STATEMENTS OF POLICY

Title 4—ADMINISTRATION

PART II. EXECUTIVE BOARD

[4 PA. CODE CH. 9]

Reorganization of the Department of Agriculture

The Executive Board approved a reorganization of the Department of Agriculture effective July 19, 1999.

The organization chart at 29 Pa.B. 5617 (October 30, 1999) is published at the request of the Joint Committee on Documents under 1 Pa. Code § 3.1(a)(9) (relating to contents of *Code*).

(*Editor's Note*: The Joint Committee on Documents has found organization charts to be general and permanent in nature. This document meets the criteria of 45 Pa.C.S. § 702(7) as a document general and permanent in nature which shall be codified in the *Pennsylvania Code*.)

[Pa.B. Doc. No. 99-1829. Filed for public inspection October 29, 1999, 9:00 a.m.]

[4 PA. CODE CH. 9]

Reorganization of the Department of Transportation

The Executive Board approved a reorganization of the Department of Transportation effective October 13, 1999.

The organization chart at 29 Pa.B. 5618 (October 30, 1999) is published at the request of the Joint Committee on Documents under 1 Pa. Code § 3.1(a)(9) (relating to contents of Code).

(*Editor's Note*: The Joint Committee on Documents has found organization charts to be general and permanent in nature. This document meets the criteria of 45 Pa.C.S. § 702(7) as a document general and permanent in nature which shall be codified in the *Pennsylvania Code*.)

[Pa.B. Doc. No. 99-1830. Filed for public inspection October 29, 1999, 9:00 a.m.]

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CHS. 41 AND 69]

[M-00991221]

Expanding Alternative Dispute Resolution (ADR) Process to Contested Proceedings

The Pennsylvania Public Utility Commission (Commission) on July 15, 1999, adopted a final policy statement to expand the availability of mediation to all contested proceedings or proceedings which could be contested. The proposal accords all industry groups, including transportation, the same opportunity to seek negotiated settlements in contested proceedings in lieu of incurring the time, expense and uncertainty of litigation. The contact person is Rhonda Daviston, Law Bureau, (717) 787-6166.

Commissioners Present: Robert K. Bloom, Vice Chairperson; David W. Rolka; Nora Mead Brownell; Aaron Wilson, Jr.

Public Meeting held
July 15, 1999

Policy Statement Expanding Alternative Dispute Resolution (ADR) Process to Contested Proceedings Including §§ 41.1—41.21; Doc. No. M-00991221

Order

By the Commission:

On February 11, 1999, the Commission adopted a proposed policy statement to expand the availability and use of the Alternative Dispute Resolution (ADR) Process (mediation) to all contested proceedings or proceedings which could be contested. The Commission noted that the proposed expansion would include transportation proceedings.

The proposed changes are based on 4 years of experience in handling mediations by the Commission's Office of Administrative Law Judge (OALJ) as well as the OALJ's favorable experience with the mediation process. This proposal allows more flexibility and is drafted to conform with general mediation principles which were not as well defined in the past. Accordingly, to make mediation a more flexible process and available to more parties, we will modify the existing policy statement.

