RULES AND REGULATIONS

Title 7—AGRICULTURE

DEPARTMENT OF AGRICULTURE

[7 PA. CODE CHS. 3 AND 7]

Health Requirements for Importation and Intrastate Transportation of Animals and Brucellosis

The Department of Agriculture (Department), under the authority conferred by 3 Pa.C.S. §§ 2301—2389 (relating to Domestic Animal Law) (act) amends §§ 3.103, 7.1, 7.47 and 7.72—7.74 to read as set forth in Annex A.

Authority

The Department has the power and authority to amend and adopt these regulations. This authority includes:

(1) The general duty to implement the policy of section 2302 of the act (relating to finding, policy and purpose), which is to ". . . assure the health and welfare of animals kept in captivity, to prevent and control diseases and dangerous substances that may threaten the safety of animals and humans, and to provide for desirable management practices for the production, keeping and use of domestic animals."

(2) The general authority to regulate the keeping and handling of domestic animals to exclude or contain dangerous transmissible diseases and hazardous substances and to test and treat domestic animals exposed to or contracting a dangerous transmissible disease or hazardous substance as delineated in sections 2305 and 2329 of the act (relating to keeping and handling of domestic animals; and quarantine).

(3) The specific authority and duties conferred upon the Department by sections 2321, 2323 and 2325 of the act (relating to dangerous transmissible diseases; health requirements; and use of biologicals, antibiotics, genetic material, chemicals, diagnostic agents and other substances). Section 2321(a) of the act designates Brucellosis and Equine Infectious Anemia (EIA) as dangerous transmissible diseases. Section 2321(e) of the act confers upon the Department the power to "establish regulations addressing the specific . . prevention, . . . testing, control and eradication measures which it determines are necessary with respect to any dangerous transmissible disease." Section 2325 of the act further defines the Department's authority to prescribe testing techniques and regulate the use of vaccines. Section 2323 of the act sets forth the Department's authority to establish health standards for the importation or intrastate movement of domestic animals in this Commonwealth.

Need for the Rulemaking

These amendments are necessary to update the Department's policy on diagnostic testing techniques used to detect the presence of EIA and the use of vaccines intended for the prevention of Brucellosis. Section 2302 of the act states that "animal health is of major economic interest in this Commonwealth." In addition, section 2302 of the act delineates the policy and purpose of the act. The policy of the act is to "assure the health and welfare of animals kept in captivity, to prevent and control diseases . . . and to provide for desirable management practices for the production, keeping and use of domestic animals."

EIA

The EIA is an infectious disease of equines caused by a virus. The current regulations in § 3.103 (relating to test methods), require equidae imported into this Commonwealth, for other than immediate slaughter, to be negative to an agar gel immunodiffusion blood test (Coggins Test). While the Coggins Test is a proven and effective testing device for EIA, a new and reportedly as effective test has been developed. This new test is an enzyme linked immunosorbent assay test (commonly called the ELISA Test). The ELISA Test is a screening device that recognizes the presence of the virus responsible for EIA. The ELISA Test is widely used to test for the presence of viruses and foreign substances in equidae. It is a scientifically proven and accepted test and is used to screen equidae for EIA in surrounding states. The inability of the Commonwealth to accept the results of ELISA Tests has placed it at a great disadvantage with regard to surrounding states. Horse owners who wish to transport their horses into this Commonwealth are required to have a Coggins Test administered and to wait for the results of that test even if they have proof of a negative ELISA Test for EIA. Such a delay discourages owners from breeding, racing or carrying on other activities economically beneficial to this Commonwealth and the equine industry in this Commonwealth. Given the fact that the ELISA Test has been shown to be an effective screening device for EIA, requiring a Coggins Test in addition to or instead of an ELISA Test and the delays caused by it are unnecessary to protect the health of the equine population in this Commonwealth and are economically inefficient. Therefore, the Department proposed to amend Chapter 3 to allow for the use and acceptance of both the Coggins Test and the ELISA Test.

Brucellosis

Brucellosis is an infectious disease of animals and man that can cause premature birthing or miscarriages in animals and undulating or remittent fevers and joint swelling in humans. A recent advance in vaccine technology has rendered the current vaccine—Strain 19 brucella abortus—prescribed by regulation obsolete and relatively inefficient in the management of this disease. Until recently, Strain 19 brucella abortus (Strain 19) vaccine was the standard vaccine used to vaccinate for Brucellosis in the United States. While Strain 19 vaccine has served the domestic animal industry well, it has two disadvantages. Its major disadvantage is causing a significant number of animals to react positively to the standard Brucellosis tests (false positives). This disadvantage has limited Strain 19 vaccine's usefulness and has slowed eradication and control efforts. The second disadvantage suffered by Strain 19 vaccine is that it limits the age at which domestic animals can be vaccinated.

A newly developed vaccine—Strain RB 51—is now available and approved for use. Strain RB 51 vaccine is reportedly as effective as Strain 19 vaccine and does not cause a reaction, or false positive, with the standard Brucellosis tests. In addition, Strain RB 51 will allow the Department to broaden the age range for vaccination of calves from the current 4 to 8 months of age range to a 4 to 12 months of age range. A prompt and expedited application of this new technology will provide increased protection to this Commonwealth's extensive cattle population and will decrease the costs incurred by the Department to administer additional tests when false positives

occur. Therefore, the Department proposes that the use of Strain 19 be discontinued and that Stain RB 51 be used for the routine vaccination of cattle and any other species of domestic animal for which the vaccine is approved.

