RULES AND REGULATIONS

Title 16—COMMUNITY AFFAIRS

HUMAN RELATIONS COMMISSION

[16 PA. CODE CH. 45]

Housing Accommodations/Commercial Property

The Human Relations Commission (Commission) has adopted amendments to Chapter 45 (relating to housing accommodations), pertaining to advertising, to read as set forth in Annex A. In compliance with and under the authority of the act of June 25, 1997 (P. L. 326, No. 34) (Act 34), guidelines and a statement of policy were published earlier.

Purpose and Background

The purpose of this rulemaking is to advise the public of words, phrases, symbols and the like which are impermissible under the Pennsylvania Human Relations Act (43 P. S. §§ 951—963) (act) when used in housing advertisements. In addition, it is a guide to advertisers and publishers in their efforts to insure that any housing advertisements published or caused to be published by them do not violate the act. The list of words in § 45.182 (relating to words to be avoided) does not contain every possible word and phrase that may violate the act. Its purpose is to provide as complete a list as possible. For example, while many nationalities, types of disabilities and races are mentioned, the list is not inclusive. Words indicating ancestry, race, color, religion or disability are equally prohibited in the context of real estate advertisements. The list will provide guidance on how to recognize the type of language that may be violative of the act. When the context of the word or phrase is key to its possible unlawful meaning, that will be noted.

This rulemaking also contains examples of types of conduct which constitute reasonable efforts to comply with the advertising provisions of the act so that a finding of knowing and willful violation of those portions of the PHRA is precluded.

Notice, Comments and Commission Responses

Notice of the proposed rulemaking was published at 29 Pa.B. 3895 (July 24, 1999) with a 60 day public review and comment period. As a result of this publication, the Commission received two public comments, one from the Pennsylvania Association of Realtors (PAR) and one from the Pennsylvania Newspaper's Association (PNA). In addition to the public comments, the Independent Regulatory Review Commission (IRRC) and the House State Government Committee made a number of comments. The Senate Labor and Industry Committee allowed its 20-day comment period to pass without comment or objection to the proposed rulemaking. The comments from IRRC and the House State Government Committee involved some of the same areas of concern raised by PAR and PNA. The Commission's responses to the various comments, from all sources, are set forth as follows.

1. *Section 45.171—Race/Color/National Origin.*

a) IRRC and PNA requested further clarification regarding whether a reference to a property located in an area recognized as a community landmark, such as, "Chinatown" or "Little Italy" is prohibited. The Commission believes that as long as the named area is in fact a recognized broad geographical landmark, and not simply a term being used for exclusionary purposes, its use is not unlawful. This has been added to the appropriate section.

b) IRRC and PNA questioned whether ethnic terms can be used to describe a property's unique features, such as Oriental garden and Kosher restaurant. If the description is used in connection with the property that is being sold and not as a landmark for other property, that description is acceptable. This has been included in the final rulemaking.

c) IRRC and PNA requested guidance on the term "code words." While it is a difficult term to further define as codes are by definition unique to each usage, further definition has been added to the appropriate section.

2. *Section 45.172—Familial Status/Age.*

IRRC suggested that a typographical error existed in subsection (a)(3), in that the word "The" which appears before "listing" needed to be deleted. This has been done. Further review indicated that the second use of the word "against" in the first sentence was confusing and was removed.

3. *Section 45.181—List.*

IRRC commented that the language in this section was nonregulatory, and should either be changed or placed in the purpose section. The language has been moved to the purpose section.

4. *Section 45.182—Words to be Avoided (now adopted as § 45.181).*

a) IRRC commented that information is repeated from § 45.181 and should be removed. This was done.

b) IRRC also commented that the explanatory language after "senior" is confusing and should mirror the structure of the explanatory language that follows "adult." This has been done.

5. *Section 45.191—Advertisements.*

IRRC and PNA sought clarification as to the legality of advertisements for out-of-State property published in Pennsylvania newspapers. Section 45.191(c) was added to the regulations to make it clear that the advertisements in Pennsylvania newspapers are covered by the act, regardless of where the property advertised is located.

6. *Section 45.192—Affirmative Defenses.*

a) IRRC commented that the term "housing advertiser" should be replaced with "advertiser" since this was the defined term. This has been done.

b) IRRC commented that the affirmative defense, and the good faith effort provision in § 45.193 should be clarified by outlining the process by which advertising advisories are obtained. This has been done.

7. *Section 45.193—Good Faith Efforts.*

IRRC suggested cross referencing the housing for older persons exemption to the Federal Fair Housing Act (42 U.S.C.A. §§ 3601—3619). This has been done.

8. Both IRRC and the House State Government Committee commented that Act 34 nullified § 45.8(a) and 45.13(f) (relating to advertisements; and to exemptions) of the current regulations. The Commission has thus deleted both subsections in this final-form regulations.

9. The PNA commented that the word "student" has been determined to be a word to avoid because it could indicate a preference for young persons to the exclusion of older persons or families with children. The Commission believes that the use of the word "student" is not discriminatory in that students come in all protected classes. If a realtor or landlord is discriminating against a protected class, that action will be unlawful even though the advertisement itself may not be. Therefore, we have not added the word "student" to the list.

10. The PNA and the House State Government Committee recommended that the word list be updated on a regular basis or on a 6-month basis. The Commission does not believe that it will be necessary to do a formal review of the list every 6 months. The Commission has done and will continue to do internal reviews, and over the past 2 years, it has not found any significant changes. If the Commission finds that new phrases or words are being used that should be included on our list, the Commission would immediately begin the regulatory process to add these words to the current list.

11. The PNA and the House State Government Committee both commented on the need for clarification of shared housing advertisements. The PNA stated that it was unclear whether an advertiser may lawfully describe the circumstances of the shared housing arrangement. For example, "female and child looking for female roommate," "female and son looking for female roommate" and "female and teenager looking for roommate" have all been approved by the Commission. With respect to discrimination based on sex, the advertising provisions of the Commission do not apply to one's personal residence. The advertisements focus primarily on the sex of the head of household. Any possible discriminatory effect on the basis of familial status or age is de minimis. The Commission therefore believes that the advertising phrases cited previously do not violate the act. Thus, the Commission has chosen to leave the section as originally proposed.

12. The PNA commented that there should be a regulation on human model advertisements. This has been added in § 45.191(c).

13. The PNA commented that the right of advertisers to note a preference in an ad for a nonsmoker or nonpet owner should be included in this rulemaking. They also commented that the Commission should state whether an ad might discriminate on the basis of a nonprotected classification. This rulemaking is intended as a basis for determining unlawful advertisements. The Commission believes that to begin to include words and phrases that are legal would create a document more cumbersome than already exists and has therefore chosen to maintain current language.

14. The PAR commented that it supports the rulemaking if after a written advisory of approval by the Commission is received, the advertisement is found in violation of the proposed rule, the realtor is not liable and therefore not subject to any penalty. First, it must be pointed out that the rulemaking only binds the Commission and has no effect whatsoever on the Department of Housing and Urban Development's (HUD) enforcement of Federal fair housing law. Title VIII of the Federal Fair Housing Act covers the same areas as the act and HUD may enforce the Federal act as it sees fit. It is correct that compliance with a written advisory of the Commission will preclude a finding by the Commission of a knowing and willful violation of the advertising provisions of the act.

Paperwork Requirements:

No additional routine paperwork will be required by this final-form rulemaking.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), of July 13, 1999, the Commission submitted a copy of the notice of proposed rulemaking, published at 29 Pa.B. 3895 to IRRC and to the Chairpersons of the House and Senate Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing these final-form regulations, the Commission has considered all comments from IRRC, the Committees and the public.

Under section 5.1(d) of the Regulatory Review Act (71 P.S. § 745.5(d)), on April 12, 2000, these final-form regulations were deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on May 11, 2000, and approved the final-form regulations.

Fiscal Impact

The Commission believes that the final-form regulations will not result in additional cost to the Commission or to the general public. Additional costs which arise were created by the Commission and not these final-form regulations.

Effective Date

The final-form regulations shall take effect upon publication in the *Pennsylvania Bulletin.*

Order

The Commission, acting under the authorizing statute, orders that:

(a) The regulations of the Commission, 16 Pa. Code Chapter 45, are amended by:

(1) Deleting §§ 45.101—45.103, 45.121—45.126, 45.141, 45.142 and 45.151—45.154;

(2) Amending §§ 45.8 and 45.13; and

(3) Adding §§ 45.161—45.163, 45.171—45.175, 45.181 and 45.191—45.194 to read as set forth in Annex A.

(*Editor's Note*: Sections 45.8 and 45.13 were not published with the proposed rulemaking.)

(b) The Director shall submit this order and Annex A to the Office of the Attorney General for approval as to form and legality as required by law.

(c) The Director shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) The regulations shall take effect upon publication in the *Pennsylvania Bulletin.*

HOMER C. FLOYD,
Executive Director

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 30 Pa.B. 2688 (May 27, 2000).)

Fiscal Note: Fiscal Note 52-10 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 16. COMMUNITY AFFAIRS

PART II. GOVERNOR'S OFFICE

Subpart A. HUMAN RELATIONS COMMISSION

CHAPTER 45. HOUSING ACCOMMODATIONS/COMMERCIAL PROPERTY

Subpart A. REGULATIONS

§ 45.8. Advertisements.

(a) It is unlawful for a person to indicate in advertising that the housing that the person is offering for sale or lease is exempt from the act or to offer a preference, limitation or discrimination in the advertising of that exempt property.

(b) This section does not restrict the inclusion of applicable age and familial status requirements in advertisments of dwellings which are intended and operated for occupancy by older persons and which constitute housing for older persons as defined by § 45.4 (relating to definitions).

§ 45.13. Exemptions.

(a) Section 5(h) of the act (43 P. S. § 955(h)) does not prohibit the following:

(1) A religious or denominational institution or organization, or a charitable or educational organization which is operated, supervised or controlled by or in conjunction with a religious organization, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose, to persons of the same religion or denomination, or from giving preference to these persons, unless membership in the religion is restricted because of race, color or national origin.

(2) A private club or fraternal organization, not in fact open to the public, which, incident to its primary purpose, provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of the lodgings to its members or from giving preference to its members.

(b) Nothing in section 5(h) of the housing provisions of the act, regarding age or familial status, applies with respect to housing for older persons.

(c) With the exception of the exemption for dwellings which constitute housing for older persons as defined by § 45.4(f) (relating to definitions), the exemptions to the act are not applicable to real estate firms, brokers, agents, sales people or an individual employed by any of them, when acting on behalf of them.

(d) The exemption for housing for older persons in which the housing is solely occupied by persons 62 years of age or older shall be met if all of the occupants are 62 years of age or older.

(e) In determining whether the exemption for housing for older persons in which the housing is provided under a Federal or State program is met, the Commission will adopt the finding of the Secretary of the Department of Housing and Urban Development as to whether the housing is designed or operated to assist elderly persons.

§§ 45.101—45.103. (Reserved).

§§ 45.121—45.126. (Reserved).

§ 45.141. (Reserved).

§ 45.142. (Reserved).

§§ 45.151—45.154. (Reserved).

GENERAL

§ 45.161. Purpose.

(a) The list of words in § 45.181 (relating to words to be avoided) does not contain every possible word and phrase that may violate the act. The purpose of this section is to provide as complete a list as possible.

(1) For example, while many nationalities, types of disabilities and races are mentioned, the list is not inclusive. Any word indicating ancestry, race, color, religion or disability is equally prohibited in the context of the real estate advertisements.

(2) The list will provide guidance on how to recognize the type of language that may be violative of the act.

(3) When the context of the word or phrase is key to its possible unlawful meaning that will be noted.

(b) The purpose of this subchapter is to insure that advertisements for housing and commercial property do not include words, phrases, symbols, and the like, which violate the advertising provisions of the act.

(c) Section 45.192 (relating to affirmative defenses) contains affirmative defenses which will preclude a finding of a willful and knowing violation of the advertising provisions of the act.

(d) This subchapter implements the statutory mandate of section 9.1(b) of the act (43 P. S. § 959.1(b)).

§ 45.162. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, which are identical to those found in section 4 of the act (43 P. S. § 954):

Act—The Pennsylvania Human Relations Act (43 P. S. §§ 951—963).

Advertisement or *advertising*—See 43 P. S. § 954(3).

Advertiser—See 43 P. S. § 954(aa).

Housing accommodation—See 43 P. S. § 954(i).

Housing for older persons—See 43 P. S. § 954(w).

Person—See 43 P. S. § 954(a).

Personal residence—See 43 P. S. § 954(k). This term applies to any person as defined in this section.

§ 45.163. General rules.

The prohibited words and phrases in § 45.181 (relating to words to be avoided) are unlawful when used in housing advertisements. In addition to those words and phrases, a word or phrase that is commonly understood to be offensive to a group of people in a protected class also violates the act.

PROHIBITED USAGES

§ 45.171. Race/color/national origin.

It is unlawful to advertise a limitation, preference or discrimination on account of race, color or national origin. Examples include the use of:

(1) Any color to describe a group of people for example, white, brown, red, black or yellow.

(2) Any nationality or race to describe a group of people for example, Caucasian, Negroid, Chinese, Asian Immigrant, French Hawaiian, Arab, Oriental, African-American, Irish, and the like.

(3) Landmarks or organizational locations which are indicative of a particular nationality or race, unless all of the landmarks in the area are noted—for example, if proximity to a specific place associated with a particular ethnic group is noted as a directional landmark, reference should be made to all other nearby comparable facilities of interest to other groups.

(4) Code words which are recognizable in a particular neighborhood as connoting neighborhoods that restrict certain races or ethnic groups. Code words are facially neutral words and phrases which are used in a particular circumstance which are understood to mean an illegal preference.

(5) Neighborhood and geographical landmarks such as "chinatown" and "little Italy" are acceptable terms if the description is used in connection with the property being sold or rented and not for exclusionary purposes.

(6) Phrases such as "oriental garden" and "kosher restaurant" are acceptable when used as a description of the property being sold or rented, not as a landmark for other property.

§ 45.172. Familial status/age.

(a) It is unlawful to advertise a preference, limitation or discrimination against families with children in the household or against persons 40 years of age or older. Examples include, the following:

(1) The use of any phrase which notes a preference, limitation or discrimination for adults, couples or singles or families without children for example—"adult atmosphere," "mature adults preferred," "great for retired couple or couple just starting out," "adult/family sections," "no kids/pets okay," "couples only," "ideal for singles," "adult community" or "suitable for one or two adults."

(2) The use of any colloquialisms which imply the same as those in subsection (a)(1) for example—"empty nesters," "honeymooners" or "swinging singles."

(3) The listing the number of children allowed.

(b) Not withstanding the prohibitions in subsection (a), it is not unlawful to:

(1) List the size and number of rooms or bedrooms.

(2) Indicate that the housing meets the requirements for "housing for older persons" as defined in section 4 of the act (43 P. S. § 954). A publisher may rely on the advertisers written representations of such, unless the publisher has reason to believe otherwise.

(3) Advertise a preference against children and advertise age restrictions when the housing accommodation qualifies as "housing for older persons" as defined in section 4 of the act.

§ 45.173. Disability.

(a) It is unlawful to advertise a preference, limitation or discrimination against persons with disabilities or to advertise that the property is not accessible.

(b) It is not unlawful to describe housing as accessible to persons with disabilities.

§ 45.174. Religion.

(a) It is unlawful to advertise a preference, limitation or discrimination on the basis of religion. Examples include the following:

(1) The use of any religious denomination—for example, Christian, Jew, Muslim or Buddhist.

(2) Phrases such as "surround yourself with Christians."

(3) The use of a particular landmark or location which is indicative of a particular religion.

(b) Notwithstanding the prohibitions in subsection (a), it is not unlawful for any religious or denominational institution or organization or any charitable or educational organization which is operated, supervised or controlled by or in connection with a religious organization or any bona fide private or fraternal organization to advertise:

(1) A preference to persons of the same religion or denomination or to members of the private or fraternal organization.

(2) That the making of the selection is calculated by the organization to promote the religious principles or the aims, purposes or fraternal principles for which it is established or maintained.

§ 45.175. Sex.

(a) It is unlawful to advertise any preference, limitation or discrimination on the basis of sex. Examples include "males only need apply," "professional male preferred" or "perfect for single female."

(b) Notwithstanding the prohibitions in subsection (a), it is not unlawful to advertise a preference based on sex in the rental or leasing of housing accommodations as follows:

(1) In single-sex dormitory.

(2) For rooms in one's personal residence in which common living areas are shared.

LIST OF WORDS OR PHRASES TO AVOID

§ 45.181. Words to be avoided.

(a) It is unlawful to use the following words or phrases in housing advertisements unless used in a clearly nondiscriminatory context such as "white cabinets" or "french doors." The list is neither intended nor reasonably able to be all inclusive. It is also unlawful to use words or phrases not appearing on the list, but which are used in a context which may reasonably be interpreted as indicating an unlawful discriminatory intent.

Able-bodied adult—If the housing is "housing for older persons" as defined by the Federal Fair Housing Act (42 U.S.C.A. §§ 3601—3619) and the act, it is appropriate to say so.

(i) A newspaper/publisher may publish an advertisement for housing, and be held harmless for liability for an advertisement which uses the terms "senior housing," "senior community," "retirement community," if the advertiser provides a statement formally, in writing, to the newspaper/publisher that the property being advertised meets the requirements for "housing for older persons" as defined in the act.