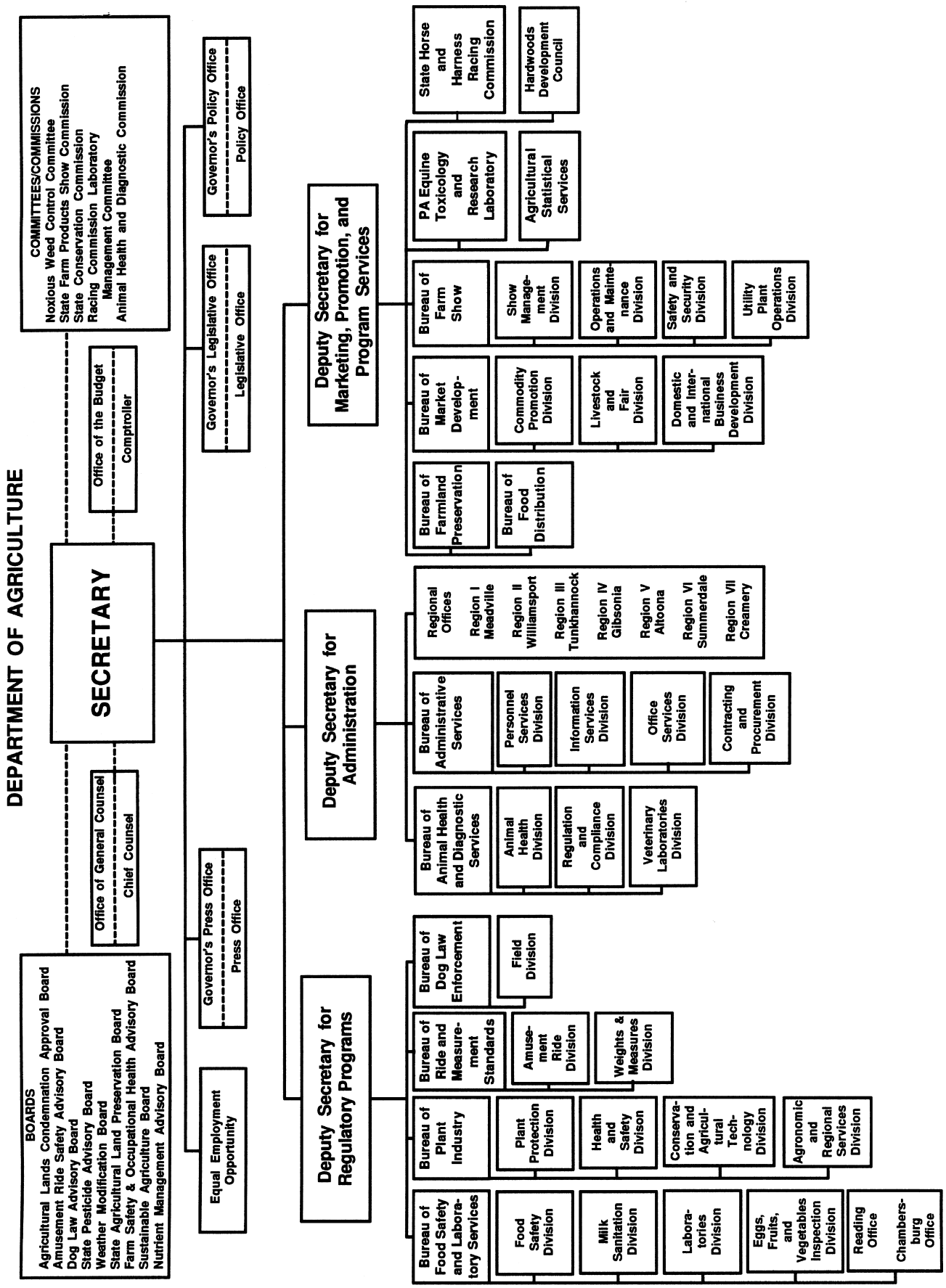
The ADR process has been in effect since March 15, 1994. The OALJ reports that the ADR process is working well and is highly successful.[1] The OALJ also reports that the ADR process is worthwhile in resolving disputes and agrees that it should be expanded to include all utility types.

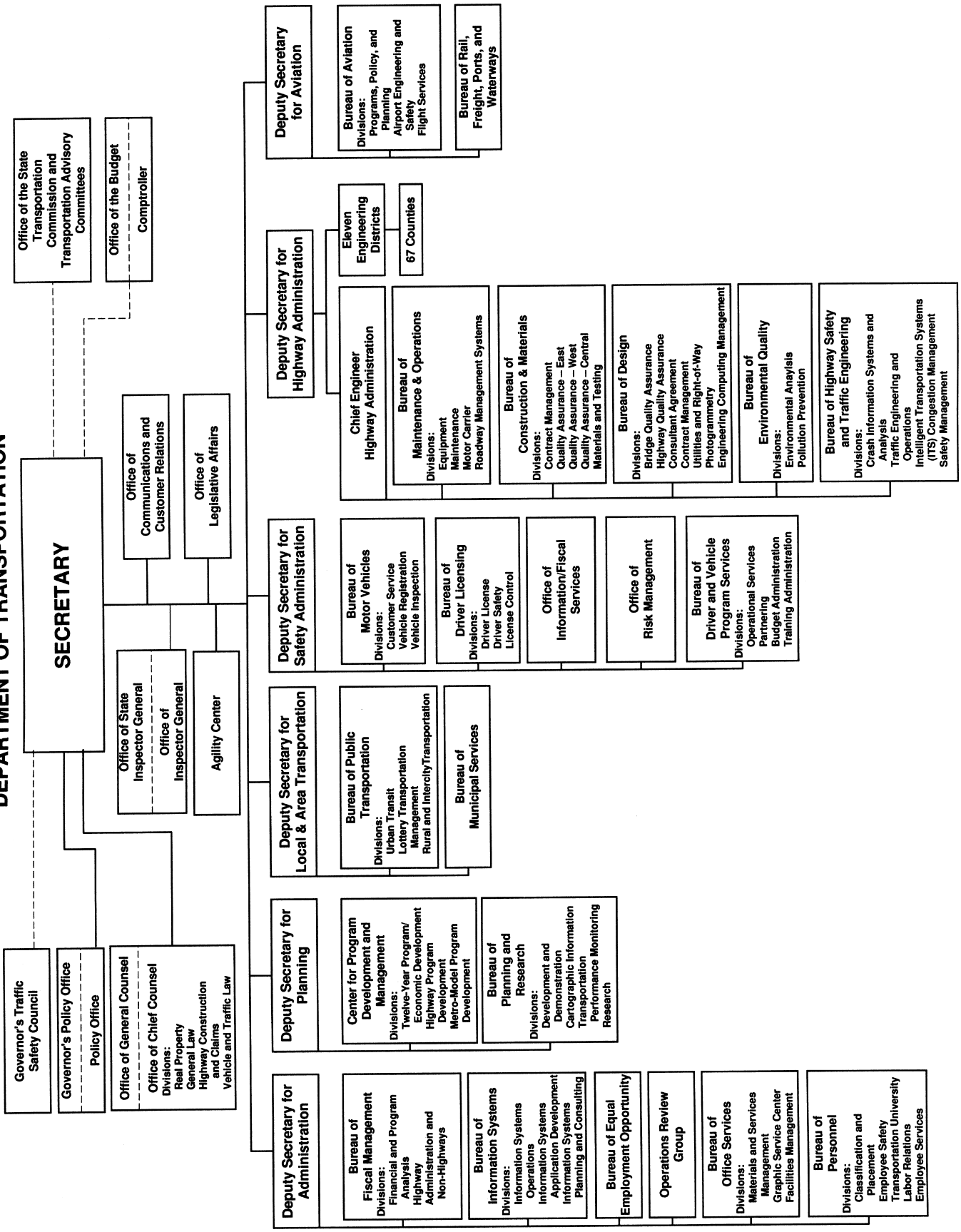
The policy statement recognizes the positive effect that mediation has had in streamlining contested proceedings in both rate and nonrate cases. The Commission wishes to accord all industries, including the transportation industry, the same opportunity to seek negotiated settlements in contested proceedings in lieu of incurring the time, expense and uncertainty of litigation. Expanding the availability to all contested proceedings or proceedings which could be contested, will further promote the goal of obtaining negotiated settlements in the public interest.