In the interest of continuing to carry out the policy of the act, to assure the health and welfare of domestic animals and thereby secure the economic well being of the domestic animal industry, the Department proposes to amend §§ 3.1, 3.103, 7.1, 7.47 and 7.72—7.74 to effectuate these changes referred to in this Preamble.

In summary, the Department is satisfied there is a need for the regulations, and that they are otherwise consistent with Executive Order 1996-1, "Regulatory Review and Promulgation."

Comments

Notice of proposed rulemaking was published at 30 Pa.B. 768 (February 12, 2000). The notice of proposed rulemaking did not contain a statement regarding the length of the public comment period. A notice, clarifying the length of the public comment period, providing that the public comment period was the statutorily required 30 days, was published at 30 Pa.B. 1255 (March 4, 2000).

Comments were received from the Independent Regulatory Review Commission (IRRC).

Comment: IRRC objected to two provisions of the proposed amendments, stating that the provisions were not consistent with the Department's statutory authority and the intent of the General Assembly. The sections objected to were §§ 3.103(d) and 7.72(a) (relating to test methods; and procedure). Both sections provide in whole or in part, that the Secretary may designate a new testing procedure or vaccine by publishing an order in the *Pennsylvania Bulletin*, provided the proposed rulemaking is published within 1 year of the order.

Response: Upon further review, the Department agrees with this objection and will delete any language regarding the Secretary's ability to designate a new test or vaccine through issuance and publication of an order in the *Pennsylvania Bulletin*. Although the Department believes it is inconsistent with the purpose of the act to require the Department to wait until regulations are published to approve and use a new and effective vaccine or testing technique which could eradicate, prevent or control diseases and thereby assure the health and welfare of domestic animals and humans, the regulatory provisions the Department seeks to amend implement section 2325 of the act, which requires the Department to promulgate regulations governing diagnostic agents and vaccines.

Comment: IRRC commented that §§ 3.103(c) and 7.72(c) need to be clarified. IRRC's concern is that neither section sets forth the procedure the regulated community must follow to comply with those sections of the regulations. IRRC suggested the regulations should outline the procedure to be followed or provide a cross reference to an existing regulation if there is one.

Response: The Department agrees with this comment. The Department has revised §§ 3.103(c) and 7.72(c) to address IRRC's concerns. A person seeking permission to import an equid with inconsistent tests results into this Commonwealth or seeking permission for the vaccination of cattle over the age of 12 months must do so in writing on a form provided by the Department, and must state the reasons for and facts relating to the request. The State Veterinarian will then provide a written approval or denial of the request. In addition, the Department has added the same language to § 7.72(b), which also required approval of the State Veterinarian.

Comment: IRRC had an additional comment, again concerning clarity, with regard to § 7.72(c) (relating to official vaccination). The language of the section states that a vaccination given to cattle over 12 months of age is not considered an official vaccination. IRRC suggested that the Department either cross reference the Federal code of regulations, at 9 CFR 78.1 (relating to definitions) or define "official vaccination."

Response: The Department agrees that the term "official vaccination" and what constitutes an "official vaccination" needs to be clarified. To clarify this term the Department has added three definitions to § 7.1 (relating to definitions). The Department defines "official vaccination," "official calfhood vaccination" and "adult vaccination." An "adult vaccination" may only be given and will only constitute an "official vaccination" with the express written permission of the State Veterinarian. The Department has also outlined the procedure for obtaining the express written permission of the State Veterinarian.

Comment: IRRC pointed out a typographical error in § 7.73(c). IRRC suggested the Department should delete "or" from the last sentence, leaving "and" in its place.

Response: This is not a typographical error. The identification on the vaccination report may be the official State vaccination tag, the breed registration number, the registration number of the dam or any combination thereof. The Department has changed the wording of the sentence to better reflect this intent.

Fiscal Impact

Commonwealth

The final-form regulations will impose minimal costs and have minimal fiscal impact upon the Commonwealth. The Commonwealth will realize a reduction in costs as a result of the use of RB 51 vaccine. Strain 19 vaccine causes a number of cattle to test falsely positive each year. The cost of each false positive test is approximately ($400) for the Commonwealth and ($300) for the producer. These falsely positive tests will not occur in cattle vaccinated with RB 51 vaccine. Savings relative to the ELISA Test are not easily quantified. However, acceptance of the ELISA Test will eliminate the cost of performing a Coggins Test on animals, which have already been screened for EIA through the use of an ELISA Test. The Department will benefit from not having to conduct additional testing. In addition, it will result in a decreased regulatory workload, since there will be fewer import violations to investigate and manage.

Political Subdivisions

The final-form regulations will impose no costs and have no fiscal impact upon political subdivisions.