(ii) Equivalent phrases referring to persons 55 and 62 and older such as "adult community," "55 and over," "adult community," "62 and over," "adult 55+," "adult 62+" to describe housing for older persons, will also be acceptable.

(iii) The term "adult" alone or with terms that do not meet housing for older persons requirements will remain unlawful terms as a description of housing for older persons.

African-American
Asian
American
Ancestry (any)
Black
Blind
Buddhist
Catholic
Caucasian
Chicano/Chicana
Child/children—Restrictions, unless housing for older persons
Chinese
Christian
Church, near
Color (any when used to describe persons)
Colored
Couple
Crippled
Deaf
Disability (any)—It is acceptable to describe housing as accessible to persons with disabilities. It is not acceptable to attempt to limit the housing to certain persons by stating that it is not accessible.
Disabled
Empty nester
Ethnic neighborhood
Ethnic group (any)
Foreigners
Handicapped
Hindi
Hispanic
Ideal for . . . (a type of person)
Immigrants
Independently, capable of living
Indian
Integrated
Interracial
Irish
Jew/Jewish
Latino/Latina
Mentally handicapped, ill, retarded
Mexican-American
Middle Eastern(er)
Minority
Mixed community
Mormon
Moslem
Mosque, near
Muslim
Nationality (any)
Newlyweds
Parish, near
Perfect for (a type of person)
Polish
Prefer Protestant
Puerto Rican
Race (any, when used to describe a person)
Religion (any, when used to describe persons)
Retarded
Retired persons, retirees—If it is "housing for older persons," as defined by the Federal Fair Housing Act and the act, use that phrase, as many people who are retired may not qualify for housing for older persons while many people still working may in fact be eligible for housing for older persons.
Segregated
Senior Use—"housing for older persons," as defined by the Federal Fair Housing Act and the act. See note under "adult" and "retired persons." Many people who do not consider themselves senior may be eligible for housing for older persons.
Suitable for
Synagogue, near
Temple, near
White
Young
Youthful

(b) Any of the words in subsection (a) may be used if they are part of an address. For example, Poplar Church Road, Lutheran Street, Churchville, Black Ridge or Indian Hills, and the like, are permissible.

ADDITIONAL REQUIREMENTS

§ 45.191. Advertisements.

(a) Advertisements published within this Commonwealth are covered by this chapter regardless of the locality of the property or financial institution.

(b) Except to the extent allowed by §§ 45.172(b), 45.174(b) and 45.175(b) (relating to familial status/age; religion; and sex), it is unlawful to advertise any discriminatory preference or limitation, even if the property is otherwise exempt from coverage under the act.

(c) When an advertising campaign includes pictures of individuals or families, the advertiser has the responsibility to alternate the picture from time to time to include a variety of protected classes in the advertisement.

§ 45.192. Affirmative defenses.

It shall be an affirmative defense precluding a finding that an advertiser has knowingly and willfully violated the act and this subchapter if the advertiser has complied with one of the following:

(1) Attempted, in good faith, to comply with the list and specific examples of impermissible housing advertisements described in this subchapter.

(2) A written advisory of the Commission concerning what constitutes appropriate housing advertisements. The Commission will maintain the written advisory on file and provide a copy of the advisory to the advertiser. To obtain an advisory, the advertiser shall telephone the Commission Housing Division at (717) 787-4055 or write to the Commission, 101 S. Second Street, Suite 300, P. O. Box 3145, Harrisburg, Pennsylvania 17105-3145, Attn: Housing Division, and indicate the language of the advertisement in question. Appropriate Commission housing staff will inform the advertiser of its decision on the ad and follow-up with a written advisory within 10 working days.

(3) Made reasonable efforts in good faith to comply with the act.

§ 45.193. Good faith efforts.

An advertiser will be deemed to have acted in good faith if the advertiser complies with one or more of the following:

(1) As to an advertisement for "housing for older persons," as defined by the Federal Fair Housing Act (42 U.S.C.A. §§ 3601—3619) and the act, if the advertiser produces a signed written statement by a housing provider which states that the facility or community complies with the requirements of the housing for older persons exemption and the advertiser has no actual knowledge that the facility or community is not actually eligible for the exemption.

(2) If the word or phrase complained of is in compliance with the list in § 45.182 (relating to words to be

avoided) and is not, on its face, discriminatory within the context of the advertisement.

(3) If the advertiser produces a written Commission advisory, obtained by use of the procedure in § 45.192(2) (relating to affirmative defenses), that the language complained of is legal, within the same context in which the advertiser requested the opinion from the Commission.

§ 45.194. Federal regulations.

Federal regulations published by the Department of Housing and Urban Development, regarding housing advertisements in areas of concurrent jurisdiction, preempt anything to the contrary in this subchapter.

[Pa.B. Doc. No. 00-1157. Filed for public inspection July 7, 2000, 9:00 a.m.]

Title 25—ENVIRONMENTAL PROTECTION

DEPARTMENT OF ENVIRONMENT PROTECTION

[25 PA. CODE CH. 89]

Corrective Amendment to 25 Pa. Code § 89.67(b)

The Department of Environmental Protection has discovered a discrepancy between the agency text of 25 Pa. Code § 89.67(b) (relating to support facilities) as deposited with the Legislative Reference Bureau and as published at 28 Pa.B. 2761, 2783, (June 13, 1998) and the official text as published in the *Pennsylvania Code Reporter* (Master Transmittal Sheet No. 301) and as currently appearing in the *Pennsylvania Code*. An amendment to § 89.67(b), adopted at 28 Pa.B. 2761, 2783, was subsequently incorrectly codified due to a corrective amendment to subsection (a) of the section.

Therefore, under 45 Pa.C.S. § 901: The Department of Environmental Protection has deposited with the Legislative Reference Bureau a corrective amendment to 25 Pa. Code § 89.67(b). The corrective amendment to 25 Pa. Code § 89.67(b) is effective as of October 16, 1999, the date the defective corrective amendment was published in the *Pennsylvania Bulletin*.

The correct version of 25 Pa. Code § 89.67 appears in Annex A.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE I. LAND RESOURCES

CHAPTER 89. UNDERGROUND MINING OF COAL AND COAL PREPARATION FACILITIES

Subchapter B. OPERATIONS PERFORMANCE STANDARDS

§ 89.67. Support facilities.

(a) Support facilities required for, or used incidentally to, the operation of the underground mine, including, but not limited to, mine buildings, coal loading facilities at or near the mine site, coal storage facilities, equipment storage facilities, fan buildings, hoist buildings, preparation plants, sheds, shops and other buildings, shall be located, maintained and used in a manner that does the following:

(1) Prevents or controls erosion and siltation, water pollution and damage to public or private property.

(2) To the extent possible using the best technology currently available:

(i) Minimizes damage to fish, wildlife and related environmental values.

(ii) Minimizes additional contributions of suspended solids to streamflow or runoff outside the permit area. Contributions may not be in excess of limitations of State or Federal law.

(b) Surface mining activities associated with an underground mine shall be conducted in a manner which minimizes damage, destruction or disruption of services provided by oil, gas and water wells; oil, gas and coal-slurry pipelines; railroads; electric and telephone lines; and water and sewage lines which pass over, under or through a permit area, unless otherwise approved by the owner of those surface facilities and the Department.

[Pa.B. Doc. No. 00-1158. Filed for public inspection July 7, 2000, 9:00 a.m.]

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 32]

[L-00970124]

Passenger Carrier Insurance Coverage Requirements

The Pennsylvania Public Utility Commission (Commission) on May 11, 2000, adopted a final rulemaking to clarify § 32.11 (relating to passenger carrier insurance) that the amount of minimum third party coverage refers to split coverage. The contact person is Rhonda Daviston, Law Bureau, (717) 787-6166.

Executive Summary

In 1994, the Commission issued a policy statement in an attempt to quiet confusion in the passenger carrier industry concerning the minimum requirements under the Commission's regulation regarding insurance coverage for passenger carriers. Since then, it has become apparent that the policy statement did not meet the intended goal. In an effort to formalize the Commission's intent and clarify the language of the regulations, the Commission has amended § 32.11(b).

Section 32.11(b) has been amended to clarify that the amount of minimum third party coverage refers to split coverage.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on April 28, 1998, the Commission submitted a copy of the notice of proposed rulemaking, published at 28 Pa.B. 2146 (May 9, 1998), to IRRC and to the Chairpersons of the House and Senate Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as

well as other documents when requested. In preparing this final-form regulation, the Department has considered all comments from IRRC, the Committees and the public.

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), on June 7, 2000, this final-form regulation was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on June 8, 2000, and approved the final-form regulation.

Commissioners present: John M. Quain, Chairperson; Robert K. Bloom, Vice Chairperson; Nora Mead Brownell; Aaron Wilson, Jr., Statement attached; Terrance J. Fitzpatrick

Public meeting held
May 11, 2000

Final Rulemaking Order

By the Commission:

By order adopted October 28, 1994, Docket No. L-940087, we issued a final policy statement interpreting the minimum insurance requirements for passenger carriers transporting fewer than 16 passengers. The final policy statement was published at 25 Pa.B. 681 (February 25, 1995) see § 41.21 (relating to insurance coverage for common or contract carriers of less than 16 passengers—statement of policy).

The issuance of the policy statement was the culmination of a request to issue a declaratory order in *Petition of Damone Clayter*, Docket No. P-00930722. In *Damone Clayter*, petitioner was a passenger in a taxi owned by Jenny Cab Company and said cab was involved in a motor vehicle accident. Clayter was injured in the accident and was at risk of losing rights to underinsured motorist coverage because of a controversy as to the amount of liability coverage required by § 32.11 of the Commission's regulations. Clayter petitioned this Commission requesting a declaratory order which detailed the third party insurance limits that a cab company must maintain in Pennsylvania and approved as valid the liability policy of Jenny Cab Company. In response to Clayter's petition, the Commission ordered an investigation into insurance claims, state liability coverage requirements and driver safety records.

At the conclusion of the investigation, the Commission issued a policy statement detailing its interpretation of § 32.11. In issuing the policy statement, it was this Commission's intent to put to rest any confusion or controversy regarding third party insurance coverage as required by § 32.11(b).[1]

Unfortunately, as evidenced by the recent Federal case *Adams v. Clarendon*, confusion and controversy remains. *Adams v. Clarendon*, Civil Action No. 95-6392 (U.S. District Ct. (E.D. Pa.)). Adams, who was injured in a Philadelphia taxicab insured by Clarendon Insurance Co., filed a class action suit against Clarendon charging, inter alia, that Clarendon had issued policies at less than the minimum amounts required by § 32.11(b). The Courts have found that insurance carriers may be liable for more than the policy limits if the carrier issued insurance at less than the minimum amount required by law. *Metro Transp. Co. v. North Star Reinsurance Co.*, 912 F.2d 672 (3rd. Cir. 1990).

Adams argued that § 32.11(b) requires a minimum of $35,000 in third-party liability coverage for each individual passenger/pedestrian injured in a taxicab accident, regardless of the number of individuals injured in a particular accident or of the aggregate required minimum amount of insurance coverage.[2] Such an interpretation is at odds with our interpretation as set forth in the policy statement in § 41.21.

To avoid future controversies regarding the minimum amount of insurance required by this Commission, we proposed to amend the existing regulation covering motor vehicles capable of carrying fewer than 16 passengers in an attempt to remove doubt as to the required minimum amount of insurance coverage and how it is applied. By amending the existing regulation, we will formalize our intent as expressed in the policy statement.

The proposed rulemaking was published at 28 Pa.B. 2146 (May 9, 1998). Following publication, the Commission received one formal comment from IRRC which raised two questions. In its comment, IRRC noted that the required coverage may be inadequate when considering that the minimum $35,000 per accident could conceivably need to provide coverage for up to 15 passengers.

In responding to this comment, the Commission notes that in addition to ensuring that the public is adequately covered in the event of an accident, the Commission must also take into consideration the high cost of insurance for taxicab companies. We are mindful that our goal is not to make getting and maintaining insurance an insurmountable burden on taxicab companies. We must balance the interest of protecting the public with the interests of making it financially feasible for taxicab companies to continue providing adequate, safe and reasonable service to the public. To that end, we do not believe that raising the established minimum requirements is in the best interest of all parties concerned.

IRRC also raised a clarification concern. IRRC noted that the first sentence in § 32.11(b) makes reference to "liability insurance maintained by a common carrier of passengers." However, the existing text in § 32.11(b) references "liability insurance maintained by a common or contract carrier of persons." The omission of the word "contract" is a typographical error. The subsection has been corrected to include the word "contract" in the first sentence of § 32.11(b).

The purpose of this rulemaking is to clarify the Commission's intent that third-party benefits refer to "split" coverage. That is, the $35,000 minimum amount of coverage required for bodily injury, death or property damage must be split in the amounts of $15,000 bodily injury per person, $30,000 bodily injury per accident and $5,000 property damage per accident.

We believe that the changes will promote ease of application as well as fairness while greatly reducing the confusion evidenced in the recent *Adams* lawsuit.

Accordingly, under sections 501 and 512 of the Public Utility Code, 66 Pa.C.S. §§ 501 and 512, and the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. § 1201 et seq.) and the regulations promulgated thereunder, we hereby amend § 32.11; *Therefore*,

It Is Ordered That:

1. The regulations of the Commission, 52 Pa. Code Chapter 32, are amended consistent with this order by amending the reporting requirements in § 32.11 as set forth in Annex A.

[1] Specifically not addressed in the policy statement was any interpretation of first party benefits.

[2] Although the Federal suit settled, Clarendon Insurance Co. has petitioned the Commonwealth Court of Pennsylvania for a declaratory judgment as to the proper interpretation of our regulation at 52 Pa. Code § 32.11(b). *Clarendon v. Pa.P.U.C.*, 359 M. D. 1997 (Pa.Cmwlth. Ct.).

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

3. The Secretary shall submit this order and Annex A to the Office of Attorney General for review as to form and legality.

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

5. The Secretary shall submit this order and Annex A for review by designated standing committees of both Houses of the General Assembly, and for review and approval by IRRC.

6. A copy of this order and Annex A shall be served upon the Pennsylvania Insurance Department, the Pennsylvania Taxicab & Paratransit Association, the Delaware Valley Limo Association, the Northeastern Limo Association, the Western Pennsylvania Limousine Association, and the Radio Associations in the Commonwealth.

JAMES J. MCNULTY,
Secretary

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 30 Pa.B. 3239 (June 24, 2000).)

Fiscal Note: Fiscal Note 57-189 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PENNSYLVANIA PUBLIC UTILITY COMMISSION

Subpart B. CARRIERS OF PASSENGERS OR PROPERTY

CHAPTER 32. MOTOR CARRIER INSURANCE

Subchapter B. INSURANCE REQUIREMENTS

§ 32.11. Passenger carrier insurance.

(a) A common carrier or contract carrier of passengers may not engage in intrastate commerce and a certificate or permit will not be issued, or remain in force, except as provided in § 32.15 (relating to applications to self-insure) until there has been filed with and approved by the Commission a certificate of insurance by an insurer authorized to do business in this Commonwealth, to provide for the payment of valid accident claims against the insured for bodily injury to or the death of a person, or the loss of or damage to property of others resulting from the operation, maintenance or use of a motor vehicle in the insured authorized service.

(b) The liability insurance maintained by a common or contract carrier of passengers on each motor vehicle capable of transporting fewer than 16 passengers shall be in an amount not less than $35,000 to cover liability for bodily injury, death or property damage incurred in an accident arising from authorized service. The $35,000 minimum coverage is split coverage in the amounts of $15,000 bodily injury per person, $30,000 bodily injury per accident and $5,000 property damage per accident. This coverage shall include first party medical benefits in the amount of $25,000 and first party wage loss benefits in the amount of $10,000 for passengers and pedestrians. Except as to the required amount of coverage, these benefits shall conform to 75 Pa.C.S. §§ 1701—1799.7 (relating to Motor Vehicle Financial Responsibility Law). First party coverage of the driver of certificated vehicles shall meet the requirements of 75 Pa.C.S. § 1711 (relating to required benefits).

(c) The liability insurance maintained by a common or contract carrier of passengers on each motor vehicle capable of transporting 16 to 28 passengers shall be in an amount not less than $1 million to cover liability for bodily injury, death or property damage incurred in an accident arising from authorized service. Except as to the required amount of liability coverage, this coverage shall meet the requirements of 75 Pa.C.S. §§ 1701—1799.7.

(d) The liability insurance maintained by a common or contract carrier of passengers on each motor vehicle capable of transporting more than 28 passengers shall be in an amount not less than $5 million to cover liability for bodily injury, death or property damage incurred in an accident arising from authorized service. Except as to the required amount of liability coverage, this coverage shall meet the requirements of 75 Pa.C.S. §§ 1701—1799.7.

(e) The limits in subsections (b)—(d) do not include the insurance of cargo.

[Pa.B. Doc. No. 00-1159. Filed for public inspection July 7, 2000, 9:00 a.m.]

PENNSYLVANIA PUBLIC UTILITY COMMISSION
[52 PA. CODE CH. 53]

[L-00990143]

Recovery of Natural Gas Costs and the Fixed Rate Option

The Pennsylvania Public Utility Commission (Commission) on May 11, 2000, adopted a final rulemaking implementing changes in requirements mandated in the Natural Gas Choice and Competition Act, 66 Pa.C.S. §§ 2201—2211 (act) for natural gas distribution companies (NGDC) regarding recovery of natural gas costs.

