

STATEMENTS OF POLICY

Title 31—INSURANCE

INSURANCE DEPARTMENT

[31 PA. CODE CH. 153]

Permissible Activity under the Liability Risk Retention Act of 1986 (15 U.S.C.A. §§ 3901—3906)—Statement of Policy

The Insurance Department (Department) hereby deletes a statement of policy in § 153.1 pertaining to permissible activity under the Federal Liability Risk Retention Act of 1986 (Federal act) (15 U.S.C.A. §§ 3901—3906), to read as set forth in Annex A. The statement of policy was announced August 26, 1988 (18 Pa.B. 3849) under the authority of sections 209, 605 and 606 of The Insurance Department Act of 1921 (40 P.S. §§ 47, 235 and 236); and section 3 of the act of January 24, 1966 (40 P.S. §§ 1006.1—1006.19) (now repealed) relating to unlicensed insurers. The statement of policy notified the insurance industry of the Department's interpretation of the Federal act with respect to the permissible activities of agents, brokers and insurers when dealing with risk retention groups and purchasing groups.

Purpose

The purpose of this notice is to delete § 153.1, to eliminate an obsolete statement of policy. The Federal act created risk retention groups (insurers owned and operated by insureds) and purchasing groups (groups of insureds seeking to purchase insurance) and allowed these groups to operate to a certain extent outside the scope of state insurance regulation. In October 1986, Congress responded to a commercial insurance crisis by passing amendments to the act which broadened the scope to include all commercial liability insurance (except worker's compensation).

The Federal act preempts state insurance laws with respect to risk retention groups and to a lesser extent with respect to purchasing groups. Each state may regulate these entities only to the extent permitted by the Federal law. The statement of policy delineated the conduct of agents and brokers regarding risk retention groups and the conduct of agents, brokers and insurers regarding purchasing groups that the Department considered to be outside the scope of the act and therefore subject to Pennsylvania's insurance statutes.

On December 18, 1992, Article XV was added to The Insurance Company Law of 1921, known as the Pennsylvania Risk Retention Act (40 P.S. §§ 991.1501—991.1516). The currently effective requirements with respect to the permissible activities of agents, brokers and insurers in this Commonwealth when dealing with risk retention groups and purchasing groups are found in the Pennsylvania Risk Retention Act. Specifically, sections 1510 and 1514 of that act (40 P.S. §§ 991.1510 and 991.1514) set forth the restrictions on insurance purchased by purchasing groups and the duty of an agent or broker to obtain a license. In addition, section 1509(a)(7) (40 P.S. § 991.1509(a)(7)) clarifies that insurers of purchasing groups are subject to the applicable provisions of

insurance laws, rules and regulations governing policy form and rate standards. Therefore, the statement of policy has been superseded by the Pennsylvania Risk Retention Act and is no longer needed.

Affected Parties

There are no parties affected by the deletion of this statement of policy because the statement of policy was made obsolete by the enactment of the Pennsylvania Risk Retention Act.

Fiscal Impact

The deletion of the statement of policy has no fiscal impact.

Paperwork

The deletion of the statement of policy has no impact on paperwork.

Effectiveness/Sunset Date

The deletion of the statement of policy will become effective upon final publication in the *Pennsylvania Bulletin*. No sunset date has been assigned because the Department is deleting an obsolete statement of policy.

Contact Person

The person to contact for information on the deletion of this statement of policy is Elaine M. Leitzel, Administrative Officer, Office of Regulation of Companies, 1345 Strawberry Square, Harrisburg, PA 17120, (717) 787-8840.

GREGORY S. MARTINO,
Acting Insurance Commissioner

Fiscal Note: 11-168. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 31. INSURANCE

PART VIII. MISCELLANEOUS PROVISIONS

CHAPTER 153. (Reserved)

§ 153.1. (Reserved).

[Pa.B. Doc. No. 97-1301. Filed for public inspection August 15, 1997, 9:00 a.m.]

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 69]

[M-00960838]

Affiliated Interest Issues of Natural Gas Marketers

The Pennsylvania Public Utility Commission (Commission) on June 5, 1997, adopted a final policy statement to provide guidance to local distribution companies (LDCs) providing natural gas service in this Commonwealth with regard to uniform standards for affiliated interests of the LDCs and for gas marketing divisions of LDCs. The contact person is Joseph K. Witmer, Assistant Counsel, Law Bureau, (717) 783-2818.

Commissioners Present: John M. Quain, Chairperson; Robert K. Bloom, Vice Chairperson; John Hanger, statement follows; David W. Rolka Dissenting—statement follows; Nora Mead Brownell

Public Meeting held
June 5, 1997

Policy Statement Addressing Affiliated Interests of Natural Gas Marketers; Doc. No. M-00960838

Final Order

By the Commission:

On October 3, 1996, the Commission adopted a proposed policy statement to provide guidance to LDCs providing natural gas service in this Commonwealth. A proposed policy statement was published in the *Pennsylvania Bulletin* on November 23, 1996. Comments were due within 30 days after publication. A public forum was held on March 7, 1997. We issued this proposed policy statement along with a statement on policies for marketer fitness at M-960839. Most comments submitted by the interested parties¹ jointly commented on both dockets.²

A. General

This Policy Statement addresses an LDC's relationship with its marketing subsidiary. That is necessary because an LDC's marketing subsidiary may be competing against other non-LDC marketers or brokers for deliveries of gas supplies to customers located on an LDC's distribution network under an LDC's transportation tariff. The parties have divergent views on handling an LDC's marketing subsidiary based on their interests.

B. Policy Statements Under Pennsylvania Law

Several comments requested that the Commission's Policy Statement be mandatory. Those comments objected to the use of the term "should" in the Policy Statement because the Commission's approach must be mandatory and regulatory.

We reject that suggestion because it is inconsistent with Pennsylvania law. In this Commonwealth, the language of a policy statement is generally precatory rather than mandatory. The Commission lacks statutory authority to implement mandatory policy statements, let alone enforce them unilaterally or immediately since that is the purpose of regulations under Pennsylvania law. The Commonwealth Court has commented, in relevant part, as follows:

... a statement of policy does not have the force of law, and is merely interpretive in nature and is not binding upon a reviewing court. The value of a policy statement is only persuasive, so long as it represents an accurate interpretation of the relevant statute or other authorities from which it is derived.

Shenago Township Board of Supervisors v. PA PUC, (No. 1387 C.D., filed December 20, 1996).

Our rejection is also based on the distinction under Pennsylvania law between a statement of general policy or guideline and a rule or regulation issued by a govern-

¹ Unless otherwise stated, the phrase "marketers" and/or "marketers or brokers" includes all LDC affiliates, subsidiaries, parents, divisions, and the like providing gas supply to a respective LDC's customer.

² The Commission received comments from the Office of Consumer Advocate (OCA); the Independent Oil and Gas Association of Pennsylvania (IOGA); the Pennsylvania Gas Association (PGA); and the Industrial Energy Consumers of Pennsylvania (IECPA); Eastern Energy Marketing; Enron Capital and Trade Resources; KCS, LG&E, MidCon and Natural Gas Clearing House (Clearinghouse); Open Flow Gas Supply Corporation, and T.W. Phillips; and UGI.

mental body. Where an agency's guidelines are intended to provide a general statement of policy, they are not treated as binding administrative rules or regulations. *Willman v. Children's Hospital of Pittsburgh*, 459 A.2d 855, 859 (1983) citing *Pennsylvania Human Relations Commission v. Norristown Area School District*, 473 Pa. 334, 374 A.2d 671 (1977). Consequently, we view this document as a policy statement or guideline and not a binding administrative regulation.

C. The Purpose of The Policy Statement and the Creation of a Level Playing Field

The LDCs and marketers or brokers have different opinions about the Policy Statement. The Pennsylvania Gas Association (PGA) and several LDCs disputed the claim that LDCs can leverage their local distribution system so as to impede the competitive presence of competing gas suppliers.

Equitable, in particular, objected to the Commission's attempt to create a new level playing field in this proceeding and suggested that the Commission await further legislation. Equitable and UGI both claimed that LDCs, unlike a marketer or broker, had a continuing obligation to less profitable or desirable customers. They further claimed that, if anything, these legal obligations placed an LDC at a competitive disadvantage vis-a-vis large competitors of gas suppliers who are not burdened with these duties.

Upon consideration, we reject the marketer or broker argument. We do so because they seek to use this Policy Statement to extend the Commission's statutory authority with regard to policy statements. We also reject their position because they would use this Policy Statement as a vehicle to restructure the entire industry. That is a legislative function which should not be accomplished by the guidance set forth in this Policy Statement.

By the same token, we also reject the LDC's argument. We do so because the LDCs would limit the Commission's jurisdictional authority to review or address potentially inappropriate dealings with affiliated interests. Neither approach is acceptable.

We will not use this Policy Statement as a means to restrict our jurisdiction nor as a forum to restructure the natural gas industry. Those are legislative functions. In addition, we recognize that an LDC's statutory obligations under the *Pennsylvania Code*, which obligations are not imposed on a marketer or broker of gas supplies, presents a challenge to an LDC which might benefit from the guidance provided by this Policy Statement.

We conclude that the guidance of a Policy Statement and not the mandate of a regulation is the best way to manage competition between an affiliate and a competing gas supplier. We believe that interested parties are far better at protecting their interests on a tariff-by-tariff basis, which are developed in light of the LDC's situation and the legal rights and obligations of an LDC and competing gas suppliers, than by regulatory mandate.