Private Sector

The final-form regulations will impose minimal costs on private sector organizations and individuals. There will not be an increased cost to the regulated community. Cost of vaccinations will be essentially the same. Approximately 30 cattle test falsely positive each year. Each false positive case costs the farmer approximately $300 in special handling, early culling and reduced value of the animal. These costs will be eliminated with the use of RB 51 vaccine. The amendments will potentially affect approximately 1,800 accredited veterinarians who may be required to vaccinate calves for brucellosis. However, these veterinarians, Pennsylvania and the industry would

eventually be forced to use RB 51 vaccine because, the same company makes both the "new" and "old" vaccines and Strain 19 vaccine is being phased out of use throughout the United States. Adoption of the ELISA Test will not result in any increased cost. Pleasure horse and racehorse owners and trainers and equine veterinarians will be required to comply. However, the ELISA Test is accepted and used by a majority of states and therefore, the majority of owners, trainers and other persons in the equine industry already use and comply with ELISA Testing. There is a potential savings in terms of the elimination of additional testing and reduced turnaround time for test results. In many cases, horse owners have been required to conduct the additional Coggins Test at their expense. Also, there have been instances when horses that were entered in a race were denied entrance to the track because of failure to meet Pennsylvania's rigid and unnecessary EIA requirements. The instances result in lost opportunities to race and to recoup training expenses.

General Public

The final-form regulations will impose no costs and have no fiscal impact on the general public. The farm community and the general public should benefit through reduced costs to the industry and the Commonwealth. The continued use of Strain 19 vaccine would result in continued low, but significant numbers, of false positive animals, which will continue to be a regulatory burden and expense to the cattle industry and the Department. Strain 19 brucellosis vaccine can also cause infection in humans and is a health risk that veterinary practitioners have faced over the years. Delay in changing the EIA import requirements will perpetuate the ongoing problem of horses which are entered to race being turned away from the track, and will continue to impose an undue hardship on horse owners and the equine industry in this Commonwealth. The equine industry in this Commonwealth will benefit by coming into conformity with surrounding states with regard to accepted testing and screening techniques. Decreased costs and increased opportunities in both industries will benefit the general public.

Paperwork Requirements

The final-form regulations will not result in an appreciable increase of paperwork. The Department has already developed the appropriate forms and procedures to administer the EIA testing program and the Brucellosis vaccination program. Only small changes will be required.

Contact Person

Further information is available by contacting the Department of Agriculture, Bureau of Animal Health and Diagnostic Services, 2301 North Cameron Street, Harrisburg, PA 17110-9408; Attn: Dr. Phillip Debok (717) 783-8555.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on January 31, 2000, the Department submitted a copy of the notice of proposed rulemaking published at 30 Pa.B. 768 (February 12, 2000), to IRRC and to the Chairpersons of the House Agriculture and Rural Affairs Committee and the Senate Agriculture and Rural Affairs Committee for review and comment.

In compliance with section 5(c) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of all comments received, as well as other documentation. In preparing these final-form regulations, the Department 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)), these final-form regulations were deemed approved by the House and Senate Committees on October 4, 2000. Under section 5.1(e) of the Regulatory Review Act, IRRC met on October 19, 2000, and approved the final-form amendments.

Findings

The Department finds that:

(1) Public notice of its intention to adopt the regulations encompassed by this order 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 their attendant regulations in 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and all comments received were considered.

(3) The modifications that were made to these final-form regulations in response to comments received do not enlarge the purpose of the proposed rulemaking published at 30 Pa.B. 768.

(4) The adoption of the final-form regulations in the manner provided in this order is necessary and appropriate for the administration of the authorizing statute.

Order

The Department, acting under authority of the authorizing statute, orders the following:

(a) The regulations of the Department, 7 Pa. Code Chapters 3 and 7, are amended by amending §§ 3.1, 3.103, 7.1, 7.47 and 7.72—7.74 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

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

(c) The Secretary of Agriculture 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*.

SAMUEL E. HAYES, Jr.,
Secretary

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 30 Pa.B. 5807 (November 4, 2000).)

Fiscal Note: Fiscal Note 2-128 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 7. AGRICULTURE

PART I. BUREAU OF ANIMAL HEALTH AND DIAGNOSTIC SERVICES

CHAPTER 3. HEALTH REQUIREMENTS FOR IMPORTATION AND INTRASTATE TRANSPORTATION OF ANIMALS

Subchapter A. GENERAL PROVISIONS

§ 3.1. Definitions.

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

* * * * *

Pennsylvania State Veterinarian—The Director of the Bureau of Animal Health and Diagnostic Services of the Department.

* * * * *

Secretary—The Secretary of the Department.

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Subchapter D. IMPORTATION OF HORSES, MULES, ASSES AND OTHER EQUIDAE

§ 3.103. Test methods.

(a) *Testing required*. Equidae imported into this Commonwealth for other than immediate slaughter shall be negative to either of the following:

(1) An official agar gel immunodiffusion blood test (commonly called the Coggins Test), conducted by a Federally approved laboratory within 12 months prior to date of entry.

(2) An enzyme-linked immunosorbent assay test (commonly called the ELISA Test), conducted by a Federally approved laboratory within 12 months prior to date of entry.

(b) *Documentation required*. A copy of the official test shall accompany the animal to its final destination.

(c) *Inconsistent results*. If an equid receives more than one of the tests described in subsection (a), and one test shows a negative result and another a positive result, the equid may not be imported into this Commonwealth unless permission is granted by the Pennsylvania State Veterinarian.

(1) A person seeking permission shall do so in writing on a form provided by the Department setting forth the test dates, results of the tests and any other pertinent information.

(2) The Pennsylvania State Veterinarian may request additional information as may be necessary to assure the health of the animal and to prevent and control diseases and dangerous substances that may threaten the health and safety of animals and humans.