Executive Summary

On June 22, 1999, Governor Thomas J. Ridge signed into law the act. Under 66 Pa.C.S. § 1307(f)(1)(II) (relating to sliding scale of rate adjustments), a natural gas distribution company may file a tariff to establish a mechanism by which its rates for natural gas sales may be adjusted on a regular basis but no more frequently than monthly. This monthly adjustment is to reflect actual or projected changes in natural gas costs currently reflected in rates. In the event that the NGDC adjusts rates more frequently than quarterly, it shall also offer retail gas customers a fixed rate option which recovers natural gas costs over a 12-month period.

This rulemaking concerns the following: 1) the reconciliation mechanism and period; 2) the contract period and customer sign-up procedures; and 3) applicability to Chapter 56 (relating to standards and billing practices for residential utility service) regarding the Commission's standards and billing practices for residential utility service.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 20, 1999, the Commission submitted a copy of the final-form rulemaking to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Committee on Consumer

Affairs and the Senate Committee on Consumer Protection and Professional Licensure for review and comment.

In compliance with section 5(c) of the Regulatory Review Act, the Commission also provided IRRC and the Committees with copies of the comments received, as well as other documentation. In preparing this final-form rulemaking, the Commission has considered the comments received from IRRC, the Committees and the public.

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), this final-form rulemaking was approved by the House Committee on Consumer Affairs and was approved by the Senate Committee on Consumer Protection and Professional Licensure. Under section 5.1(e) of the Regulatory Review Act, IRRC met on June 8, 2000, and approved the final-form rulemaking.

Commissioners present: John M. Quain, Chairperson; Robert K. Bloom, Vice Chairperson; Nora Mead Brownell; Aaron Wilson, Jr.; and Terrance J. Fitzpatrick

Public meeting held
May 11, 2000

Final Rulemaking Order

By the Commission:

On June 22, 1999, Governor Thomas J. Ridge signed into law the act. Under the act, retail customers will have the ability to choose their natural gas supplier.

With regard to service for customers who continue to purchase gas from their natural gas distribution company (NGDC), the act provides that each company may file a tariff which would permit it to adjust its gas cost rates on a regular basis, as frequently as once a month. See section 1307(f)(1)(ii) of the act. Prior to the act, utilities were limited to making these adjustments no more frequently than once per quarter.

Now under the act should an NGDC choose to adjust its rates more frequently than quarterly, it must offer its retail customers a fixed rate option which recovers natural gas costs over a 12-month period subject to annual reconciliation. See section 1307(f)(1)(ii) of the act.

On August 13, 1999, the Commission entered a proposed rulemaking order, published at 29 Pa.B. 5098 (October 2, 1999) which set forth for comment proposed regulations which would apply to each NGDC offering a fixed rate option. Comments were received from the Office of Trial Staff (OTS), the Pennsylvania Gas Association (PGA), the Office of the Consumer Advocate of Pennsylvania (OCA), and the Independent Regulatory Review Commission (IRRC).

DISCUSSION

A. Application

1. Position of the Parties

IRRC and the OCA commented that the act limits the applicability of a fixed rate option to NGDCs with gross intrastate operating revenues in excess of $40 million. The OCA Comments, p.2; IRRC Comments, p.1. These parties note that section 1307(f)(1)(ii) of the act does not apply to other natural gas distribution companies that employ a gas cost rate established under section 1307(a)—(e).

2. Resolution

We agree. The language of the act places the $40 million limit on the applicability of the fixed rate option. See section 1307(f)(1) of the act. The fixed rate option regulations shall apply only to those NGDCs with gross intrastate operating annual revenues in excess of $40 million whose natural gas costs are recovered through section 1307(f) of the act.

B. § 53.69(a)

1. Position of the Parties

This section of the proposed regulations sets forth the gas costs covered by the fixed rate option and would allow the fixed rate option to apply either for the heating season or another time period which is not to exceed 12 months.

The OCA submitted that a fixed rate option for less than a 12-month period, such as the heating season, was not contemplated by the General Assembly. The OCA comments, p 4. The OCA argued that it did not believe that it was advisable at this time to implement such an option even if the statute could be interpreted to allow for it. The OCA stated that it anticipated that most competitive gas supply offers would be for a 12-month period and not vary by season. The OCA further argued that the intent of the act concerning the fixed rate option was to provide a stable option for the entire year rather than a price that fluctuated by season.

IRRC stated that the proposal to allow a fixed rate option for either the heating season or another time period appeared to be in direct conflict with the act. IRRC Comments, p.1. IRRC believes that the General Assembly did not contemplate allowing a distribution company to offer the fixed rate option for time periods shorter than 12 months. IRRC cited specific language in section 1307(f)(1)(ii) of the act that refers to the recovery of "natural gas costs over a 12-month period." IRRC also cites references to 12-month periods in section 1307(f)(3) and (5) of the act.

2. Resolution

While the Commission believes that the act may be interpreted to allow the implementation of a fixed rate option covering a heating season with section 1307(f) of the act type rates covering the balance of the 12-month period, we are persuaded by the arguments of the OCA concerning the need to establish a stable option to the anticipated 12-month service offers by competitive natural gas suppliers. We will, therefore, amend this section of the proposed regulations to delete references to the heating season or another time period.

C. § 53.69(b)

1. Position of the Parties

This section of the proposed regulations sets forth the reconciliation of the fixed rate option sales, revenues and costs.

The OCA submitted that the fixed rate option should be designed to recover an annual level of gas costs, reconciled on an annual basis and should not be separately reconciled from the gas costs for non-fixed rate option customers. Moreover, customers should be permitted to select the fixed rate option or switch to the fixed rate option with minimal limitations. The OCA Comments, pp. 3-5. The OCA stated that the statutory language contemplated a fixed rate for gas supply for a 12-month period with an annual reconciliation. The OCA argued that this procedure was to give customers a more stable option than the option provided for those companies with section 1307 adjustment procedures which impose changes more frequently than once per quarter. The OCA stated that the fixed rate option was designed to provide customers with a choice as to the level of stability of the gas prices

and was not intended to provide customers with a separate gas supply with a different underlying amount of costs.

The OCA believes that to utilize separate gas supply assets to serve fixed rate option customers, as compared to monthly-reconciled customers, would be a quantitatively different service offering. The OCA submits that the fixed rate option is not contract rate, but a tariff rate that should be equally available to customers as a more frequently adjusted rate and should have no limitation on its availability. Finally, the OCA criticized the "no reconciliation" procedure because it states a reconciliation procedure is mandated by the act and must be utilized.

IRRC stated that the Commission does not have the statutory authority to allow the fixed rate option proceedings with no reconciliation. IRRC Comments, pp.1-2; citing section 1307(f)(1)(ii) of the act.

The OTS recommended that the reconciliation period under the fixed rate option coincide with the section 1307(f) reconciliation period and that annual filings be made in connection with the annual section 1307(f) filing. OTS Comments, pp.1-3. The OTS stated that this would enable all parties to the proceeding to verify and review the companies' direct assignments and/or allocations of gas costs to the traditional section 1307(f) customers and the fixed rate option customers. The OTS supported a separate fixed rate option reconciliation calculation to prevent cross subsidization between customers. The OTS stated that the separate reconciliation implies the development of separate E-factor over/under collection for section 1307(f) and fixed rate option customers. The OTS stated that this was its preferred option in the initial year of restructuring. The OTS also stated it supported a fixed rate option without reconciliation. The OTS believes that this would be consistent with a gradual movement toward incentive regulation and would reflect a movement toward deregulating the merchant function to promote competition for natural gas commodity sales. However, the OTS believes that the "no reconciliation" option should be requested by the NGDCs in connection with a base rate proceeding so that any base rate implications could be addressed.

The PGA stated that reconciliation of the fixed and variable rate options separately must be rejected as unwarranted and unworkable. PGA Comments, pp.1-3. The PGA submits that section 1307(f) natural gas costs should be reconciled on a consolidated basis with no segregation of natural gas costs incurred to provide service under the fixed rate option. The PGA argued that all customers are equally exposed to price fluctuations and the effects of these fluctuations should be resolved through the section 1307(f) reconciliation process. The PGA believed that a consolidated reconciliation would entail fewer administrative burdens and would lessen the customers' incentives to migrate from fixed to variable service or vice versa depending on the relative difference between the reconciliation adjustments. Furthermore, the PGA argued that, if separate reconciliations were required, there would be a need to implement a second set of migration riders to account for the cost effects of customers switching between fixed rate and variable rate service. The PGA recommended that the Commission refrain from mandating a particular reconciliation methodology and allow the NGDCs to develop and advance specific proposals in individual section 1307(f) filings. The PGA believes that the "no reconciliation" concept may be worth exploring.

2. Resolution

We believe that competitive natural gas suppliers will offer customers natural gas supplies for fixed price for 12-month period without a reconciliation process similar to that employed under section 1307(f) of the act. This was the underlying reason the Commission requested comments on the "no reconciliation" alternative. Upon review of the parties' comments the Commission believes that it may lack sufficient jurisdiction under the act to implement a "no reconciliation" alternative. Therefore, the Commission shall not employ such a reconciliation option under the proposed fixed rate option regulations.

We acknowledge that separate reconciliations for fixed rate option customers and variable rate customers will add to the complexities and administrative burdens of the section 1307(f) process. However, the ability to vary natural gas charges on a monthly basis also adds to the NGDC's administrative burdens while offsetting cash working capital requirements due to undercollections of gas costs.

We are not persuaded by the arguments raised against separate reconciliations of the gas costs for fixed rate option customers as opposed to variable rate option customers. We believe that the OTS correctly notes the potential for cross subsidization. We believe that variable rate option customers would be called upon to pay unrecovered gas costs incurred by service to the fixed rate option customers. Variable rate option customers may see their gas costs fluctuate monthly. This should enable the NGDCs to match their monthly charges with their actual costs. The Commission believes that it is reasonable to assume that fixed rate option customers actual gas costs will vary more frequently from the fixed rate option charges and, therefore, the amount of unrecovered gas costs may be greater for a fixed rate option customer. Therefore, we will retain the requirement in the proposed regulation that a separate reconciliation calculation be performed for the fixed rate option service.

We do not believe that the requirement for a separate reconciliation necessitates the creation of an additional migration rider. A fixed rate option customer may be required to remain under the fixed rate option for a 12-month period. Any subsequent E-factor could be applied to the next year's fixed rate option customers. One annual E-factor would apply to all fixed rate option customers.

We recognize that requiring a fixed rate option customer to remain under this option for a 12-month period certainly limits the customer's ability to switch to the NGDC's variable rate. However, the fixed rate option customers should not be limited in their ability to switch to the services of a competitive natural gas supplier. We believe that issues of switching among services and the implementation of additional migration riders may be more appropriately addressed in the section 1307(f) proceedings which established a fixed rate option for a NGDC.

D. § 53.69(c)

1. Position of the Parties

This provision sets forth a time period during which a customer may elect to take service under a fixed rate option.

The PGA stated that if the fixed rate option is reconciled, a 3-month sign up period is feasible. PGA Comments, p.2. The PGA noted that a change in service to a fixed rate option should take effect on a meter read date so that the customer will not be billed two different rates in a single billing period. The PGA stated that, if the

fixed rate option was not reconciled, then an enrollment period could not exceed 30 days because any period longer than 30 days would expose the NGDC to an unacceptable level of risk associated with potential gas cost increases.

IRRC requested that the Commission clarify this section and specified the timeframe for the enrollment in the Commission's final regulations. IRRC Comments, p.2.

2. Resolution

We are concerned that an annual enrollment period should be of sufficient length to allow consumers to make informed choices. However, the Commission realizes that the NGDCs may have some difficulty in proposing reasonable fixed price options if the enrollment periods are too long. In view of the fact that the Commission no longer considers the "no reconciliation" mechanism viable for a fixed rate option, the NGDCs would be exposed to a lesser level of risk. The Commission believes that to the greatest extent possible, the section 1307(f) process should be utilized for the implementation and reconciliation of a fixed rate option.

We appreciate the PGA's concerns over partial rate billings, the additional administrative costs in preparing such billings, and the inevitable customer confusion concerning the rates applicable for their service. Therefore, we will consider a fixed rate option plan, which allows the initiation of service to coincide with the customer's first meter reading following the initiation of the new annual section 1307(f) rates.

We believe that the proposed 3-month enrollment timeframe is reasonable. Customers would begin service under the fixed rate option on the first day of the individual customer's billing cycle in which the annual section 1307(f) rate becomes effective.

E. Customer Application

1. Position of the Parties

IRRC noted that section E of the August 13, 1999 Order included a list of particular items that could be included in the customer's application form for a fixed rate option. IRRC Comments, p.2. Section E, page 8, lists the following information that could be included on the application, at a minimum: 1) customer name; 2) account number; 3) address; 4) billing address, if different; 5) a clear description of the fixed rate option program, including what components of the bill will be fixed; 6) the price per unit and; 7) any other information deemed relevant to provide a clear understanding of the fixed rate option program offering. IRRC recommended that these requirements should be included in a new proposed regulation.

2. Resolution

We will decline to adopt IRRC's recommendation. The information we listed in section E of the August 13, 1999 Order was very basic information. We believe that the details of any fixed rate option program can be addressed within each NGDC's section 1307(f) proceedings. This will give all interested parties an opportunity to comment on the specific elements of each individual fixed rate option program.

Accordingly, under sections 501, 1301, 1307 and 1501 of the Public Utility Code, 66 Pa.C.S. §§ 501, 1301, 1307 and 1501, and the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. § 1201 et seq.), and the regulations promulgated thereunder in 1 Pa. Code §§ 7.1—7.4, we propose to amend our regulations by adding § 53.69, as noted and as set forth in Annex A;

Therefore,

It Is Ordered that:

(1) The regulations of the Commission, 52 Pa. Code Chapter 53, are amended by adding § 53.69 to read as set forth in Annex A.

(2) The Secretary shall submit this order and Annex A for review by the designated standing committees of the General Assembly, and for review by IRRC.

(3) The Secretary shall submit this order and Annex A to the Office of the Attorney General for review as to form and legality.

(4) The Secretary shall submit a copy of this order and Annex A to the Governor's Budget Office for review of fiscal impact.

(5) The Secretary shall certify this order and Annex A and deposit them with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*. This regulation shall become effective upon final publication in the *Pennsylvania Bulletin*.

(6) The contact persons for this matter are Robert Bennett, Fixed Utility Services, (717) 787-5553, bennettr @puc.state.pa.us, and Lawrence F. Barth, Assistant Counsel, Law Bureau, (717) 772-8579, barth@puc.state.pa.us. Alternate formats of this document are available to persons with disabilities and may be obtained by contacting Sherri DelBiondo, Regulatory Coordinator, Law Bureau, (717) 772-4597.

JAMES J. MCNULTY,
Secretary

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 30 Pa.B. 3239 (June 24, 2000).)

Fiscal Note: Fiscal Note 57-207 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PENNSYLVANIA PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 53. TARIFFS FOR NONCOMMON CARRIERS

RECOVERY OF FUEL COSTS BY GAS UTILITIES

§ 53.69. Fixed rate option.

(a) Components of the fixed rate option shall include all gas costs as defined in 66 Pa.C.S. 1307(f) (relating to sliding to scale of rates; adjustments). The natural gas distribution company may offer a fixed rate option to collect these costs over a 12-month period.

(b) Natural gas distribution companies adjusting rates for natural gas sales on a regular, less than quarterly but not more frequent than monthly, basis shall submit a separate reconciliation calculation of the fixed rate option service, consistent with the company's response to § 53.64(i) (relating to filing requirements for natural gas distributors with gross intrastate annual operating revenues in excess of $40 million).

(1) The reconciliation shall present the fixed rate option sales, revenues and costs, separated from the reconciliation of other retail sales.

(2) The reconciliation period of fixed rate option sales shall be the same period used to reconcile the company's other retail sales as presented in compliance with 66 Pa.C.S. § 1307(f)(3).

(c) Eligible customers may sign up for the fixed rate option during the 3-month period which ends when the annual section 1307(f) rates become effective, service under the fixed rate option starts on the first day of the customer's billing cycle in which the annual section 1307(f) rates become effective.

(d) Chapter 56 (relating to standards and billing practices for residential utility service) is applicable to all fixed rate option sales to residential customers.

[Pa.B. Doc. No. 00-1160. Filed for public inspection July 7, 2000, 9:00 a.m.]

PENNSYLVANIA PUBLIC UTILITY COMMISSION
[52 PA. CODE CH. 54]

[L-00980132]

Competitive Safeguards for the Electric Industry

The Pennsylvania Public Utility Commission (Commission) on April 27, 2000, adopted a final-form rulemaking order establishing competitive safeguards for interaction between electric distribution companies, electric generation suppliers and customers in the competitive electric industry. The contact person is John Levin, Law Bureau, (717) 787-5978.

Executive Summary

With the passage of the Electricity Generation Customer Choice and Competition Act (act), 66 Pa.C.S. §§ 2801—2812 the General Assembly amended 66 Pa.C.S. (relating to Public Utility Code) (code) and established a comprehensive scheme for the restructuring of this Commonwealth's electric industry. This rulemaking establishes competitive safeguards for interaction between electric distribution companies, electric generation suppliers and customers in furtherance of the act's provisions directing the establishment of a new, vibrant and effective competitive retail market in electricity generation in this Commonwealth by January 1, 2001.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on April 28, 1998, the Commission submitted a copy of the proposed rulemaking published at 28 Pa.B. 2139 (May 9, 1998) to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Committee on Consumer Affairs and the Senate Committee on Consumer Protection and Professional Licensure for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of all comments received, as well as other documentation. In preparing these final-form regulations, the Commission has considered all comments received from IRRC, the Committees and the public.

