For that reason, the Commission proposes a review period longer than that adopted by the FCC. Unlike the FCC, moreover, the proposed regulation does not distinguish between "dominant" and "nondominant" applicants but provides the same filing options to all applicants.

The proposed regulation tracks with the *Streamlined Regulation Order*. The FCC dates the review period from the time an application is posted for comment and the FCC does not use the application's filing day as the trigger for FCC review.[10]

The proposed regulation established a 30-day review period dating from filing with the Commission (unlike the FCC) or posting on the web site (like the FCC but not yet available at the Commission as at the FCC). This is similar to the way the FCC triggers review from posting at the FCC.[11]

The *Streamlined Regulation Order* established a 30-day review period for nondominant carriers but retained a 60-day review period for dominant carriers. Level 3 wants a 15-day review period but only for competitors. Verizon wants an identical review and approval period.

The proposed regulation adopts Verizon's regulatory parity suggestion regardless of a carrier's "dominant" or "nondominant" role in the market. This is consistent with the FCC's *Streamlined Regulation Order*.[12]

This also reflects real differences between CLECs and incumbent carriers in Pennsylvania markets.[13] There are real differences between "nondominant" CLECs as well. Nondominant CLECs with a predominant market presence in related markets, like markets for access to internet transmission backbones, occupy a position in Pennsylvania markets that is very different than a nondominant CLEC with no transmission backbone.

The 30-day review and approval period is substantially shorter than the traditional rule for acquisitions, diminution in control, mergers, stock sales and transfers, transfers of assets or control of a telecommunications public utility, and utility stock transfers. The 30-day review period accommodates the differences between incumbents and CLECs as well as differences between CLECs. An ILEC traditionally has a more extensive presence in their service territory compared to new CLEC entrants. By the same token, however, a reseller CLEC without access to a corporate affiliate's assets, like an internet transmission backbone or a long-standing wireline operation, is not in the same market position as a CLEC with access to those assets. The proposed "equality of review and approval" regulation reflects those situations.

This regulation treats all applicants equally since all telecommunications public utilities could benefit from a general review and approval period, a pro forma review and approval period, and traditional review and approval. This is a marked improvement over subjecting all transactions to traditional review.

Given these considerations, we conclude that a 30-day period should be equally available to all telecommunications public utilities, incumbent or competitive. This period provides a less-costly alternative to traditional review and approval which can allegedly take 6-to-9 months to complete, particularly if there are formal protests.

Section 63.325(k)(1)—(3) addresses the mechanics of approval. Section 63.325(k)(1) provides that the Commission will issue a Secretarial Letter or order approving a transaction. Section 63.325(k)(2) recognizes that staff may need to extend a review period, reclassify a transaction, or take other action deemed appropriate to the circumstances. Section 63.325(k)(3) provides that final staff action shall be taken in writing and subject to an appeal of staff which shall be stated in the writing informing the applicant of the decision.

Section 63.325(l). Limitations on pro forma transactions. This concluding provision addresses bankruptcy and the possible misuse of pro forma transactions.

[10] *Streamlined Regulation Order*, paragraph 22.

[11] *Streamlined Regulation Order*, paragraph 19.

[12] *Streamlined Regulation Order*, paragraph 21.

[13] *Pennsylvania Telco Release*, Department of Justice Release 07-448, June 25, 2007.

Section 63.325(l)(1) excludes bankruptcy proceedings from pro forma treatment. Bankruptcy filing requirements are addressed in the Commission's regulations in §§ 1.61 and 1.62. The Commission sees no compelling reason to revisit that provision at this time.

Section 63.325(l)(2) prohibits a carrier or public utility from using this pro forma provision to abandon existing conditions of service, like payment dates and penalty provisions, or embed a rate change in an otherwise seamless transaction. This is consistent with the FCC's *Streamlined Regulation Order*.[14]

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

This provision reflects Level 3's request to codify the limited affiliated interest review and approval authority of the Commission under Chapter 30 of the Public Utility Code. Level 3 and Verizon agree on this point.

This provision, however, reflects our agreement with the comments although the provision reiterates the Commission's authority to monitor and prohibit the use of noncompetitive services to subsidize competitive services under section 3016(f)(1). This provision reflects the discretion the Commission has to conduct the necessary reviews, audits or other necessary action so long as the Commission does so consistent with due process. As with Section 63.324, the Commission would exercise this discretionary authority only upon notice and opportunity to be heard.

Additional Issues

The FCC's *Streamlined Order* addressed other issues not discussed heretofore that may warrant resolution in this rulemaking.

The first issue is the FCC's distinction between "presumptively streamlined" matters involving CLECs and "eligible for streamlining" matters involving incumbent carriers even though both are subject to a 30-day review and approval period. In particular, the Commission seeks comment on whether the list set forth in paragraph 28 of the *Streamlined Order* should be the basis for distinguishing between "presumptively streamlined" and "eligible for streamlined" treatment in this Commonwealth.

The second issue is whether there should be an opportunity to provide comments and reply comments in response to an application. The FCC permits this in its regulations. The Commission's regulations anticipate a protest period which includes an opportunity to file a general comment that would not constitute a formal protest and would not reclassify a transaction.

The Commission seeks comment on whether the regulation should incorporate a comment and reply comment period within the 60-day review period for a general rule and pro forma transaction. The Commission is particularly interested in comments on whether, and how, a comment and reply period could substitute for the filing of a formal protest or objection consistent with Pennsylvania law. This approach minimizes the need for a full-blown formal administrative adjudication but is also responsive to due process and formal protests in an efficient manner.

The third issue is Commission review and approval. The proposed general rule completes review and approval within 60 days for most transactions under 66 Pa.C.S. §§ 1102(a)(3) and 1103. General rule transactions require prior approval within a 60-day period dating from publication in the *Pennsylvania Bulletin*. Pro forma review is completed within 60 days, but notice is not required until 30 days before the transaction is completed. The Commission retains discretion to reclassify any transaction as well.

One way to accomplish review or reclassification is to charge staff with reviewing and addressing the transaction or making any reclassification decisions. Staff would issue a Secretarial letter on any final staff decision. A staff decision would be expressly subject to appeal mirroring the procedures set out in § 5.44 of our regulations, even though there is no delegation of Commission authority, so that an applicant can appeal a staff action and thereby ensure final action by the Commission at Public Meeting.

A second option is for staff to conduct a review and prepare a recommendation for disposition at public meeting regardless if the transaction is traditional, general, or pro forma. This requires a detailed level of oversight for many transactions that may not necessarily warrant such oversight.

Another concern is transactions involving less than 2% of the nation's subscribers or, in Pennsylvania's case, every carrier except Verizon. The FCC's *Streamlined Regulation Order* subjects those transactions to abbreviated review unless the transaction involves service areas adjacent to each other. Neither Level 3, PTA, nor Verizon addressed rural carrier issues. The Commission seeks comment on whether, and how, rural carrier transactions could be treated under the regulation.

Finally, the Commission recognizes that there may be other issues or suggestions beyond those set out in this order and Annex A. The Commission encourages comment on any other appropriate issue. The Commission asks that members of the public providing any comment also provide proposed language as well.

Due to the complexities of a rulemaking addressing transfers of control and affiliate filing requirements, particularly in light of 66 Pa.C.S. Chapter 30, interested members of the public will be given 60 days from the date of publication of Annex A in the *Pennsylvania Bulletin* to file comments. The Commission is committed to considering revisions in a timely fashion. Since the comment period is a generous one, extensions of time will not be granted absent compelling reasons.

Procedural Issues

This proceeding arose as a petition for rulemaking under 52 Pa. Code. §§ 1.5, 5.11 and 5.43 of our Rules of Administrative Practice and Procedure. The Level 3 Petition was not published in the *Pennsylvania Bulletin* although the Commission did receive some comments and replies on the Level 3 Petition. Verizon also filed a motion seeking the pro haec vice admission of Attorney Leigh A. Hyer, Esquire.

Additionally, the Commission received numerous updates on decisions from other jurisdictions from Level 3. There were decisions from Louisiana, North Carolina, Minnesota, Ohio and Texas. In June 2007, Level 3 provided a press release indicating that Level 3's network and transmission backbone is so extensive that Pennsylvania selected Level 3 as the exclusive network provider

[14] *Streamlined Regulation Order*, paragraph 52.

for Wall Street West, a Federal and Pennsylvania-funded initiative to provide back-up systems to New York City's financial institutions.[15]

We will grant Verizon's motion for admission pro haec vice under § 1.22(b) of our regulations. The Commission will also incorporate all pleadings and filings to date into the record of this rulemaking proceeding.

Accordingly, under the Public Utility Code, 66 Pa.C.S. §§ 502, 1102—1103, 2101—2107 and 3019; the Commonwealth Documents Law (45 P. S. §§ 1201 and 1202), and the regulations promulgated thereunder; section 204(b) of the Commonwealth Attorneys Act (71 P. S. § 732.204(b)); and section 5 of the Regulatory Review Act (71 P. S. § 745.5); the Commission proposes adopting the regulations set forth in Annex A, therefore,

It Is Ordered That:

1. The Motion for Admission pro haec vice of Leigh A. Hyer, Esquire, is granted.

2. The pleadings and filings filed to date on the Level 3 Petition are incorporated into the record of this proceeding.

3. A rulemaking proceeding is hereby initiated at this docket to consider the adoption of new regulations appearing as Subchapter O, §§ 63.321—63.326.

4. The Secretary shall submit this order and Annex A to the Office of the Attorney General for review as to form and legality and to the Governor's Budget Office for review of fiscal impact.