(3) The Pennsylvania State Veterinarian will provide a written approval or denial of a request within 3 working days of receiving the written request and all necessary information pertaining thereto.

(d) *Exception*. Foals under 6 months of age, accompanied by dam with negative agar gel immunodiffusion test or a negative enzyme-linked immunosorbent assay test do not require a negative test.

CHAPTER 7. BRUCELLOSIS REGULATIONS

Subchapter A. GENERAL PROVISIONS

§ 7.1. Definitions.

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

Accredited veterinarian—A licensed veterinarian jointly accredited by APHIS-USDA and the Department in the state the veterinarian is licensed to perform official duties on behalf of APHIS-USDA or the Department. See accreditation standards established by 9 CFR Parts 160 and 161 (relating to definition of terms; and requirements and standards for accredited veterinarians and suspension or revocation of such accreditation).

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Official adult vaccination—Strain RB 51 vaccine administered to female cattle or bison over the age of 12 months (365 days).

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Official calfhood vaccination—Strain RB 51 vaccine administered to female cattle or bison from 4 to 12 months of age.

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Official vaccination—An official calfhood or adult vaccination.

* * * * *

Pennsylvania State Veterinarian—The Director of the Bureau of Animal Health and Diagnostic Services of the Department.

* * * * *

Secretary—The Secretary of the Department.

* * * * *

Subchapter E. INDIVIDUAL CERTIFIED BRUCELLOSIS HERD PLAN

§ 7.47. Herd additions.

(a) Additions to herds shall be accompanied with valid health charts and verified by an accredited veterinarian on the record of herd change and meet the requirements of Chapter 3, Subchapters B and I (relating to importation of cattle, goats and buffalo; and intrastate transportation of cattle, goats and buffalo).

(b) Progeny of the herd shall be accompanied with a signed statement by the owner and veterinarian indicating that these animals are progeny of the herd.

(c) Animals officially vaccinated in accordance with Subchapter H (relating to vaccination) and under 18 months of age, may enter a herd without a blood test but shall be accompanied by a health certificate.

Subchapter H. VACCINATION

§ 7.72. Procedure.

(a) *Designation of vaccine.* Except as authorized under subsection (b), Strain RB 51 vaccine is hereby designated the only brucellosis vaccine authorized for use within this Commonwealth.

(b) *State Veterinarian approval required.* Strain 19 vaccine may only be used with the express written permission of the Pennsylvania State Veterinarian. Requests for permission to administer Strain 19 vaccine shall be made in writing on a form provided by the Department.

(1) The Pennsylvania State Veterinarian may request additional information as may be necessary to assure the health of the animal and to prevent and control diseases and dangerous substances that may threaten the health and safety of animals and humans.

(2) The Pennsylvania State Veterinarian will provide a written approval or denial of a request within 3 working days of receiving the written request and the necessary information pertaining thereto.

(c) *Official vaccination.* An official vaccination shall consist of Strain RB 51 vaccine administered to female cattle or bison from 4 through 12 months of age (120-365 days). A vaccination of female cattle or bison over the age of 12 months (365 days) will not be considered an official vaccination unless done with the guidance and express written permission of the Pennsylvania State Veterinar-

ian. Requests to administer an official adult vaccination shall be made in writing on a form provided by the Department.

(1) The request shall set forth the reasons for the request, the vaccine to be administered and the age of the animal at the time of the request.

(2) The Pennsylvania State Veterinarian may request additional information as may be necessary to assure the health of the animal and to prevent and control diseases and dangerous substances that may threaten the health and safety of animals and humans.

(3) The Pennsylvania State Veterinarian will provide a written approval or denial of the request within 3 working days of receiving the written request and the necessary information pertaining thereto.

(d) *Veterinarian to administer vaccine.* An official vaccination may only be administered by an accredited veterinarian.

(e) *Veterinarian fees.* Accredited veterinarians shall be permitted to charge the herd owner for their services and the vaccine.

§ 7.73. Identification of officially vaccinated animals.

(a) *Tattoo required.* Veterinarians administering official calfhood or official adult vaccinations shall tattoo in the right ear of the animal the letter "R," followed by a United States Registered "V" shield followed by the last number of the year.

(b) *Official state vaccination tag or official breed registry tattoo required.* An orange official State vaccination tag shall be placed in the right ear. If the vaccinated animal has an official breed registry tattoo, an official State vaccination tag is not required.

(c) *Identification on vaccination report.* Officially vaccinated animals shall be identified on the vaccination report by date of birth, and an official State vaccination tag, their breed registration number or registration number of the dam, or both.

§ 7.74. Vaccination report.

Vaccinations shall be reported to the Department within 30 days following vaccination of the animal. The reports shall be made on forms provided by the Department. The original and one copy shall be forwarded to the Department, one copy given to the herd owner for the owner's records and one copy retained by the veterinarian.

[Pa.B. Doc. No. 00-2057. Filed for public inspection December 1, 2000, 9:00 a.m.]

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 93]

Stream Redesignation (Trout Run)

The Environmental Quality Board (Board) by this order amends § 93.9t (relating to Drainage List T) to read as set forth in Annex A.

This order was adopted by the Board at its meeting of April 18, 2000.

A. *Effective Date*

This amendment is effective upon publication in the *Pennsylvania Bulletin* as final-form rulemaking.