These final-form regulations were approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on June 8, 2000, and approved the final-form regulations.

Public meeting held
April 27, 2000

Commissioners Present: John M. Quain, Chairperson; Robert K. Bloom, Vice Chairperson; Terrance J. Fitzpatrick; Nora Mead Brownell; Aaron Wilson, Jr.

Final Rulemaking Order

By the Commission:

This final-form rulemaking order establishes competitive safeguards in furtherance of the act. On February 13, 1998, we entered a notice of proposed rulemaking, published at 28 Pa.B. 2139 proposing competitive safeguards for the restructured electric power industry, and intended to assure the provision of direct access to all Commonwealth retail electric generation market participants at comparable rates, terms and conditions as well as to forestall the exercise of unlawful market power which would have the effect of inhibiting the development and continuation of that market. We invited comments from the public to be filed on or before June 8, 1998.

Comments were received from West Penn Power Company t/d/b/a/ Allegheny Power (WPP), joint comments from the Associated Builders and Contractors Inc. and the Pennsylvania Petroleum Association (ABC), the Office of the Consumer Advocate of Pennsylvania (OCA), Enron Energy Services, Inc. (Enron), the Clean Air Council, Environmental Defense Fund and the Pennsylvania Campaign for Clean Affordable Energy (an ad hoc group calling itself the Environmentalists), Electric Clearinghouse, Inc. (ECI), Horizon Energy Company (Horizon, an affiliate of PECO Energy Company), IRRC, the Honorable William R. Lloyd, Jr., formerly member of the Pennsylvania House of Representatives, the Mid-Atlantic Power Supply Association (MAPSA), NEV East, LLC (NEV), the Pennsylvania Electric Association (PEA), the Pennsylvania Gas Association (PGA), PP&L Inc. (PP&L), and the Pennsylvania Rural Electric Association jointly with Allegheny Electric Cooperative, Inc. (PREA).

The 15 sets of comments, by interest, include representation from local electric distribution companies and their generation affiliates (4), independent power marketers (5), LDC competitors in alternate and nonfuel markets (2), electric cooperatives (1), other governmental agencies (2), environmental interests (1) and elected representatives (1).

Additionally, a number of other jurisdictions have considered or promulgated code of conduct provisions similar to those proposed at this docket. To the extent relevant here, those provisions are discussed here.

The form and structure of these rules is as follows:

§ 54.121 outlines the purpose of these provisions.

§ 54.122(1) prohibits an electric distribution company from giving any electric generation supplier any preference or advantage in processing requests for retail electric service.

§ 54.122(2) requires fair dissemination of nonprivate customer information by distribution companies to generation suppliers.

§ 54.122(3) prohibits false or deceptive advertising.

§ 54.122(4) establishes dispute resolution procedures.

§ 54.122(5) prohibits illegal tying of any goods or services or limitations on dealing as a requirement for obtaining electric distribution service.

§ 54.122(6) prohibits distribution companies from providing any preference or advantage to any generation supplier in the provision of information about the operational status and availability of the distribution system.

§ 54.122(7) requires distribution companies to supply all regulated services and apply all tariffs on a nondiscriminatory manner.

§ 54.122(8) requires formal adoption of these rules by distribution companies and affiliated or divisional generation suppliers, and to train and instruct employes in them.

§ 54.122(9) requires that customer requests for information about generation suppliers made to distribution companies be handled fairly and impartially.

§ 54.122(10) forbids misrepresentation by a distribution company, affiliate or division that generation service bundled with the distribution service of the distribution company is superior solely on the basis of affiliation. It also requires that advertising by these affiliated companies contain a suitable disclaimer.

§ 54.122(11) requires functional separation of affiliated or divisional generation, distribution and transmission functions.

§ 54.122(12) provides that substantial, good faith compliance with these provisions will constitute a substantial factor in mitigation of any penalties that might otherwise be applied for a violation.

Comments and Discussion

As noted, 15 sets of comments were received from the public and from representatives of government entities. It should be observed that members of the same industry do not always agree with each other, and where significant disagreement occurs in the comments, it is noted.

Additionally, and as we noted in our notice of proposed rulemaking in 1998, the first ten provisions of this rulemaking, § 54.122(1)—(10) were the product of a consensus based Competitive Safeguards Working Group, which made its report to the Commission on October 5, 1997. We have made some modifications to these consensus provisions,[1] in response to the comments and our experience with interim settlement Code of Conduct provisions. Most of the comments submitted on the proposed rules involved generalized policy considerations or focussed on the provisions proposed in § 54.122(11) and (12).

The most significant changes in the "consensus" provisions are as follows: § 54.122(4) was revised to prescribe a uniform Statewide mediation procedure to address grievances. Section 54.122(10) was revised to provide for standard disclaimer language when an electric distribution company engages in joint marketing with a divisional or affiliated electric generation supplier.

With respect to paragraphs (11) and (12), dealing with functional separation of affiliated generation and nongeneration lines of business by regulated utilities, we have made some modifications to simplify paragraph (11) and have deleted paragraph (12) in response to comments.

General Comments

Horizon Energy Company, a generation marketing affiliate of PECO Energy Company, observes that some restrictions on joint marketing may be appropriate, but that all market participants should be subject to the same rules (that is, that nonaffiliated generation suppliers should also be prohibited from engaging in the same kind of joint marketing). Horizon asserts that market share evaluations are not necessary, that separation of generation, distribution and transmission functions is not required under Pennsylvania law and should not be considered by the Commission, and that an "emergency suspension" provision should be considered.[2]

ABC represents a coalition of a trade association of builders and contractors engaged in the construction and the installation and maintenance of "electrical and mechanical systems," and the Pennsylvania Petroleum Association, which is a trade association of marketers of oil, gas, propane and related equipment. ABC asks that we extend our competitive safeguards to protect industries other than the electric generation supply industry. We note that while the code gives us broad authority with respect to the regulation of the supply of electric generation and distribution services, we have no express authority with regard to other industries. To the extent that utilities engage, through a division or separate affiliate, in nonjurisdictional lines of business, the General Assembly has not given us authority to oversee the competitive health of these nonutility lines of business, nor have we the expertise or resources to so extend our supervision. To the extent that utilities enter nonutility businesses, they are subject to all existing regulations, including the competitive laws and regulations of the United States and this Commonwealth which apply to existing participants. We continue to enforce the ratemaking laws of the Commonwealth, including laws and rules against forcing utility ratepayers to subsidize nonutility enterprises through cross-subsidization.

The Environmentalists urge the need for publicly available market share studies performed by an unbiased consultant to be hired by the Commission, as well as consideration of changing the method of evaluating stranded costs and including the issues of competitive safeguards in the ongoing Statewide education campaign.

We intend to require that information regarding these safeguards be included in customer education programs. As to the Environmentalists' other suggestions, they are outside the scope of this rulemaking.

Section 54.121

This provision sets forth the general purpose of this rulemaking. IRRC suggests that open access be better defined. "Open access" is the same concept as "direct access" prescribed by statute. To avoid confusion, we have changed the wording to "direct" access.

The PREA suggests language changes which would, in its opinion, clarify the broad statement of principles to more clearly establish the goals of the Code of Conduct. We decline to adopt most of these proposed language changes as they primarily involve matters of form or emphasis, rather than substance.

Section 54.122

The PEA submitted comments on behalf of seven of its members (Allegheny Power, Duquesne Light Company, GPU Energy, PP&L, Inc., Pennsylvania Power Company, PECO Energy Company and UGI Utilities, Inc.). It also submitted comments by Alfred E. Kahn, a Nationally known economist and former regulator who held posts in New York State and in the Federal Government under the administration of President Jimmy Carter. The PEA states that it generally supports the paragraphs (1)—(10), inasmuch as they were derived from the 1997 consensus working group process in which the PEA participated. The proffered commentators of Dr. Kahn also support

[1] Modifications have been made to § 54.122(4) and (10).

[2] While we are not amending the proposed rules to include such a provision, we call the public's attention to 52 Pa. Code §§ 3.1—3.12 which provides for the issuance of ex parte emergency orders by the Commission.

those provisions. In general, the local distribution company commentators likewise support these principles.

PP&L echoes many of the comments offered by the PEA. It supports paragraphs (1)—(10).

Enron, an independent electric generation supplier, urges the Commission both to adopt the "consensus" rules (paragraphs (1)—(10)), but also to go beyond them in five respects.

First, Enron recommends that the Commission create "virtual" subsidiaries with no sharing of operational or managerial personnel, facilities and information and adopt detailed cost allocation rules for common costs shared between these "virtual" subsidiaries. We decline to take that step. We believe that the provisions of paragraph (11) as amended, provide sufficient direction against affiliate abuses. As to cross subsidization, local distribution utilities continue to be subject to negotiated or statutory rate caps, under section 2804(c) of the act (relating to standards for restructuring of electric industry). It appears unlikely that any of our jurisdictional local distribution companies will file a major rate case with us for several years. In the event that we discover that existing accounting and ratemaking rules and procedures are insufficient to deter cross subsidization, we may choose to revisit this topic.

Second, Enron suggests that we establish detailed rules to govern the use of generation assets by an affiliated distribution company. With the advent of competition not merely in this Commonwealth, but in neighboring states as well, the need for these rules seems less urgent than when Enron's comments were filed in 1998. With the exception of West Penn Power (presently trading and doing business as Allegheny Power), Duquesne Light and Penn Power, this Commonwealth utilities are members of a well formed independent system operator, PJM, Inc. LLC, which has established a strong self governance process, market rules and a market monitoring unit capable of investigating and deterring attempted exercises of market power by generation asset owners. We anticipate that the three Pennsylvania utilities which are not members of an ISO at present will be in compliance by the close of 2001 with the provisions of FERC Order 2000 requiring formation or membership in a regional transmission organization with identical or similar functions and other protections for market participants and end users. It is apparent to us that a combination of self governed regional transmission organizations, market rules and monitoring by an independent RTO market monitor should be superior in deterring the sort of anticompetitive behavior Enron asks us to address through prescriptive Pennsylvania-only rules.

Third, Enron urges us to prohibit joint marketing between an electric distribution company and its affiliated or divisional electric generation supplier. This issue was raised and extensively discussed in the Competitive Safeguards Working Group and rejected. While we are willing to revisit this issue in the future in the event that joint marketing is conducted in a manner that is deceptive or injurious to the public interest in a way that cannot be addressed on an ad hoc basis, we are unwilling to adopt this proposal at present. However, we will amend these proposed regulations to improve affiliation disclosure requirements in paragraph (10).

Fourth, Enron urges us to prohibit an electric distribution company-affiliated generation supplier from using the utility name or logo, or in the alternative, to impose disclosure requirements to properly inform customers about affiliation. Again, we are unwilling to flatly prohibit use of utility name or logo. While it may be that there is some initial customer confusion concerning retail competition and the role of utilities, their affiliates and competitors, we have adopted a strong and ongoing customer education program that we believe has been successful in acquainting the people of this Commonwealth with their retail options. This Commonwealth continues to have one of the highest retail electric generation shopping rates in the Nation. However, we do accept Enron's suggestion that we include disclosure language such as that adopted in the PECO settlement and have modified paragraph (10) accordingly.

Fifth, we are urged to permit customers who have signed long-term contracts with a utility to "opt out" of such contracts and switch to a competitive energy supplier without incurring contractual penalties. This is assertedly necessary to permit customers locked into long-term generation contracts to take advantage of retail competition, which commenced in 1998. We decline to do that. Retail competition has been discussed in public forums at least since 1994. Those signing long-term contracts are, in general, reasonably sophisticated large commercial or industrial customers who have been aware of the changing nature of the market. We are generally reluctant to interfere in the provisions of these contracts, absent a convincing demonstration that the provisions were obtained by misrepresentation, fraud, coercion or other duress. A blanket cancellation of these contracts is therefore not warranted, especially since many of them will have already expired or will shortly expire.

Finally, Enron urges us to change the proposed regulations to conform in several respects to the language of the PECO settlement code of conduct[3] with respect to replacing the term "comparable" with "equal and nondiscriminatory," to replace the term "unlawful discrimination" with "undue discrimination" or simply "discrimination," to replace the term "unlawful cross-subsidization" with "cross subsidization." We agree that these proposed changes are appropriate and are in better accord with the intent of the act. In any complaint under this code of conduct, we would in any event necessarily be called upon to determine whether a specific arrangement offered to an electric generation supplier was equal and nondiscriminatory. While we do not interpret "equal" to mean "identical" in every situation, the term "comparable" is overly ambiguous and does not sufficiently address the issues.

Several of IRRC's comments suggest that portions of these rules dealing with requirements to be imposed on electric generation suppliers (specifically, portions of § 54.122(3), (8) and (11)) are already covered in § 54.43 (relating to standards of conduct and disclosure for licensees). IRRC appears to misunderstand the different scope of those provisions. Section 54.43 deals with consumer protection issues, that is, the relationship and communications between electric generation supplier and end users. The instant provisions deal with competitive issues, more specifically, relationship and communications between competitors. It may be that competitors will seek to disadvantage other competitors through misleading or erroneous communications or behavior with respect to end users. These issues are clearly to be dealt with through the licensing provisions of § 54.43. Those provisions were not drafted, and are not intended to deal

[3] *Application of PECO Energy Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code*, R-00973953, *Joint Petition for Full Settlement*, ¶39a, Appendix H.

with competitive relationships or to forestall exercise of market power or gain unfair advantage from leveraging monopoly assets.

Accordingly, we believe that all competitive issues belong together in this section and we decline IRRC's suggestion that we remove electric generation supplier related provisions from the final rule and amend § 54.43 to add these provisions.

IRRC also proposes a number of technical and language amendments, some of which we have adopted elsewhere or will adopt without further comment.

§ 54.122(3)

This provision prohibits false or deceptive advertising by generation suppliers or distributing companies. Representative Lloyd suggested that paragraph (3) be amended to include "misleading" advertising as a prohibited activity. We believe that "deceptive" advertising includes "misleading" advertising and thus decline to make the suggested change.

Horizon suggests that additional language be added to paragraph (3). Horizon's amendment would prohibit any electric generation supplier from competing "unfairly in the market through, inter alia, anticompetitive practices or cross subsidies from corporate affiliates." We decline to make the suggested revision. "Cross-subsidies" are a term of regulatory art, and are so defined in public utility ratemaking law because these subsidies involve forced ratepayers to subsidize (through unjust utility rates) the costs and profits of unregulated, competitive enterprises. We have full jurisdiction to investigate and ameliorate these abuses. Horizon's additional and somewhat vague suggestion that we prohibit "anticompetitive practices" lacks any specificity and Horizon does not explain in detail what it intends us to prohibit.

In general, these rules are intended to address the potential for anticompetitive actions or cross subsidization by regulated utilities subject to the Commission's jurisdiction. While we retain considerable authority over the rates, rules and practices of regulated distribution companies, and must continue to assure that the regulated rates, rules and practices are "just and reasonable" within the meaning of the code, we believe that the Legislature did not intend us to apply regulated principles to unregulated entities wholly outside our jurisdiction. If Horizon believes that any electric generation supplier is violating the terms of its Pennsylvania license, it is free to file a complaint with the Commission to remedy the violation.

As to general "anticompetitive" behavior by unregulated entities, the Legislature has provided that Horizon may file a complaint, under section 2811(f) of the act (relating to market power remediation), asking the Commission to remedy the behavior, insofar as it is within our power to do so. In any event, Horizon retains all remedies available to it or any other market participant to complain to a Federal District Court that the behavior is in violation of the competition laws of the United States, and to ask for remedies and damages. That is a far more effective remedy than any we can fashion in the context of the present rulemaking.

§ 54.122(4)

This provision establishes dispute resolution procedures. Representative Lloyd suggested that paragraph (4) be deleted as it improperly allows parties to negotiate compromises among themselves concerning appropriate dispute resolution procedures. We note that it is our policy to encourage negotiated arrangements of the sort permitted, but have amended the provision to clarify the procedural steps of informally resolving disputes.

The OCA recommends that we adopt the PECO Energy Interim Code of Conduct provisions regarding dispute resolution process. We have had some experience with those provisions and agree that they are better suited to dispute resolution than the draft provisions and have amended paragraph (4) accordingly. This will have the additional benefit of making dispute resolution procedures under this Code of Conduct uniform throughout this Commonwealth.

§ 54.122(5)

This provision prohibits illegal tying of goods and services as a requirement for obtaining electric distribution service. Representative Lloyd recommended that paragraph (5) be amended to delete the word "illegally." This provision is based upon negotiated stakeholder language and was intended to reach and prohibit only illegal tying arrangements. Accordingly, we decline to make the suggested editorial change.

§ 54.122(6)

Representative Lloyd recommended that we add the phrase "affiliated or division electric generation supplier" to paragraph (6), which prohibits distribution companies from providing any advantage to a generation supplier in the provision of information about the operational status and availability of the distribution system. The language as presently drafted is "any electric generation supplier," which includes, but is not limited to, affiliated and divisional suppliers. This language was intentional, and was intended to prevent preference being given to any electric generation supplier, whether or not affiliated with a distribution company. Businesses often enter into joint ventures or other contractual arrangements that may advantage the contracting parties to the disadvantage of others.