5. The Secretary shall certify this order and Annex A for review and comments to the Independent Regulatory Review Commission and Legislative Standing Committees.

6. The Secretary shall certify this order and Annex A with the Legislative Reference Bureau to be published in the *Pennsylvania Bulletin*.

7. Interested parties shall have 60 days from the date of publication in the *Pennsylvania Bulletin* of the notice of proposed rulemaking to file written comments and replies to comments 30 days after filing written comments.

8. Parties filing comments or reply comments should, where appropriate, include a numerical reference to the proposed regulations as set forth in Annex A, should include proposed language for revision, and should provide a clear explanation for the recommendation.

9. Interested parties should file an original plus 15 copies of each comment and reply comment to the Secretary, Pennsylvania Public Utility Commission, P. O. Box 3265, Harrisburg PA 17105-3265. Comments should be filed in Word format and mailed electronically to joswitmer@state.pa.us.

10. A copy of this order and Annex A shall be served on all certificated telephone utilities subject to the Commission's jurisdiction.

11. The Commission's contact person on this matter is Assistant Counsel Joseph K. Witmer, (717) 787-3663.

JAMES J. MCNULTY,
Secretary

Fiscal Note: 57-260. No fiscal impact; (8) recommends adoption.

[15] Level 3 Selected as Exclusive Network Provider for the Commonwealth of Pennsylvania's "Wall Street West," Level 3: Broomfield, CO, (June 7, 2007).

STATEMENT OF TYRONE J. CHRISTY

Before the Commission for consideration is Law Bureau's recommendation to grant, in part, the Level 3 petition regarding amending our regulations to streamline the transfer of control and affiliate filing requirements for competitive telecommunications carriers. The Law Bureau recommends that the Commission issue a Notice of Proposed Rulemaking to amend Chapter 63 of the Commission's regulations to streamline procedures for the review of transfers of control and affiliated filings for all telecommunications carriers.

I am pleased that the Commission is granting this petition to permit at comprehensive examination of our current procedures to review and approve transfers of control and affiliated filings for all telecommunications carriers. I believe that the commencement of a notice of proposed rulemaking in this matter moves the discussion in the right direction by examining our current procedures and possibly modifying them to provide options for adequate review and analysis of both simple and complex matters while providing proper safeguards and protecting the public interest. In doing so, it may permit this Commission to develop a process that will provide the necessary, but expeedited, regulatory approvals to keep pace with the rapid changes in the telecommunications marketplace.

I look forward to reviewing the comments submitted in response to the notice of propose rulemaking so that this Commission can determine whether streamlined, yet comprehensive, procedures are appropriate to approve these types of transactions for all telecommunications carriers.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 63. TELEPHONE SERVICE

Subchapter O. ABBREVIATED PROCEDURES FOR REVIEW OF TRANSFER OF CONTROL AND AFFILIATE FILINGS FOR TELECOMMUNICATIONS CARRIERS

Sec.
63.321. Purpose.
63.322. Definitions.
63.323. Applicability.
63.324. Commission approval of a general rule transaction subject to 66 Pa.C.S. §§ 1102(a)(3) and 1103.
63.325. Commission approval of a pro forma transaction subject to 66 Pa.C.S. §§ 1102(a)(3) and 1103.
63.326. Approval of contracts between a carrier or public utility and an affiliated interest under 66 Pa.C.S. §§ 2101(a), 3016(f)(1), and 3019(b)(1).

§ 63.321. Purpose.

This subchapter establishes cost-effective review and approval periods that abbreviate the traditional time for approving transactions involving an acquisition, diminution in control, merger, stock sales or transfers, transfer of assets or transfer of control of a telecommunications public utility requiring a certificate of public convenience under 66 Pa.C.S. § 1102(a)(3) (relating to enumeration of acts requiring certificate) or approval of a contract between 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) (relating to definition of affiliated interest).

Carrier—An entity defined as a "public utility" in 66 Pa.C.S. 102 (relating to definitions) or defined as a "public utility" in 66 Pa.C.S. § 102 and certificated by the Commission under 66 Pa.C.S. § 1102(a).

Competitive carrier—An entity that provides information service or telecommunications service as defined in section 3 to the Telecommunications Act of 1934 (47 U.S.C.A. § 153), or an alternative service provider as defined in 66 Pa.C.S. § 3012 (relating to definitions) 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 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 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 § 1.8 (relating to definitions) of the Commission's rules of practice and procedure.

Formal investigation—The term as defined in § 1.8 of the Commission's rules of practice and procedure.

Formal proceeding—The term as defined in § 1.8 of the Commission's rules of practice and procedure.

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 section 3(26) of the Telecommunications Act of 1934 or a local exchange telecommunications company as defined in 66 Pa.C.S. § 3012 including a certificated carrier under 66 Pa.C.S. § 1102(a).

Informal complaint—The term as defined in § 1.8 of the Commission's rules of practice and procedure.

Informal investigation—The term as defined in § 1.8 of the Commission's rules of practice and procedure.

Informal proceeding—The term as defined in § 1.8 of the Commission's rules of practice and procedure.

Party—The term as defined in § 1.8 of the Commission's rules of practice and procedure.

Pennsylvania legal counsel—The attorney of record appearing before the Commission as required under §§ 1.21 and 1.22 (relating to appearance; and appearance by attorney or certified legal intern) of the Commission's rules of practice and procedure.

Person—The term as defined in § 1.8 of the Commission's rules of practice and procedure.

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 nonhorizontal merger guidelines of the United States 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 § 1.8 of the Commission's rules of practice and procedure.

Statutory Advocate—The term as defined in § 1.8 of the Commission's rules of practice and procedure.

Telecommunications public utility—An entity that provides information service or telecommunications service as defined in section 103 of the Telecommunications Act of 1934 or 66 Pa.C.S. § 3012 or as a carrier.

Verification—The term as defined in § 1.8 of the Commission's rules of practice and procedure.

63.323. Applicability.

This subchapter applies to a telecommunications public utility seeking Commission approval for an acquisition, diminution in control, merger, stock sales or transfers, transfer of assets or transfer of control of a telecommunications public utility requiring a certificate of public convenience under 66 Pa.C.S. § 1102(a)(3) (relating to enumeration of acts requiring certificate) or approval of a contract between public utilities and affiliates.

§ 63.324. Commission approval of a general rule transaction subject to 66 Pa.C.S. §§ 1102(a)(3) and 1103.

(a) *General rule transactions.* The following transactions of a telecommunications public utility involving a change in conditions of service or rates that seeks Commission approval for acquisition, diminution in control, merger, stock sales or transfers, transfer of assets or transfer of control of a telecommunications public utility requires 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 under 66 Pa.C.S. § 1102(a) (relating to enumeration of acts requiring certification).

(5) A transaction subject to evaluation under the statement of policy on transfer of control. See § 69.901 (relating to utility stock transfer under 66 Pa.C.S. § 1102(a)(3)).

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

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

(b) *Reclassification of a general rule transaction*. When a telecommunications public utility seeks review and approval of a transaction as a general rule transaction and the Commission reclassifies the general rule transaction, the transaction shall be subject to the requirements of a pro forma transaction in § 63.325 (relating to Commission approval of a pro forma transaction subject to 66 Pa.C.S. §§ 1102(a)(3) and 1103) unless determined otherwise for good cause shown.

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

(2) *Review of a general rule transaction reclassified as other than a pro forma transaction*. The review and approval of a general rule transaction not reclassified as a pro forma transaction shall begin on the date that the telecommunications public utility is notified in writing that the transaction is reclassified. A transaction classified under this section shall be reviewed within the time governing review and approval under 66 Pa.C.S. §§ 1102 and 1103 (relating to enumeration of acts requiring certification; and procedure to obtain certificates of public convenience).

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

(c) *Notification requirements for general rule transactions*. Notification shall be filed with the Commission on the date of filing with a Federal regulatory agency seeking Federal approval of a general rule transaction or no later than 60 days prior to the closing of a transaction subject to this subchapter, whichever is longer. The telecommunications public utility filing the notification shall comply with the Commission's rules of practice and procedure governing applications. (See §§ 5.11—5.14 (relating to applications.)) 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) under the Hart-Scott-Rodino Antitrust Improvements Act (15 U.S.C.A. §§ 15c-15h, 18a and 66) (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 utilty 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 66 Pa.C.S. 1102(a) for a copy.

(iii) A request by the Commission or staff for a copy.

(iv) A request by a person or party for a copy.

(d) *Content of notification for general rule transactions*. In addition to the information required by § 5.12 (relating to contents of applications) of the Commission's rules of practice and procedure, a general rule transaction must 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 legal counsel in this Commonwealth, 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 this Commonwealth and its 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 Commonwealth utility certificates held by the telecommunications public utility.

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

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

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

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

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

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

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

(f) *Commission publication of general rule transactions.*

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

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

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

(iii) A formal protest objecting to a general rule transaction involving a change in conditions of service or rates by a statutory advocate shall constitute a formal protest under § 5.14 of the Commission's rules of practice and procedure and shall reclassify a general rule transaction as a pro forma transaction or a transaction subject to the review and approval for transactions under 66 Pa.C.S. §§ 1102 and 1103, 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 does not constitute a formal protest under § 5.14 of the Commission's rules of practice and procedure nor reclassify the general rule transaction, unless the Commission determines otherwise for good cause shown.

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

(iv) A formal protest objecting to a general rule transaction involving a change in conditions of service or rates by a statutory advocate shall constitute a formal protest under § 5.14 of the Commission's rules of practice and procedure and shall reclassify a general rule transaction as either a pro forma transaction or a transaction subject to the review and approval for transactions under 66 Pa.C.S. §§ 1102 and 1103.