B. *Contact Persons*

For further information, contact Edward R. Brezina, Chief, Division of Water Quality Assessment and Standards, Bureau of Watershed Conservation, 10th Floor, Rachel Carson State Office Building, P. O. Box 8555, 400 Market Street, Harrisburg, PA 17105-8555, (717) 787-9637 or William J. Gerlach, Assistant Counsel, Bureau of Regulatory Counsel, 9th Floor, Rachel Carson State Office Building, P. O. Box 8464, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available electronically through the Department of Environmental Protection's (Department) website (http://www.dep.state.pa.us).

C. *Statutory and Regulatory Authority*

This final-form rulemaking is being made under the authority of the following acts: sections 5(b)(1) and 402 of The Clean Streams Law (35 P. S. §§ 691.5(b)(1) and 691.402) and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20), which grant to the Board the authority to develop and adopt rules and regulations to implement the provisions of The Clean Streams Law. In addition, the Federal regulation in 40 CFR 131.32 (relating to Pennsylvania) sets forth certain requirements for portions of the Commonwealth's antidegradation program.

D. *Background of the Amendments*

The Commonwealth's Water Quality Standards, which are set forth in part in Chapter 93 (relating to water quality standards) implement sections 5 and 402 of The Clean Streams Law and section 303 of the Federal Clean Water Act (33 U.S.C.A. § 1313). Water quality standards are in-stream water quality goals that are implemented by imposing specific regulatory requirements (such as treatment requirements and effluent limits) on individual sources of pollution.

The Department considers candidates for High Quality (HQ) or Exceptional Value (EV) Waters designation in its ongoing review of water quality standards. In general, HQ and EV waters shall be maintained at their existing quality, and wastewater treatment requirements shall meet existing and designated water uses. The Department may identify candidates during routine waterbody investigations. Requests for consideration may also be initiated by other agencies, such as the Fish and Boat Commission (FBC). In addition, organizations, businesses or individuals may submit a rulemaking petition to the Board.

The Department evaluated Trout Run, Westmoreland County, in response to a rulemaking petition from the Blairsville Municipal Authority. An aquatic survey was conducted by the Department's Bureau of Watershed Conservation. The physical, chemical and biological characteristics of Trout Run were evaluated to determine the appropriateness of the current and requested designations using applicable regulatory criteria and definitions.

Based upon the data collected in this survey, the Board has made the designations set forth in Annex A.

A copy of the Department's stream evaluation report is available from Edward R. Brezina whose address and telephone number are listed in Section B of this Preamble.

E. *Summary of Changes and Comments and Responses on the Proposed Rulemaking*

The Board approved the proposed rulemaking on January 20, 1998. At that time, Trout Run was part of the Buck Hill Creek, et al. package. The Department separated Trout Run from that package for final-form rulemaking.

The proposal, as part of the Buck Hill Creek, et al. package, was published at 28 Pa.B. 1635 (April 4, 1998) with provision for a 60-day public comment period that closed on June 3, 1998. A request for a public hearing was received during the public comment period. As a result, a Department public meeting and a Board public hearing were held at the Derry High School, Derry, on September 1, 1998. An additional public comment period, ending September 15, was also provided. Comments were received from a total of 14 commentators and the Independent Regulatory Review Commission (IRRC).

A total of eight of the 14 public comments were in support of the proposed redesignation of the upper portion of Trout Run. These comments were provided by the general public, the Hillside Community Association, the Blairsville Municipal Authority, the Mid-Atlantic Karst Conservancy, the Loyalhanna Grotto of the National Speleological Society, the Loyalhanna Watershed Association and the Chestnut Ridge Conservancy.

IRRC commented that the Department relies on the selection criteria in the "Special Protection Waters Implementation Handbook" to arrive at stream reclassifications. They noted that the handbook is only a guidance document. They also stated that the proposed redesignation should more appropriately cite statutes and regulations rather than the handbook. A number of commentators and IRRC indicated that the proposed redesignation was premature because the Department's antidegradation regulations were undergoing revision. Those revisions have been completed, with Board approval on May 19, 1999, and publication at 29 Pa.B. 3720 (July 17, 1999). The "biological test" used as the basis for the recommended redesignation of Trout Run has been incorporated into the antidegradation regulation in § 93.4b(a)(2) and (b)(1)(v) (relating to qualifying as High Quantity or Exceptional Value Waters).

Several commentators asserted that reclassification based on one water chemistry grab sample used to represent 4.6 stream miles is not scientifically defensible. The redesignation is not based on water chemistry. It is based on the biological test in the antidegradation regulations, and this portion of Trout Run attains a 100% comparison to an EV reference station. The indigenous aquatic community is a good indicator of long-term water quality because the organisms complete portions of their life cycle in the stream. Water samples for chemical analysis were collected during the stream evaluation to provide a "snapshot" of water quality conditions, but these data do not form a basis for the recommended redesignation.

Several commentators questioned the use of Indian Creek as the reference station in the evaluation of Trout Run since Indian Creek is classified as HQ. As stated in the evaluation report, Trout Run was compared to Camp Run, a tributary to Indian Creek. Camp Run is listed separately in Chapter 93 as EV, and is therefore an appropriate reference station.