Previously, mediation was available to the transportation industry as a result of being included in the nonrate category. However, by including the availability of mediation in 52 Pa. Code §§ 41.1—41.21, the Commission intends to notify those in the transportation industry, who may have been previously unaware of the Commission's mediation process, that mediation is available in contested proceedings as a fair and efficient alternative to protracted litigation.

The proposed policy statement was published in the *Pennsylvania Bulletin* on March 27, 1999, at 29 Pa.B. 1617. Prior to publication, the Commission received internal comments from the Bureau of Audits (Audits), the Bureau of Consumer Services (BCS), the Bureau of Transportation and Safety (BTS), and the Office of Trial Staff (OTS).

[1] In the Commission's 1997/1998 Fiscal year Annual Report, the OALJ reported that a total of 55 cases were concluded under mediation procedures. Of those cases, 50 cases were resolved in full, 2 were resolved for the most past, and 3 mediations were terminated, resulting in a success rate in excess of 90%.


DEPARTMENT OF AGRICULTURE
SECRETARY
BOARDS
Agricultural Lands Condemnation Approval Board
Amusement Ride Safety Advisory Board
Dog Law Advisory Board
State Pesticide Advisory Board
Weather Modification Board
State Agricultural Land Preservation Board
Farm Safety & Occupational Health Advisory Board
Sustainable Agriculture Board
Nutrient Management Advisory Board
COMMITTEES/COMMISSIONS
Noxious Weed Control Committee
State Farm Products Show Commission
State Conservation Commission
Racing Commission Laboratory
Management Committee
Animal Health and Diagnostic Commission
Office of General Counsel
Chief Counsel
Office of the Budget
Comptroller
Governor's Legislative Office
Legislative Office
Governor's Policy Office
Policy Office
Governor's Press Office
Press Office
Equal Employment Opportunity
Deputy Secretary for Regulatory Programs
Bureau of Food Safety and Laboratory Services
Food Safety Division
Milk Sanitation Division
Laboratories Division
Eggs, Fruits, and Vegetables Inspection Division
Reading Office
Chambersburg Office
Bureau of Plant Industry
Plant Protection Division
Health and Safety Divison
Conservation and Agricultural Technology Division
Agronomic and Regional Services Division
Bureau of Ride and Measurement Standards
Amusement Ride Division
Weights & Measures Division
Bureau of Dog Law Enforcement
Field Division
Deputy Secretary for Administration
Bureau of Animal Health and Diagnostic Services
Animal Health Division
Regulation and Compliance Division
Veterinary Laboratories Division
Bureau of Administrative Services
Personnel Services Division
Information Services Division
Office Services Division
Contracting and Procurement Division
Regional Offices
Region I Meadville
Region II Williamsport
Region III Tunkhannock
Region IV Gibsonia
Region V Altoona
Region VI Summerdale
Region VII Creamery
Deputy Secretary for Marketing, Promotion, and Program Services
Bureau of Farmland Preservation
Bureau of Food Distribution
Bureau of Market Development
Commodity Promotion Division
Livestock and Fair Division
Domestic and International Business Development Division
Bureau of Farm Show
Show Management Division
Operations and Maintenance Division
Safety and Security Division
Utility Plant Operations Division
PA Equine Toxicology and Research Laboratory
Agricultural Statistical Services
State Horse and Harness Racing Commission
Hardwoods Development Council