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

(i) *Formal protests to a general rule transaction.* A protest filed to a transaction subject to the general rule must comply with the Commission's rules of practice and procedure. (See Subpart A (relating to general provisions).)

(j) *Reclassification of a transaction from the general rule.* The Commission will reclassify a general rule transaction in the following circumstances:

(1) The filing of a formal protest by a statutory advocate or the filing of a formal protest warranting reclassification for good cause shown, including competitive impact.

(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 general rule transaction.* A transaction subject to this subchapter 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.

(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 under 66 Pa.C.S. §§ 1102(a) and 1103.

(2) The Commission or staff may extend the review and approval period, reject the filing or transaction, remove a transaction from the general transaction rule or take other action deemed appropriate to protect the public interest.

(3) A staff action will 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 § 5.44 (relating to petitions to appeal from actions of the staff) 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 §§ 1.61 and 1.62 (relating to matters before other tribunals) 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.

§ 63.325. 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 requires 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 under 66 Pa.C.S. § 1102(a) (relating to enumeration of acts requiring certificate).

(5) A transaction subject to evaluation under the statement of policy on transfer of control, § 69.901 (relating to utility stock transfer under 66 Pa.C.S. § 1102(a)(3)).

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

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

(b) *Reclassification of a pro forma transaction.* When a telecommunications public utility seeks review and approval of a transaction as a pro forma transaction and the Commission reclassifies the pro forma transaction, the pro forma transaction shall be subject to the requirements of a general rule transaction in § 63.324 (relating to Commission approval of a general rule transaction subject to 66 Pa.C.S. §§ 1102(a) and 1103) unless the Commission determines otherwise for good cause shown.

(1) *Review of a pro forma transaction reclassified as a general rule transaction.* The 60-day review and approval period for a pro forma transaction reclassified as a general rule transaction shall begin on the date that the telecommunications public utility is notified in writing that the pro forma transaction is reclassified.

(2) *Review of a pro forma transaction reclassified as other than a general rule transaction.* The review and approval of a pro forma transaction reclassified as other than a general rule transaction shall begin on the date that the telecommunications public utility is notified in writing that the pro forma transaction is reclassified but not as a general rule transaction. A pro forma transaction reclassified under this section shall be reviewed within the period governing review and approval under 66 Pa.C.S. §§ 1102 and 1103 (relating to enumeration of acts requiring certificate; and procedure to obtain certificates of public convenience).

(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 § 5.44 (relating to petitions for appeal from actions of the staff) of the Commission's rules of practice and procedure. The writing will 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 (15 U.S.C.A. §§ 15c-15h, 18a and 66) (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 66 Pa.C.S. § 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 § 5.12 (relating to contents of applications) of the Commission's rules of practice and procedure, a pro forma transaction must 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 this Commonwealth and its 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 Commonwealth utility certificates held by the telecommunications public utility.

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

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

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

(18) A verified statement that no State or Federal regulatory undertaking is appropriate regarding the transaction because the carrier lacks dominant market power or predominant market presence.

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

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

(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 web site, unless the Commission determines otherwise for good cause shown.

(2) A notice posted on the Commission web site may contain a general comment period established according to § 5.14(d) (relating to applications requiring notice) of the Commission's rules of practice.

(3) There shall be no formal protest period under § 5.14(d) of the Commission's rules of practice and 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 web site, shall be subject to a general comment period and a formal protest period established under § 5.14(d) of the Commission's rules of practice and 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 will not constitute a formal protest under § 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 constitutes a formal protest under § 5.14 of the Commission rules of practice and procedure and may reclassify the general rule transaction, unless the Commission determines otherwise for good cause shown.

(iii) A formal protest objecting to a transaction not involving a change in conditions of service or rates by a statutory advocate constitutes a formal protest under § 5.14 of the Commission's rules of practice and procedure and reclassify a general rule transaction either as a general rule transaction or as a transaction subject to the review and approval for transactions under 66 Pa.C.S. §§ 1102 and 1103.

(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% does 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 will not constitute a formal protest under § 5.14 of the Commission's rules of practice and procedure nor reclassify the pro forma transaction, unless the Commmission 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 constitutes a formal protest under § 5.14 of the Commission rules of practice and procedure but does 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 law of the Commonwealth.

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

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

(1) The filing of a 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 will 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 web site, whichever is longer, unless the Commission determines otherwise for good cause shown.

(1) The Commission will issue a Secretarial letter or order approving a pro forma transaction and issue a certificate of public convenience authorizing the transaction under 66 Pa.C.S. §§ 1102(a) and 1103.

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

(3) A staff action will 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 § 5.44 of the Commission's rules of practice and procedure.

(l) *Limitations on pro forma transactions.*

(1) *Bankruptcy proceedings.* Pro forma changes related to bankruptcy remain subject to §§ 1.61 and 1.63 (relating to matters before other tribunals) of the Commission's rules of practice and procedure.

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

§ 63.326. Approval of contracts between a carrier or public utility and an affiliated interest under 66 Pa.C.S. §§ 2101(a), 3016(f)(1) and 3019(b)(1).

(a) A written or oral contract or transaction between a telecommunications utility and an affiliated interest is governed by 66 Pa.C.S. §§ 3016(f)(1) and 3019(b)(1) (relating to competitive services; and additional powers and duties). 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 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 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.

[Pa.B. Doc. No. 08-218. Filed for public inspection February 8, 2008, 9:00 a.m.]

[52 PA. CODE CHS. 54, 62 AND 76]

[L-00070186/57-257]

Universal Service and Energy Conservation Reporting Requirements and Customer Assistance Programs

The Pennsylvania Public Utility Commission (Commission) on August 30, 2007, adopted a proposed rulemaking order which establishes a unified process by which the level of funding for each natural gas distribution company (NGDC) and electric distribution company (EDC) could be determined in conjunction with the Commission's review of the company's universal service and energy conservation plan.

Executive Summary

On December 15, 2005, the Commission issued an order closing its investigation on universal service funding for EDCs and NGDCs. *Customer Assistance Programs: Funding Levels and Cost Recovery Mechanisms*, Docket No. M-00051923. In its order, the Commission directed that a rulemaking be instituted to establish an administrative process in which program funding and cost recovery could be determined in conjunction with the Commission's triennial review of a distribution company's universal service and energy conservation plan.

In its September 4, 2007, proposed rulemaking order, the Commission proposed that its regulations relating to universal service and energy conservation reporting in §§ 54.74 and 62.4 (relating to review of universal service and energy conservation plans, funding and cost recovery) be revised (with other necessary regulations) to create a unified proceeding for the approval of distribution company's customer assistance program (CAP) designs and funding levels, the determination of recoverable costs and the establishment of a cost recovery mechanism. The proposed revisions require that company plans include CAP rules and proposals for universal service cost recovery, and that the plans be submitted as a tariff filing consistent with Chapter 53 (relating to tariffs for noncommon carriers). Also it is proposed that the tariff contain rules for applying Low Income Home Energy Assistance Program (LIHEAP) grants to customer accounts.

Other proposed amendments address the implementation of CAPs and control of CAP costs. For example, proposed § 76.3(a) (relating to approval process) would require Commission approval before a company can implement a CAP plan or a permanent or temporary modification to an existing plan. Proposed § 76.5 (relating to default provisions for failure to comply with program rules) mandates dismissal from CAP participation for the following: the failure to accept usage reduction services; the failure to verify eligibility requirements; the failure to apply for the LIHEAP; the failure to report changes in income or household size; and the failure to accept free budget counseling offered by the utility. The proposed amendments also address CAP cost recovery and notify the companies that the Commission will consider timeliness of collection activities in evaluating costs claimed for recovery.

Housekeeping revisions are also proposed to make shared language mutually consistent in §§ 54.71—54.78 (relating to universal service and energy conservation plna: review funding and reporting requirements; electric) and similar regulations in §§ 62.1—62.8 (relating to universal service and energy conservation plan: review, funding and reporting requirements; natural gas). These proposed revisions are clearly marked in the Annex A.

Public Meeting held
August 30, 2007

Commissioners Present: Wendell F. Holland, Chairperson; James H. Cawley, Vice Chairperson; Terrance J. Fitzpatrick; Tyrone J. Christy; Kim Pizzingrilli

Proposed Rulemaking Relating to Universal Service and Energy Conservation Reporting Requirements, 52 Pa. Code §§ 54.71—54.78 (electric); §§ 62.1—62.8 (natural gas) and Customer Assistance Programs, §§ 76.1—76.6; Doc. No. L-00070186

Proposed Rulemaking Order

By the Commission:

In the *Final Investigatory Order* in *Customer Assistance Programs: Funding Levels and Cost Recovery Mechanisms*, Order entered December 18, 2006 at Docket No. M-00051923, the Commission directed, inter alia, that a rulemaking be instituted to revise its regulations at 52 Pa. Code § 54.74 and § 62.4. The purpose of the rulemaking would be to establish a unified process by which the level of funding for each natural gas distribution company and electric distribution company could be determined in conjunction with the Commission's triennial review of the company's universal service and energy conservation plan. By this order, we initiate this rulemaking.

DISCUSSION

Background

On December 15, 2005, the Commission initiated an investigation with the purpose of developing general standards for appropriately funding universal service programs, including Customer Assistance Programs (CAPs) for electric distribution companies (EDCs) and natural gas distribution companies (NGDCs). In its December 15, 2005 order, the Commission requested comments on the types of cost recovery mechanisms that best

allow utilities to "fully recover" universal service costs and on the following CAP design elements: consumption limits, maximum energy burdens, maximum CAP benefits, default provisions, restoration provisions, timely collections for delinquent CAP accounts, minimum CAP budgets, eligibility and income verification, arrearage forgiveness and coordination of energy assistance benefits. See *Policy Statement on Customer Assistance Programs*, 52 Pa. Code §§ 69.261—69.267.