Two commentators believed the present Cold Water Fishes (CWF) classification is more than sufficient to protect the existing potable water supply and indigenous animal and plant life in the watershed. The Department's water quality standards are designed to protect the designated fish and aquatic life use, a number of water supply uses including potable water supply, and a number of recreational uses. While CWF may be sufficient to protect Trout Run, the headwaters of Trout Run meet the requirement of the biological test in the antidegradation regulation for designation as EV.

A number of commentators stated the opinion that the proposed redesignation would halt economic growth in the area generally, as well as prevent planned development in this watershed in particular. The Department's antidegradation regulation does not preclude development. It does require that existing water quality be maintained in HQ and EV Waters. Any proposed development must include consideration of nondischarge alternatives and appropriate controls to assure that existing quality is maintained.

The IRRC recommended that the Board analyze the economic impact of the regulation. The Federal Clean Water Act does not allow states to consider social and economic factors in developing water quality standards (including designated uses). Each water body is evaluated using the Department's regulatory criteria, and an appropriate classification is developed.

This regulatory change will allow wastewater treatment requirements for dischargers to Trout Run to be consistent with the water uses to be protected. This regulatory amendment does not contain any standards or requirements that exceed requirements of the companion Federal regulations.

F. *Benefits, Costs and Compliance*

Executive Order 1996-1 requires a cost /benefit analysis of the amendments.

1. *Benefits*—Overall, the citizens of this Commonwealth will benefit from the recommended change because it will reflect the appropriate designated use and maintain the most appropriate degree of protection for Trout Run in accordance with the existing use.

2. *Compliance Costs*—Generally, the changes should have no fiscal impact on, or create additional compliance costs for the Commonwealth or its political subdivisions. The stream is already protected at its existing use, and therefore the designated use change will have no impact on treatment requirements. No costs will be imposed directly upon local government by this recommendation. Political subdivisions that add a new sewage treatment plant in the basin, or expand an existing facility, may experience changes in cost as noted in the discussion of impacts on the private sector.

Persons conducting or proposing activities or projects that result in a discharge to the stream shall comply with the regulatory requirements relating to designated and existing uses. These persons could be adversely affected if they add a new or expanded discharge since they may need to provide a higher level of treatment to meet the designated and existing uses of the stream. These increased costs may take the form of higher engineering,

construction or operating costs for wastewater treatment facilities. Treatment costs are site-specific and may depend upon the size of the discharge in relation to the size of the stream and many other factors. It is therefore not possible to precisely predict the actual change in costs.

3. *Compliance Assistance Plan*—The regulatory revision has been developed as part of an established program that has been implemented by the Department since the early 1980's. The revision is consistent with and based on existing Department regulations. The revision extends additional protection to a waterbody that exhibits exceptional water quality and is consistent with antidegradation requirements established by the Federal Clean Water Act and The Clean Streams Law. Surface waters in this Commonwealth are afforded a minimum level of protection through compliance with the water quality standards, which prevent pollution and protect existing water uses.

The amendment will be implemented through the National Pollutant Discharge Elimination System (NPDES) permitting program since the stream use designation is a basis for determining allowable stream discharge effluent limitations. Permit conditions are established to assure water quality criteria are achieved and designated and existing uses are protected. New or expanding dischargers with water quality based effluent limitations are required to provide effluent treatment according to the water quality criteria associated with existing uses and designated water uses.

4. *Paperwork Requirements*—The regulatory revision should have no direct paperwork impact on the Commonwealth, local governments and political subdivisions, or the private sector. The regulatory revision is based on existing Department regulations and simply mirrors the existing use protection that is already in place. There may be some indirect paperwork requirements for new dischargers. For example, NPDES general permits are not currently available for new discharges to EV or HQ streams. Thus an individual permit, and its associated additional paperwork, would be required.

G. *Pollution Prevention*

The antidegradation program is a major pollution prevention tool because its objective is to prevent degradation by maintaining and protecting existing water quality and existing uses. Although the antidegradation program does not prohibit new or expanded wastewater discharges, nondischarge alternatives are encouraged, and required, when environmentally sound and cost effective. Nondischarge alternatives, when implemented, remove impacts to surface water and reduce the overall level of pollution to the environment by remediation of the effluent through the soil.

H. *Sunset Review*

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

I. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 23, 1998, the Department submitted a copy of the notice of proposed rulemaking, published at 28 Pa.B. 1635, to IRRC and to the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of the comments received, as well as other documentation. In preparing this final-form regulation, the Department has considered comments received from IRRC and the public. The Committees did not provide comments on the proposed rulemaking.

This final-form regulation was deemed approved by the Senate and House Environmental Resources and Energy Committees on May 22, 2000. IRRC met on May 25, 2000, and disapproved the amendment in accordance with section 6(a) of the Regulatory Review Act (71 P. S. § 745.6(a)). Under section 7(b) of the Regulatory Review Act (71 P. S. § 745.7(b)), the Department determined it was desirable to implement the final-form regulation without revisions or modifications recommended by IRRC and submitted a report to the House and Senate Committees on May 31, 2000. On June 6, 2000, the Senate Committee passed a resolution disapproving the final-form rulemaking; however, no further action was taken during the remainder of the Committees' review period which ended on October 10, 2000.

J. *Findings*

The Board finds that:

(1) Public notice of proposed rulemaking was 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 regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law. In addition, a Board hearing was held and an additional public comment period was provided. All comments were considered.