D. Definitions Under the Policy Statement

The parties disputed the terms used in the Policy Statement. One term that caused extensive debate was the meaning and scope of "affiliate" as it was used in the Policy Statement.

An affiliated interest, to the extent that an LDC's affiliated marketing division or subsidiary constitutes an affiliated interest, is defined at 66 Pa.C.S. § 2101. Section 2101 provides, in relevant part, as follows:

(6) Every corporation or person which the commission may determine as a matter of fact after investigation and hearing is actually exercising any substantial influence over the policies and actions of such public utility, even though such influence is not based upon stockholding, stockholders, directors, or officers to the extent specified in this section. As used in this part substantial influence means any corporation or person which or who stands in such relationship to the public utility that there is an absence of free and equal bargaining power between it or him and the public utility.

(7) Every person or corporation who or which the commission may determine as a matter of fact after investigation and hearing is actually exercising such substantial influence over the policies and actions of such public utility in conjunction with one or more other corporations or persons, or both, with which or whom they are related by ownership or blood relationship, or both, or by action in concert that together they are affiliated with such public utility within the meaning of this section even though no one of them alone is so affiliated.

Upon analysis of the facts and arguments in this case, we conclude that, for purposes of this Policy Statement only, the comments provided during this Policy Statement's investigation and the public forum hearings provided in conjunction therewith justify a determination that the term "affiliated interest" as used in section 2101 includes an affiliate as used in this Policy Statement. That is because the gas supply operations of an LDC typically intertwine with the transportation tariff services and the distribution system operations of an LDC.

We conclude that such an affiliated interest includes a legally or functionally distinct entity, or both, of an LDC engaged in competition against other marketers or brokers for the supply of gas regardless of whether other marketers or brokers are themselves an affiliate as defined in our Policy Statement.

E. *Specific Provisions*

1. *Selective Enforcement of Transportation and Balancing, for example, § 69.192(b)*

Section 69.192(2) of the Proposed Policy Statement provided, in relevant part, as follows:

(2) The LDC shall likewise not apply a tariff provision in a manner that would give its affiliate or division an *unreasonable* preference over other marketers with regard to matters such as scheduling, *balancing, transportation, storage, curtailment, or nondelivery.*

Pennsylvania Bulletin, Vol 26, No. 47, November 23, 1996, p. 5721, emphasis added.

An issue arose concerning the equitable enforcement or application of these balancing and transportation regulations.

We note that 66 Pa.C.S. § 1502 prohibits unreasonable, and hence discriminatory, preferences by a public utility as regards its customers. While section 1502 does not apply directly to the relationship between the LDC and

the nonutility marketer or broker, it must be recognized that the failure to treat all gas suppliers on an equal basis impacts the end user's ability to obtain the service for which it has contracted. In addition, actions taken consistent with this Policy Statement would prevent the filing of Formal Complaints by an LDC's transportation service customer and thereby avoid the expenditure of time and resources in formal proceedings. Furthermore, under sections 501(a), 1501 and 1502, we find that end-users using transportation tariffs come within the purview of this Policy Statement with respect to the enforcement of our transportation regulations and protecting the public interest.

Finally, we conclude that this Policy Statement is not intended to prohibit any existing tariffs or tariff practices in existence before issuance of the guidance set forth in this Policy Statement. In particular, the Commission's Policy Statement is not intended to prohibit the use of bundled tariff offerings to the extent they constitute competitive responses to market circumstances so long as those practices do not contravene, *inter alia*, 66 Pa.C.S. § 1502 of the Public Utility Code or constitute an illicit tying arrangement in contravention of law.

2. *Unreasonable "Preferences" Under § 69.192(b)*

The Office of Consumer Advocate (OCA) and other parties questioned the use of the adjective "unreasonable" in § 69.192(2). They consider the adjective dangerous because it suggests that some differentiation may be acceptable and legal.

Upon consideration, we conclude that elimination of that term is unnecessary. We do so because there may be a legitimate regulatory basis for providing a local affiliate with a different requirement given the difference in the legal rights and obligations existing with regard to an LDC and a marketer or broker. In addition, a customer unhappy with an LDC's actions can challenge those actions under 66 Pa.C.S. § 1502. Finally, the Commission needs to monitor such preferences under 66 Pa.C.S. § 1317(b) whereby integrated gas companies must furnish information regarding the purchase of gas supplies from nonaffiliated interests, purchases from affiliated interests, and gas supplies withheld. Likewise, § 1318 places limitations on gas supplies purchased from affiliates.

3. *Recordkeeping and Reporting Under § 69.192(e)*

Section 69.192(5) of the Proposed Policy Statement provided, in relevant part, as follows:

(5) The LDC shall maintain a chronological log of tariff provisions for which it has granted waivers. Entries shall include the name of the party receiving the waiver, the date and time of the request, the specific tariff provision, the specific tariff provisions waived and the reason for the waiver.

Pennsylvania Bulletin, Vol 26, No. 47, November 23, 1996, p. 5721.

The marketers and brokers strongly urge the Commission to impose extensive reporting requirements on an affiliate.

Upon consideration, we do not believe that imposition of mandatory reporting requirements in a guidance document is necessary, appropriate, or legally sound. The concerns to be addressed by these reporting requirement suggestions are better managed through the Commission's Formal Complaint and regulatory review processes.

Those concerns can also be addressed and resolved on an individual basis as part of any transportation tariff proposed by an LDC. Consequently, we are unwilling to impose those suggested reporting requirements given that other avenues exist to address them.

4. *Restrictions on Disclosure and Exchange of Information Under § 69.192(h)*

Section 69.192(8) of the Proposed Policy Statement provided, in relevant part, as follows:

(8) The LDC should not disclose customer proprietary information to its marketing affiliates or division, and to the extent that it does disclose customer information, it shall do so to other similarly situated marketers in a similar fashion so as not to selectively disclose, delay disclosure, or give itself or its affiliate any undue advantage related to the disclosure.

Pennsylvania Bulletin, Vol 26, No. 47, November 23, 1996, p. 5721.

PGA claimed that a categorical ban on exchanges of information would unduly restrict legitimate utility management.

Upon consideration, we would simply point out that this provision simply means that information conveyed to an LDC's affiliate must be done via public dissemination and not private disclosure.

We believe that system reliability is enhanced by public dissemination as opposed to private disclosure. That is because all the parties engaged in a competitive gas supply market would be made aware of potential gas supply customers. This will enable all gas suppliers to react to such market changes and make the adjustments needed to enhance their transportation and gas supply operations. In addition, all parties would be informed about the enhanced gas supply sales arising from plant expansions.

We do not believe that an LDC must be allowed to privately disclose to its affiliate any gas supply marketing opportunities, gleaned from its role as system operator, in advance of public dissemination. We reach that conclusion because selective disclosure of such gas supply market potential could prejudice other marketers. Such action might also be to a customer's disadvantage because that customer might lock-in gas supplies from an affiliate before other marketers or brokers have an opportunity to provide competitive gas supply options.

Nevertheless, contrary to the understanding contained in some comments, we would point out that the guidance provided by this Policy Statement does not mean that all gas supply disseminations to an affiliate are prohibited. Our Policy Statement only expects that disclosures made to an LDC's affiliate with regard to gas supply changes must also be made simultaneously to other competitive gas supply participants.

6. *Structural Separation Under § 69.192(i)*

This provision was contested in several respects. Section 69.192(9) of the Proposed Policy Statement provided, in relevant part, as follows:

(9) An LDC shall fairly allocate to its marketing affiliate or division costs or expenses for general administration or support services so as to not give either the LDC or the affiliate an unfair advantage over competitors through an unfair allocation of these costs.

Pennsylvania Bulletin, Vol 26, No. 47, November 23, 1996, p. 5721.

a. *Structural and Employee Separation*

A number of comments addressed the issue of cost allocation between an LDC and its affiliate. Upon consideration, we conclude that physical separation should not be mandated in this Policy Statement. This does not mean, however, that a case cannot be made for such separations requirements depending on the size and sophistication of any given LDC. Such a matter, we believe, is best reserved for those proceedings in which we actively consider an LDC's transportation tariff. We do so in light of the fact, as the smaller LDCs have noted, that separation may be unwieldy and unnecessary for small operations but may be a practical and efficient alternative for larger operations. Such a determination can be made on an LDC-by-LDC basis. A blanket generic requirement on that issue is not a proper subject of this Policy Statement.

b. *Cost Allocation*

PGA claimed that § 69.192(9) posited two cost allocation standards, for example, "fairness" and "competitive advantage," which presumably called for an assessment of other considerations. PGA suggested that the Commission intended a distinction regarding cost allocation and, that if no distinction is intended, the standards were redundant. PGA further suggested that the fairness standard was really a "just and reasonable" standard whereas competitive advantage implied a new standard for assessing cost allocations and deployment of assets.

Upon consideration, we conclude that the language used may create confusion. The section will be altered so as to clearly state the purposes for which it is intended.

7. *Capacity and Supply Releases Under § 69.192(j)*

Section 69.192(10) of the Proposed Policy Statement provided, in relevant part, as follows:

(10) An LDC selling surplus gas supplies or upstream capacity on a short-term basis to its affiliate shall make supplies available to similarly situated marketers on a nondiscriminatory basis.