DEPARTMENT OF TRANSPORTATION
SECRETARY
Governor's Traffic Safety Council
Governor's Policy Office
Policy Office
Office of General Counsel
Office of Chief Counsel
Divisions:
Real Property
General Law
Highway Construction and Claims
Vehicle and Traffic Law
Office of the State Transportation Commission and Transportation Advisory Committees
Office of the Budget
Comptroller
Office of Communications and Customer Relations
Office of Legislative Affairs
Office of State Inspector General
Office of Inspector General
Agility Center
Deputy Secretary for Aviation
Bureau of Aviation
Divisions:
Programs, Policy, and Planning
Airport Engineering and Safety
Flight Services
Bureau of Rail, Freight, Ports, and Waterways
Deputy Secretary for Highway Administration
Eleven Engineering Districts
67 Counties
Chief Engineer Highway Administration
Bureau of Maintenance & Operations
Divisions:
Equipment
Maintenance
Motor Carrier
Roadway Management Systems
Bureau of Construction & Materials
Divisions:
Contract Management
Quality Assurance – East
Quality Assurance – West
Quality Assurance – Central
Materials and Testing
Bureau of Design
Divisions:
Bridge Quality Assurance
Highway Quality Assurance
Consultant Agreement
Contract Management
Utilities and Right-of-Way
Photogrammetry
Engineering Computing Management
Bureau of Environmental Quality
Divisions:
Environmental Anaylsis
Pollution Prevention
Bureau of Highway Safety and Traffic Engineering
Divisions:
Crash Information Systems and Analysis
Traffic Engineering and Operations
Intelligent Transportation Systems (ITS) Congestion Management
Safety Management
Deputy Secretary for Safety Administration
Bureau of Motor Vehicles
Divisions:
Customer Service
Vehicle Registration
Vehicle Inspection
Bureau of Driver Licensing
Divisions:
Driver License
Driver Safety
License Control
Office of Information/Fiscal Services
Office of Risk Management
Bureau of Driver and Vehicle Program Services
Divisions:
Operational Services
Partnering
Budget Administration
Training Administration
Deputy Secretary for Local & Area Transportation
Bureau of Public Transportation
Divisions:
Urban Transit
Lottery Transportation Management
Rural and Intercity Transportation
Bureau of Municipal Services
Deputy Secretary for Planning
Center for Program Development and Management
Divisions:
Twelve-Year Program/ Economic Development
Highway Program Development
Metro-Model Program Development
Bureau of Planning and Research
Divisions:
Development and Demonstration
Cartographic Information
Transportation Performance Monitoring
Research
Deputy Secretary for Administration
Bureau of Fiscal Management
Divisions:
Financial and Program Analysis
Highway Administration and Non-Highways
Bureau of Information Systems
Divisions:
Information Systems Operations
Information Systems Application Development
Information Systems Planning and Consulting
Bureau of Equal Employment Opportunity
Operations Review Group
Bureau of Office Services
Divisions:
Materials and Services Management
Graphic Service Center
Facilities Management
Bureau of Personnel
Divisions:
Classification and Placement
Employee Safety
Transportation University
Labor Relations
Employee Services

Following publication in the *Pennsylvania Bulletin*, the Commission received formal comments from the following entities: the Pennsylvania Electric Association, (PEA), the Office of Consumer Advocate (OCA), the Pennsylvania Gas Association (PGA), and the National Association of Water Companies, (NAWC). Additionally, the BTS filed its internal comments again.

All of the comments generally favor the policy. Audits believes that the policy will have a positive impact. PEA supports the policy. BCS generally endorses the policy; however, it wants to make sure that the policy is consistent with existing regulations and that OALJ and BCS will coordinate their efforts in administering the policy. Generally, the proposal merely allows more flexibility and is drafted to conform with general mediation principles which were not as well defined in the past. Just as before, there will be no inconsistency in implementation of the policy and existing regulations and OALJ shall continue to coordinate the mediation program with BCS.

The BTS, OTS, OCA, PGA and NAWC have made comments which seek modification to the policy. These will be addressed as follows.

Bureau of Transportation and Safety

In its filed comments, BTS suggests that the mediation process should not be applicable to complaint proceedings initiated by BTS. BTS states that the vast majority of its initiated complaints involve safety issues and therefore, a compromise or settlement regarding these issues is inappropriate. Moreover, BTS states that the addition of the mediation process in the area of BTS initiated motor carrier complaints may delay the ultimate resolution of the proceeding since the mediator, with his limited role, will most likely be unable to facilitate resolution of any contested issues. (BTS comments, p. 2)

The policy of the Commission is to encourage settlements. See 52 Pa. Code § 5.231. The existing mediation policy also encourages settlements. See 52 Pa. Code § 69.391. Furthermore, the existing mediation policy allows for mediation in all "nonrate cases." See 52. Pa. Code § 69.392(a)(1). The Commission noted that the present definition of "nonrate cases" is all inclusive, and includes transportation cases. See 25 Pa.B.1966 (May 20, 1995). Just as there is no exclusion of complaint proceedings initiated by BTS, at the present time, there should be no exclusion for the future. This is true, particularly, in view of the policy of the Commission to expand opportunities for mediation, as opposed to limiting these opportunities.

The Commission is of the opinion that safety issues can be mediated. The proposed revised policy does not suggest that safety should be compromised by the mediation method. Rather, the method will allow the parties to draft an agreement on how best to resolve the safety matter under the circumstances. This could include, among other things, what requirements the utility will comply with to improve its safety program for the future.