(3) This final-form regulation does not enlarge the purpose of the proposal published at 28 Pa.B. 1635.

(4) This final-form regulation is necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C this Preamble.

K. *Order*

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 25 Pa. Code Chapter 93, are amended by amending § 93.9t to read as set forth in Annex A, with ellipses referring to the existing text of the regulation.

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

(c) The Chairperson shall submit this order and Annex A to IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

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

JAMES M. SEIF,
Chairperson

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 30 Pa.B. 2965 (June 10, 2000).)

Fiscal Note: 7-333B. No fiscal impact; (8) recommends adoption.

This regulation was previously published as 7-333. This has now been split into 7-333A, which designates water uses and water quality criteria in various streams in Monroe, Lebanon, Berks, Montgomery, Cameron and Somerset Counties; and 7-333B which designates water uses and water quality criteria for Trout Run in Westmoreland County.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE II. WATER RESOURCES

CHAPTER 93. WATER QUALITY STANDARDS

§ 93.9t. Drainage List T.

Ohio River Basin in Pennsylvania

Kiskiminetas River

Stream	*Zone*	*County*	*Water Uses Protected*	*Exceptions To Specific Criteria*
	* * * * *			
5—McGee Run	Main Stem, Farthest Upstream Crossing of Derry Borough Border to Mouth	Westmoreland	TSF	None
	* * * * *			
6—Trout Run	Basin, source to inlet of Blairsville Reservoir	Westmoreland	EV	None
6—Trout Run	Basin, inlet of Blairsville Reservoir to Mouth	Westmoreland	CWF	None
	* * * * *			

[Pa.B. Doc. No. 00-2058. Filed for public inspection December 1, 2000, 9:00 a.m.]

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE BOARD OF ACCOUNTANCY

[49 PA. CODE CH. 11]

Peer Review

The State Board of Accountancy (Board), by this order adds §§ 11.81—11.86 (relating to peer review) to read as set forth in Annex A.

Sections 11.81—11.86 implement the peer review requirements of section 8.9 of the CPA Law (63 P. S. § 9.8i), which was added by the act of December 4, 1996 (P. L. 851, No. 140) (Act 140). Specifically, the regulations clarify deadlines for peer review compliance and the requirements for peer review exemptions; establish qualifications for peer review administering organizations and peer reviewers; adopt peer review standards; provide for confidentiality of peer review reports; and define relevant terms.

Summary of Comments and Responses to Proposed Rulemaking

The Board published a notice of proposed rulemaking at 29 Pa.B. 4448 (August 21, 1999) following which the Board entertained public comment for 30 days. The Board received comments from the Pennsylvania Institute of Certified Public Accountants (PICPA), which supported the proposed regulations, and the Pennsylvania Society of Public Accountants (PSPA), which objected to parts of the proposed amendments.

The Board received comments from the House Professional Licensure Committee (House Committee) on October 6, 1999, and the Independent Regulatory Review Commission (IRRC) on October 22, 1999, as part of their review of the proposed regulations under the Regulatory Review Act (71 P. S. §§ 745.1—745.15). The Board did not receive comments from the Senate Committee on Consumer Protection and Professional Licensure (Senate Committee), which also reviewed the proposed amendments under the Regulatory Review Act.

Following is a summary of the comments that the Board received during proposed rulemaking and of the changes the Board has made to the regulations in response to the comments.

§ 11.81. (Definitions).

Section 11.81 defines terms used in the peer review regulations. At the suggestion of IRRC, the Board has added definitions for "audit engagement," "review engagement" and "sole practitioner." An audit engagement is an audit as defined in the Statement on Auditing Standards of the American Institute of Certified Public Accountants (AICPA); a review engagement is a review as defined in

the AICPA's Statement of Standards on Accounting and Review Services (SSARS); and a sole practitioner is a licensed certified public accountant or licensed public accountant who practices public accounting on his own behalf. (AICPA and other acronyms used by the Board throughout Chapter 11 are defined in existing § 11.1 (relating to definitions).)

In addition, the Board has added definitions of "onsite peer review" and "offsite peer review" to § 11.81 to conform to recently approved changes in terminology in the AICPA's Standards for Performing and Reporting on Peer Reviews (AICPA Peer Review Standards). Section 8.9(d)(1) and (2) of the CPA Law (63 P. S. § 9.8i(d)(1) and (2)), provides that the peer review of a nonexempt public accounting firm that performs audit engagements shall be an "onsite review," while the peer review of a nonexempt public accounting firm that performs review engagements shall be an "offsite review." Section 8.9(d)(1) and (2) of the CPA Law also describes in general terms the scope of an onsite review and an offsite review; one of the differences between the two types of peer reviews is that an offsite review, unlike an onsite review, does not include a study of associated working papers. The terminology and descriptions used in section 8.9(d)(1) and (2) of the CPA Law are consistent with the current AICPA Peer Review Standards, which were also in effect when section 8.9 was added to the CPA Law in 1996. The Board's regulations adopt the AICPA Peer Review Standards. On October 5, 1999, the AICPA Peer Review Board approved revisions to the AICPA Peer Review Standards that will take effect January 1, 2001. The revised AICPA Peer Review Standards redesignate the terms onsite review and offsite review as "system review" and "engagement review," respectively, and also enlarge the scope of the offsite, or engagement, review to include a study of associated working papers. To apprise firms how the revisions to the AICPA Peer Review Standards relate to the peer requirements of the CPA Law and to clarify that the revisions do not alter the requirements of the CPA Law, the Board has defined onsite peer review as a system review under the AICPA's Peer Review Standards and has defined offsite peer review as an engagement review under the AICPA's Peer Review Standards except for the study of associated working papers.