Pennsylvania Bulletin, Vol 26, No. 47, November 23, 1996, p. 5721.

PGA noted that the Federal Energy Regulatory Commission (FERC) excluded short-term releases of capacity from competitive bidding and has considered further elimination of competitive bidding for released capacity. PGA suggested that the proposed policy would be an impediment to short-term transactions and that there may be no means to make pipeline capacity available to all similarly situated customers.

OCA claimed that the Commission has provided no definition of "short-term" nor has it explained why the nondiscriminatory requirement is limited to short-term versus long-term upstream capacity. OCA recommended defining short-term as a transaction of 31 days or less and applying this standard to long-term surpluses as well.

Upon consideration, we conclude that the FERC approach for exempting short-term transactions, as defined and set forth at FERC, is appropriate here in light of our desire to avoid imposing more requirements on Pennsylvania LDC's. However, we believe that public dissemina-

tion of any availability is necessary, to enhance competition, and that a log showing such availability should be kept and remain open for inspection during normal business hours. We believe that this approach sets forth our expectations regarding competition and our desire to make sure that information concerning available gas and capacity is public. That ensures the safety and reliability of gas supplies or capacity.

8. *Enforcement and Complaints Under § 69.192(l)*

Section 69.192(13) of the Proposed Policy Statement provided, in relevant part, as follows:

(13) The LDC shall establish and file with the Commission a complaint procedure for dealing with alleged violations of this section.

Pennsylvania Bulletin, Vol 26, No. 47, November 23, 1996, p. 5721.

The marketers and brokers suggested that the burden should not be on them to discover and prove violations. They want that burden shifted to the LDC.

Upon consideration, we note that 66 Pa.C.S. § 332(a), of the Public Utility Code states that, except in regard a public utility's rates or alleged violations investigated by the Commission, the burden of proof is on the party bringing the complaint. The Commission lacks the statutory authority to alter that requirement.

As we noted in our discussion of an LDC in § 69.191(10) of this Policy Statement, we believe that such an internal complaint procedure is appropriate and should be developed by the parties on an LDC-by-LDC basis. Where a utility has an established arrangement for conflict resolution, resolution may prove far less expensive and time consuming than resort to the Commission's Formal Complaint processes. That, however, can be examined on a case-by-case basis in conjunction with review of any tariff filing. With regard to our authority to require such a process, this Commission has the authority to address the terms and conditions of service of a public utility under section 1501 of the Public Utility Code.

Consequently, we see no need to invoke that authority today. The fact is that competing gas suppliers and the LDCs have financial incentives for developing processes to manage any violation of the Public Utility Code that might be faster and less costly than resort to Commission processes.

Conclusion

The Commission is amending the proposed Policy Statement in several respects. The first paragraph of § 69.191(a) has been amended to clearly state that marketers or brokers come within the scope of the Policy Statement. The third paragraph of § 69.191(a) has been amended to clearly indicate the Commission's determination that a generic separations requirement is not expected as a result of this Policy Statement although separations may be expected if warranted by subsequent facts and circumstances.

Section 69.191(b) has been amended to indicate the Commission's determination that recordkeeping and conflict resolution will not be addressed on a generic basis in this Policy Statement. The Commission expects the parties in any tariff proceeding guided by this Policy Statement to resolve those concerns in joint consultation. The Commission reserves the option of addressing both recordkeeping and conflict resolution in any tariff determination guided by this Policy Statement if the parties are unable to do that or if warranted by subsequent facts or circumstances.

Section 69.192(5) has been amended to expect that the chronological log for waivers from any tariff provisions shall be open for inspection during normal business hours. Sections 69.192(5)—69.192(7), 69.192(10), and 69.192(14) have been amended to reflect the Commission's expectation that chronological logs will be kept and that such logs shall be open for public inspection during normal business hours.

Section 69.192(10) has been amended to reflect the Commission's expectation that any release of gas surplus and/or upstream capacity shall be publicly disseminated simultaneously in conjunction with any private disclosure to an LDC's affiliate. Section 69.192(13) has been amended to expect a permissive, as opposed to mandatory, conflict resolution procedure.

Accordingly, under our authority under sections 501, 508, 1301—1304, 1317, 1318, 1501, and 1502 of the Public Utility Code, 66 Pa. C.S. §§ 501, 508, 1301—1304, 1317, 1318, 1501 and 1502, as well as the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. § 1201 *et seq.*), the Commission has authority to promulgate this Final Policy Statement addressing the Affiliated Interests of a Local Distribution Company to read as set forth in Annex A; *Therefore, It Is Ordered That:*

1. The Final Policy Statement addressing the Affiliated Interests of Natural Gas Marketers of a Local Distribution Company, as set forth in Annex A, be and hereby is adopted.
2. The Secretary shall submit this order and Annex A to the Governor's Budget Office for review of fiscal impact.
3. The Secretary shall duly certify this order and Annex A and deposit them with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.
4. This policy statement shall become effective upon publication.
5. A copy of this Order and Annex A are to be served upon all jurisdictional gas utilities, the Office of Consumer Advocate, the Office of Small Business Advocate, and on any parties who filed comments in this proceeding.

JAMES J. MCNULTY,
Acting Secretary

(Editor's Note: The regulations of the Commission, 52 Pa. Code Chapter 69, are amended by adding a statement of policy at §§ 69.191 and 69.192 to read as set forth in Annex A).

Statement of Commissioner Hanger

This Policy Statement provides guidelines for the parties to use in jointly developing amendments to transportation tariffs or in developing new transportation tariffs for the possible expansion of customer choice to all customers in the near future. The Policy Statement places natural gas market participants on notice that the Commission expects that the tariff amendments to be filed will not tolerate discrimination in the provision of unbundled monopoly elements, including scheduling, balancing transportation, storage, curtailment or nondelivery; that information an LDC gives to its subsidiary must also be publicly available; that transportation discounts provided to a marketing affiliate or the LDC's favored customers must be offered to the affiliate's competitors;

and that LDCs must maintain and make publicly available during normal business hours a chronological log of tariff provisions for which it has granted waivers. Finally, the affiliate interest rules ultimately have to be approved by the Commission. Any standard that is anticompetitive will not be approved by me.

There is one item that I would like to see considered by the LDC and the parties. That issue involves the physical separation of the LDC marketing function from the LDC monopoly business. For many LDCs in this Commonwealth, physical separation of the affiliate already is a reality. But there exists other LDCs that should consider the separation of monopoly and competitive functions as well. In fully competitive markets where unlimited cross subsidies from the competitive core business to the fledgling new enterprise could mean the demise of the core business, the commingling of subsidiary financial resources is not an issue because there is a competitive limit to the resources the parent firm will commit to the subsidiary.

By contrast, a regulated monopoly such as an LDC has a captive source of resources, both financial and informational, to fund the LDC affiliate's competitive ventures. This is why regulated monopoly industries are different from competitive retail firms. The playing field cannot be level, and competition cannot maximally flourish, unless, in addition to the Policy Statement items, there is a structural separation of staffing and locations. For these reasons, it is not surprising that physical separation of affiliates either in location or staffing has been required by the Wisconsin Public Service Commission, the New York Public Service Commission, New Jersey Board of Public Utilities, and the Maryland Public Service Commission.

Statement of Commissioner David W. Rolka

This Policy Statement is intended to provide guidance to, but not restructure, Pennsylvania's natural gas industry. The Policy Statement recognizes that the industry restructuring is an issue that is within the General Assembly's purview and not the Pennsylvania Public Utility Commission's. To the extent that the will of the General Assembly is known, this knowledge should be reflected in any Policy Statement issued by this agency.

An indication of the current thinking of the General Assembly regarding the structural separation of local distribution companies (LDCs) is set forth in the present version of House Bill 1968, Printer's Number 1193. This proposed bill is being considered actively, as demonstrated by the recent round of both House and Senate hearings on gas restructuring.

Section 2203(4) of House Bill 1068 would require LDCs to "separate physically, operationally and legally all natural gas supply facilities and functions from gas operations." Section 69.192 of the Commission's Policy Statement urges LDCs to apply their tariffs "in a nondiscriminatory manner." It contemplates a system of cost allocations and fire walls between LDCs and their marketing affiliates. Experience in the telecommunications industry demonstrates that fire walls based on cost allocations are actually more rather than less regulatory and are as difficult to maintain.

On an issue such as this, under active consideration by the Legislature, it is in my opinion more appropriately the subject of legislative testimony and consideration prior to our agency taking action. I, therefore, do not support the issuance of this Policy Statement at this time.

Fiscal Note: Fiscal Note 57-180 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 69. GENERAL ORDERS, POLICY STATEMENTS AND GUIDELINES ON FIXED UTILITIES

POLICY STATEMENT ADDRESSING AFFILIATED INTEREST ISSUES OF NATURAL GAS MARKETERS

§ 69.191. General.

(a) Given the unbundling of monopoly distribution services in the natural gas industry and the development of customer access to commodity gas and transportation services, the Commission has developed policies for local distribution companies (LDCs), marketers and customers with regard to the affiliated and nonaffiliated interests of LDCs. Unless otherwise stated, the phrase "marketer" or "marketers or brokers" includes all LDC affiliates, subsidiaries, parents, divisions, and the like providing gas supply to a respective LDC's customer. This section and § 69.192 (relating to affiliated interest—statement of policy) are intended to clarify additional aspects of the Commission's authority in this area. The Commission has a strong policy against direct or indirect discrimination by LDCs in favor of their marketing affiliates or marketing divisions and against independent gas marketers. The discrimination impermissibly hinders the unbundling of services and the entry of new competitors into the marketplace. This discrimination also violates section 1502 of the code (relating to discrimination in service).