BTS also has concerns that mediation will delay resolution of a proceeding or that the mediation "will most likely be unable to facilitate resolution of any contested issues." The Commission's experience has been that mediation generally results in a more expeditious resolution than does litigation and that we are ahead of the National average for successful mediations. More specifically, skilled mediators across the country enjoy a success rate above 80%. See ADR Report, April 14, 1999, p.7. For the first three quarters of the Fiscal Year 1998—1999, those cases under the management of OALJ, which involved mediation or other types of facilitative processes, resulted in a success rate of 88%. BTS's concern that mediation cannot resolve cases involving only issues of law should be allayed because a case requiring the resolution of only an issue of law is not appropriate for mediation. Therefore, such a case would not be mediated.

In any event, use of the mediation process is not mandatory. Except for cases referred by the Commission to the mediation unit of OALJ, there can be no mediation unless parties to the case consent. With this in mind, it seems to the Commission that the better practice would be to not eliminate the opportunity for mediation of BTS initiated complaints, but to give BTS and other parties, the option of using mediation.

Office of Trial Staff

OTS states that it supports expanding the use of the ADR/mediation process and is in general agreement with the proposed language changes. OTS's suggested changes are as follows:

§ 69.392(a)(2) of the proposed policy provides that:

A proceeding qualifies for mediation when the following apply:

(1) Mediation is deemed to be appropriate by the OALJ.

(2) Necessary parties consent to mediate.

OTS suggests that the second requirement be deleted and be replaced with "The party with the burden of proof consents to mediation." OTS further states that because the Commission's rules defines "party" and "active party," perhaps "active party" could be substituted for "necessary party." The Commission agrees with OTS's comment that the second qualification "necessary parties" should be deleted because consent is a separate element from qualification. Even if part (2) were required, the terms "active" and "inactive" would not serve as substitutes for "necessary" because they relate to rate cases only, and therefore are not pertinent to general utility matters. See 52 Pa. Code § 1.8. In any event, the term "necessary" can be deleted so that the second sentence in § 69.392(a) will read: "A proceeding qualifies for mediation when mediation is deemed to be appropriate by the OALJ."

When reviewing § 69.392, the parties should distinguish between (1) whether mediation is appropriate and (2) whether there is sufficient consent to proceed with a mediation session.

Mediation is generally not appropriate where (1) the result requires a determination of an issue of law, (2) a party wants a determination of who is right, (3) a party or the parties would like the result of a proceeding to serve as precedent, or (4) the result of a proceeding would establish a policy (unless all of the stakeholders collaborate for the purpose of setting a policy).

After the OALJ determines that a matter is appropriate for mediation, there will be no mediation unless participants in a proceeding consent to use the mediation process, except when the Commission assigns a case for mediation. If there are only two parties in a case, that is, a complainant and a respondent or an applicant and a protestant, it is clear that there can be no mediation unless both parties consent to use that process. In a multiparty case, there may be occasions when it is proper to proceed with mediation without the consent of all participants. On these occasions, the nonconsenting participants can proceed independently of the mediation.

§ 69.392(d)(1)

OTS suggests that we delete the phrase "and other necessary parties" so that subsection (d)(1) will read: "Except as otherwise directed by the Commission, there can be no mediation unless the party with the burden of proof consents to mediate." The Commission agrees that the phrase "and other necessary parties" should be deleted because it is not required for this subsection.

§ 69.393

With respect to § 69.393, OTS would like the mediator's role to include a "settlement" or resolution. The proposal includes only the term "resolution."

The Commission feels that the terms "settlement" and "resolution" should not be included together. Settlement is one type of resolution. To use both words would give the appearance to the contrary and create confusion. Because the goal of mediation is to achieve a settlement-type resolution, we do not see a need to include the word "resolution" as proposed.

Furthermore, OTS seems to make a distinction between resolving single issues in a matter and resolving all the issues. OTS is also concerned with whether a mediator will feel comfortable enough "to express an opinion of the merits of each party's position." The mediation mission at the Commission has been to attempt to resolve all the issues, if possible. If this does not happen, the mediation will still be useful if it resolves some of the issues. The Commission believes that this mission should continue. Moreover, mediation at the Commission, to date, has not been evaluative and the mediators have not expressed an opinion on the merits of a particular position of any party. The Commission will continue using mediation as a facilitative process and not an evaluative one.

§ 69.395(b)

The Commission concurs with OTS that the following phrase can be omitted: "There will be no mediation when the necessary parties do not agree to abide by these rules and procedures." On further consideration, the phrase appears to be superfluous.

§ 69.395(c)

OTS would like to add subsection (c) which would read: "Mediation should not commence prior to 60 days from the date of filing in rate related cases to provide for adequate time for discovery." OTS notes that in rate proceedings, parties must have adequate time to develop positions prior to the mediation process. In developing the Alternative Dispute Resolution Process, we stated: "In the Commission's judgment, formal discovery techniques do not aid in a quick resolution of a case. For this reason, we believe that formal discovery procedures are not appropriate in the informal ADR process. Since ADR is an informal process, the information that is discoverable should be discovered informally." See 25 Pa.B.1966 (May 20, 1995).