Written comments were filed by 40 interested parties.[1]

On December 18, 2006, the Commission entered its *Final Investigatory Order* that directed inter alia that a rulemaking proceeding be initiated to amend:

> [Commission] regulations at 52 Pa. Code § 54.74 and § 62.4 to establish a triennial review process that takes the form of a tariff filing and addresses CAP program funding, design criteria and cost recovery on a case-by-case basis. This proposed rulemaking will address surcharge adjustments, the types of costs to be included in the surcharge as well as the recognition of CAP savings, if any, as offsetting some of these costs. This proposed rulemaking will also address how utilities will provide for the application of LIHEAP cash grants.
>
> Additionally, the proposed rulemaking will address the issues of Default Provisions for Failure to Comply with Program Rules and Timely Collections as discussed within the body of this order.

Final Investigatory Order

The instant proposed rulemaking order has been drafted to revise current Commission regulations so that they are consistent with these directives.[2]

Establishment of a Triennial Review Process for Review of CAP Design and Tariff Filings Relating to Funding and Cost Recovery

In the *Final Investigatory Order*, the Commission refrained from establishing a uniform level of universal service funding for every distribution company. Instead the Commission determined that the review of the adequacy of universal service funding for each company would be accomplished on a case-by-case basis in conjunction with the established triennial review of the company's universal service program under 52 Pa. Code §§ 54.74 and 62.4.

Final Investigatory Order. The rationale for this decision was cost containment:

> It is critically important that the Commission move toward a comprehensive, integrated consideration of CAP designs and CAP cost recovery. The total statewide cost of CAP programs has increased dramatically over the past several years. Since the year 2000, this cost has risen from $69.6 million in 2000 to $242.8 million in 2005,[3] an increase of 249%. To illustrate the cost impact on paying customers, in 2005 the average electric customer was billed an extra $25.83 for universal service programs; the average natural gas customer paid an extra $60.78 (CAP programs constitute roughly 90% of a utility's universal service costs). If energy prices continue to increase, so will the cost of these programs. In order to balance the interests of beneficiaries of CAP programs with the interests of paying customers, the Commission must begin to consider CAP designs and recovery of CAP costs at the same time.
>
> In order to remedy this truncated consideration of CAP issues, we direct that Commission regulations be amended so that (1) a utility's CAP rules are placed in its tariff, (2) the triennial update filing take the form of a tariff filing and (3) adjustments to the CAP surcharge be addressed in the same tariff filing.
>
> Using this process,[4] the Commission can consider the rate implications of changes to a company's CAP proposed by affected parties and recommended by staff, and can establish with greater certainty the appropriate funding level to ensure availability of universal service throughout the company's service territory.

Final Investigatory Order (footnote in the original).

Consistent with the discussion in the *Final Investigatory Order*, §§ 54.74 and 62.4 have been amended to establish the review process for CAP review and funding. These sections have also been revised to require that triennial filings, including CAP rules and proposals for cost recovery, be submitted as a tariff filing consistent with Commission regulations at 52 Pa. Code Ch. 53 (relating to tariffs for noncommon carriers).[5] These sections have also been revised to require that the tariff contain a method for applying LIHEAP grants.[6] See Annex A.

Prior Commission Approval

Proposed § 76.3 (relating to approval process) establishes that prior Commission approval is required before the distribution company can implement a CAP plan, or a revision or modification of an existing CAP program. This requirement for prior Commission approval also applies when there is a temporary modification to maintain the operation of an established CAP. Specifically, § 76.3(b) requires that, when a temporary modification must be made, the distribution company must file an application for special permission to file a tariff revision or supplement on less than statutory notice consistent with the requirements of 52 Pa. Code §§ 53.102 and 53.103 (relating to exception to the requirement for statutory notice; and concurrently furnished information). To ensure due

[1] The commenters were as follows: Energy Association of Pennsylvania, Office of Consumer Advocate, Department of Public Welfare, Office of Trial Staff, Dollar Energy Fund, Inc., Office of Small Business Advocate, City of Philadelphia—Mayor's Office—Consumer Affairs, Action Alliance of Senior Citizens of Southeastern Pennsylvania, through counsel Community Legal Services, Inc. and the Pennsylvania Utility Law Project (collectively, "Action Alliance"), Allegheny Power, Duquesne Light Company, Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company, PECO Energy Company, PPL Electric Utilities Corporation and PPL Gas Utilities, Columbia Gas of Pennsylvania, Inc., Peoples Natural Gas Company d/b/a Dominion Peoples, Equitable Gas Company, National Fuel Gas Distribution Corporation, PG Energy, Philadelphia Gas Works, Valley Energy, Inc., Citizens' Electric Company of Lewisburg PA, and Wellsboro Electric Company, UGI Utilities, Inc., T.W. Phillips Gas and Oil Co., Pennsylvania Association of Community Organizations for Reform Now, Energy Coordinating Agency of Philadelphia, Inc., AARP Pennsylvania, and the Industrial Energy Consumers of Pennsylvania, the Columbia Industrial Intervenors, the Met-Ed Industrial Users Group, the Penelec Industrial Customer Alliance, the Philadelphia Area Industrial Energy Users Group, the Philadelphia Industrial and Commercial Gas Users Group, the PP&L Industrial Customer Alliance, the UGI Industrial Intervenors, the West Penn Power Industrial Intervenors, and Senator LeAnna M. Washington, 4th District.

[2] In order to revise §§ 54.74 and 62.4 consistent with the direction given in the Final investigatory Order, it was necessary to revise other related regulations. Although these additional revisions are not expressly discussed in this order, they are clearly marked in Annex A and proposed subject to comment by interested parties.

[3] These figures were provided by the Bureau of Consumer Services as supplied by the electric and gas utilities.

[4] A similar process was adopted by the Commission in its order that consolidated a contested settlement in Dominion Peoples' tariff filing with its triennial CAP filing and assigned the proceeding for hearing to the OALJ. *See* Commission order entered July 31, 2006 re: *Dominion Peoples' Universal Service and Energy Conservation Plan Submission Pursuant to 52 Pa. Code § 62.4*, Docket No. M-00051880; Pa. *PUC, OSBA v. The Peoples Natural Gas Company d/b/a Dominion Peoples*, Docket No. R-00051093, R-00051093C0001.

[5] Housekeeping and style changes have also been proposed to these sections. Because these changes are fairly obvious and clearly marked in Annex A, they are not discussed in detail here.

[6] *See Final Investigatory Order*, p. 66.

process, the distribution company is required to serve a copy of the application including the supporting information on the Office of Consumer Advocate, the Office of Trial Staff, and other advocates for low income customers, and to provide a copy of the filing to BCS. See § 76.3, Annex A.

Default Provisions for Failure to Comply with Program Rules

In the Final Investigatory Order, the Commission directed the promulgation of regulations that would establish rules for dismissal of customers from Customer Assistance Programs.

> After reviewing the comments, we believe that failure to accept usage reduction services and failure to verify or certify eligibility are two of the reasons that may lead to dismissal from CAP for not complying with program rules. We believe that the following additional program rules should also be included and also should result in dismissal from the CAP if not complied with:
>
> (1) Failure to apply for LIHEAP;
>
> (2) Failure to report changes in income and household size; and
>
> (3) Failure to accept free budget counseling offered by the utility.[7]
>
> We believe that each of the above-listed rules is justified on the basis that it makes the CAP programs more "cost effective." They also seem to be fair requirements for customers receiving the benefits of CAP without placing an unreasonable burden upon them.

Final Investigatory Order

The Commission did decide, however, that failure to allow for a meter reading will not be proposed as a reason for dismissal from a CAP. *See Final Investigatory Order*.

We have added the default provisions for failure to follow CAP rules in new § 76.5. See Annex A.

Coordination of Energy Assistance Benefits Application of LIHEAP Cash Payments

Coordination of benefits refers to the manner in which a LIHEAP (Low Income Heating Energy Assistance Program) grant is applied to a customer's account. In the *Final Investigatory Order* the Commission concluded that:

> [d]irecting utilities on how to apply LIHEAP cash grants requires making a policy decision. The basic choice here affects who benefits and pays for these programs. By initiating a change directing that the LIHEAP cash benefits are used to reduce a customer's monthly CAP budget or a customer's preprogram arrearage allows the individual CAP customer to receive the benefit of such a grant, while the customers who are not beneficiaries of CAP programs will most likely end up contributing more to support CAP programs.
>
> Instead of establishing an inflexible standard in a regulation directing how LIHEAP cash benefits are to be applied, the Commission will address this issue on a case-by-case basis in the tariff filing as part of the triennial review process. As a result, § 69.265(9) of the CAP statement of policy should be amended accordingly. Additionally, with the tariff filing as part of the triennial review process, each utility's tariff must provide for the method of application of LIHEAP cash grants.

Final Investigatory Order

In accordance with this direction, §§ 54.74 and 62.4 have been revised by adding new subsections (b)(2)(iv) and (b)(2)(iv), respectively to require that a distribution company propose a tariff rule dealing with the application of LIHEAP grants to CAP customer accounts. See Annex A.