(b) Many Pennsylvania LDCs have affiliated marketing divisions. Some Pennsylvania LDCs may have divisions or marketing sections that are not separately organized as affiliates as defined in 66 Pa.C.S. (relating to Public Utility Code). This section and § 69.192 provide guidance to an LDC's affiliate, regardless of the format used to operate an LDC's affiliate, in order to be effective, to prevent discriminatory behavior, and insure compliance with section 1502 of the code (relating to discrimination in service). This section and § 69.192 will apply without regard to the structural relationship of the LDC's marketer to the LDC.

(c) This section and § 69.192 cover both the LDC's affiliates and gas marketing divisions or marketing sections, even those without any distinct organizational structure, that do not have affiliate status. This section and § 69.192 will not require any generic structural separation of an LDC's affiliate, notwithstanding actions taken to the contrary in other states, because the Commission does not believe this is necessary as long as the LDC fairly allocates costs to an LDC's affiliate and refrains from giving the LDC's affiliate any unfair advantage vis-a-vis a marketer or broker not affiliated with an LDC. The Commission may impose such a structural requirement if and when warranted by the facts and circumstances.

(d) The Commission's authority with respect to affiliates and marketing divisions derives from different portions of the code. Chapter 21 of the code (relating to relations with affiliated interests) directly governs affiliated interests. Section 1318(b) of the code (relating to just and reasonable natural gas rates), addresses gas pur-

chased from affiliates. Other provisions govern natural gas costs such as sections 1307, 1308, 1317, and 1318. The code requires adherence to tariffs under section 1303 (relating to adherence to tariffs) and thus prohibits a lack of uniformity or discrimination in the application of tariff provisions. Likewise under section 1304 (relating to discrimination in rates) it prohibits rate discrimination. Other provisions reenforce these policies: section 1501 (relating to character of service and facilities) requires utilities to furnish "adequate, efficient, safe and reasonable service," while section 1502 prohibits "any unreasonable preference or disadvantage" and forbids "any unreasonable prejudice or disadvantage." These provisions require equal treatment of similarly situated parties, in this case customers of an LDC's transportation tariff services, regardless of whether that customer chooses to use the gas supply services of an LDC or otherwise.

(e) Under sections 505 and 506 of the code (relating to duty to furnish information to the Commission; cooperation in valuing property; and inspection of facilities and records), the Commission has authority to require utilities to keep and furnish information in accordance with requirements set forth by the Commission. As part of this section and § 69.192 the Commission has set forth certain recordkeeping requirements to help ensure that parties are fairly treated. The Commission expects the LDC, in consultation with marketers or brokers to propose a process for reporting and managing marketer or broker complaints as part of any tariff proposed as a result of this section and § 69.192.. The Commission may expect additional recordkeeping or conflict resolution processes if the parties are unable to resolve this or if warranted by subsequent facts and circumstances.

§ 69.192. Affiliated interest—statement of policy.

The following policies should be applied by the local distribution companies (LDCs):

(1) The LDC should apply its tariffs in a nondiscriminatory manner to its affiliate, its own marketing division and any nonaffiliate.

(2) The LDC should likewise not apply a tariff provision in any manner that would give its affiliate or division an unreasonable preference over other marketers with regard to matters such as scheduling, balancing, transportation, storage, curtailment or nondelivery.

(3) If a tariff provision is mandatory, the LDC should not waive the provision for its affiliate or division absent prior approval of the Commission.

(4) If a tariff provision is not mandatory or provides for waivers, the LDC should grant the waivers without preference to affiliates and divisions or nonaffiliates.

(5) The LDC should maintain a chronological log of tariff provisions for which it has granted waivers. Entries should include the name of the party receiving the waiver, the date and time of the request, the specific tariff provision waived and the reason for the waiver. Any chronological log should be open for public inspection during normal business hours.

(6) The LDC should process requests for transportation promptly and in a nondiscriminatory fashion with respect to other requests received in the same or a similar period. The LDC should maintain a chronological log showing the processing of requests for transportation services. Any chronological log should be open for public inspection during normal business hours.

(7) Transportation discounts provided to the LDC's or its marketing affiliate's favored customers should be offered to other similarly situated customers and should not be tied to any unrelated service, incentive or offer on behalf of either the parent or affiliate. A chronological log should be maintained showing the date, party, time and rationale for the action. Any chronological log should be open for public inspection during normal business hours.

(8) The LDC should not disclose any customer proprietary information to its marketing affiliate or division, and to the extent that it does disclose customer information, it should do so to other similarly situated marketers in a similar fashion so as not to selectively disclose, delay disclosure, or give itself or its affiliate any undue advantage related to the disclosure. A chronological log should be maintained showing the date, time and rationale for the disclosure. Any chronological log should be open for public inspection during normal business hours.

(9) An LDC should justly and reasonably allocate to its marketing affiliate or division the costs or expenses for general administration or support services.

(10) An LDC selling surplus gas supplies and/or upstream capacity on a short-term basis (as defined by the Federal Energy Regulatory Commission's definition) to its affiliate should make supplies available to similarly situated marketers on a nondiscriminatory basis. An LDC should not make any gas supplies and/or upstream capacity available through private disclosure to an LDC's affiliate unless the availability is made simultaneously with public dissemination in a manner that fairly apprises interested parties of the availability of the gas supplies and/or upstream capacity. An LDC should maintain a chronological log of these public disseminations. Any chronological log should be open for public inspection during normal business hours.

(11) The LDC should not condition or tie agreements to release interstate pipeline capacity to any service in which the LDC or affiliate is involved.

(12) The LDC should not directly or by implication unfairly represent to any customer, supplier or third party that an advantage may accrue to any party through use of the LDC's affiliate or subsidiary.

(13) The LDC should establish and file with the Commission a complaint procedure for dealing with any alleged violations of any of the standards listed in paragraphs (1)—(12), this paragraph or paragraphs (14) and (15), excepting for paragraph (9), which should be exclusively under the purview of the Commission. These procedures should be developed in consultation with interested parties during consideration of any tariff guided by this section and §69.191 (relating to general). The Commission may expect establishment of a complaint procedure or other recordkeeping requirements if warranted by subsequent facts or circumstances.

(14) The LDC should keep a chronological log of any complaints, excepting paragraph (9), regarding discriminatory treatment of brokers. This chronological log should include the date and nature of the complaint and the LDC's resolution of it. Any chronological log should be open for public inspection during normal business hours.

(15) Parties alleging violations of these standards may pursue their allegations through the Commission's established complaint procedures. A complainant bears the burden of proof consistent with 66 Pa.C.S. (relating to Public Utility Code) in regard to the allegations.

[Pa.B. Doc. No. 97-1302. Filed for public inspection August 15, 1997, 9:00 a.m.]

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PENNSYLVANIA PUBLIC UTILITY COMMISSION
[52 PA. CODE CH. 69]

[M-960839]

Fitness of Natural Gas Marketers

The Pennsylvania Public Utility Commission (Commission) on May 22, 1997, adopted a final policy statement to provide guidance to local distribution companies (LDCs) providing natural gas service in this Commonwealth with regard to uniform standards for brokers and marketers. The contact person is Joseph K. Witmer, Assistant Counsel, Law Bureau (717) 783-3663.

Commissioners present: John M. Quain, Chairperson; Robert K. Bloom, Vice-Chairperson; John Hanger, Statement follows; David W. Rolka; Nora Mead Brownell

Public Meeting held
May 22, 1997

Final Order

By the Commission:

On October 3, 1996, the Commission adopted a proposed policy statement to provide guidance to LDCs providing natural gas service in this Commonwealth simultaneously with a companion statement on policies for affiliated interests of LDCs at M-960838. A corrected proposed policy statement was published in the *Pennsylvania Bulletin* on November 23, 1996. Comments were due within 30 days after publication, with reply comments 60 days after publication.¹ A public forum was held on March 7, 1997.

The commentators raised a number of issues, including jurisdiction, enforcement, 66 Pa.C.S. § 1307(f), Gas Reserve requirements, LDC discretion and the role of the Federal Energy Regulatory Commission's (FERC) rules. With respect to jurisdiction, a number of commentators initially disagreed on the extent of the Commission's authority to impose fitness standards on a marketer or broker. In addition, where some degree of jurisdiction was conceded, they differed widely in their views of the scope and relevance of fitness standards and how those standards should be imposed.

A. Jurisdiction

The Office of Consumer Advocate (OCA) and the Pennsylvania Gas Association (PGA) concluded that the Commission had jurisdiction over a marketer or broker. The OCA claimed that 66 Pa.C.S. §§ 501(b) and 508 provided the Commission with the authority to impose require-

ments directly on a marketer or broker in order to ensure system reliability. The PGA also claimed that the Commission's authority to approve gas transportation tariffs allowed the Commission to impose requirements in order to avoid those higher costs that might result whenever an LDC was forced to perform its supplier-of-last-resort role when a marketer or broker failed to perform.

Other commentators questioned the Commission's authority to impose any requirements on a marketer or broker. Specifically, it was argued that the Commission lacked authority over a marketer or broker because these entities, with the exception of the LDC affiliate, were not public utilities as defined under 66 Pa.C.S. § 102 of the Public Utility Code (code).