The Commission's opinion is that there should be no time set forth in the guidelines prohibiting mediation before a certain date. If the parties are ready to commence mediation before 60 days, this should be encouraged instead of discouraged by requiring 60 days to pass before the mediation commences. In any case, the parties will have adequate time to develop information for the mediation process provided that the parties make a good-faith effort in their attempts to obtain the necessary information. Without a good-faith effort, there will be no mediation.

Office of Consumer Advocate

OCA states that it generally supports the expansion of mediation to all contested proceedings if the participants desire to use the mediation process. However, OCA states that certain of the proposed changes raise issues that should be clarified by the Commission before finalizing the policy statement.

§ 69.392

OCA notes that the proposed policy statement does not define "necessary parties." The proposed revision also does not state who will determine "necessary parties." The Commission agrees that the term "necessary parties" has not been defined and that neither the existing policy statement nor the revision states who will determine which parties are necessary. The Commission also notes that the term "necessary parties" will be deleted as set forth in the analysis relating to OTS.

§ 69.393

Deletion of the phrase that "the OALJ mediator will not have access to nonpublic Commission reports that evaluate the merits of the parties' positions or claims, or both," is not intended to mean that the mediator may have access to those reports. In fact, the mediator does not have access to those reports. Therefore, the Commission sees no useful purpose of including this in the guidelines. The guidelines contain provisions for the process, and should not include details outside of the process itself.

§ 69.394

OCA states that the proposed language is not clear that if the mediation process does not result in a full settlement, the parties are entitled to a hearing. OCA suggests that the policy should contain a provision concerning what happens if a full settlement is not achieved. This issue is covered in the proposed policy at § 69.396 (relating to conclusion of mediation). Section 69.396 provides: "When appropriate, the mediator may submit a report to an administrative law judge, or the Commission. The report will describe only the procedural background and the result of the mediation."

Sometimes it is not appropriate to submit a report to an administrative law judge (ALJ). For example, when a complaint is withdrawn, there will be no need to submit a report to an ALJ. On the other hand, when a matter is not settled, or only partially settled, and the case is not withdrawn, the mediator will write a report to an ALJ, or the Commission, as relevant, so that the ALJ or Commission can follow through as deemed necessary.

As suggested by OCA, the Commission will change the word "may" to "should" in the first sentence of § 69.396(b) so that it would read: "When appropriate, the mediator should submit a report . . . ."

In addition, OCA submits that an ALJ should be assigned at the beginning of a contested proceeding. It is the practice of the OALJ to assign certain cases to an ALJ immediately when that is necessary, such as cases subject to statutory deadlines (rate cases, for example). In those cases, the ALJ sets an initial schedule so that he or she can follow the case from the beginning to meet the statutory deadline. However, the OALJ should not be bound to always assign an ALJ to a matter to be mediated. To do so involves more people than necessary to handle the case efficiently, and creates an unnecessary extra administrative burden in the OALJ. It also adds a formality that does not belong in the informal mediation process. If a discovery problem, or other "threshold legal issues" arise, as mentioned by OCA, which cannot be

quickly resolved with facilitation by the mediator, the OALJ assigns a judge promptly to decide the issues and mediation is held in abeyance until those decisions are made.

§ 69.395

OCA is concerned as to whether the guidelines are clear that agreement to mediate only waives the 90-day requirement for when a hearing should commence, as opposed to waiving the right to hold the hearing itself.

The existing provision of § 69.494 of the policy statement, on this subject, states as follows: "For cases in which hearings must be commenced within 90 days, a party's request for mediation shall be construed as a waiver of that requirement."

The proposed provision, at § 69.395(a) states: "Acceptance into the mediation program is construed as a waiver of the requirement that hearings shall be commenced within 90 days after the proceeding is initiated."

The Commission believes that both provisions make it clear that only the 90-day period is waived and not that a hearing is waived. However, with reference to the 90-day rule, upon further reflection, we feel that the existing provision is more clear than the proposed provision. Therefore, we will continue using the existing provision in the revised guidelines instead of the one proposed, for § 69.395(a).

Pennsylvania Gas Association

PGA suggests that, for large, multiple rate cases, mediation is already an option under 52 Pa. Code § 5.224 (relating to prehearing conference in rate proceedings). The Commission notes that § 5.224 involves a more formal overall process than does mediation. Under § 5.224, the ALJ sets a prehearing conference after which an order is entered establishing certain items to be covered by the parties. After that, there is a second prehearing conference. This conference should be combined with a settlement conference to which a mediator could be assigned. Comparing this procedure to the proposed mediation guidelines, one can see that the guidelines do not encompass the same procedure as § 5.224. Rather, the mediation guidelines give an option to § 5.224, in that the guidelines allow for mediation at the very start and also allow for a more flexible, informal, overall procedure to expedite resolution.

In all, the mediation option, as proposed, is not the same as § 5.224. Instead, it is an option to § 5.224. Short of the Commission's assigning a case to mediation, the parties may choose either option. Therefore, no change is required in the proposal.