Timely Collection Efforts

Issues related to timely collection efforts on the part of the distribution companies are to be addressed in this proposed rulemaking. The *Final Investigatory Order* discusses the need for timely collection as follows:

> Although we find that Chapter 14 cannot be used to limit the amount of termination notices or reconnection requirements, we believe that utilities should focus equally on both timely payments and timely collections. In most situations, failing to take timely collection action on multiple months of missed CAP payments is not cost effective and, therefore, is unreasonable. Therefore, while customers have the responsibility to consistently pay their monthly bills on time, utilities also should initiate timely collection actions when customers fall behind on their monthly CAP obligations. Failure to do so may result in a denial of cost recovery if the Commission were to conclude that certain costs were imprudent. A regulation consistent with the language delineated above should be proposed.

Final Investigatory Order

New § 76.4 (relating to recovery of costs of customer assistance programs) addresses categories of CAP costs that may be recovered by a distribution company. To qualify for recovery, the costs must be prudently incurred and reasonable in amount, as is standard under Pennsylvania law, and include the following cost categories: CAP credits given to participants, preprogram acreage forgiveness, administrative costs, and taxes and other costs that can be proven to be associated with the distribution company's CAP. See § 76.4(b) in Annex A. In addition, there may be cost savings to the distribution company as a consequence of a successfully operating CAP that should be considered. To address these potential cost savings, subsection (c) requires the distribution company to identify savings that would offset costs in certain operational areas, including collection. See § 76.4(c) in Annex A. The timeliness of a distribution company's collection activities will be considered in evaluating the reasonableness of costs claimed for recovery. See § 76.4(d) in Annex A.

The basis for proposed § 76.4(d) is simple. The costs of CAPs are borne by all residential customers and timely collection of overdue customer accounts, including those of CAP customers, decrease the overall cost of these programs. In enacting Chapter 14 of the Public Utility Code, 66 Pa.C.S. §§ 1401—1418 (relating to responsible utility customer protection), the General Assembly recognized the need to provide "protections against rate increases for timely paying customers resulting from other customers' delinquencies." 66 Pa.C.S. § 1402(2). To ensure this protection, the General Assembly provided the distribution companies with "an equitable means to reduce their uncollectible accounts by modifying the procedures for

[7] Failure to apply for LIHEAP is a newly-proposed default provision; however, the other two additional program rules are included in the existing CAP Policy Statement. 52 Pa. Code § 69.265(7).

delinquent account collections and by increasing timely collections." 66 Pa.C.S. § 1402(3). For these reasons, we have proposed that prudently incurred operational expenses related to collection activities may be recoverable by surcharge. However, consistent with 66 Pa.C.S. § 1408, we have specifically excluded the recovery by surcharge of uncollectible expenses. See § 76.4(e) in Annex A.

CONCLUSION

As a result of our investigation into funding levels and cost recovery for Customer Assistance Programs, we propose to amend Commission regulations at 52 Pa. Code §§ 54.71—54.78 (relating to universal service and energy conservation reporting requirements for electric distribution companies) and §§ 62.1—62.8 (relating to universal service and energy conservation reporting requirements for natural gas distribution companies). We also propose to promulgate new regulations in 52 Pa. Code §§ 76.1—76.6 (relating to customer assistance programs) as set forth in Annex A. All interested parties are invited to submit comments on the proposals set forth in Annex A. Persons submitting comments are requested to provide supporting justification for requested revisions and proposed regulatory language.

Accordingly, under 66 Pa.C.S. §§ 501, 1501, 2202, 2203(8) and 2801—2812; sections 201 and 202 of the act of July 31, 1968 (P. L. 769 No. 240) (45 P. S. §§ 1201 and 1202), and the regulations promulgated thereunder in 1 Pa. Code §§ 7.1, 7.2 and 7.5; section 204(b) of the Commonwealth Attorneys Act (71 P. S. § 732.204(b)); section 5 of the Regulatory Review Act (71 P. S. § 745.5) and section 612 of The Administrative Code of 1929 (71 P. S. § 232) and the regulations promulgated thereunder in 4 Pa. Code §§ 7.231—7.234, we are considering adopting the proposed amendments set forth in Annex A, Therefore,

It Is Ordered That:

1. The proposed amendments to 52 Pa. Code Chapters 54 and 62 and the proposed addition of Chapter 76 as set forth in Annex A, be issued for comment.

2. The Secretary shall submit this order and Annex A to the Office of Attorney General for review as to form and legality and to the Governor's Budget Office for review of fiscal impact.

3. The Secretary shall submit this order and Annex A for review and comments to the Independent Regulatory Review Commission and the Legislative Standing Committees.

4. The Secretary shall certify this order and Annex A and deposit them with the Legislative Reference Bureau to be published in the *Pennsylvania Bulletin*.

5. An original and 15 copies of written comments referencing the docket number of the proposed amendments be submitted within 60 days of publication in the *Pennsylvania Bulletin* to the Pennsylvania Public Utility Commission, Attn.: Secretary, P. O. Box 3265, Harrisburg, PA 17105-3265. To facilitate posting, all filed comments shall be forwarded by means of e-mail to Michael Smith, at michasmit@state.pa.us, Patricia Krise Burket, at pburket@state.pa.us and Cyndi Page at cypage@state.pa.us.

6. A copy of this order and Annex A shall be served on all jurisdictional EDCs, all NGDCs, all licensed electric generation suppliers, all licensed natural gas suppliers, the Office of Trial Staff, the Office of Consumer Advocate, and the Office of Small Business Advocate, and all other parties of record in the *Investigation into Customer Assistance Programs: Funding Levels and Cost Recovery Mechanisms* at Docket No. M-00051923.

7. The contact persons for this proposed rulemaking are Michael Smith, Consumer Policy Analyst, Bureau of Consumer Services, (717) 783-3232 (technical), and Patricia Krise Burket, Law Bureau, (717) 787-3464 (legal). Alternate formats of this document are available to persons with disabilities and may be obtained by contacting Sherri DelBiondo, Regulatory Coordinator, Law Bureau, (717) 772-4597, sdelbiondo@state.pa.us.

JAMES J. MCNULTY,
Secretary

Fiscal Note: 57-257. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 54. ELECTRICITY GENERATION CUSTOMER CHOICE

Subchapter C. UNIVERSAL SERVICE AND ENERGY CONSERVATION **PLAN: REVIEW, FUNDING AND** REPORTING REQUIREMENTS

§ 54.71. Statement of purpose and policy.

[Section] The requirements of 66 Pa.C.S. § 2804(9) **[of the code]** (relating to standards for **[restructing] restructuring** of electric industry) **[mandates] mandate** that the Commission ensure universal service and energy conservation policies, activities and services for residential electric customers are appropriately funded and available in each EDC territory. **This subchapter establishes a unified process which allows the Commission, in the context of its review of an EDC's universal service and energy conservation plan, to approve an adequate level of program funding, to determine the types and amount of program costs recoverable from residential customers and to approve a mechanism for full cost recovery.** This subchapter requires covered EDCs to establish uniform reporting requirements for universal service and energy conservation policies, programs and protections and to report this information to the Commission.

§ 54.72. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

BCS—Bureau of Consumer Services.

CAP—Customer Assistance Program—**[An alternative collection method that provides payment assistance to low-income, payment troubled utility customers. CAP participants agree to make regular monthly payments that may be for an amount that is less than the current bill in exchange for continued provision of electric utility services.] A plan implemented by a distribution company for the purpose of providing universal service and energy conservation services to low income customers, in which the customers shall:**

(i) Make monthly payments based on household income and household size.

(ii) Comply with specific responsibilities to remain eligible for the program.

* * * * *

CARES—***Customer Assistance and Referral Evaluation Services***—A program that provides a cost-effective service that helps selected, payment-troubled customers maximize their ability to pay utility bills. A CARES program provides a casework approach to help customers secure energy assistance funds and other needed services.

CARES benefits—The number **[and kinds]** of referrals **[to] and number of customers accepted into** CARES.

Classification of accounts—Accounts are classified by the following categories: all residential accounts and confirmed **[low-income] low income** residential accounts.

* * * * *

Confirmed ***[low-income] low income*** *residential account*—Accounts where the EDC has obtained information that would reasonably place the customer in a **[low-income] low income** designation. **This information may include receipt of LIHEAP funds, self-certification by the customer, income source or information obtained in § 56.97(b) (relating to procedures upon ratepayer or occupant contact prior to termination).**

* * * * *

***Distribution company*—A natural gas distribution company or an electric distribution company.**

EDC—Electric distribution company—The **[public utility] distribution company** providing facilities for the jurisdictional transmission and distribution of electricity to retail customers, except building or facility owners/operators that manage the internal distribution system serving the building or facility and that supply electric power and other related electric power services to occupants of the building or facility.

* * * * *

***LIHEAP—Low Income Home Energy Assistance Program*—A Federally funded program that provides financial assistance in the form of cash and crisis grants to low income households for home energy bills and is administered by the Department of Public Welfare.**

LIURP—**[*Low-income usage reduction program*] Low Income Usage Reduction Program—[An energy usage reduction] A** program that assists **[low-income] low income** customers **to** conserve energy and reduce residential energy bills **established by a distribution company consistent with Chapter 58 (relating to residential low income usage reduction programs).**

[*Low-income*] *Low income* customer—A residential utility customer whose **gross** household income is at or below 150% of the Federal poverty guidelines. **Gross household income does not include the value of food stamps or other noncash income.**

Outreach referral contacts—**[Addresses and telephone numbers] An address and telephone number** that a customer would call or write to apply for the hardship fund. Contact information should be specific to each county in the EDC's service territory, if applicable.

Payment rate—**[Payment rate is the] The** total number of full monthly payments received from CAP participants in a given period divided by the total number of monthly bills issued to CAP participants.

Payment troubled—A household that has failed to maintain one or more payment arrangements in a 1-year period **or has received a termination notice**.