It was also argued that the Commission should avoid extending regulatory concepts to businesses which are not monopolies and which offered services subject to the rigors of the competitive marketplace. Specifically, Enron noted that any attempt to exercise jurisdiction over unregulated third-party suppliers of natural gas through licensing, certification or otherwise would be unwarranted and unlawful—especially in light of the Commission's nonexercise of this authority over nonutility gas suppliers in the many years of LDC transportation for end users.

In addition, some commentators claimed that the Commission's fitness guidelines represented an attempt to regulate marketer or broker practices, contractual relationships and the like. Specifically, Natural Gas Clearinghouse (Clearinghouse) claimed that marketers or brokers are not regulated entities subject to Commission jurisdiction, given that they do not avail themselves of the rights (for example, franchise territories, cost of service/rate of return regulation) of public utility status. Clearinghouse claimed that attempts to exercise this authority would push qualified marketers or brokers out of this Commonwealth.

With respect to the arguments that marketers and brokers are public utilities within the meaning of section 102 of the Public Utility Code, 66 Pa.C.S. § 102, this Commission would not agree with this interpretation of the statute. As such, we do not have direct authority over the marketers or brokers except to the extent that they are affiliates or divisions of the LDC and are, therefore, certificated by this Commission to provide service within their designated service territories.

With respect to section 501(b) of the code, 66 Pa.C.S. § 501(b), which provides:

(b) Administrative authority and regulations.—The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. The commission may make such regulations, not inconsistent with law, as may be necessary or proper in the exercise of its powers or for the performance of its duties.

the Commission would point out that, under this provision, its authority extends to the regulation of public utilities. An attempt to impose any regulation on nonutility marketers or brokers would be inconsistent with the exercise of its powers. As for section 508 of the code which addresses the power of this Commission to vary, reform and revise contracts, the Commission would note again that this authority extends to contracts in which the utility is a contracting party. Section 508 provides, in pertinent part:

¹The Commission received comments from the Office of Consumer Advocate (OCA); the Independent Oil and Gas Association of Pennsylvania (IOGA); the Pennsylvania Gas Association (PGA); and the Industrial Energy Consumers of Pennsylvania (IECPA); Eastern Energy Marketing (Eastern); Enron Capital and Trade Resources (Enron); KCS, LG&E, MidCon and Natural Gas Clearing House (Clearinghouse); Open Flow Gas Supply Corporation (Open Flow); T. W. Phillips (Phillips) and UGI. Comments at the March 7, 1997, Open Forum were provided by IOGA, Enron, T. W. Phillips and PGA. Enron and PGA filed reply comments.

The commission shall have the power and authority to vary, reform, or revise, upon a fair, reasonable, and equitable basis, any obligation, terms or conditions of any contract heretofore or hereafter entered into between any public utility and any person, corporation, or municipal corporation, which embrace or concern a public right, benefit, privilege, duty, or franchise, or the grant thereof, or are otherwise affected or concerned with the public interest and the general well-being of this Commonwealth.

66 Pa.C.S. § 508.

Since contracts for nonutility gas supply are between the marketer or broker and the end user, the Commission's authority is limited in this area.

However, while this Commission recognizes that there are limitations to our authority with respect to nonutility marketers and brokers, we would disagree with those commentators who maintain that the Commission is precluded from taking any substantive action to address issues involving marketers or brokers. In particular, this Commission would point to its authority under section 1501 of the code concerning the character of service and facilities which provides, in part:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service.

66 Pa.C.S. § 1501.

In addition to the above, the Commission's authority to address matters raised in the subject policy statement arises out of the general powers provisions of section 501 of the code.

Accordingly, we conclude that the Commission has the authority to regulate the operations of participants in the market to the extent that this Commission is authorized to insure that gas service is safe, adequate and without unreasonable interruption or delay. While this authority is derived from the Commission's jurisdiction over public utilities and its authority to issue orders and regulations concerning these matters, the net effect of the exercise of this authority is the resolution of issues which will affect all participants in this Commonwealth's jurisdictional gas supply market.

That is especially the case when the actions of a marketer or broker, such as nonperformance or delivery in excess of one's nomination, causes harm to the system's reliability and operations. Otherwise, a marketer or broker would be free to cause harm to Commonwealth ratepayers without regulatory consequences. That, we believe, was not the intent of the General Assembly in establishing the Commission's authority in the code.

The Commission's challenge is to reconcile reliability and competition. Consequently, the action we take today is premised on our jurisdiction over public utilities, public

utility tariffs and public utility contracts to the extent they implicate the public interest in system reliability. The exercise of jurisdiction is necessary to meet our public interest obligation to ensure that an LDC's system operations are adequate.

B. Enforcement

A number of commentators raised the issue of who would be responsible for the enforcement of the provisions of the Policy Statement. The PGA submits that the LDCs should be allowed to make the initial cost-benefit assessment in tariffs given their expertise and reliability obligations. Enron Capital and Trade Resources (Enron), however, would leave enforcement largely to the market although Enron agrees with the PGA that nonperformance could be addressed with penalties set forth in a transportation tariff. The Independent Oil and Gas Association of Pennsylvania (IOGA) believes that tariffs are the appropriate vehicle for ensuring system reliability but believes that a marketer or broker serving only sophisticated industrial customers not be subjected to these provisions in an LDC's gas transportation tariff. One concern identified by T. W. Phillips (Phillips) is the matter of the ability of the smaller LDCs to implement this policy.

We are concerned about the perception of the commentators that the LDC will be the sole determiner of the financial and technical fitness of various gas suppliers. It has never been this Commission's intention to delegate its responsibilities to the LDC. It is anticipated that the LDC will develop specific criteria or standards as part of their transportation service which will provide a litmus test of the supplier's financial and technical abilities. These standards are subject to Commission review and approval.

We would expect, however, that the LDCs will develop such tariff provisions in conjunction with their customers and the marketers and brokers. We expect the development of generic tariff provisions on an LDC-by-LDC basis in light of each LDC's configuration and the desire of a marketer or broker to access customers behind an LDC's gate. In those discussions, we further expect the participants to address the scope and applicability of Chapter 56 regulations as part of any tariff filed in response to this Policy Statement.

With regard to IOGA's position that these requirements should apply only to small residential customers, we cannot agree. System reliability is dependent upon all participants meeting their obligations. The failure of a large industrial customer's supplier to meet its obligations can have serious effects on the operations of the gas system, including a substantial impact upon the LDC's obligation as supplier of last resort. Customers, large or small, who obtain gas from unreliable and financially unfit suppliers place the entire system at risk. It is incumbent upon this Commission, under sections 1501 and 501 of the code, to take the requisite actions to address this possibility.

For the above reasons, we will amend § 69.195(a) of our proposed Policy Statement to add a provision expecting the parties to address, and the LDC to propose, tariff provisions regarding the enforcement of any tariff filed in adherence to the Policy Statement. Again, we would emphasize that we expect such provisions to be generic in nature and to be developed in consultation with the customers and the interested marketer or broker communities.

C. 66 Pa.C.S. § 1307(f)

In our proposed Policy Statement at § 69.195(a) and (b), we proposed that firms delivering gas must demonstrate the financial and technical fitness necessary to meet their *contractual obligations*. (Emphasis added). This has been a hotly contested matter. That is because the matter goes to the extent to which contractual information of a competitor must be given to an LDC with the attendant risk it could be transmitted to an LDC's affiliated merchant. Some commentators were concerned that this directly subjects a marketer or broker to 66 Pa.C.S. § 1307(f).

The PGA claims that a marketer or broker must be subjected to the full panoply of section 1307(f) of the code because an examination of, and information about, their supply contracts is critical to ensuring system reliability and gauging an LDC's supplier-of-last-resort obligations. The PGA also claims that, because a combination of market forces and contract rights are insufficient to guarantee delivery of tangible gas supplies in periods of tight demand, the Commission may need to examine the supply contracts of a marketer or broker just like an LDC.

In the alternative, the PGA wants the Commission to reevaluate its approach to LDC supply contracts under section 1307(f) of the code if the Commission determines that a marketer or broker is not subject to section 1307(f).

The IOGA, Enron and Clearinghouse oppose any Commission examination of a nonutility marketer or broker's supply contracts under section 1307(f). IOGA claims that section 1307(f) of the code was only intended to monitor a monopolist's purchase of gas supplies and that using section 1307(f) of the code to conduct an in-depth examination of marketer or broker supply contracts is misguided. In addition, IOGA urges the Commission to limit its fitness policy statement to residential (and possibly small commercial) customers through the ongoing regulation of an LDC's distribution operations.

Enron claims that the only vehicle for addressing fitness and reliability are LDC transportation tariffs, that any penalties for nonperformance must be clearly spelled out in LDC tariffs, and that the Commission cannot subject gas supply contracts to LDC disclosure or Commission review under section 1307(f) of the code. Clearinghouse claimed that system reliability and operational fitness cannot be guaranteed through a supply contract's examination because every contract would need to be examined and that the examination would not preclude an inability to perform due to causes outside the contract. Eastern Energy Marketing (Eastern) objects to using section 1307(f) to the extent it requires the disclosure of commercially sensitive information. They urge the Commission to establish guidelines in order to reduce LDC-marketer battles in individual LDC proceedings.