PGA objects to the provision of the proposed mediation guidelines which would allow the Commission to assign cases to mediation without consent of the parties. The Commission sees the usefulness of assigning certain cases, under certain circumstances, directly to mediation as an exception to requiring consent of the parties before mediation commences. There have been times that, considering all the factors in a case, it was the Commission's judgment that mediation would be appropriate. The Commission has, over the years, assigned certain cases to mediation and the results have been very positive. Therefore, the Commission should not be precluded from assigning certain cases to mediation.

Moreover, while the Commission can require parties to mediate, we cannot require them to agree. When the parties do not agree, the mediation will terminate. Therefore, the parties have this built-in protection in any event.

The Commission's practice of referring certain cases to mediation is consistent with a Nationwide trend. As stated by Bennett G. Picker, in *Mediation Practice Guide*, A Handbook for Resolving Business Disputes (Pike & Fischer, Inc., 1998): "In addition to voluntary mediation, many state and federal jurisdictions require mediation of some or all cases filed with the court." The Commission sees no reason why we should not be part of this trend when, on a case by case analysis, we feel that a certain case would best be processed by mediation.

Accordingly, we decline to eliminate the provisions which allow us to order a case to mediation.

National Association of Water Companies, Pennsylvania Chapter

NAWC recommends that the mediation program remain voluntary. In other words, NAWC recommends that the Commission should not be permitted to direct the parties to mediate their dispute without specific consent of the parties. Our remarks on this subject were discussed previously in response to PGA's comments.

NAWC raises the additional issue of due process of law. On this, NAWC asserts that, if parties are directed to mediate, they will be deprived of due process of law. The Commission's view is that the parties will not be denied due process because mediation does not deprive a party of a hearing. If a party does not enter into an agreement during mediation, that party may always be heard, and obtain an adjudication.

NAWC is concerned that the proposed guidelines fail "to establish timelines for the mediation process, or procedure for withdrawing from the mediation."

With reference to timelines, the Commission's experience with mediation is that there should be no rigid timelines, unless there is a statutory time for completing a case. The mediator certainly should attempt to keep abreast of the status of a mediation. However, if the mediator feels that the parties are acting in good faith, no useful purpose would be served by setting a deadline to settle. To the contrary, such a deadline could be detrimental because it could arbitrarily end a mediation that could be successful if the deadline were not established. Of course, if the parties are not acting in good faith, the mediator should terminate the mediation. Flexibility, rather than mandatory deadlines, is required for a successful process.

Next we will address the ability of a party to terminate a mediation. Mediation, by definition, is nonbinding. This means that a party can "walk away" from a mediation at any time. At the beginning of an initial mediation session at the Commission, a standard item is for the mediator to inform the parties that "any party may withdraw from the mediation at any time."

We have reviewed and addressed all of the comments with respect to revisions to the ADR policy statement. As many interested parties have been given an opportunity to comment on the substantive revisions to the Commission's existing ADR Policy Statement, we are directing that the revisions to the ADR Policy Statement become effective upon publication in the *Pennsylvania Bulletin*;

Therefore,

It Is Ordered that:

1. The regulations of the Commission, 52 Pa. Code Chapters 41 and 69, are amended by adding a statement of policy at §§ 41.31, 41.32 and 69.37 and amending § 69.391 to read as set forth at 29 Pa.B. 1617 (March 27,

1999); and by amending §§ 69.392—69.395 and by adding § 69.396 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 fiscal impact.

3. A copy of this order and Annex A be published in the *Pennsylvania Bulletin*.

4. A copy of this order and Annex A be served upon the Pennsylvania Motor Truck Association, the Pennsylvania Bus Association, the International Taxicab and Livery Association, the National Association of Water Companies-Pennsylvania Chapter, the Pennsylvania Gas Association, the Pennsylvania Telephone Association, the Pennsylvania Electric Association, the Office of Consumer Advocate, the Office of Small Business Advocate, and the Office of Trial Staff.

5. This Policy Statement shall become effective upon publication the *Pennsylvania Bulletin*.

6. Alternative formats of this document are available to persons with disabilities and may be obtained by contacting Sherri Delbiondo, Regulatory Coordinator, at (717) 772-4597. The contact person is Rhonda L. Daviston, Assistant Counsel, Pennsylvania Public Utility Commission, P. O. Box 3265, Harrisburg, PA 17105-3265, (717) 787-6166.

JAMES J. MCNULTY,
Secretary

Fiscal Note: Fiscal Note 57-205 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

MEDIATION PROCESS

§ 69.392. Availability of mediation process.

(a) *Mediation*. Mediation is available to parties in all contested proceedings, or proceedings which could be contested, when the proceeding qualifies for mediation. A proceeding qualifies for mediation when mediation is deemed appropriate by the Office of Administrative Law Judge (OALJ).

(b) *Requesting mediation*.

(1) Parties may request mediation, prior to the commencement of a proceeding, by sending a letter request to the Mediation Coordinator of OALJ, and a copy of the request to the Secretary of the Commission.

(2) Parties may request mediation in their pleadings.

(3) Parties may request mediation during the course of a proceeding.