§ 54.122(9)

This provision requires that customer requests for information about generation suppliers be handled fairly and impartially by distribution companies. Representative Lloyd recommended that paragraph (9) be amended to state that the customer, not the electric distribution company, has the right to determine how the list of electric generation customers will be provided (that is, whether over the telephone, in writing or by some other means). We have licensed approximately 125 electric generation suppliers in this Commonwealth, many with limited geographical areas or which serve only certain kinds of retail customers. Electric generation suppliers are constantly changing their conditions of service or service areas. We believe that it is best to permit some managerial discretion in the mode of provision of the list information.

§ 54.122(10)

This provision prohibits a distribution company affiliate or division from claiming that generation bundled with distribution service is superior solely on the basis of the affiliation. Representative Lloyd recommended deleting from this provision the phrase "solely on the basis of their affiliation with the electric distribution company," as he believes that distribution companies should be forbidden from stating or implying that purchasing power from affiliates or divisions is inherently superior under any circumstances. Section 54.6(3)(c) requires any claims about power be based upon available information substantiating the claims. Likewise, it is not our intent that

distribution companies be prohibited from making any advertising claim which is truthful and not misleading to the public. The recommendation would effectively ban any advertising or customer relations regarding a distribution company's generation affiliate, a result that is extreme, in our judgment. Also, we note that the language sought to be amended was a product of the collaborative working group process. We therefore decline to make the proposed amendment.

However, we believe that it is appropriate to impose a disclosure requirement similar to that suggested by Enron, and have adopted language similar to that adopted in the PECO interim code of conduct, as suggested by the OCA.

§ 54.122(11) and (12)

Paragraph (11) requires functional separation of affiliated or divisional generation, distribution and transmission functions. Paragraph (12) provides that an adequate functional separation would be a substantial factor in the mitigation of penalties in an action brought against a distribution company under section 2811(f) of the act.

The OCA calls our attention to California and Massachusetts Codes of Conduct which, in the OCA's opinion, "ensure that functional separation between the monopoly distribution function and any retail sales operation is real and complete." In effect, the OCA believes that these rules should be amended to require complete physical separation of the retail generation and distribution functions. The OCA would also prohibit (as does the PECO interim settlement code of conduct) joint marketing or packaging of regulated distribution services with the generation services of an affiliate or division. While those are theoretically "purer" approaches, they are also far more prescriptive and we do not adopt them.

The WPP warns that the proposed paragraph (11) "has an ominous quality" and unreasonably regulates "speech" in that it prevents employes engaged in generation supply activities from private discussions with employes of related distribution or transmission businesses concerning current or future operations. It also argues that the provision would cover conduct "well beyond" FERC regulations at 18 CFR Part 37.4, which restricts only the interchange of competitive information about the transmission system. The WPP argues that it is "absolutely necessary for Allegheny's affiliated electric generation supplier to provide information to Allegheny Power's power control center transmission staff to allow the staff to operate the control area reliability (sic)." The WPP argues as well that communications are also necessary between Allegheny Power's transmission and distribution center and its power control center with respect to outages and performance conditions.

The PEA opposes adoption of paragraphs (11) and (12), asserting that they contravene section 2804(5) of the act (relating to standards for restructuring of electric industry) which states (in its entirety) "The Commission may permit, but shall not require, an electric utility to divest itself of facilities or to reorganize its corporate structure."

In effect, the PEA argues that in addition to the plain language of that provision, which forbids the Commission from ordering divestment of facilities or corporate reorganization (structural reorganization), the General Assembly also intended to forbid the Commission from regulating anticompetitive utility behavior through a nonstructural remedy.

It is a hard stretch to interpret this language to prohibit the Commission from directing that monopoly utilities arrange their internal operations to prevent them from unfairly disadvantaging competitors or potential competitors. The statute, as stated, simply prohibits the Commission from directing that structural corporate changes be made, leaving restructuring to the judgment of utility management.

The PGA, in a single page letter, supports the PEA's opposition to § 54.122(11)(ii)—(v) and (12).

PP&L opposes paragraphs (11) and (12). PP&L makes the same point as does the WPP, that regulated distribution companies must coordinate operations with transmission systems and should not be barred from communicating in the ordinary course of business.

The ECI suggests a number of minor language changes that we decline to accept, as they consist mainly of changes in emphasis, rather than substance. However, we accept the ECI's suggestion that "related" should be changed to "affiliate or division" for § 54.122(11)(i)—(vi), in parallel with language proposed elsewhere in these rules. In addition to other editorial changes, we have modified this provision to apply to affiliates and divisions.

The ECI recommends that electric distribution companies be obligated to include the provisions of this regulation in their tariffs. The only substantial advantage to tariff publication is that it might, in theory, provide a more general notification to the public, as tariffs required to be available at company offices and to be posted on company internet web sites and are often more widely available for customer review.

In reality, electric generation suppliers and large enduse customers can be expected to be well aware of the obligations of the act and this Code of Conduct. For less sophisticated consumers, direct customer education programs, as implemented by the Commission from the outset of restructuring, are far more effective in conveying the rules, rights and obligations of retail electric competition. It should also be noted that all of Pennsylvania's regulations are now available to the public at no charge on the internet at http://www.pacode.com. In addition, we require that information about direct access and electric competition be disclosed in all bills, under §§ 54.1—54.7. Accordingly, we decline to require that the Code of Conduct be filed as part of electric distribution company tariffs.

The MAPSA faults the proposed regulations (in criticizing paragraphs (11) and (12) as not going far enough) for not barring joint marketing by affiliated generation suppliers and distribution companies. It also asks that we mandate physical separation between affiliated or divisional electric generation suppliers and electric distribution utilities. As noted elsewhere in this order, we decline to adopt either suggestion. The MAPSA also asks that we include a provision which would regulate the transfer of nonpower goods and services between an affiliated or divisional distribution company and generation supplier. We decline to do that, too.

However, that does not mean that the effect of and terms of the transfers between related entities will be ignored for ratemaking purposes. Cross-subsidization of nonutility enterprises by utility customers has been unlawful under the code for many years. Transfers of goods and services made between a utility and an affiliated or divisional entity which constitute a cross-subsidy may not be recovered from utility ratepayers. Moreover, these transactions, to the extent they are made between affiliated interests within the meaning of section 2101 of the code (relating to definition of affiliated interest) must

follow the rules of Chapter 21 of the code (relating to affiliated interests) at the risk of being disallowed or voided under those statutory provisions.

Accordingly, we decline to adopt the MAPSA's additional provisions and will rely upon existing law to provide safeguards to the public interest. The NEV also proposes joint marketing prohibitions, goods and services transfer rules and physical separation of related electric generation suppliers and electric distribution utilities. We decline, for the reasons stated previously.

After consideration of comments on paragraphs (11) and (12), we have decided to amend paragraph (11) and delete paragraph (12). We are troubled by the attempt at proscription in paragraph (11). We are not even sure that this attempt succeeds and covers every possible permutation of inter-employe contacts and information sharing. It appears that paragraph (11), in attempting to capture every possible element of the independence required to be observed, has also become too procedurally complex.

While we do not agree that paragraph (11) amounts to de facto divestiture, the proposed rulemaking is unnecessarily complicated and should be simplified. Further, as a State commission with jurisdiction over intrastate facilities we do not wish to exceed our jurisdiction by attempting to dictate the actions of transmission company affiliate employes. FERC has primary jurisdictional authority over the actions of transmission utilities, and Order No. 888 and its successive orders should be invoked by complaining market participants if they believe that the rates, terms and conditions of transmission service have been the subject of any anticompetitive acts by the transmission owner.

As edited, paragraph (11) now simply declares that affiliated or divisional entities covered under these provisions shall ensure that their employes act independently of each other. We have deleted paragraph (12) to further simplify these rules. It should be noted that we agree with comments that suggest that it appears pointless to accord a regulated company any mitigation of penalties for compliance with lawful regulations. In any case before the Commission, a utility may argue mitigation however it chooses.

Accordingly, under 66 Pa.C.S. §§ 501, 502, 504—506, 508, 701, 1301, 1304, 1501, 1502, 1505, 1701—1705, 2101—2107 and 2801—2811, the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder in 1 Pa. Code §§ 7.1—7.4, we adopt the rules to read as set forth in Annex A; *Therefore,*

It Is Ordered That:

1. The regulations of the Commission, 52 Pa. Code Chapter 54, are amended by adding §§ 54.121 and 54.122 to read as set forth in Annex A.

2. The Secretary shall submit this order and Annex A for review by the designated standing committees of both Houses of the General Assembly, and for review by IRRC.

3. A copy of this order and Annex A shall be served upon all commentators to our proposed rulemaking at this docket, including the OCA, the Office of Small Business Advocate, the Office of Trial Staff, all members of the Competitive Safeguards Working Group, all jurisdictional electric companies, all licensed electric providers and the PEA.

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

5. This order shall become effective upon final publication in the *Pennsylvania Bulletin*.

6. The contact person is John Levin, Assistant Counsel, Pennsylvania Public Utility Commission, P. O. Box 3265, Harrisburg, PA 17105-3265, (717) 787-5978.

JAMES J. MCNULTY,
Secretary

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 30 Pa.B. 3239 (June 24, 2000).)

Fiscal Note: Fiscal Note 57-195 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PENNSYLVANIA PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 54. ELECTRIC GENERATION CUSTOMER CHOICE

Subchapter E. COMPETITIVE SAFEGUARDS

Sec.
54.121. Purpose.
54.122. Code of conduct.

§ 54.121. Purpose.

The purpose of these competitive safeguards is to assure the provision of direct access on equal and nondiscriminatory terms to all customers and generation suppliers, prevent discrimination in rates, terms or conditions of service by electric distribution companies, prevent the cross subsidization of service amongst customers, customer classes or between related electric distribution companies and electric generation suppliers, to forbid unfair or deceptive practices by electric generation companies and electric generation suppliers, and to establish and maintain an effective and vibrant competitive market in the purchase and sale of retail electric energy in this Commonwealth.

§ 54.122. Code of conduct.

Electric generation suppliers and electric distribution companies shall comply with the following requirements:

(1) An electric distribution company may not give an electric generation supplier, including without limitation, its affiliate or division, any preference or advantage over any other electric generation supplier in processing a request by a distribution company customer for retail generation supply service.

(2) Subject to customer privacy or confidentiality constraints, an electric distribution company may not give an electric generation supplier, including without limitation its affiliate or division, any preference or advantage in the dissemination or disclosure of customer information and any dissemination or disclosure shall occur at the same time and in an equal and nondiscriminatory manner. "Customer information" means all information pertaining to retail electric customer identity and current and future retail electric customer usage patterns, including appliance usage patterns, service requirements or service facilities.

(3) An electric distribution company or electric generation supplier may not engage in false or deceptive advertising to customers with respect to the retail supply of electricity in this Commonwealth.

(4) Each electric distribution company shall adopt the following dispute resolution procedures to address alleged violations of this section:

(i) Regarding any dispute between an electric distribution company or a related supplier, or both, and an electric generation supplier (each individually referred to as a "party" and collectively referred to as "parties"), alleging a violation of any of the provisions of this section, the electric generation supplier shall provide the electric distribution company or related supplier, or both, as applicable, a written notice of dispute which includes the names of the parties and customers, if any involved and a brief description of the matters in dispute.

(ii) Within 5 days of receipt of the notice by the electric distribution company or related supplier, or both, a designated senior representative of each of the parties shall attempt to resolve the dispute on an informal basis.

(iii) If the designated representatives are unable to resolve the dispute by mutual agreement within 30 days of the referral, the dispute shall be referred for mediation through the Commission's Office of Administrative Law Judge. A party may request mediation prior to that time if it appears that informal resolution is not productive.

(iv) If mediation is not successful, the matter shall be converted to a formal proceeding before a Commission administrative law judge, and the prosecuting parties shall be directed to file a formal pleading in the nature of a complaint, petition or other appropriate pleading with the Commission within 30 days or the matter will be dismissed for lack of prosecution. Any party may file a complaint, petition or other appropriate pleading concerning the dispute under any relevant provision of 66 Pa.C.S. (relating to the Public Utility Code).

(5) An electric distribution company may not illegally tie the provision of any electric distribution service within the jurisdiction of the Commission to one of the following:

(i) The purchase, lease or use of any other goods or services offered by the electric distribution company or its affiliates.

(ii) A direct or indirect commitment not to deal with any competing electric generation supplier.

(6) An electric distribution company may not provide any preference or advantage to any electric generation supplier in the disclosure of information about operational status and availability of the distribution system.

(7) An electric distribution company shall supply all regulated services and apply tariffs to nonaffiliated electric generation suppliers in the same manner as it does for itself and its affiliated or division electric generation supplier, and shall uniformly supply all regulated services and apply its tariff provisions in a nondiscriminatory manner.

(8) Every electric distribution company and its affiliated or divisional electric generation supplier shall formally adopt and implement these provisions as company policy and shall take appropriate steps to train and instruct its employes in their content and application.

(9) If an electric distribution company customer requests information about electric generation suppliers, the electric distribution company shall provide the latest list as compiled by the Commission to the customer over the telephone, or in written form or by other equal and nondiscriminatory means. In addition, an electric distribution company may provide the address and telephone number of an electric generation supplier if specifically requested by the customer by name. To enable electric distribution companies to fulfill this obligation, the Commission will maintain a written list of licensed electric generation suppliers. The Commission will regularly update this list and provide the updates to electric distribution companies as soon as reasonably practicable. The Commission will compile the list in a manner that is fair to all electric generation suppliers and that is not designed to provide any particular electric generation supplier with a competitive advantage.

(10) An electric distribution company or its affiliate or division may not state or imply that any delivery services provided to an affiliate or division or customer of either are inherently superior, solely on the basis of their affiliation with the electric distribution company, to those provided to any other electric generation supplier or customer or that the electric distribution company's delivery services are enhanced should supply services be procured from its affiliate or division. When an electric distribution company's affiliated or divisional supplier markets or communicates to the public using the electric distribution company's name or logo, it shall include a disclaimer stating that the affiliated or divisional supplier is not the same company as the electric distribution company, that the prices of the affiliated or divisional supplier are not regulated by the Commission and that a customer is not required to buy electricity or other products from the affiliated or divisional supplier to receive the same quality service from the electric distribution company. When an affiliated or divisional supplier advertises or communicates through radio, television or other electronic medium to the public using the electric distribution company's name or logo, the affiliated or divisional supplier shall include at the conclusion of any communication a disclaimer that includes all of the disclaimers listed in this paragraph.

(11) An electric distribution company which is related as an affiliate or division of an electric generation supplier or transmission supplier (meaning any public utility that owns, operates, or controls facilities used for the transmission of electric energy) which serves any portion of this Commonwealth; and any electric generation supplier which is related as an affiliate or division of any electric distribution company or transmission supplier which serves any portion of this Commonwealth, shall insure that its employes function independently of other related companies.

[Pa.B. Doc. No. 00-1161. Filed for public inspection July 7, 2000, 9:00 a.m.]

PENNSYLVANIA PUBLIC UTILITY COMMISSION
[52 PA. CODE CH. 59]

[L-00990145]

Ensuring Customer Consent to a Change of Natural Gas Supplier

The Pennsylvania Public Utility Commission (Commission) on May 11, 2000, adopted a final rulemaking order promulgating regulations to implement and codify 66 Pa.C.S. § 2206(b) (relating to consumer protections and customer service) which requires the establishment of procedures to ensure that natural gas suppliers do not change a customer's gas supplier without direct oral confirmation from the customer of record or written evidence of the customer's consent to a change of supplier.

The contact persons are Louis Sauers, Bureau of Consumer Services, (717) 783-6688 and Terrence J. Buda, Law Bureau, (717) 787-5755.

Executive Summary

On June 22, 1999, Governor Tom Ridge signed into law the Natural Gas Customer Choice and Competition Act, 66 Pa.C.S. §§ 2201—2211 (act). The act revised the Public Utility Code, 66 Pa.C.S. § 101 et seq., by, inter alia, adding Chapter 22, relating to restructuring of the gas utility industry. The purpose of the law is to permit customers to buy natural gas supply service from their choice of gas suppliers.

Section 2206(b) of the act (relating to consumer protections and customer service) requires that "[t]he Commission shall, by order or regulation, establish procedures to ensure that a natural gas distribution company does not change a retail gas customer's natural gas supplier without direct oral confirmation from the customer of record or written evidence of the customer's consent to a change of supplier." The purpose of this rulemaking is to implement and codify this provision of the act.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on December 21, 1999, the Commission submitted a copy of the proposed rulemaking which was published at 30 Pa.B. 37 (January 1, 2000) to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Committee on Consumer Affairs and the Senate Committee on Consumer Protection and Professional Licensure for review and comment.

In compliance with section 5(b.1) of the Regulatory Review Act, the Commission also provided IRRC and the Committees with copies of all comments received, as well as other documentation. In preparing this final-form rulemaking, the Commission has considered the comments received from IRRC, the Committees and the public.

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d), this final-form regulation was approved by the House Committee on Consumer Affairs and was approved by the Senate Committee on Consumer Protection and Professional Licensure. Under section 5.1(e) of the Regulatory Review Act, IRRC met on June 8, 2000, and approved the final-form rulemaking.