As noted in our previous discussion, marketer and brokers, unless they are part of the LDC, are not public utilities within the definition of section 102 of the code, 66 Pa.C.S. § 102. As such, they do not fall within the purview of section 1307(f) of the code and this Commission does not have the authority to review those gas supply contracts. Our authority does, however, extend to the assurance that customers will receive continuous and safe service. 66 Pa.C.S. § 1501.

While they dispute what that entails and whether those requirements can be leveraged to favor an LDC's affiliate, most commentators recognize the necessity of some minimum reliability standards for competitors.

We find that financial or technical fitness standards may be an efficient vehicle for dealing with a marketer or broker whose inability or unwillingness to meet their performance obligations directly threatens system reliability. Nevertheless, we recognize the marketers and brokers concern about an LDC's ability to leverage those standards into market impediments or bias in favor of its affiliate because of untempered discretion. We believe, however, that this concern is addressed by the fact that the Commission must approve any tariff proposal, those tariffs remain subject to challenge by disgruntled parties, and the fact that all actions taken under a tariff remain subject to the Commission's regulatory authority. We also believe that the participation of the customers and the marketers and brokers in the development of these tariff standards will help to alleviate some of their concerns.

We would also note that we believe that a marketer or broker need not be subjected to an in-depth examination and disclosure of every contract related to gas reserves to accomplish that end. Such a level of review is not necessary to provide an LDC with the information it needs to meet the system reliability and supplier-of-last resort obligations.

We expect marketers, brokers and the LDCs to develop, in consultation with each other, the generic information requirements needed for system reliability and supplier-of-last-resort obligations.

We will amend our Proposed Policy Statement at § 69.195(b)(1) and (2) to expect an LDC's transportation tariff, developed in consultation with other brokers and marketers, to secure sufficient generic information about a marketer or broker's gas operations, supplies, emergency contingencies, the ability to meet peak demand, and other information necessary for the safe and continuous operation of the gas supply and distribution system.

We believe this approach strikes a balance between an LDC's legitimate information needs, pertaining to those system operator and supplier of last resort obligations which a gas marketer or broker is not required to perform, and a marketer or broker's need to retain some confidential commercial information in order to effectively compete against an LDC's merchant operations.

D. Gas Reserves

The Commission has traditionally required LDCs to provide sufficient gas reserves, as part of their gas service, aimed at meeting peak demands. In our proposed Policy Statement at § 69.195(b)(2), we proposed extending that requirement to a marketer or broker by requiring a marketer or broker to demonstrate operational fitness with "gas reserves and the ability of the firm to meet the peak demand of contracted customers."

PGA's comments, that fitness standards should apply to all sectors covered by an LDC's supplier-of-last-resort obligation and that LDC's should be free to establish the requirements of a gas marketer or broker (including an LDC's affiliate) in order to maintain system reliability, suggest that a gas reserves requirement should be but one of many ways to maintain reliability in a competitive market. Open Flow Gas Supply Corporation (Open Flow) and Phillips challenge a gas reserve requirement, to the extent it would shift responsibility for determining fitness to the local utilities, because they consider it an additional burden that adds to the cost of service, requires expertise some LDCs lack, and opens the door to competitive abuses.

The IOGA, Enron, Clearinghouse, Eastern and the OCA also question the gas reserves requirement. The IOGA

would impose requirements only on an interim basis, limit them to a marketer or broker serving residential and small commercial customers, and avoid mandates since mandates cannot account for the dynamics of a competitive market. Enron believes that fitness should be limited to financial tests and that mandatory requirements such as gas reserves only limit the flexibility of a marketer or broker. Both Eastern and Clearinghouse oppose this requirement to the extent it requires a marketer or broker to demonstrate their upstream supply sources and transportation arrangements, as opposed to holding a marketer or broker financially responsible for any harm stemming from nonperformance, and result in disclosure of sensitive commercial information.

The OCA also opposes the gas reserves requirements. The OCA believes that the better approach is to require a showing that the alternative supplier has sufficient supply and capacity to meet maximum daily delivery obligations with sufficient emergency back-up supplies and that such provisions be enforced by penalties.

Upon consideration, we conclude that LDCs will need supply-related information in order to ensure reliability and provide transportation services for competitors consistent with our discussion above. While the need for assurances of financial soundness is essential, it must be recognized that an inability or failure to provide the gas supply required by the customer is the most immediate concern.

The OCA's suggestion is useful. It presents another way to ensure system reliability with due regard for the different market positions and legal obligations of gas marketers or brokers and LDCs in this Commonwealth. That difference includes, but is not limited to, the LDC's supplier of last resort obligation imposed by Pennsylvania law and practice.

This approach lets the parties make the initial determination on gas reserve requirements or the appropriateness of the OCA's alternative. It gives the parties the maximum flexibility they need to design an approach melding competition with system reliability.

This flexible approach is premised on an expectation that the marketers, brokers and an LDC, as opposed to the Commission, can best make the initial determination on what measures will guarantee that peak demand will be met with due regard for emergency situations and an LDC's system reliability and supplier-of-last-resort obligations. As always, the Commission's processes remain open to parties otherwise unable or unwilling to resolve these concerns through negotiations.

We will amend our Policy Statement and refrain from imposing any explicit gas reserves requirement. We leave that matter to resolution by the LDCs as part of the tariffs proposals an LDC submits after consultation with customers, marketers or brokers.

We further amend our Policy Statement to provide that any supply and reserve information requirements will be as generic as possible and not result in the disclosure of sensitive commercial information by a marketer or broker to an LDC. We agree with the OCA that a marketer or broker could meet this gas reserve requirement, contingent upon a determination by the participants, by a generic showing that it has sufficient supply and capacity to meet the maximum daily delivery obligations with sufficient emergency back-up supplies as agreed to by the LDC and the marketer or broker.

E. FERC Requirements for Marketers

The PGA and the LDC's claim that FERC's rules in regard to system reliability are insufficient because they are limited to the wholesale market whereas the Commission must address delivery at the retail level in this Commonwealth. The PGA asserts that IOGA's position that fitness standards should not apply to industrial customers is based on a premise that fitness standards would increase costs to industrial customers without any outstanding benefits. The PGA counters that industrial customers still have regulatory rights with respect to obtaining service from the supplier of last resort. However, the PGA points out that some customers might want to forego reliance on an LDC's supplier-of-last-resort obligation in order to maximize energy savings. In that case, a supplier serving a customer that releases an LDC from its supplier-of-last-resort obligation may not be expected to demonstrate any modicum of fitness as regards that particular customer.

Eastern, Enron and Clearinghouse collectively claim that FERC's rules, which require compliance with basic and commonly used creditworthiness standards and rely on the use of penalties and incentives to manage nonperformance, constitute the regulatory maximum necessary for ensuring system reliability.

The OCA recognizes that industrial users have extensive experience in dealing with a gas marketer or broker, however, it opines that, as with any creditor of the LDC, the financial and technical soundness of marketers and brokers needs to be assessed. The IOGA uses experience as an argument for a hands off policy on part of the Commission with respect to the larger customers and argues for standards limited to suppliers wishing to market to residential customers.

In our Proposed Policy Statement, we had suggested that fitness should be addressed consistent with the requirements for marketers or brokers at FERC. The issue has now become whether we should expect parties to show anything more than the minimum requirements addressed by FERC.

We agree with PGA that the Federal model may not be sufficient. The minimum FERC requirements are imposed on a wholesale market with large and sophisticated agents. We are not setting regulatory standards for such a market. We are charged with setting some advisory policy guidelines for managing the discrete and insular purchases of gas supplies by a myriad of, potentially, less sophisticated residential and smaller customers, as well as some large and sophisticated agents, for delivery at the retail level. As such, we remain convinced that this policy statement must set forth some minimum requirements of fitness for retail service by suppliers.

We also believe that they should not be limited to small residential and commercial customers because all customers, including large industrial and commercial customers, benefit from those standards to the extent they enhance system reliability and provide a supply of last resort. As the PGA notes, an LDC would be required to make up for delivery shortfalls to all customer classes, including the experienced and sophisticated, as the supplier of last resort.

With respect to the PGA's statement that a complete waiver and release from underlying system reliability and supplier-of-last-resort obligations would be a necessary prerequisite to foregoing the imposition of any financial or technical fitness standards on a marketer or broker serving a customer, we have serious reservations about the enforceability of such a waiver. The obligation of the

LDC to serve is statutorily mandated. Since this Commission does not have the authority to waive a statute, there is sufficient doubt as to the enforceability of such an agreement between the LDC and the customer to eliminate its consideration as a viable option at this time.

For purposes of this Policy Statement, this Commission will retain the provision pertaining to the requirement that any standards adopted by the LDC be consistent with FERC requirements. However, we would note that this is a policy statement which is applied on a case by case basis. Where a participant believes that a more substantial demonstration of fitness is necessary, the LDC, and any other party has the opportunity to present its arguments at the time the subject tariffs are submitted for review. In that situation, where there is a clear showing that the proposed standard is not sufficient or applicable, the Commission will consider other alternatives. We would note, however, that it is our expectation that the customers, marketers, brokers and LDC will be able to come to a resolution of these issues without resort to formal Commission proceedings.

Conclusion

Based upon the foregoing discussion, we have made some modifications in our language. In § 69.195(a), we have modified the phrase "marketer or broker" to include an LDC's affiliate for all purposes under this Policy Statement. We have also modified § 69.195(a) to require an LDC to develop enforcement provisions in any tariff proposed in light of this Policy Statement. We are also modifying § 69.195(a) to have the parties address the applicability of Chapter 56.