Residential account in arrears—A residential account that is at least 30 days overdue. This classification includes all customer accounts which have payment arrangements.

Successful payment arrangements—A payment arrangement in which the agreed upon number of payments have been made in full in the **[preceeding] preceding** 12 months.

Universal service and energy conservation—**[Policies, protections and services that help low-income customers to maintain electric service. The term includes customer assistance programs, termination of service protection and policies and services that help low-income customers to reduce or manage energy consumption in a cost-effective manner, such as the low-income usage reduction programs, application of renewable resources and consumer education.] The term as defined in 66 Pa.C.S. § 2803 (relating to definitions).**

§ 54.73. Universal service and energy conservation program goals.

* * * * *

(b) The general goals of universal service and energy conservation programs include the following:

(1) To protect consumers' health and safety by helping **[low-income] low income** customers maintain **affordable** electric service.

(2) To provide for affordable electric service by making available payment assistance to **[low-income] low income** customers.

(3) To assist **[low-income] low income** customers **[conserve] in conserving** energy and **[reduce] reducing** residential utility bills.

(4) To establish universal service and energy conservation programs **that** are operated in a cost-effective and efficient manner **to minimize overall program costs**.

§ 54.74. **[Universal] Review of universal** service and energy conservation plans**, funding and cost recovery**.

(a) *Plan submission.*

(1) **[Each] An** EDC shall submit to the Commission for approval an updated universal service and energy conservation plan **in the form of a tariff filing** every 3 years **[beginning February 28, 2000, on a staggered schedule]**.

(2) The plan **[should cover] must provide for universal service and energy conservation for** the next 3-calendar years.

(3) **An EDC shall file its universal service and energy conservation plan in the form of a tariff filing. The tariff filing must conform with applicable regulations in Chapters 53 and 76 (relating to tariffs for noncommon carriers; and customer assistance programs).** The plan should state how it differs from the previously approved plan.

(4) **[The plan should include revisions based on analysis of program experiences and evaluations.] An EDC shall consult BCS for advice regarding the design and implementation of its plan at least 30 days prior to submission of the plan to the Commission for approval.**

(5) **In the proceeding on the plan, the Commission will establish a funding level that balances efforts to ensure the availability of universal service and energy conservation programs throughout an EDC's service territory with the cost of the programs and the rate impact on residential customers that are not enrolled in the programs, and will permit an EDC to recover costs related to universal service and energy conservation from residential customers. The Commission will approve recovery of CAP costs consistent with § 76.4 (relating to recovery of costs of customer assistance programs). [If the Commission rejects the plan, the EDC shall submit a revised plan under the order rejecting or directing modification of the plan as previously filed. If the order rejecting the plan does not state a timeline, the EDC shall file its revised plan within 45 days of the entry of the order.**

(6) The Commission will act on the plans within 90 days of the EDC filing date.]

(b) **[*Plan*] *Tariff contents.* The tariff must include the following information:**

(1) [The components of] *General requirements.* A universal service and energy conservation **plan that** may include **[the following:] a** CAP, LIURP, CARES, Hardship Funds **[and] or** other programs, policies and protections **consistent with Commission orders, regulations and other applicable law**. For each component of **[universal service and energy conservation,]** the plan **[shall include, but not be limited to]**, the following **information shall be submitted**:

[(1) Program] (i) The program description **including an explanation of the manner and the extent to which the universal service or energy conservation component operates in an integrated manner with other components of the plan to accomplish the goals stated in § 54.73 (relating to universal service and energy conservation program goals)**.

[(2) Eligibility] (ii) The eligibility criteria.

[(3) Projected] (iii) The projected needs assessment. **The needs assessment must include:**

(A) The number of identified low income customers.

(B) An estimate of low income customers.

(C) The number of identified payment troubled, low income customers.

(D) An estimate of payment troubled, low income customers.

(E) The number of customers who still need LIURP services and the cost to serve that number.

(F) The enrollment size of the CAP to serve all eligible customers.

[(4) Projected] (iv) The projected enrollment levels.

[(5) Program] (v) The program budget.

[(6) Plans] (vi) The plans to use community-based organizations.

[(7) Organizational] (vii) The organizational structure of staff responsible for universal service programs.

[(8) Explanation] (viii) An explanation of **[any]** differences between the EDC's approved plan and the implementation of that plan. The **[EDC should] plan must** include a **[plan] proposal** to address **[those] the identified** differences. **When an EDC has not implemented all of the provisions of an approved plan, the EDC shall provide a justification for that failure and plans for corrective action. When an EDC is requesting approval of a revised plan, the EDC shall provide a justification of the revisions in its request for approval.**

(ix) A description of outreach and intake efforts, including the specific steps used to identify low income customers with arrears and to enroll them in appropriate universal service and energy conservation programs.

(2) *Program rules.* The tariff must contain rules that apply to the universal service and energy conservation programs. The rules must be consistent with the code, applicable Commission regulations, orders and other applicable law. The rules must address the following:

(i) Program eligibility.

(ii) Enrollment process.

(iii) Customer responsibilities for continued program participation.

(iv) Coordination of energy assistance benefits including the application of LIHEAP grants.

(v) Arrearage forgiveness.

(vi) Dismissal from the program, including default rules in § 76.5 (relating to default provisions for failure to comply with program rules).

(vii) Reinstatement to the program.

(viii) Termination of service.

(ix) Restoration of service.

(x) Treatment of CAP customers who become income ineligible for continued participation.

(xi) Other matters required for the implementation and operation of the program.

(3) *Documentation in support of funding and cost recovery for universal service and energy conservation.* The tariff filing must contain documentation of costs for the EDC's existing universal service and energy conservation program and a projection of costs for the next 3 years. The cost projection must take into account changes proposed to be made to the programs and the impact of their implementation on costs. The tariff filing must contain docu-

mentation of cost savings that result from customer participation in these programs, to the extent that savings exist.

(4) *Surcharge.* An EDC may propose a surcharge under 66 Pa.C.S. § 1307 (relating to sliding scale of rates; adjustments) to provide for full recovery of universal service and energy conservation costs. The surcharge may be subject to annual reconciliation or may be adjusted prospectively on a quarterly basis as required by changes in the level of costs incurred. When a surcharge is proposed, the tariff filing must contain:

(i) A description of the surcharge, a list of the specific costs proposed for recovery, and, when applicable, an adjustment mechanism. Consistent with 66 Pa.C.S. § 1408 (relating to surcharges for uncollectible expenses prohibited), the surcharge may not recover uncollectible expenses.

(ii) A statement of the time period after which the surcharge becomes effective for service referenced from the date of the filing of the tariff.

(iii) Calculations based on current and projected costs that support the use of the surcharge and the adjustment mechanism, when applicable.

(iv) A statement that the surcharge is applicable only to residential customers.

§ 54.75. Annual residential collection and universal service and energy conservation program reporting requirements.

[Each] An EDC shall report annually to the Commission on the degree to which universal service and energy conservation programs within its service territory are available and appropriately funded. Annual EDC reports **[shall] must** contain information on programs and collections for the prior calendar year. Unless otherwise stated, the report shall be due April 1 each year **[, beginning April 1, 2001]. [Where] When** noted, the data shall be reported by classification of accounts **as total residential customers and confirmed low income residential customers**. **[Each] An** EDC's report **[shall] must** contain the following information:

(1) ***Collection reporting***. Collection reporting **[shall] must** be categorized as follows:

* * * * *

(vi) The total dollar amount of annual residential revenues by classification of accounts.

(vii) The total number of residential accounts in arrears and on payment agreements by month for the 12 months covered by the report, by classification of accounts.

(viii) The total number of residential accounts in arrears and not on payment agreements by month for the 12 months covered by the report, by classification of accounts.

(ix) The total dollar amount of residential accounts in arrears and on payment agreements by month for the 12 months covered by the report, by classification of accounts.

[(vi)] (x) The total dollar amount of residential accounts in arrears **and not on payment agreements** by month for the 12 months covered by the report, by classification of accounts.

[(vii)] (xi) The total number of residential customers who are payment troubled by month for the 12 months covered by the report, by classification of accounts.

[(viii)] (xii) The total number of terminations completed by month for the 12 months covered by the report, by classification of accounts.

[(ix)] (xiii) The total number of reconnections by month for the 12 months covered by the report, by classification of accounts.

[(x)] (xiv) The total number of **[low-income] low income** households. EDCs may estimate this number using census data or other information the EDC finds appropriate.

(2) ***Program reporting***. Program reporting **[shall] must** be categorized as follows:

(i) For **[each] a** universal service and energy conservation component, program data **[shall] must** include information on the following:

* * * * *

(B) Program recipient demographics, including the number of **[family] household** members under **[age]** 18 **years of age** and **[over age]** 62 **[family] years of age or older**, **household** size, income and source of income.

* * * * *

(D) The number of program participants by source of intake.

(E) The number of program participants participating in two or more of the EDC's universal service and energy conservation programs, broken down by program component.

(ii) Additional program data for individual universal service and energy conservation components **[shall] must** include the following information:

(A) LIURP. Reporting requirements as established **[at] in** § 58.15 (relating to program evaluation).

(I) LIURP reporting data shall be due **annually** by April 30.

(II) Actual **[production] number of completed jobs** and spending data for the recently completed program year and projections for the current year shall be due annually by the end of February.

* * * * *

(D) *Hardship funds.*

* * * * *

(II) Special contributions, **other than shareholder or ratepayer contributions**.

* * * * *

§ 54.76. Evaluation reporting requirements.

(a) **[Each] An** EDC shall **[have] select, after conferring with BCS,** an independent third-party **to** conduct an impact evaluation of its universal service and energy conservation programs and **to** provide a report of findings and recommendations to the Commission and EDC.