Commissioners present: John M. Quain, Chairperson; Robert K. Bloom, Vice Chairperson; Nora Mead Brownell; Aaron Wilson, Jr.; and Terrance J. Fitzpatrick

Public meeting held
May 11, 2000

Final Rulemaking Order

By the Commission:

At public meeting of November 4, 1999, the Pennsylvania Public Utility Commission (Commission) issued an order adopting and directing publication of proposed regulations to ensure customer consent to a change of natural gas suppliers. The proposed regulations are part of the implementation duties performed by the Commission under the act. Signed into law on June 22, 1999, by Governor Tom Ridge, the act revised the Public Utility Code, 66 Pa.C.S. § 101 et seq., by, inter alia, adding Chapter 22 relating to restructuring of the natural gas industry. The Commission is the agency charged with implementing the act. Section 2206(b) of the act states that "[t]he Commission shall, by order or regulation, establish procedures to ensure that a natural gas distribution company does not change a retail gas customer's natural gas supplier without direct oral confirmation from the customer of record or written evidence of the customer's consent to a change of supplier."

On December 1, 1999, the Office of Attorney General issued its approval of the proposed regulations as to form and legality. On December 21, 1999, the Commission delivered copies of the proposed rulemaking to the Chairperson of the House Committee on Consumer Affairs, the Chairperson of the Senate Committee on Consumer Protection and Professional Licensure, IRRC and to the Legislative Reference Bureau. The proposed regulations were published for comment at 30 Pa.B. 37 and a 30-day comment period set. The Commission also posted the order on the Commission's Internet website.

Comments were filed by the Pennsylvania Gas Association (PGA) on behalf of its member companies, the Office of Consumer Advocate (OCA), the Peoples Natural Gas Company (Peoples), the Consumer Advisory Council of the Public Utility Commission (CAC) and IRRC. We have considered all comments, and thank the parties for their suggestions on developing final regulations.

The instant order presents a section-by-section summary of comments and response. The final regulations, as revised under the discussion in the instant order, appear in Annex A of this order.

§ 59.91. Definitions.

IRRC expresses several concerns relative to the proposed definition of the term "customer." IRRC believes that the phrase "a service account exists with either a [Natural Gas Distribution Company] NGDC or a [Natural Gas Supplier] NGS" is unclear since a typical residential customer may be listed with both the NGDC and NGS. Given this possibility of two service accounts, IRRC states it is unclear which service account would be controlling for other provisions proposed in the regulations, such as § 59.95 (relating to persons authorized to act on behalf of a customer). IRRC also believes the reference to §§ 59.92—59.99 is unnecessary and recommends the reference be limited to § 59.95.

Response

With respect to IRRC's comments, the proposed definition of "customer" reflects, in part, a recommendation made by PG Energy in comments to the Tentative Order establishing interim guidelines pending completion of the instant rulemaking. In its comments to the tentative order that the Commission issued on August 27, 1999, PG Energy recommended the definition of "customer" be limited to the scope of the interim guidelines. We agreed and proposed a definition of "customer" that reflected PG Energy's recommendation. In light of IRRC's comments, however, it is evident that more clarity is needed in the definition of this term. We have, therefore, revised the definition to specifically reference the definition of "retail gas customer" at section 2202 of the act. We will, however, retain the portion of the definition that limits its scope to the instant regulations. Moreover, the revised definition clarifies that, for the purpose of application of the instant regulations, the term "customer" includes all persons identified by the NGDC ratepayer of record, under § 59.95, as authorized to act on behalf of the NGDC ratepayer in changing the supplier for the account. The revised definition reads:

> Customer—A retail gas customer as defined by 66 Pa.C.S. § 2202 (relating to definitions). The term includes all persons identified by the NGDC ratepayer of record, under § 59.95 (relating to per-

sons authorized to act on behalf of a customer), as authorized to act on behalf of the NGDC ratepayer of record in changing the NGS for the account.

§ 59.93. Customer Contacts with the NGS.

Peoples reiterates a suggestion it made in comments to the Tentative Order that the Commission modify § 59.93(a)(1) to permit NGSs to "batch" requests for change of supplier, and permit NGSs to submit them less frequently than daily. To address the Commission's concern that this practice might unnecessarily delay some customers' supplier changes, Peoples recommends that weekly or monthly submissions of requests be permitted "so long as the actual change of supplier for the customer's account occurs at the same time it would have happened if the information was relayed to the natural gas distribution company no later than the next day." Peoples contends this added condition will achieve the same result as § 59.93(a)(1), that is, the customer's supplier will be changed at the beginning of the first feasible billing period following the 10-day waiting period. Since this modification reduces administrative work for both NGDCs and NGSs without adversely delaying a customer's supplier change, Peoples asks the Commission to reevaluate its position regarding modification of this provision.

The OCA suggests including additional specificity regarding third party verification without establishing regulations that may hinder the development of a competitive market. The OCA believes specific guidelines would aid those natural gas suppliers who decide to implement third party verification practices. The OCA suggests that a third party verifier should be completely independent of the provider that seeks to initiate service, and operate from facilities separate from those of the provider seeking to supply service. Additionally, the OCA recommends that a third party verifier should not receive compensation or commission of any kind based upon the number of confirmed sales. Finally, the OCA suggests that a third party verifier not be permitted to use any data or information for other commercial or marketing purposes, and should be required to maintain the confidentiality of the information.

IRRC recommends that the Commission define the term "data elements" found at § 59.93(a)(1) and list some examples in the provision of the data elements required to verify a request to change supplier. Regarding the confirmation letter required at § 59.93(a)(2), IRRC recommends that the Commission clarify in the regulation whether or not the NGDC is required to provide this confirmation notice to all persons who have authority to initiate a change of NGS.

Response

With respect to Peoples' recommendation to modify § 59.93(a)(1), we decline to make the requested change at this time. While the language proposed by Peoples appears to address our concern that "batching" might unnecessarily delay some supplier selections, it apparently is premised on the understanding that all NGDC meter reading schedules can be made available to all NGSs. Our experience to date with electric choice indicates this may not be the case. In electric choice, the Commission found it necessary to issue a Secretarial letter dated February 23, 2000 (Re: Transmittal of Future Customer Selection; Docket No. P-00991673) in which the Commission notified all Electric Distribution Companies (EDCs) and Electric Generation Suppliers (EGSs) of the Commission's desire to address the availability of EDC schedules of meter read dates in all service territories. The EDC meter reading schedules are necessary to develop a long-term solution for delayed EGS transmittals of future customer selections. An example of a delayed EGS transmittal would be an EGS contracting with a customer today for service to commence in 6 months, and holding the enrollment transaction to the EDC until the appropriate meter reading so service could begin on the sixth month. These EGS transmittal delays reflect an exception granted by the Commission at Docket No. P-00991673 to the general rule in § 57.173(a)(1) (relating to consumer contracts with EGSs) requiring an EGS to notify the EDC of the customer's selection by the end of the next business day. This electric rule in § 57.173(a)(1) corresponds with the proposed rule in § 59.93(a)(1).

We believe the electric choice issues involving transmittal delays and availability of meter reading schedules are pertinent to the issue of "batching." If NGDC meter reading schedules are not available, an NGS may be unsure when to submit a selection to guarantee that it is not delayed due to "batching." Moreover, NGDCs sometimes have to alter meter read dates. This raises the concern that an NGS, unaware of a change in NGDC meter read dates, may inadvertently transmit a "batch" selection too late to have some of the customer accounts in the batch processed as timely as they would have been had the NGS transmitted the selections as currently proposed in § 59.93(a)(1). For some customers, the delay could mean a month of lost savings.

While we decline to alter the general rule in § 59.93(a)(1) at this time to allow "batching" of supplier selections, we wish to emphasize that we will continue to explore viable electronic data interchange (EDI) enhancements with all parties. Our willingness to revisit this issue is evidenced by the previously noted limited waiver we recently granted to electric generation suppliers regarding the corresponding requirement in § 57.173(a)(1). We suggest that an appropriate time to revisit this issue would be after the standard EDI transactions between NGDCs and NGSs are designed, tested and in operation, and upon determining that NGSs are able to obtain access to NGDC meter reading schedules.

In regard to the OCA's suggestion to include third party verification guidelines in the instant regulations, we agree that the substance of the guidelines have merit and encourage the NGSs to voluntarily incorporate them in their verification practices. However, we disagree that the proper place for these guidelines is in the instant regulations and therefore decline to include them with the instant regulations.

With respect to IRRC's recommendation that the Commission define the term "data elements" found in § 59.93(a)(1), we accept the recommendation and have added a definition of the term in § 59.91. The term "data element" will be defined as, "One or more characters that represent numeric or alphanumeric fields of data." This definition comes from the *Revised Plan for Electronic Data Exchange Standards for Electric Deregulation in the Commonwealth of Pennsylvania,* Docket No. M-00960890 F0015. IRRC also suggested that the Commission place some examples in the provision of the data elements required to verify a request to change supplier. We have therefore revised the second sentence under § 59.93(a)(1) to include some examples of data elements that can be matched to verify the accuracy of information provided by the NGS. The revised sentence reads: "The NGDC shall verify the accuracy of the information provided by the

NGS by matching at least two data elements such as name and account number, or address and account number, with NGDC records."

In regard to the recommendation by IRRC to clarify who the NGDC is required to send the 10-day confirmation letter to, we do not believe the NGDC should be required to send letters to all persons authorized under § 59.95. Instead, we believe it is important to send the letter to the NGDC ratepayer of record, that is, to the person under whose name the NGDC account is listed. Therefore, to clarify this practice in the regulation, we have revised the language in § 59.93(a)(2) to indicate that the 10-day confirmation letter should be sent to the "NGDC ratepayer of record."

§ 59.94. Time Frame Requirement.

IRRC notes that § 59.94 requires an authorization for a change of NGS to be "consistent with the Commission's data transfer and exchange standards." Since this phrase is not clear as to the exact standards, IRRC recommends the Commission either reference the required standards, or delete the phrase.

Response

We will delete the phrase "consistent with the Commission's data transfer and exchange standards" since, as of the date of preparation of the instant order, the EDI standards for the computer-to-computer transaction of business between a NGDC and an NGS have not been established. We note, however, some progress toward this objective in that PECO Energy Company filed on January 18, 2000, a Joint Petition for Settlement of Electronic Data Interchange Issues (Docket Nos. R-00994787 and R-00994787C0001). In this Joint Petition, numerous parties requested that the Commission permit PECO Energy to adopt for gas choice several of the same procedures used by PECO Energy in electric choice. The rationale for this request is that PECO Energy's potential gas choice customers are dual rate customers who receive a combined electric and gas bill. Regarding EDI rules for the other NGDCs, we anticipate establishment of EDI transaction sets for all NGDCs and NGSs in the near future through a collaborative process. Therefore, we have deleted the phrase in question and will address the need for both NGDCs and NGSs to adhere to EDI protocols when EDI transaction sets are developed for gas choice.

§ 59.95. Persons authorized to act on behalf of a customer.

IRRC recommends that the Commission revise § 59.95 so that it addresses the process of adding or deleting persons authorized to act on behalf of a customer. IRRC raises the following query to illustrate the potential for confusion:

> It could become confusing if the NGDC received an original document authorizing Person A to act on the customer's behalf and six months later received a second document authorizing Person B to act on the customer's behalf. In this instance, who would be authorized?

Response

In answer to the question posed by IRRC, we believe proper application of § 59.95 would result in the NGDC adding Person B, but not deleting Person A unless so instructed by the customer. Based on our experience to date with electric choice, we do not believe it is necessary to revise the provision at § 59.95 to include a specific process by which an NGDC adds or deletes persons authorized to act on behalf of a customer. The corresponding provision in the *Standards for Changing a Customer's Electricity Generation Supplier*, § 57.176, does not contain a specific process for adding or deleting persons authorized to make changes on behalf of the customer. To our knowledge, this lack of a specific process in § 57.176 has not adversely affected the electric distribution companies' implementation of this provision. In our view, it is adequate under § 59.95 to establish that a customer has the right to designate one or more persons to act on his or her behalf to switch suppliers, and to direct that the NGDC obtain that authorization in writing. Therefore, we have not revised the language at § 59.95.

§ 59.96. Valid written authorization.

The OCA expresses concern about § 59.96 as it pertains to door-to-door sales practices. The OCA notes that even though a signature is obtained on door-to-door enrollments, the signature may not be from the customer or a person authorized to act on behalf of the customer. While the OCA states that the Commission addresses this concern, in part, by requiring the written authorization form be limited to the sole purpose of obtaining consent, the OCA recommends that the written form clearly indicate that it must be signed by the customer of record or the customer's designee.

Response

We decline to make the change suggested by the OCA. While we can continue to add safeguards, there is no fail-safe mechanism to prevent inappropriate actions of door-to-door marketers. In our opinion, the current proposed requirement provides adequate safeguard by limiting the document to the sole purpose of obtaining proper consent to a change of gas supplier. If an unauthorized party signs an enrollment form, the ratepayer will be alerted to this fact by the 10-day confirmation letter.

§ 59.97. Customer Dispute Procedures.

Both the PGA and IRRC express concerns about the dispute procedures at § 59.97. The PGA asserts that the proposed rulemaking order "does not engage PGA's arguments on their merits." The primary objection of the PGA continues to be the requirement at § 59.97(a)(1) that a NGDC must bestow automatic dispute status to contacts it receives from customers alleging unauthorized change of supplier, a practice commonly referred to as "slamming." In the PGA's view, this requirement to automatically treat these contacts as disputes is unfair and disproportionate "given the essential fact that slamming results from actions by customers and suppliers, with utilities playing only a tangential, ministerial role." The PGA argues that NGDC obligations should be proportionate to the NGDC's involvement in the underlying transaction. The PGA maintains that every allegation of slamming arises from an interaction between a customer and a supplier. Therefore, in the PGA's view, the NGDC should be able to handle initial contacts alleging slamming as an "initial inquiry" under § 56.2. If the NGDC determines that it fulfilled its duties with regard to change of supplier, the PGA believes the NGDC should be able to refer the customer to the NGS that requested the NGDC to switch the customer's supplier. Under the PGA's proposal to split § 59.97(a) into two parts, the NGDC would maintain records of its "initial inquiry" investigation and response, and "such documentation shall be available for inspection by the Commission." Dispute status would be bestowed by the NGDC only where an NGDC's initial investigation determines the NGDC did not adequately and accurately fulfill its duties.

The PGA also disagrees with the Commission's argument that automatic dispute status is justified, in part, to

ensure that customer complaints against an NGDC affiliated supplier are not handled differently than disputes against non-affiliated gas suppliers. The PGA argues that the PUC Order, *Binding Interim Standards of Conduct* at Docket No. M-00991249 F0004, removes this concern as a foundation for imposing automatic dispute status.

Finally, the PGA's addresses the Commission's assertion in the proposed rulemaking order that, since some suppliers will offer both gas and electric supply to customers, it would be counterproductive to the goal of developing competitive gas and electric markets to impose substantively different rules for essentially the same activity. The PGA notes that throughout the various antislamming dockets, it has consistently maintained that NGDCs and EDCs should be on equal footing. The PGA advocates that equal footing should be accomplished by freeing the EDCs from the current requirement in § 57.173, not by extending this same requirement on the NGDCs.

IRRC, noting the PGA's view that the compliance requirements and costs of implementing § 59.97(a)(1) as proposed are unfair and disproportionate, recommends that the Commission fully explain why the NGDCs should be required to consider customer contacts under this provision as "disputes." IRRC suggests that the Commission provide a specific estimate of the costs imposed by this provision and an explanation of why these costs are justified. Further, IRRC recommends that the Commission consider whether a different classification, other than "disputes," would accomplish the same objectives without imposing the same costs on the NGDC.

IRRC also comments on § 59.97(b). This provision requires the Commission's Bureau of Consumer Services (BCS) to issue an informal decision in response to receiving an informal complaint alleging supplier change without customer consent. IRRC asks the Commission to clarify whether the customer is responsible for charges during a BCS review. Additionally, IRRC suggests that the Commission provide the time frame for a BCS decision, and explain as well what the customer's billing status is during this period.

IRRC's final comment regarding § 59.97 relates to subsection (e). IRRC states that, as proposed, this subsection allows the Commission to require an NGS to obtain written authorization from every new customer. IRRC, however, notes that section 2206(b) of the act permits both written and oral authorization. IRRC suggests that the Commission explain its authority to limit consent to written authorization.

Response

We disagree with the PGA's contention that the Commission has not engaged "on their merits" the PGA's prior comments opposing the proposed requirement at § 59.97(a)(1). The proposed rulemaking order reflects our careful consideration of all comments made by all parties regarding this important provision. We note that comments from other parties reflect agreement with our assessment. The CAC, for example, supports the "Rule as proposed" and states that the "Commission's discussion of the comments submitted reflect thoughtful consideration and the Commission's efforts to protect consumers without imposing excessive administrative burdens on suppliers and distribution companies." The OCA "commends the Commission on setting forth these regulations that strike a reasonable balance between preventing unauthorized switching, while still allowing for the development of competition." Thus, while the PGA's prior comments relative to § 59.97(a)(1) did not result in modification of this provision, we wish to assure the PGA that its comments were given careful consideration.

In light of the importance of this provision, and in consideration of the most recent comments of the PGA and IRRC, we will review in detail the requirement in § 59.97(a)(1) to consider customer contacts under this provision as "disputes." First, we believe it is important to consider the context of the requirement in § 59.97(a)(1). The interrelated provisions preceding this section set forth a process that is neither excessive nor burdensome, but nevertheless serves to minimize, if not eliminate, instances of slamming. In our opinion, it is logical to anticipate minimal application of a provision designed to address a contingency contrary to the act, namely, changing a customer's NGS without authorization, otherwise known as "slamming."