(c) *Consent to use mediation process*. The OALJ may notify the parties in a proceeding that mediation may be appropriate and ask whether the parties consent to use the mediation process.

(d) *Party with the burden of proof*.

(1) Except as otherwise directed by the Commission, there can be no mediation unless the party with the burden of proof consents to mediate.

(2) When the party with the burden of proof consents to mediation in proceedings subject to a statutory deadline for adjudication, that party must also agree, in writing, to extend the statutory deadline by, at least, 60 days.

(e) *Assignment by Commission*. The Commission may assign a case to the OALJ for mediation.

§ 69.393. Assignment and role of mediator.

If the Commission assigns a case for mediation, or OALJ determines that a case should go forward with mediation, OALJ will assign a mediator to the proceeding. The mediator's role will be to facilitate settlement of the contested issues between, or among, the parties, as opposed to rendering a decision.

§ 69.394. Notice.

(a) If the Commission assigns a case for mediation, or the Office of Administrative Law Judge (OALJ) determines that a proceeding should go forward with mediation, the parties will be notified of the time, date, and place of the mediation session, as well as the name, address, and telephone number of the mediator.

(b) If the OALJ determines that the proceeding should not be set for mediation, the parties will be notified of this as well as the procedure to be used in lieu of mediation.

§ 69.395. Rules.

(a) For cases in which hearings must be commenced within 90 days, a party's request for mediation shall be construed as a waiver of that requirement.

(b) The participants in a mediation proceeding must agree to abide by mediation rules and procedures established by the Office of Administrative Law Judge. Failure to abide by these rules and procedures, following commencement of mediation, could lead to the termination of the mediation.

§ 69.396. Conclusion of mediation.

(a) When an agreement is reached in a formal complaint proceeding, the complaint may be withdrawn, unless otherwise provided for by law or regulation.

(b) When appropriate, the mediator should submit a report to an administrative law judge, or the Commission. The report will describe only the procedural background and the result of the mediation.

[Pa.B. Doc. No. 99-1831. Filed for public inspection October 29, 1999, 9:00 a.m.]

Title 55—PUBLIC WELFARE

DEPARTMENT OF PUBLIC WELFARE

[55 PA. CODE CH. 1101]

Payment in Full

Purpose

The purpose of this statement of policy is to remind providers of the legal prohibition of seeking or requesting supplemental or additional payments from recipients for covered services.

Scope

This statement of policy is applicable to all providers enrolled in the Medical Assistance (MA) Program.

Background/Discussion

In a recent State Medicaid Director letter, the Health Care Financing Administration alerted States of incidents where providers required Medicaid recipients to make cash payments for Medicaid covered services and refused to provide medically necessary services to a Medicaid recipient for lack of prepayment for these services. These practices are illegal and contrary to the participation requirements of Pennsylvania's MA Program and MA provider's responsibility to assure delivery of all compensable medically necessary services to MA recipients.

The following examples illustrate this issue:

1. The Department of Public Welfare denies payment to an MA participating provider because the provider failed to submit the original or initial invoice within 180 days of the date of service. The provider is prohibited from seeking payment from the MA recipient.

2. An MA participating provider treats a dually eligible recipient. The Medicare payment (80% of the reasonable and customary charge) is equal to or greater than the MA fee. The provider has been "paid in full" and cannot seek reimbursement from the MA recipient for the coinsurance or deductibles.

3. An MA participating provider tells his patient that MA does not pay enough and indicates that he will treat the MA recipient as a private pay patient. The provider charges the recipient a supplemental fee of $20 for each office visit. This arrangement is illegal.

4. A network provider treats a HealthChoices member, who also has other commercial insurance, for an MA covered service. The commercial insurance payment, less copayment, is equal to the HealthChoices plan's charge for this service. The network provider may not bill the member for the copayment.

Effective Date

This statement of policy takes effect upon publication in the *Pennsylvania Bulletin*.

FEATHER O. HOUSTOUN,
Secretary

(*Editor's Note*: The regulations of the Department, 55 Pa. Code Chapter 1101, are amended by adding a statement of policy in § 1101.63a (relating to full reimbursement for covered services rendered—statement of policy).)

Fiscal Note: 14-BUL-057. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 55. PUBLIC WELFARE

PART III. MEDICAL ASSISTANCE MANUAL

CHAPTER 1101. GENERAL PROVISIONS

FEES AND PAYMENTS

§ 1101.63a. Full reimbursement for covered services rendered—statement of policy.

(a) Section 1406(a) of the Public Welfare Code (62 P. S. § 1406(a)) and MA regulations in § 1101.63(a) (relating to payment in full) mandate that all payments made to providers under the MA Program plus any copayment required to be paid by a recipient shall constitute full reimbursement to the provider for covered services rendered.

(b) A provider who seeks or accepts supplementary payment of another kind from the Department, the recipient or another person for a compensable service or item is required to return the supplementary payment.

(c) A provider may bill an MA recipient for a noncompensable service or item if the recipient is told before the service is rendered that the program does not cover it.

[Pa.B. Doc. No. 99-1832. Filed for public inspection October 29, 1999, 9:00 a.m.]