(b) **[The first impact evaluation will be due beginning October 31, 2002, on a staggered schedule. Subsequent evaluation reports shall be presented**

to the EDC and the Commission at no more than 6 year intervals.] An EDC shall submit an impact evaluation report to the Commission every 6 years. When an EDC is required to submit an impact evaluation in the same year as it is required to file its universal service and energy conservation plan, the EDC shall file the impact evaluation report 6 months prior to the filing date for the universal service and energy conservation plan.

(c) To ensure an independent evaluation, neither the EDC nor the Commission shall exercise control over content or recommendations contained in the independent evaluation report. The EDCs may **[provide] submit to** the Commission **[with]** a companion report that expresses where **[they agree or disagree] there is agreement or disagreement** with **the** independent evaluation report content or recommendations.

[(d) An independent third-party evaluator shall conduct the impact evaluation.]

§ 54.77. **[Electric distribution companies] EDCs** with less than 60,000 residential accounts.

[Beginning March 1, 2000, each] An EDC with less than 60,000 accounts shall report to the Commission every 3 years the following information in lieu of **the requirements in** §§ 54.74—54.76 (relating to review of universal service and energy conservation plans**, funding and cost recovery**; annual residential collection and universal service and energy conservation program reporting requirements; and evaluation reporting requirements):

* * * * *

(2) **[Expenses] The expenses** associated with **[low-income] low income** customers.

(3) A description of the universal service and energy conservation services provided to **[low-income] low income** residential customers.

(4) The number of services or benefits provided to **[low-income] low income** residential customers.

(5) The dollar amount of services or benefits provided to **[low-income] low income** residential customers.

CHAPTER 62. NATURAL GAS SUPPLY CUSTOMER CHOICE

Subchapter A. UNIVERSAL SERVICE AND ENERGY CONSERVATION **PLAN: REVIEW, FUNDING AND** REPORTING REQUIREMENTS

§ 62.1. Statement of purpose and policy.

The requirements of 66 Pa.C.S. § 2203(8) (relating to standards for restructuring of natural gas utility industry) mandate that the Commission ensure universal service and energy conservation policies, activities and services for residential natural gas customers are appropriately funded and available in each NGDC territory. **This subchapter establishes a unified process which allows the Commission, in the context of its review of an NGDC's universal service and energy conservation plan, to approve an adequate level of program funding, to determine the types and amount of program costs recoverable from residential customers and to approve a mechanism for full cost recovery.** This subchapter requires covered NGDCs to establish uniform reporting requirements for universal service and energy conservation policies, programs and protections and to report this information to the Commission.

§ 62.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

BCS—Bureau of Consumer Services.

* * * * *

CAP—Customer Assistance Program—**[An alternative collection method that provides payment assistance to low-income, payment troubled utility customers. CAP participants agree to make regular monthly payments that may be for an amount that is less than the current bill in exchange for continued provision of natural gas utility services.] A plan implemented by a distribution company for the purpose of providing universal service and energy conservation services to low income customers, in which the customers shall:**

(i) Make monthly payments based on household income and household size.

(ii) Comply with specific responsibilities to remain eligible for the program.

[*CARES benefits*—The number of referrals and number of customers accepted into CARES.]

* * * * *

***CARES benefits*—The number of referrals and number of customers accepted into CARES.**

Classification of accounts—Accounts are classified by the following categories: all residential accounts and confirmed **[low-income] low income** residential accounts.

* * * * *

Confirmed ***[low-income] low income*** *residential account*—Accounts where the NGDC has obtained information that would reasonably place the customer in a **[low-income] low income** designation. This information may include receipt of LIHEAP funds (**[Low-Income] Low Income** Home Energy Assistance Program), self-certification by the customer, income source or information obtained in § 56.97(b) (relating to procedures upon ratepayer or occupant contact prior to termination).

* * * * *

***LIHEAP—Low Income Home Energy Assistance Program*—A Federally funded program that provides financial assistance in the form of cash and crisis grants to low income households for home energy bills and is administered by the Department of Public Welfare.**

LIURP—**[Low-income]** ***Low Income*** *Usage Reduction Program*—An energy usage reduction program that helps **[low-income] low income** customers to conserve energy and reduce residential energy bills **established by a distribution company consistent with Chapter 58 (relating to residential low income usage reduction programs)**.

[Low-income] ***Low income*** *customer*—A residential utility customer whose gross household income is at or below 150% of the Federal poverty guidelines. Gross household income does not include the value of food stamps or other noncash income.

* * * * *

Payment troubled—A household that has failed to maintain one or more payment arrangements in a 1-year period **or has received a termination notice**.

* * * * *

§ 62.3. Universal service and energy conservation program goals.

* * * * *

(b) The general goals of universal service and energy conservation programs include the following:

(1) To protect consumers' health and safety by helping **[low-income] low income** customers maintain affordable natural gas service.

(2) To provide for affordable natural gas service by making available payment assistance to **[low-income] low income** customers.

(3) To **[help low-income] assist low income** customers **[conserve] in conserving** energy and **[reduce] reducing** residential utility bills.

(4) To ensure universal service and energy conservation programs are operated in a cost-effective and efficient manner **to minimize program costs**.

§ 62.4. **[Universal] Review of universal** service and energy conservation plans**, funding and cost recovery**.

(a) *Plan submission.*

(1) **[Each] An** NGDC shall submit to the Commission for approval an updated universal service and energy conservation plan **in the form of a tariff filing** every 3 years **[beginning February 28, 2002, on a staggered schedule]**.

(2) The plan **[should cover] must provide for universal service and energy conservation for** the next 3-calendar years.

(3) **An NGDC shall file its universal service and energy conservation plan in the form of a tariff filing. The tariff filing must conform with applicable regulations in Chapters 53 and 76 (relating to tariffs for noncommon carriers; and customer assistance programs).** The plan should state how it differs from the previously approved plan.

(4) **[The plan should include revisions based on analysis of program experiences and evaluations.] An NGDC shall consult BCS for advice regarding the design and implementation of its plan at least 30 days prior to submission of the plan to the Commission for approval.**

(5) **In the proceeding on the plan, the Commission will establish a funding level that balances efforts to ensure the availability of universal service and energy conservation programs throughout an NGDC's service territory with the cost of the programs and the rate impact on residential customers that are not enrolled in the programs, and will permit an NGDC to recover costs related to universal service and energy conservation from residential customers. The Commission will approve recovery of CAP costs consistent with § 76.4 (relating to recovery of costs of customer assistance programs). [The Commission will act on the plans within 90 days of the NGDC filing date.**

(6) If the Commission rejects the plan, the NGDC shall submit a revised plan pursuant to the order rejecting or directing modification of the plan as previously filed. If the order rejecting the plan does not state a timeline, the NGDC shall file its revised plan within 45 days of the entry of the order.]

(b) **[*Plan*]** ***Tariff*** *contents.* **The tariff must contain the following information:**

(1) [The components of] ***General requirements.*** **A** universal service and energy conservation **plan that** may include **[the following:] a** CAP, LIURP, CARES, Hardship Funds **[and] or** other programs, policies and protections **consistent with Commission orders, regulations and other applicable law**. For each component of **[universal service and energy conservation,]** the plan**, [shall include]** the following **information shall be submitted:**

[(1)] (i) The program description **[that includes a description of the program rules for each program component] including an explanation of the manner and the extent to which the universal service or energy conservation component operates in an integrated manner with other components of the plan to accomplish the goals stated in § 62.3 (relating to universal service and energy conservation program goals)**.

[(2)] (ii) The eligibility criteria **[for each program component]**.

[(3)] (iii) The projected needs assessment **[for each program component and an explanation of how each program component responds to one or more identified needs]**. The needs assessment **[shall] must** include **[the]:**

(A) The number of identified **[low-income] low income** customers **[and].**

(B) An estimate of **[low-income] low income** customers **[, the].**

(C) The number of identified payment troubled, **[low-income] low income** customers **[, an].**

(D) An estimate of payment troubled, **[low-income] low income** customers **[, the].**

(E) The number of customers who still need LIURP services and the cost to serve that number **[, and the].**

(F) The enrollment size of CAP to serve all eligible customers.

[(4)] (iv) The projected enrollment levels **[for each program component]**.

[(5)] (v) The program budget **[for each program component]**.

[(6)] (vi) The plans to use community-based organizations **[for each program component]**.

[(7)] (vii) The organizational structure of staff responsible for universal service programs.

[(8)] (viii) An explanation of **[any]** differences between the NGDC's approved plan and the implementation of that plan. **The plan must include a proposal to address the identified differences. [If] When** an NGDC has not implemented all of the provisions of an approved plan, the NGDC **[should] shall** provide a justification for that failure and plans for corrective action. **[If] When** an NGDC is requesting approval of a revised plan, the NGDC **[should] shall** provide a justification of the revisions in its request for approval.

[(9)] (ix) A description of outreach and intake efforts**, [for each program component.**

(10) An identification of the] specific steps used to identify **[low-income] low income** customers with arrears and to enroll them in appropriate universal service and energy conservation programs.

[(11) An identification of the manner in which universal service and energy conservation programs operate in an integrated fashion.]

(2) *Program rules.* The tariff must contain rules that apply to the universal service and energy conservation programs. The rules must be consistent with the code, applicable Commission regulations, orders and other applicable law. The rules must address the following:

(i) Program eligibility.

(ii) Enrollment process.

(iii) Customer responsibilities for continued program participation.

(iv) Coordination of energy assistance benefits including the application of LIHEAP grants.

(v) Arrearage forgiveness.