If the regulations in §§ 59.92 and 59.93 (relating to customer contacts with the NGDC; and customer contacts with the NGS) are applied properly, the overwhelming majority of switches will occur without giving rise to allegations of slamming. A customer will deal directly with a NGS. The NGS, once satisfied they are dealing with a person who meets the definition in § 59.91 of "customer," will receive direct oral confirmation or written authorization from the customer to change their supplier. The NGS will send the switch request to the NGDC in a timely manner. The NGDC, in turn, will send the customer a 10-day confirmation letter. This confirmation letter acts as the first safeguard in ensuring proper switches by providing the NGDC ratepayer with the opportunity to rescind an erroneous or unauthorized switch before it is processed. Clearly, the portions of the proposed regulations which set forth the process of securing customer authorization and effecting a switch virtually eliminates incidents of slamming, provided the rules are applied properly. We therefore believe it is reasonable to assume limited application of § 59.97(a)(1) if one assumes "good faith" application by all parties of the other procedures to ensure customer consent to change of NGS.

To view § 59.97(a)(1) alternatively, as the PGA suggests, as a costly provision that will need to be applied frequently in response to a significant number of slamming complaints presumes an intolerable level of noncompliance with the other provisions of the instant proposed regulations. Assuming, however, for the sake of argument, that PGA's concerns are realized and NGDCs receive a high number of slamming disputes, the Commission must be able to exercise proper oversight. To correct such a pattern of noncompliance, restore the integrity of section 2206(b) of the act, and eliminate a hindrance to the development of a competitive market, the Commission must be able to access all potential violations that may be part of an enforcement action. This requires that records of all slamming complaints must be complete, properly maintained, and available for Commission review. Thus, the requirement in § 59.97(a)(1) is properly viewed as a safeguard to ensure adherence to the intent of section 2206(b) of the act; that is, to ensure customer consent to a change of the NGS. Any occurrences of frequent application by an NGDC of § 59.97 should be short-lived, and therefore not likely to have a significant impact on the NGDC dispute-handling costs.

With respect to IRRC's request that the Commission attempt to provide an estimate of the costs imposed by § 59.97(a)(1), we acknowledge that it is difficult to determine an across-the-board cost estimate on NGDCs' han-

dling of disputes in general, or slamming disputes in particular. Perhaps such difficulties explain, in part, the absence of any cost estimates in any of the three sets of the PGA comments filed in the various antislamming dockets.

One difficulty in attempting to determine an across-the-board estimate on NGDCs' dispute costs, including slamming disputes, is determining costs for every action or activity involved in handling disputes. Some of these costs, such as fixed overhead costs associated with offices, salaries, telecommunication equipment, computers, customer information system, and the like, cover costs for handling other types of customer contacts in addition to dispute handling. This makes it difficult to determine the portion of fixed overhead costs attributable to dispute handling actions versus the portion attributable to other actions.

These other actions respond to customer contacts about matters such as collections, outages and other emergency calls, general inquiries, applications for service, disconnection requests, and the like. In some instances, an action or activity may be performed to address both a dispute as well as another action. For example, an NGDC may obtain an actual meter read at a residence to initiate a new account, and to investigate a billing dispute from the prior occupant that their final bill was not based on an actual read.

A further difficulty is that the activities and costs involved in handling disputes vary from one type of dispute to another. Some disputes, such as claims of improper credit for a payment, are addressed by an internal review of account records and, if necessary, the generation of a corrective transaction. Other disputes, such as a high bill complaint alleging a faulty meter, require expensive field or on-site visits. Moreover, the NGDC cost to perform a particular activity or action varies from one NGDC to another. For example, the on-site visit adds significantly to the cost of investigating a residential customer dispute. Although some NGDCs do not charge for investigative on-site visits, others do. Equitable Gas Company, for example, charges a customer $25 to conduct an on-site visit as part of a high bill investigation. See Equitable Tariff Rule 6.4. UGI Utilities, on the other hand, charges $45 under its Tariff Rule 9.7 for the same activity. In both cases, the formally approved tariff charge is waived if the investigation detects a metering error. Disparities such as these in the cost of various NGDC dispute-related actions makes it difficult to calculate a meaningful across-the-board estimate of the cost of handling disputes, including slamming disputes.

While the costs associated with handling disputes, including slamming disputes, are admittedly difficult to estimate, we nevertheless remain convinced for several reasons that the NGDC costs for handling slamming disputes will not significantly impact an NGDC's overall dispute-handling costs. First, as noted previously, we do not anticipate that NGDCs will receive a high number of slamming complaints. Therefore, we do not anticipate the need for NGDCs to increase their fixed overhead costs to handle the volume. Second, expensive on-site or field visit costs, such as those noted previously, will not be part of the NGDC investigations of slamming disputes. And third, slamming disputes to the NGDC will generally be investigated through review of documentation on EDI transactions, and resolved through the generation of additional corrective EDI transactions. We do not believe the unit costs for these activities will be significant.

With respect to IRRC's suggestion that we consider whether a different classification, other than "disputes," would accomplish the same objectives without imposing the same costs on a NGDC, we do not believe that changing the name for these types of customer contacts will significantly change the activities or costs associated with addressing them in an appropriate manner. Following is a summary of the way we anticipate that the Chapter 56 dispute procedures will be applied to a slamming dispute. We include in the following summary a comparison with the actions inherent in the alternative procedures proposed by the PGA.

Slamming complaints will fall under two broad categories: those registered before the switch request is processed, and those registered after the change in supplier has occurred. If, in response to receiving the 10-day confirmation letter required by § 59.93(a)(2), a customer contacts the NGDC to both rescind the switch and allege slamming, the NGDC customer service representative (CSR) must access the customer's account and make a notation of the customer's claim. This step is necessary to satisfy the requirement in § 56.152(1) to document the claim or dispute. This action, and the cost associated with it, would also occur in the PGA's alternative process. Next, the CSR would generate the appropriate EDI transactions to rescind the switch request and, if applicable, reinstate the customer with their prior competitive supplier. Once again, the PGA's alternative procedure would require these actions and incur these costs. The NGDC would also notify the NGS who requested the switch of the customer's slamming allegation. The NGDC would ask the NGS to provide its position regarding the customer's slamming allegation so the NGDC could include this information in its response to the customer. This request to the NGS reflects adherence to the requirements in § 56.151(2) to conduct a reasonable investigation, and the requirement in § 56.151(4) to provide the complainant with the information necessary for an informed judgment. The PGA's alternative procedures eliminate this action and instead would call for the NGDC to inform the customer to pursue the slamming allegation by contacting the NGS directly. Finally, the NGDC would convey the information it gathered to the customer under § 56.151(4), determine satisfaction and prepare the appropriate summary of the resolution in accordance with § 56.151(5). The PGA's proposed procedures also call for documentation of the customer contact and provides "such documentation shall be available for inspection by the Commission." In regard to the dispute requirements in § 56.151(1) and (3), neither would apply to handling these types of disputes. Therefore, the costs associated with applying these two subsections of the Chapter 56 dispute procedures do not come into play.

If, on the other hand, the NGDC receives the slamming dispute after the switch has occurred, the steps noted above would apply, plus the additional step of securing appropriate billing adjustment from the NGS under § 59.97(b). The billing adjustment information from the NGS to the NGDC would be communicated by means of an EDI transaction. The PGA's alternative would place the burden on the customer to contact the NGS to have it rescind the switch and send a billing adjustment transaction. Additionally, the PGA's procedures would require that the customer also contact their prior supplier to have it submit a new enrollment request so that the customer can be switched back to their original supplier.

In our view the activities summarized previously, and the costs associated with implementing them, are reasonable and necessary to resolve these types of complaints,

regardless of whether one refers to them as disputes, initial inquiries, claims, complaints or grievances. Also, many of the actions and costs to apply the Chapter 56 dispute procedures to these types of disputes are also inherent in the PGA's alternative procedures. Our previously expressed view that the costs for handling these types of disputes are not significant is based, in part, on the fact that the NGDC actions primarily involve reviewing and initiating the EDI transactions, making account notations, and preparing a record of the complaint. The NGDC is not determining the validity of the position taken by the NGS. The NGDC is relaying this position along with other pertinent information to the complainant.

With respect to the PGA's contention that the anticipated actions expected of the NGDC under § 59.97 are "unfair and disproportionate," we disagree given the complainant's relationship with the NGDC. The complainant is a customer of the NGDC and one of the consequences of a slam is that it adversely affects the customer's NGDC bills. In effect, the complainant is contacting the NGDC, in part, to prevent or correct inaccurate NGDC billings. The PGA's alternative would require some customers to contact up to three entities to restore their account to its pre-slam status. In our view, promulgating regulations requiring this many contacts from a customer to reverse an unauthorized switch and correct the NGDC billing information would neither be fair to the customer nor proportionate given the customer's role in the slam. When customers are required to contact multiple entities to resolve a complaint they did not cause, they often derisively refer to such practices as "getting the runaround" or being "ping-ponged." The proposed regulations avoid this practice, and do so without significantly affecting the costs incurred by the NGDC.

Besides avoiding the possibility of bouncing the customer between parties, we wish to reiterate some of the other advantages in using the Chapter 56 dispute procedures to handle slamming disputes. The NGDC frontline service representatives are familiar with these procedures and therefore would need little additional training to properly implement them. Furthermore, by requiring that all customer contacts alleging slamming be classified as disputes, all parties can have more confidence that complaints against an NGDC's affiliate will not be treated differently than slamming complaints against other NGSs. Finally, some suppliers will offer both gas and electric supply to customers, and at least one NGDC, PECO Energy, serves dual rate customers who receive a combined electric and gas bill. As we stated in the proposed rulemaking order, it would be counterproductive to our goal of developing competitive gas and electric markets to impose substantively different rules for essentially the same activity. The PGA, while agreeing "that both fixed utility groups should be on equal footing," suggests we maintain consistency by revising the corresponding regulations for electric choice in §§ 57.171—57.179. We disagree. We believe the electric rules to date have proved effective in addressing slamming complaints, and therefore agree with the OCA that ". . . the Commission's regulations at 52 Pa. Code § 57.171—57.179 . . . provide a sound basis for addressing consumer concerns regarding slamming in retail gas choice."

On the basis of the lengthy rationale presented previously, we remain convinced that the proposed language in § 59.97(a)(1) is both reasonable and necessary to ensure consistent identification and handling of all slamming disputes, and to ensure, if necessary, that complete dispute records are available for Commission review. Therefore, we will not revise § 59.97(a)(1) as recommended by the PGA.

With respect to IRRC's comments regarding § 59.97(b), IRRC correctly notes that this provision requires the Commission's BCS to issue an informal decision in response to receiving an informal complaint alleging supplier change without consent. Based on the BCS' experience with electric slamming complaints, the BCS will determine on a case-by-case basis whether the customer is responsible for charges incurred during the Commission's review. In many cases we anticipate that the change in the complainant's supplier will not have occurred since the complainant will have responded in a timely manner to the 10-day confirmation letter. In these instances the informal complainant will not be seeking a billing adjustment from the Commission. Instead, the complainant will generally be upset or angry about the attempt to switch without authorization, and will wish to pursue the matter, particularly when the supplier maintains it received the customer's authorization before it submitted the switch request. In cases where the customer fails to rescind the switch request in time to prevent receiving NGS charges, the BCS' informal decision will be based on a review of NGDC or NGS dispute records and issued, under § 56.163, "within a reasonable period." The internal Commission procedures established by the BCS under § 56.211 requests utility reports from the applicable parties within 14 days of notification by the BCS of the filing of an informal slamming complaint. In general, the complainant's billing status pending resolution of the informal slamming complaint reflects a switch back to the original NGS under § 59.97(c), either before the complainant contacts the BCS or shortly thereafter.

Concerning IRRC's comment regarding § 59.97(e), this subsection allows the Commission to order an NGS to obtain written authorization from every new customer. IRRC, however, notes that section 2206(b) of the act permits both written and oral authorization, and therefore, suggests the Commission explain its authority to limit consent to written authorization.

Our authority to impose this limitation on NGSs that have a pattern of violating these regulations is rooted in the general enforcement powers accorded the Commission by 66 Pa.C.S. § 501(a) (relating to general powers). Specifically, the Commission has the power to enforce the Public Utility Code through promulgation of regulations. Therefore, to enforce section 2206(b) of the act on some NGSs, who have a track record of violating the regulations but have not lost their authority to provide natural gas supply services, it may be necessary to limit consent to written authorizations as opposed to oral which may be harder to document. Clearly, the basic intent of section 2206(b) of the act is to ensure customer consent to a change of suppliers. To satisfy the purpose of this provision, it may be necessary for some suppliers to limit their method of obtaining consent.

Given the unquestioned intent of this statutory provision, we submit that this regulation is valid since it is consistent with the statute. *Clough v. Tax Review Board*, 342 A.2d 483 (Pa. Cmwlth. 1975); *Pa. State Education Ass'n v. Com., Dept. Of Public Welfare*, 449 A.2d 89 (Pa. Cmwlth. 1982) *overruled on other grounds by Com. v. Gerstner*, 656 A.2d 108 (Pa. 1995). There is a rational reason for limiting authorization for some suppliers to written authorization, which is, in fact, an authorization allowed by the statute. We have not exceeded our author-

ity and there is no abuse of discretion in setting down this rule. *Brocal Corp. v. Com., Dept. Of Transportation*, 528 A.2d 114 (Pa. 1987).

§ 59.98. Provider of last resort.

For clarity, IRRC recommends replacing the phrase, "Sections 59.91—59.97, this section and § 59.99 do not apply . . ." with the phrase, "Sections 59.91 to 59.99 do not apply. . . ."

Response

We agree and have made the change in the wording of § 59.98 relating to provider of last resort.

§ 59.99. Record maintenance.

IRRC believes the Commission should clarify the meaning of the phrase "made available" in § 59.99. IRRC questions whether records must be sent to the Commission, or whether the Commission will travel to a site to review records. Also, IRRC suggests that the Commission explain what would happen if either an NGDC or NGS does not have a location or a facility in this Commonwealth.

Response

With respect to IRRC's concerns, we do not believe it necessary to modify for clarity the language in § 59.99 in light of other complimentary Commission provisions. For example, when the Commission requests records of a slamming dispute as part of a BCS investigation of an informal complaint, the Commission does so in accordance with the requirement in § 56.163. Section 56.163 relates to Commission informal complaint procedures, and provides for review of appropriate records. Generally, companies provide these records by fax, e-mail, or the United States mail. In electric choice, the fact that some suppliers do not have offices located in the Commonwealth has not caused problems securing appropriate records. We do not anticipate that securing appropriate records will be a problem in the BCS' investigation of gas slamming informal complaints. If the Commission needs to review all slamming records of a particular company to conduct an informal investigation under § 3.113, the Commission has full power and authority under 66 Pa.C.S. § 506 (relating to inspection of facilities and records), to inspect records. Also, we note that the sentence in § 59.99 that includes the phrase "made available" contains the same wording as in the corresponding electric choice provision in § 57.179. This wording has not caused problems securing electric slamming records and we have no reason to believe it will cause problems securing gas records. Therefore, we have not modified § 59.99.

Conclusion

In finalizing these regulations we believe we have met the intent of section 2206(b) of the act by establishing the necessary protections to assure that customers do not have their natural gas supplier changed without their consent. Accordingly, under 66 Pa.C.S. §§ 501, 504—506, 1301 and 1501, and the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201—1208), and the regulations promulgated thereunder in 1 Pa. Code §§ 7.1—7.4, the Commission hereby adopts final regulations to ensure customer consent to a change of natural gas suppliers, as noted and set forth in Annex A;

Therefore,

It Is Ordered That:

1. The regulations of the Commission, 52 Pa. Code Chapter 59, are amended by adding §§ 59.91—59.99 to read as set forth in Annex A.

2. The Secretary shall submit this order and Annex A for formal review by the designated standing committees of both houses of the General Assembly, and for review and approval by IRRC.

3. The Secretary shall submit this order and Annex A to the Office of Attorney General for approval as to legality.

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

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

6. A copy of this order and Annex A and any accompanying statements of the Commissioners shall be served upon all jurisdictional natural gas distribution companies, and all parties who submitted comments in this rulemaking proceeding.

7. A copy of this order shall be posted on the Commission's web site and shall be made available, upon request, to all interested parties.

8. The regulations adopted with this order are effective upon publication in the *Pennsylvania Bulletin*.

JAMES J. MCNULTY,
Secretary

Fiscal Note: Fiscal Note 57-211 remains valid for the final adoption of the subject regulation.

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 30 Pa.B. 3239 (June 24, 2000).)

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PENNSYLVANIA PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 59. GAS SERVICE

STANDARDS FOR CHANGING A CUSTOMER'S NATURAL GAS SUPPLIER

§ 59.91. Definitions.

The following words and terms, when used in this section and §§ 59.92—59.99, have the following meanings, unless the context clearly indicates otherwise:

Customer—A retail gas customer as defined by 66 Pa.C.S. § 2202 (relating to definitions). The term includes all persons identified by the NGDC ratepayer of record, under § 59.95 (relating to persons authorized to act on behalf of a customer), as authorized to act on behalf of the NGDC ratepayer of record in changing the NGS for the account.

Data element—One or more characters that represent numeric or alphanumeric fields of data.