In addition, we are further modifying § 69.195(c). We deleted the phrase "subject to Commission approval" under subsection (c). That phrase was superfluous given the Commission's role in approving tariff proposals as well as the Commission's regulatory authority.

We also inserted the word "transportation" before tariff in the first sentence of § 69.195(c) to reflect the fact that transportation tariffs are an effective vehicle for tariffs proposals guided by this Policy Statement. We have also added language clarifying the intended scope and use of the information sought in tariffs proposed as a result of this Policy Statement.

Accordingly, under our authority under sections 501, 508, 1301, 1302, 1303, 1304, 1317, 1318 and 1501, 66 Pa.C.S. §§ 501, 508, 1301, 1302, 1303, 1304, 1317, 1318, 1501 and the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. § 1201 et seq.), the Commission has authority to promulgate this final policy statement addressing the fitness of a marketer or broker (including an LDC's affiliate) to read as set forth in Annex A.

Therefore, It Is Ordered that:

1. The Final Policy Statement regarding the Fitness of Natural Gas Marketers, 52 Pa. Code, is amended by adding § 65.195 to read as set forth in Annex A.

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

3. The Secretary shall duly certify this order and Annex A and deposit them with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

4. This policy statement shall become effective upon publication.

5. A copy of this Order and Annex A are to be served upon all jurisdictional gas utilities, the Office of Con-

sumer Advocate, the Office of Small Business Advocate and on any parties who filed comments in this proceeding.

JAMES J. MCNULTY,
Acting Secretary

Fiscal Note: Fiscal Note 57-181 remains valid for the final adoption of the subject regulations.

Statement of Commissioner Hanger

This Policy Statement provides the Commission with the ability to effectively regulate gas marketer and brokers in order to ensure system reliability. Specifically, the Policy Statement requires the local distribution company (LDC) to consult with marketers and brokers in their service territory to develop transportation tariff provisions regarding technical and financial fitness standards that will be used to govern the entry of a marketer and broker into the LDC's service territory.

Some marketers and brokers were concerned that this Policy Statement would effectively give an LDC veto power with regard to new supplier entry into an LDC service territory. This is untrue. The Policy Statement explicitly requires the technical and financial standards to be developed in consultation with the brokers and marketers serving the LDC's territory. The standards ultimately have to be approved by the Commission. Any standard that is anti-competitive or that does not allow for input from marketers will not be approved by me.

One area that needs to be addressed is the role of brokers and marketers in satisfying the needs of human needs customers. Any provider of gas supply to human needs customers who have contracted for firm gas must insure that they have adequate gas supply and pipeline capacity to meet the needs of these customers on peak usage days. I will be very critical of broker/marketer price arbitrage on those cold winter days if firm customers in the Commonwealth are at risk for nondelivery because certain suppliers have decided to divert gas supply for those firm customers to other areas of the country because of higher prices in those markets. This behavior, if it endangers reliable service to human needs customers, should be grounds for revocation of the suppliers right to do business in the Commonwealth. I expect the technical and financial fitness standards developed by the LDC and broker/marketer community to incorporate these concerns.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 69. GENERAL ORDERS, POLICY STATEMENTS AND GUIDELINES ON FIXED UTILITIES

UNIFORM STANDARDS FOR BROKERS AND MARKETERS

§ 69.195. Fitness of natural gas marketer or broker (including an LDC's affiliate).

(a) *Fitness of brokers and marketers.*

(1) Unless otherwise stated, the phrase marketers or brokers, or both, includes all local distribution company (LDC) affiliates, subsidiaries, parents, divisions, and the like providing gas supply to the respective LDC's customers.

(2) To retain reliable service when the gas industry unbundles, the Commission seeks to insure that brokers and marketers operating in this Commonwealth possess the financial or technical, or both, fitness necessary to meet their obligations consistent with the public interest in system reliability and gas supplies. As assurance of the continuation of reliable service and secure supplies is a prerequisite for opening Pennsylvania's gas markets to full retail competition, both new and incumbent providers of gas should be fully capable of providing reliable service and supplies.

(3) The LDCs should address the issue of financial and technical fitness in their tariffs, in consultation with marketers or brokers, to assure the reliability of supplies to the end user and the public interest in system reliability. The LDCs should also address the matter of enforcement in any tariff, developed in consultation with customers, marketers or brokers, submitted in adherence to this section.

(b) *Demonstration of fitness to deliver gas.* Gas suppliers that wish to deliver gas to retail customers should demonstrate that they have the requisite financial and technical fitness to meet their obligations to customers consistent with the public interest in system reliability and LDC's underlying supplier-of-last-resort obligation. The financial and technical fitness is expected for any marketer or broker that wants to serve any or all retail commercial, industrial or retail classes. Financial and technical fitness is aimed at ensuring that a marketer or broker has the requisite ability to offer service to the public.

(c) *Nondiscriminatory transportation tariff rules.* The LDCs may offer nondiscriminatory transportation tariff rules, developed in consultation with marketers or brokers, governing the qualifications of marketers and brokers. The rules should be consistent with any registration requirements for marketers and brokers of the Federal Energy Regulatory Commission. The tariff rules should address the following:

(i) Financial fitness, including the ability to comply with any penalties stemming from nonperformance or in response to changed circumstances.

(ii) Operational fitness, including the ability of the firm to meet peak demand of contracted customers which could be met by a showing of sufficient gas reserves or sufficient supply and capacity to meet the maximum daily delivery obligations with sufficient emergency back up supplies.

(2) The information expected by this section should be as generic as possible and be limited to the information needed for system reliability and performance of an LDC's supplier-of-last-resort obligations. The information expected by this section should avoid information wanted solely or largely for an LDC's merchant function. The information expected by this section should avoid mandating the disclosure of specific and commercially sensitive information such as price, origin, destination, and the like. Information provided to an LDC as part of its system reliability and supplier-of-last-resort obligations may not be provided to an LDC's affiliate as part an LDC's merchant operations.

[Pa.B. Doc. No. 97-1303. Filed for public inspection August 15, 1997, 9:00 a.m.]

Title 55—PUBLIC WELFARE

DEPARTMENT OF PUBLIC WELFARE

[55 PA. CODE CH. 3040]

Waiver: Out-of-Home Care

The purpose of this statement of policy is to announce the expansion of the child day care provider options for families who receive a subsidy for child day care service.

Discussion

The regulation for the subsidized child day care program provides criteria which shall be met by a family to participate in the subsidized child day care program. Currently, § 3040.2(a) (relating to definition of service) limits child day care service to "out-of-home" care provided for part of the 24-hour day. The Child Care Works regulations which will be proposed by the Department of Public Welfare (Department) will permit the Department to provide subsidies for in-home care.

The Federal Child Care and Development Block Grant (CCDBG) (42 U.S.C.A. §§ 9859—9858q), requires the Department to provide subsidies to families for whom child day care service is provided in the child's home to continue to receive Federal funding. In response to this requirement, the Department will waive the "out-of-home" condition of § 3040.2(a) to allow the full range of parent choice envisioned by the CCDBG. The Department will provide subsidies for in-home care pending adoption of the Child Care Works regulations to give families receiving subsidies the same choices in child day care providers as families who are not receiving subsidies.

Policy

Providing a subsidy to families who choose in-home care is the Department's effort to meet Federal requirements and expand the child day care options available to families receiving a subsidy. The Department will waive the portion of § 3040.2(a) which requires that child day care service be "out-of-home" care, until the provision is amended by a change in regulation. A regulation package which addresses this change is currently undergoing the regulatory review process. The policy will allow the Department to participate in the funding of child day care cost if a caretaker chooses to have a child day care provider come into the child's home to care for the subsidy-eligible child.

Contact Person

Comments and questions regarding this statement of policy should be directed to: Bureau of Child Day Care Services, Jolene Gregor (717) 787-1550, 4th Floor Bertolino Building, 1401 North 7th Street, Harrisburg, PA 17105-2675.

Effective Date

This statement of policy will take effect September 2, 1997.

FEATHER O. HOUSTOUN,
Secretary

(Editor's Note: The regulations of the Department, 55 Pa. Code Chapter 3040, are amended by adding § 3040.2a to read as set forth in Annex A.)

Fiscal Note: 14-BUL-052. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 55. PUBLIC WELFARE

PART V. CHILDREN, YOUTH AND FAMILIES
MANUAL

Subpart B. ELIGIBILITY FOR SERVICES

CHAPTER 3040. SUBSIDIZED CHILD DAY CARE
ELIGIBILITY

INTRODUCTION

§ 3040.2a. Definition of service—statement of policy.

The Department will waive the requirement that child day care service is out-of-home care provided for part of the 24-hour day. The Department will participate in the funding of child day care cost when a caretaker chooses to have a child day care provider come into his home to care for the subsidy-eligible child.

[Pa.B. Doc. No. 97-1304. Filed for public inspection August 15, 1997, 9:00 a.m.]