(vi) Dismissal from the program, including default rules in § 76.5 (relating to default provisions for failure to comply with program rules).

(vii) Reinstatement to the program.

(viii) Termination of service.

(ix) Restoration of service.

(x) Treatment of CAP customers who become income ineligible for continued participation.

(xi) Other matters required for the implementation and operation of the program.

(3) *Documentation in support of funding and cost recovery for universal service and energy conservation.* The tariff filing must contain documentation of costs for the NGDC's existing universal service and energy conservation program and a projection of costs for the next 3 years. The cost projection must take into account changes proposed to be made to the programs and the impact of their implementation on costs. The tariff filing must contain documentation of cost savings that result from customer participation in these programs, to the extent savings exist.

(4) *Surcharge.* An NGDC may propose a surcharge under 66 Pa.C.S. § 1307 (relating to sliding scale of rates; adjustments) to provide for full recovery of universal service and energy conservation costs. The surcharge may be subject to annual reconciliation or may be adjusted prospectively on a quarterly basis as required by changes in the level of costs incurred. When a surcharge is proposed, the tariff filing must contain:

(i) A description of the surcharge, a list of the specific costs proposed for recovery, and, when applicable, an adjustment mechanism. Consistent with 66 Pa.C.S. § 1408 (relating to surcharges for uncollectible expenses prohibited), the surcharge may not recover uncollectible expenses.

(ii) A statement of the time period after which the surcharge becomes effective for service referenced from the date of the filing of the tariff.

(iii) Calculations based on current and projected costs that support the use of the surcharge and the adjustment mechanism, when applicable.

(iv) A statement that the surcharge is applicable only to residential customers.

§ 62.5. Annual residential collection and universal service and energy conservation program reporting requirements.

(a) **[Each] An** NGDC shall report annually to the Commission on the degree to which universal service and energy conservation programs within its service territory are available and appropriately funded. Annual NGDC reports **[shall] must** contain information on programs and collections for the prior calendar year. Unless otherwise stated, the report shall be due April 1 each year **[, beginning April 1, 2003]**. When noted, the data shall be reported by classification of accounts **as total residential customers and confirmed low income residential customers**. **[Each] An** NGDC's report **[shall] must** contain the following information:

(1) *Collection reporting.* Collection reporting **[shall] must** be categorized as follows:

* * * * *

(ii) Annual collection operating expenses by classification of accounts. **Collection operating expenses include administrative expenses associated with termination activity, negotiating payment arrangements, budget counseling, investigation and resolving informal and formal complaints associated with payment arrangements, securing and maintaining deposits, tracking delinquent accounts, collection agencies' expenses, litigation expenses other than Commission related, dunning expenses and winter survey expenses.**

* * * * *

(xiii) The total number of **[low-income] low income** households. NGDCs may estimate this number using census data or other information the NGDC finds appropriate.

(2) *Program reporting.* Program reporting **[shall] must** be categorized as follows:

(i) For **[each] a** universal service and energy conservation component, program data **[shall] must** include information on the following:

* * * * *

(ii) Additional program data for individual universal service and energy conservation components **[shall] must** include the following information:

(A) *LIURP* **[*reporting requirements*]**. **[As] Reporting requirements as** established in § 58.15 (relating to program evaluation).

(I) **[*LIURP reporting data.* Due] LIURP reporting data shall be due** annually by April 30.

(II) **[*Actual number of completed jobs and spending data.*]** Actual number of completed jobs and spending data for the recently completed program year and projections for the current year shall be due annually by April 1.

* * * * *

§ 62.6. Evaluation reporting requirements.

(a) **[Each] An** NGDC shall select, after conferring with **[the Commission's Bureau of Consumer Services] BCS**, an independent third-party to conduct an impact evaluation of its universal service and energy conservation programs and to provide a report of findings and recommendations to the Commission and NGDC.

(b) **[The first impact evaluation will be due beginning August 1, 2004, on a staggered schedule. Subsequent evaluation reports shall be presented to the NGDC and the Commission at no more than 6-year intervals.] An NGDC shall submit an impact evaluation report to the Commission every 6 years. When an NGDC is required to submit an impact evaluation in the same year as it is required to file its universal service and energy conservation plan, the NGDC shall file the impact evaluation report 6 months prior to the filing date for the universal service and energy conservation plan.**

(c) To ensure an independent evaluation, neither the NGDC nor the Commission shall exercise control over **content or** recommendations contained in the independent evaluation report. The NGDCs may **[provide] submit to** the Commission **[with]** a companion report that expresses where **[they agree or disagree] there is agreement or disagreement** with **the** independent evaluation report content or recommendations.

§ 62.7. NGDCs with less than 100,000 residential accounts.

[(a) Beginning June 1, 2003, each] An NGDC with less than 100,000 accounts shall report to the Commission every 3 years the following information in lieu of the requirements in §§ 62.4—62.6 (relating to **review of** universal service and energy conservation plans**, funding and cost recovery**; annual residential collection and universal service and energy conservation program reporting requirements; and evaluation reporting requirements):

* * * * *

(2) **[Expenses] The expenses** associated with **[low-income] low income** customers.

(3) A description of the universal service and energy conservation services provided to **[low-income] low income** residential customers.

(4) **[Number] The number** of services or benefits provided to **[low-income] low income** residential customers.

(5) **[Dollar] The dollar** amount of services or benefits provided to **[low-income] low income** residential customers.

CHAPTER 76. CUSTOMER ASSISTANCE PROGRAMS

Sec.
76.1. Purpose.
76.2. Definitions.
76.3. Approval process.
76.4. Recovery of costs of customer assistance programs.
76.5. Default provisions for failure to comply with program rules.
76.6. Restoration of service after termination for nonpayment of CAP bills.

§ 76.1. Purpose.

Universal service and energy conservation shall be made available to low income customers throughout a distribution company's territory. To ensure their availability, universal service and energy conservation programs shall be developed and funded individually for each distribution company. To ensure cost effectiveness and compliance with statutory requirements that protect all ratepayers, certain rules must be consistent for all programs. These rules relate to costs that shall be recovered by the distribution company, customer actions or inactions that result in dismissal from participation in a CAP, and billing and collection practices that shall be observed for CAP customers.

§ 76.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

CAP—Customer Assistance Program—A plan implemented by a distribution company for the purpose of providing universal service and energy conservation services to low income customers, in which the customers shall:

(i) Make monthly payments based on household income and household size.

(ii) Comply with specific responsibilities to remain eligible for the program.

Distribution company—A natural gas distribution company or an electric distribution company.

LIHEAP—Low Income Home Energy Assistance Program—A Federally-funded program that provides financial assistance in the form of cash and crisis grants to low income households for home energy bills and is administered by the Department of Public Welfare.

§ 76.3. Approval process.

(a) A distribution company shall obtain Commission approval prior to implementing a CAP plan, or a revision or expansion of an existing CAP. A distribution company shall utilize the procedures in § 54.74(a)(3) or § 62.4(a)(3) (relating to review of universal service and energy conservation plans, funding and cost recovery).

(b) When an immediate temporary modification must be made to an existing CAP to maintain its operation, a distribution company shall submit an application for special permission to file a tariff revision or supplement on less than statutory notice consistent with §§ 53.102 and 53.103 (relating to exception to requirement for statutory notice; and concurrently furnished information). A copy of the application, including the supporting infor-

mation, shall be served on the Office of Consumer Advocate, the Office of Trial Staff, and other advocates for low income customers, and provided to BCS. A distribution company shall obtain Commission approval prior to implementing a temporary modification to an existing CAP.

§ 76.4. Recovery of costs of customer assistance programs.

The following considerations apply to the recovery of CAP costs by a distribution company:

(1) CAP costs shall be recoverable only from residential customers.

(2) The following CAP costs are eligible for recovery, if prudently incurred and reasonable in amount:

(i) CAP credits.

(ii) Administrative costs, including costs related to collection activities.

(iii) Preprogram arrearage forgiveness to the extent that a distribution company can prove that recovery of these costs will not result in double recovery.

(iv) Taxes that a distribution company is able to prove are attributable to its CAP.

(v) Other costs that a distribution company is able to prove are attributable to its CAP.

(3) The company shall include, as an offset to cost recovery, cost savings it incurred in the following areas:

(i) Cash working capital.

(ii) Bad debt expense.

(iii) Credit costs.

(iv) Collection costs.

(4) The Commission will consider the timeliness of a distribution company's collection activities in evaluating the reasonableness of costs claimed for recovery.

(5) A distribution company may propose a surcharge under 66 Pa.C.S. § 1307 (relating to sliding scale of rates; adjustments) to provide for full recovery of CAP costs as part of the surcharge permitted by §§ 54.74(b)(4) and 62.4(b)(4) (relating to review of universal service and energy conservation).

§ 76.5. Default provisions for failure to comply with program rules.

(a) The failure of a CAP customer to comply with the following shall result in dismissal from CAP participation:

(1) Failure to apply for LIHEAP.

(2) Failure to verify or certify eligibility.

(3) Failure to report changes in income and household size.

(4) Failure to accept free budget counseling offered by the distribution company.

(5) Failure to accept usage reduction services.

(b) The failure of a CAP customer to make payments shall result in dismissal from CAP participation and may lead to termination of service.

§ 76.6. Restoration of service after termination for nonpayment of CAP bills.

When a CAP customer's service has been terminated for nonpayment, restoration of service shall be governed by 66 Pa.C.S. § 1407 (relating to reconnection of service) and applicable Commission regulations and orders.

[Pa.B. Doc. No. 08-219. Filed for public inspection February 8, 2008, 9:00 a.m.]