NGDC—Natural Gas Distribution Company—An NGDC as defined by 66 Pa.C.S. § 2202.

NGS—Natural gas supplier—A supplier as defined by 66 Pa.C.S. § 2202.

§ 59.92. Customer contacts with the NGDC.

When a customer orally contacts the NGDC to request a change of NGS, the NGDC shall notify the customer that the selected NGS shall be contacted directly to initiate the change.

§ 59.93. Customer contacts with NGSs.

When a contact occurs between a customer and aN NGS to request a change of the NGS, upon receiving direct oral confirmation or written authorization from the customer to change the NGS, the customer's new NGS shall:

(1) Notify the NGDC of the customer's NGS selection by the end of the next business day following completion of the application process. The NGDC shall verify the accuracy of the information provided by the NGS by matching at least two data elements such as name and account number, or address and account number, with NGDC records.

(2) Upon receipt of this notification, the NGDC shall send the NGDC ratepayer of record a confirmation letter noting the proposed change of NGS. This letter shall include notice of a 10-day waiting period in which the order may be canceled before the change of the NGS takes place. The notice shall include the date service with the new NGS will begin unless the customer contacts the NGDC to cancel the change. The 10-day waiting period shall begin on the day the letter is mailed. The letter shall be mailed by the end of the next business day following the receipt of the notification of the customer's selection of a NGS.

§ 59.94. Time frame requirement.

When a customer has provided the NGS with oral confirmation or written authorization to change NGSs, the NGDC shall make the change at the beginning of the first feasible billing period following the 10-day waiting period, as prescribed in § 59.93 (relating to customer contacts with NGSs).

§ 59.95. Persons authorized to act on behalf of a customer.

A customer may identify persons authorized to make changes to the customer's account. To accomplish this, the customer shall provide the NGDC with a signed document identifying by name those persons who have the authority to initiate a change of the customer's NGS.

§ 59.96. Valid written authorization.

A document signed by the customer whose sole purpose is to obtain the customer's consent to change NGSs shall be accepted as valid and result in the initiation of the customer's request. Documents not considered as valid include canceled checks, signed entries into contests and documents used to claim prizes won in contests.

§ 59.97. Customer Dispute Procedures.

(a) When a customer contacts an NGDC or an NGS and alleges that the customer's NGS has been changed without consent, the company contacted shall:

(1) Consider the matter a customer registered dispute.

(2) Investigate and respond to the dispute consistent with the requirements in §§ 56.151 and 56.152 (relating to utility company dispute procedures).

(b) When the customer's dispute has been filed within the first two billing periods since the customer should reasonably have known of a change of NGSs and the dispute investigation establishes that the change occurred without the customer's consent, the customer is not responsible for NGS charges rendered during that period. If the customer has made payments during this period, the company responsible for initiating the change of supplier shall issue a complete refund within 30 days of the close of the dispute. The refund or credit provision applies only to the natural gas supply charges.

(c) A customer who has had a NGS changed without having consented to that change shall be switched back to the original NGS for no additional fee. Charges involved in the switch back to the prior NGS shall be the responsibility of the company that initiated the change without the customer's consent.

(d) If a customer files an informal complaint with the Commission alleging that the customer's NGS was changed without the customer's consent, the Bureau of Consumer Services will issue an informal decision that includes a determination of customer liability for any NGS bills or administrative charges that might otherwise apply, rendered since the change of the NGS.

(e) In addition to customer-specific remedies, the Commission may, after investigation and decision, assess fines under 66 Pa.C.S. Chapter 33 (relating to violations and penalties), and initiate proceedings to revoke the license of any NGS that demonstrates a pattern of violating this chapter. The Commission may order a particular NGS that has a pattern of violating this chapter to obtain written authorization from every new customer as a condition of providing service in this Commonwealth. Nothing in this section limits the Commission's authority.

§ 59.98. Provider of last resort.

Sections 59.91—59.99 do not apply in instances when the customer's service is discontinued by the NGS and subsequently provided by the provider of last resort because no other NGS is willing to provide service to the customer.

§ 59.99. Record maintenance.

Each NGDC and each NGS shall preserve all records relating to unauthorized change of NGS disputes for 3 years from the date the customers filed the disputes. These records shall be made available to the Commission or its staff upon request.

[Pa.B. Doc. No. 00-1162. Filed for public inspection July 7, 2000, 9:00 a.m.]

Title 61—REVENUE

DEPARTMENT OF REVENUE
[61 PA. CODE CHS. 32 AND 60]

Sales and Use Tax; Commercial Motion Pictures

The Department of Revenue (Department), under authority contained in section 270 of the Tax Reform Code of 1971 (TRC) (72 P. S. § 7270), by this order adds § 32.38 (relating to commercial motion pictures) and deletes § 60.22 (relating to commercial motion pictures) to read as set forth in Annex A.

Purpose of Regulation

The Department is setting forth its interpretation of section 204(54) of the TRC (72 P. S. § 7204(54)) regarding the Sales and Use Tax exemption for the sale at retail to or use by a producer of commercial motion pictures of any tangible personal property directly used in the production of a feature-length commercial motion picture distributed to a national audience.

Explanation of Regulatory Requirements

Subsection (a) sets forth the definition of various terms for use in § 32.38. Subsection (b) details the scope of the exemption. To effect legislative intent, the Department has added language in § 32.38(b)(1)(ii). If this subparagraph were not added, the purchase of the tangible personal property would be exempt but the repair or alteration would be subject to tax. For example, the purchase of film would be exempt but the development charges would be subject to tax which clearly is not the legislative intent. Subsection (c) describes the treatment of property and services purchased for resale. Subsection (d) provides that charges to install, repair, maintain or service equipment, parts, tools and supplies directly used in the production of a commercial motion picture are exempt from tax. Subsection (e) explains that utilities used directly and exclusively in the production of a commercial motion picture are exempt from tax. Examples of taxable and exempt electricity usage are provided. An explanation regarding the use of exemption certificates is in subsection (f).

With the adoption of § 32.38, the pronouncement in § 60.22 is no longer necessary and is therefore being deleted.

Section 204(54) requires that the purchaser furnish to the vendor a certificate substantially in the form as the Department of Community and Economic Development (DCED) may prescribe by regulation. See 30 Pa.B. 3035 (June 17, 2000). In compliance with this provision, the DCED adopted 12 Pa. Code § 33.1 (relating to form required) which provides that producers of motion pictures, who are qualified to take advantage of section 204(54) of the TRC, shall use a Pennsylvania Exemption Certificate (Form REV-1220).

Affected Parties

Producers of motion pictures who qualify to take advantage of section 204(54) of the TRC may be affected by the regulation.

Comment and Response Summary

Notice of proposed rulemaking was published at 28 Pa.B. 1320 (March 14, 1998). This proposal is being adopted with changes as set forth in Annex A.

The Department received two comments from the public during the public comment period. The Department also received comments from the Independent Regulatory Review Commission (IRRC). No comments were received from the House Finance Committee or the Senate Finance Committee.

The amendments to the proposed rulemaking in response to comments are as follows:

(1) IRRC's first comment related to the inconsistent use of the terms "exemption" and "exclusion" in § 32.38. The problem relating to the use of these two terms originates with the statutory provision. The title of section 204 of the TRC is exclusions from tax; however, within paragraph (54) the term "exempt" is used. In its comments, IRRC concluded that because paragraph (54) references the term exempt, that references to "exclusion" in the regulation should be amended to "exemption." The Department also received a public comment with regard to the use of the two terms in the proposal. Contrary to IRRC, the public comment suggested that the Department use the term "exclusion" throughout the regulation instead of "exemption." The Department agrees with IRRC and the public comment that for consistency, the regulation should use only one term. The Department agrees with the revision suggested by IRRC, and has amended § 32.38(b)(2) and (3) as well as the title of subsection (b) to reference the term exemption.

(2) IRRC's second area of concern related to subsection (b) which details the scope of the exemption. IRRC suggested that the subsection does not describe the extent of the scope of the regulation and that the text should be amended and reorganized. In response to the concerns raised by IRRC, the Department has amended § 32.38(b) by removing proposed paragraph (2) and creating a definition for the term "production of a commercial motion picture." With the deletion of paragraph (2), the remaining paragraphs were renumbered accordingly. In addition, the name of subsection (b) has been changed from "scope" to "scope of the exemption." Section 32.38(b)(1) has been amended to more clearly set forth the general scope of the regulation. Finally, in accordance with IRRC's suggestion, the Department has added the phrase "of a commercial motion picture" to § 32.38(b)(2) (proposed § 32.38(b)(3)).

(3) Because section 204(54) of the TRC specifically provides that the purchaser shall furnish to the vendor a certificate substantially in the form as the DCED may prescribe by regulation, IRRC and a public commentator both suggested that the Department make specific reference to the DCED regulation that prescribes the form. The Department agrees with the comment and has amended § 32.38(f)(1) accordingly.

For clarity, the Department edited and reorganized the provisions of subsection (f) relating to exemption certificates.

The Department has also amended a style change to the term "national" when it published the proposed rulemaking. The Department has amended all references to the term to all lower case letters for two reasons. First, the enabling statute uses all lower case letters. Second, by using an initial capital, the term would be restricting the phrase "National audience" to just the United States and it is the Department's opinion that the term should apply to audiences both within and outside the United States.

Comments that did not result in amendments to the regulation are as follows:

(1) Section 32.38(e) relates to utilities used in production. The subsection provides examples of taxable and exempt electricity usage. IRRC suggested that the Department group examples of usage exempt from tax in one subsection and usage subject to tax in a second subsection. Since there are only three examples involved, the Department does not believe separate subsections are necessary.

(2) As one of its comments to § 32.38(b), IRRC suggested that the subsection be entitled "application" instead of "scope." Scope is a customary word utilized in many of the Department's regulations, whereas application is not used. The Department does not see the merit in introducing a new term in this regulation; however, as mentioned previously, the title of the subsection has been expanded to state "scope of the exemption."

Fiscal Impact

The Department has determined that the amendments will have no significant impact on the Commonwealth. The Department has determined that the expenditure for the exclusion provided by section 204(54) of the TRC is estimated to be $0.8 million for Fiscal Year 1997-98.

Paperwork

The amendments will require no additional paperwork for the public or the Commonwealth.

Effectiveness/Sunset Date

The amendments will become effective upon final publication in the *Pennsylvania Bulletin*. The regulation is scheduled for review within 5 years of final publication. No sunset date has been assigned.

Contact Person

The contact person for an explanation of the amendments is Anita M. Doucette, Office of Chief Counsel, Department of Revenue, Dept. 281061, Harrisburg, PA 17128-1061.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 2, 1998, the Department submitted a copy of the notice of proposed rulemaking, published at 28 Pa.B. 1320, to IRRC and the Chairpersons of the House Committee on Finance and the Senate Committee on Finance for review and comment.

In compliance with section 5(c) of the Regulatory Review Act (71 P. S. § 745.5(c)), the Department also provided IRRC and the Committees with copies of all comments received, as well as other documentation. In preparing this final-form regulation, the Department has considered the comments received from IRRC, the Committees and the public.

This final-form regulation was deemed approved by the Committees on May 2, 2000, and was approved by IRRC on May 11, 2000, in accordance with section 5.1(e) of the Regulatory Review Act (71 P. S. § 745a(e)).

Findings

The Department finds that:

(1) Public notice of intention to amend the regulation has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The amendment is necessary and appropriate for the administration and enforcement of the authorizing statute.

Order

The Department, acting under the authorizing statute, orders that:

(a) The regulations of the Department, 61 Pa. Code, are amended by adding § 32.38 and deleting § 60.22 to read as set forth in Annex A.

(b) The Secretary of the Department shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval as to form and legality as required by law.

(c) The Secretary of the Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

ROBERT A. JUDGE, Sr.,
Secretary

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 30 Pa.B. 2688 (June 3, 2000).)

Fiscal Note: Fiscal Note 15-400 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 61. REVENUE

PART I. DEPARTMENT OF REVENUE

Subpart B. GENERAL FUND REVENUES

ARTICLE II. SALES AND USE TAX

CHAPTER 32. EXEMPTIONS

§ 32.38. Commercial motion pictures.

(a) *Definitions*. The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise:

Commercial motion picture—A series of related images at least 40 minutes in length either on film, tape or other similar medium, when the images shown in succession impart an impression of motion together with accompanying sound, if any, which is produced for distribution to a national audience. The term does not include motion pictures produced for private noncommercial use, including motion pictures of weddings or graduations to be used as family mementos, accident reconstruction videotapes to be used for legal analysis or student films to be used for class projects.

Distribution to a national audience—Distribution by means of theatrical release or for exhibition on national television by a television network or through syndication.

Producer—A purchaser who is responsible for the production of a commercial motion picture.

Production of a commercial motion picture—The process of recording the actions taking place within a commercial motion picture and includes the actual shooting of the picture, either on location or at a motion picture studio, as well as the editing, dubbing and mixing of a commercial motion picture.

(b) *Scope of the exemption*.

(1) The sale at retail to or use by a producer of tangible personal property and services thereto that are directly used in the production of a commercial motion picture distributed to a national audience is exempt from Sales and Use Tax.

(i) Examples of tangible personal property that may be directly used in the production of a commercial motion picture include film and tape products; set construction equipment and supplies; props, including livestock, motor vehicles, books, paintings and other tangible personal property when photographed as part of a scene; wardrobe; grip and lighting equipment; cameras; camera mounts including tripods; jib arms; steadicams; cranes; dollies; generators; walkie talkies; boats, trains, helicopters, airplanes, vans, trucks or other motor vehicles specifically equipped for motion picture production or used solely for production activities, wardrobe and makeup trailers; special effects and stunt equipment; video assists, videotape recorders, cables and connectors; sound recording equipment; and editing, dubbing and mixing equipment.

(ii) Examples of services performed upon tangible personal property that may be directly used in the production of a commercial motion picture include sound or music recording; creation of special effects or animation on film, tape or other audiovisual medium, including animation drawings, inkings, paintings, tracing and celluloid "cels"; preparation of storyboards for either animation or live photography; technological modification, including

colorizing; computer graphics, including transfers of computer graphics on computer-generated media; sound dubbing or sound mixing; sound or music or effect transferring; film or tape editing or cutting; developing or processing of negative or positive prints; timing; coding or encoding; creation of opticals, titles, main or end credits; captioning; and medium transfers (for example film to tape, tape to tape).

(2) The exemption from Sales and Use Tax provided for property and services directly used in production of a commercial motion picture does not apply to either:

(i) The purchase of property used for administrative purposes. Administrative purposes includes activities such as sales promotions, general office work, ordering and receiving materials, making travel arrangements, the preparation of shooting schedules and the preparation of work and payroll records.

(ii) The purchase of catering services, as well as secretarial services, disinfecting or pest control services, building maintenance or cleaning services, help supply services, lawn care services, self-storage services and employment agency services, as those terms are defined under section 201 of the TRC (72 P. S. § 7201). However, charges for employment agency services provided by theatrical employment agencies and motion picture casting bureaus are not subject to Sales or Use Tax (72 P. S. § 7201(bb)).

(3) When a single unit of tangible personal property is used in two different activities, one of which is a direct use and the other of which is not, the property will not be exempted from tax unless the producer makes use of the property more than 50% of the time directly in the production phase of a commercial motion picture.

(c) *Property and services purchased for resale.*

(1) A producer may make certain purchases for resale. Materials and services on these materials that will become a component of the product sold may be purchased exempt from tax, if a properly completed exemption certificate is issued to the supplier.

(2) For example, the original negative is the medium (film, tape, and the like) first used in the camera when photographing live action, special effects, animation, computer generated images, and the like. The developing of the film is a service that is purchased for resale because the producer is selling the film on which the service is being performed.

(d) *Installation, repair, maintenance and service of tangible personal property*. Charges to install, repair, maintain or service equipment, parts, tools and supplies directly used in the production of a commercial motion picture are exempt from sales and use taxes. Examples of these services include:

(1) Installing illumination lighting and sound equipment.

(2) Installing special effects riggings.

(3) Connecting wiring from electrical sources to production equipment.

(e) *Utilities used in production*. Utilities used directly and exclusively in the production of a commercial motion picture are exempt from tax. Examples of taxable and exempt electricity usage:

(1) Electricity used for set lighting is exempt.

(2) Electricity used in a mobile trailer maintained for actors is taxable.

(3) Electricity used to light and heat a temporary or permanent office is taxable.

(f) *Exemption certificates*.

(1) A producer shall furnish a properly completed exemption certificate as required under 12 Pa. Code § 33.1 (relating to form required) to its vendors when claiming an exemption from the sale at retail or use of the following:

(i) Tangible personal property that becomes a physical component part of the commercial motion picture and is actually transferred to the customer.

(ii) Production machinery, equipment, parts, tools or supplies used or consumed directly in the production of a motion picture.

(iii) Repairs and maintenance services purchased by a producer which are performed upon production machinery, equipment, parts, tools or supplies used or consumed directly in the production of a motion picture.

(2) The exemption certificate shall be annotated in the space marked "other" as follows: "Property or services will be resold or shall be directly used or consumed in the production of a commercial motion picture under section 204(54) of the TRC (72 P. S. § 7204(54)).

CHAPTER 60. SALES AND USE TAX PRONOUNCEMENTS—STATEMENTS OF POLICY

§ 60.22. (Reserved).

[Pa.B. Doc. No. 00-1163. Filed for public inspection July 7, 2000, 9:00 a.m.]