Title 61—REVENUE

DEPARTMENT OF REVENUE

[61 PA. CODE CH. 9]

Research and Development Tax Credit Implementation Issues

The Department of Revenue (Department) has adopted a statement of policy under the authority contained in § 3.2 (relating to statements of policy). This statement of policy adds § 9.17 (relating to research and development tax credit implementation issues) and shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

The Research and Development Tax Credit Law (72 P. S. §§ ___), added by section 24 of the act of May 7, 1997 (P. L. 85, No. 7) provides for a credit against a taxpayer's liabilities imposed under Article III, IV or VI of the Tax Reform Code of 1971 (72 P. S. §§ 7301—7361, 7401—7412 and 7601—7606). The credit is available to those businesses who incur expenses for qualified research and development activities performed within this Commonwealth. Section 9.17 provides an explanation of eligible taxpayers.

Specific questions relating to information provided in this statement of policy may be directed to the Department of Revenue, Office of Chief Counsel, Department 281061, Harrisburg, PA 17128-1061. In addition, the form to apply for the research and development tax credit is available via the Internet at: <http://www.revenue.state.pa.us>.

ROBERT A. JUDGE, Sr.,
Secretary

(Editor's Note: The regulations of the Department, 61 Pa. Code, are amended by adding § 9.17 to read as set forth in Annex A.)

Fiscal Note: 15-391. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 61. REVENUE

PART I. DEPARTMENT OF REVENUE

Subpart A. GENERAL PROVISIONS

CHAPTER 9. REVENUE

PRONOUNCEMENTS—STATEMENTS OF POLICY

§ 9.17. Research and development tax credit implementation issues.

(a) The Research and Development Tax Credit Law (72 P. S. §§ ___) provides for a credit against a taxpayer's liabilities imposed under Article III, IV or VI of the TRC (72 P. S. §§ 7301—7361, 7401—7412 and 7601—7606). The credit is available to those businesses who incur expenses for qualified research and development activities performed within this Commonwealth. This statement of policy provides an explanation of eligible taxpayers.

(b) The Research and Development Tax Credit Law's definition of Pennsylvania base amount requires that a taxpayer have at least 1 taxable year preceding the taxable year in which the Pennsylvania qualified research and development expenses are incurred. A taxpayer may not apply for a research and development credit until the calendar year beginning after the close of the taxpayer's second taxable year in which Pennsylvania research and development expenses are incurred which are effectively connected with the conduct of a trade or business within this Commonwealth.

(c) A taxpayer with Pennsylvania qualified research and development expenses which are effectively connected with the conduct of a trade or business within this Commonwealth in at least 2 preceding taxable years, the second which ended on or before December 31, 1996, may apply for a research and development tax credit by September 15, 1997. The credit will be for those research and development expenses incurred in the taxpayer's taxable year that ended in 1996. A taxpayer shall apply for the credit on the form prescribed by the Department. The form is available by contacting the Bureau of Corporation Taxes, Taxing Division—R & D Unit, Department 280703, Harrisburg, Pennsylvania, 17128-0703.

(d) Section 306 of the TRC (72 P. S. § 7306) explains that a partnership is not subject to Personal Income Tax, but the income of a member of a partnership is subject to the tax on his share of the income received by the partnership. As the partner is the entity subject to tax under Article III of the TRC, and not the partnership, each partner is entitled to a research and development tax credit. The research and development credit applicable to a partnership may be claimed by each partner on a pass through basis with each partner (taxpayer) computing the credit on a pro rata basis.

[Pa.B. Doc. No. 97-1305. Filed for public inspection August 15, 1997, 9:00 a.m.]

DEPARTMENT OF REVENUE

[61 PA. CODE CH. 94]

Disclaimers of Nonprobate Taxable Assets

Under the authority contained in § 3.2 (relating to statements of policy), the Department of Revenue (Department) hereby adopts the statement of policy regarding disclaimers of nonprobate taxable assets which appears in Annex A. This statement of policy sets forth the

Department's interpretation of Commonwealth Court's decision in *In Re Estate of Bernecker*, 654 A.2d 246 (Pa. Cmwlth. 1995).

The statement of policy adds § 94.1 (relating to disclaimers of nonprobate taxable assets) and shall take effect upon publication in the *Pennsylvania Bulletin*.

Based on the decision and order received from the Commonwealth Court in *In Re Estate of Bernecker*, the Department is revising its policy on the effectiveness of disclaimers of nonprobate taxable assets for Pennsylvania Inheritance Tax purposes.

Subsection (b) of § 94.1 sets forth specific conditions which the Department will utilize in determining whether a disclaimer executed in regard to nonprobate taxable assets and nontrust assets of resident decedents is valid for Pennsylvania Inheritance Tax purposes when made either by the disclaiming party or the personal representative of the deceased individual or the guardian or attorney-in-fact of the incapacitated person or minor to whom the interest, absent the disclaimer, would have devolved.

Specific questions relating to information provided in this statement of policy may be directed to the Department of Revenue, Office of Chief Counsel, Dept. 281061, Harrisburg, PA 17128-1061.

(*Editor's Note:* The regulations of the Department, 61 Pa. Code, are amended by adding a statement of policy at § 94.1 to read as set forth in Annex A.)

ROBERT A. JUDGE, SR.,
Secretary

Fiscal Note: 15-383. (1) General Fund;

(2) Implementing Year 1996-97 is minor revenue losses;

(3) 1st Succeeding Year 1997-98 is \$; 2nd Succeeding Year 1998-99 is \$; 3rd Succeeding Year 1999-00 is \$; 4th Succeeding Year 2000-01 is \$; 5th Succeeding Year 2001-02 is \$;

(4) Fiscal Year 1995-96 \$ not applicable; Fiscal year 1994-95 \$; Fiscal year 1993-94 \$;

(8) recommends adoption. This statement of policy is in response to a Commonwealth Court decision that makes disclaimers of nonprobate taxable assets valid in certain instances. Properly executed disclaimers could result in refunds of the Pennsylvania Inheritance Tax. The revenue loss from these refunds is not expected to be significant.

Annex A

TITLE 61. REVENUE

PART I. DEPARTMENT OF REVENUE

Subpart B. GENERAL FUND REVENUES

ARTICLE IV. COUNTY COLLECTIONS

**CHAPTER 94. INHERITANCE TAX
PRONOUNCEMENTS—STATEMENTS OF POLICY**

§ 94.1. Disclaimers of nonprobate taxable assets.

(a) *General.* The Department is revising its policy on the validity of disclaimers of nonprobate taxable assets for Pennsylvania inheritance tax purposes to reflect the decision and order received from Commonwealth Court in *In Re Estate of Bernecker*, 654 A.2d 246 (Pa. Cmwlth. 1995).

(b) *Scope.*

(1) Disclaimers executed with regard to nonprobate taxable assets of resident decedents, including rights of

survivorship interests in multiple-party accounts, titled tangible personal property or real estate, beneficial interests in third-party beneficiary contracts (that is, retirement benefit plans, annuity contracts, individual retirement accounts, Keogh plan proceeds, matured endowment insurance policies and certain out-of-State government lottery contracts) and *intervivos* gifts are valid for Pennsylvania Inheritance Tax purposes if the following conditions are met:

(i) They are made either by the disclaiming party or the personal representative of the deceased individual or the guardian or attorney-in-fact of the incapacitated person or minor to whom the interest, absent the disclaimer, would have devolved.

(ii) The applicable conditions in paragraphs (3)—(7) have been met.

(2) The same rule applies to nonresident decedents with nonprobate taxable assets subject to Pennsylvania Inheritance Tax.

(3) The disclaimer shall be in writing and shall satisfy the requirements of 20 Pa.C.S. Chapter 62 (relating to disclaimers) in effect at the time the disclaimer is made.

(4) The disclaimer shall be signed and dated within 9 months of the date of death of the decedent whose interest is being disclaimed. (*See In Re Pomerantz' Estate*, 28 D. & C.3d 521 (Montg. 1983)).

(5) The disclaimer shall be signed and dated by the individual, the individual's personal representative if the individual seeking to disclaim has died or the guardian or attorney-in-fact of an incapacitated individual or minor.

(6) If the disclaimer is made by the personal representative, the guardian of an incapacitated or minor person, or the attorney-in-fact of the person whose interest is being disclaimed, the petition required by 20 Pa.C.S. § 6202 (relating to disclaimers by fiduciaries or attorneys-in-fact) shall be filed with the applicable county orphans' court within 9 months of the date of death of the decedent whose interest, absent the disclaimer, would have devolved. (*See, McGrady Estate*, 42 D. & C.2d 519, 17 Fiduc. Rep. 408 (O.C. Phila. 1967) and in *In Re Pomerantz' Estate*, 28 D. & C.3d 521 (O.C. Montg. 1983)).

(7) A personal representative may make a disclaimer on behalf of a decedent without court authorization if the following conditions are met:

(i) The will of the decedent authorizes the personal representative to do so (*See* 20 Pa.C.S. § 6202).

(ii) A copy of the probated last will and testament is attached to the inheritance tax return filed with the Department.

(iii) The disclaimer is signed and dated within 9 months of the date of death of the decedent as provided in section 2116(c) of the TRC (72 P.S. § 9116(c)) and paragraph (4).

(8) Notice of the filing of an estate's first and final account and of its call for audit or confirmation shall include notice of the disclaimer of the decedent's devolved interest, including the written disclaimer of any nonprobate taxable assets of the decedent, under section 2116(c) of the TRC. The notice shall be given to: Office of Chief Counsel, Department of Revenue, Department 281061, Harrisburg, Pennsylvania 17128-1061.

[Pa.B. Doc. No. 97-1306. Filed for public inspection August 15, 1997, 9:00 a.m.]