§ 11.82. (Effective dates for peer review compliance; proof of compliance or exemption).

Proposed § 11.82(a) provided that a nonexempt firm that performs an audit engagement after May 1, 1998, shall complete a peer review before the license biennium that begins May 1, 2000, while proposed § 11.82(b) provided that a nonexempt firm that performs a review engagement after May 1, 1998, shall complete a peer review before the license biennium that begins May 1, 2004. In its notice of proposed rulemaking, the Board noted that there appeared to be conflicting language in the CPA Law regarding the deadlines for peer review compliance. Section 8.9(l)(2) of the CPA Law provides: "This section [relating to peer review] shall not become applicable to firms and no firm shall be required to undergo a peer review under this section until May 1, 2000, except that this section shall not become applicable until May 1, 2004, to a firm that has not accepted or performed any audit engagement during May 1, 1998, through April 30, 2004." However, section 8.8(c) of the CPA Law (63 P. S. § 9.8h(c)), which relates to the licensing of firms, provides: "An initial or renewal license shall not be issued to a firm after April 30, 2000, unless the firm complies with the requirements of section 8.9 of this act." For reasons more fully discussed in the notice of proposed rulemaking, the Board considered section 8.8(c) of the CPA Law to be controlling.

The House Committee, IRRC and the PSPA raised objections to the proposed deadlines for peer review compliance. The House Committee commented that the Board had misapprehended the legislative intent regarding the effective dates for peer review and that the matter was clearly governed by section 8.9(l)(2) of the CPA Law. The House Committee stated that it "finds the legislative intent was for May 1, 2000, to be the starting date for the peer review program, and not the deadline for peer review compliance." In accordance with the House Committee's comments, the Board has revised § 11.82(a) and (b) to provide that a nonexempt firm that performs an audit engagement after May 1, 1998, has until May 1, 2002, to complete a peer review, while a nonexempt firm that performs a review engagement after May 1, 1998, has until May 1, 2006, to complete a peer review.

The Board has also revised § 11.82(a) and (b) to clarify the type of peer review (onsite or offsite) that a nonexempt firm is required to complete.

The Board has made editorial changes to § 11.82(c), which provides that a nonexempt firm shall submit with its application for initial licensure or license renewal a letter from the peer review administering organization that evidences the firm's completion of peer review.

Proposed § 11.82(d) provided that a firm seeking to claim an exemption from peer review under section 8.9(g) of the CPA Law shall submit "information that substantiates its entitlement to an exemption." Proposed § 11.82(d) further provided that in the case of a multistate firm that claims an exemption under section 8.9(g)(1) of the CPA Law based on its having completed a peer review in another state or jurisdiction, the firm shall submit: (1) a letter from the out-of-State peer review administering organization evidencing the firm's completion of a peer review (within 3 years of the date of application) that satisfies Pennsylvania's requirements; and (2) a statement that the firm's internal inspection or monitoring procedures require the firm's personnel from an out-of-State office to perform an inspection of the firm's offices in this Commonwealth at last once every 3 years.

IRRC noted there is a conflict between section 8.9(a) of the CPA Law which provides that a firm is not required to undergo a peer review if it meets one of the exemptions in section 8.9(g), and section 8.9(g), which states that a firm shall be shall be exempt from the requirement of a peer review if all the specified conditions in paragraphs (1)—(3) apply. IRRC questioned the Board how it intends to resolve this statutory inconsistency. A cardinal rule of statutory construction, set forth in section 1922(1) of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1922(1), provides that it may be presumed, in ascertaining the legislative intent of a statute, that the General Assembly did not intend a result that is absurd, impossible of execution or unreasonable. The three sets of conditions for exemption in section 9.8(g) of the CPA Law involve disparate, unrelated circumstances; it would appear exceedingly rare, if not impossible, for a firm to be able to satisfy all three sets of conditions at once. Accordingly, the Board believes the only reasonable interpretation of the CPA Law is to treat section 8.9(g) as setting forth three discrete exemptions, any one of which would permit a firm to be excused from the peer review requirement. Consistent with this interpretation, the Board has revised § 11.82(d) to explicitly state that a firm that has performed an audit or review engagement after May 1, 1998,

is entitled to an exemption if any one of the three conditions in section 8.9(g) of the CPA Law apply.

The Board has also revised § 11.82(d) to set forth the types of documentation required to substantiate entitlement to each of the three exemptions. In addition to retaining the language in proposed § 11.82(d) about the required documentation for a multistate firm claiming an exemption under section 8.9(g)(1) of the CPA Law, the revised § 11.82(d) provides that a firm claiming an exemption under section 8.9(g)(2) of the CPA Law shall submit a notarized statement from the firm that: (i) the firm has not accepted or performed any audit or review engagement during the preceding 2 years; (ii) the firm does not intend to accept or perform any audit or review engagement during the next 2 years; and (iii) the firm agrees to notify the Board within 30 days of accepting an audit or review engagement and undergo a peer review within 18 months of commencing the engagement. The revised § 11.82(d) also provides that a firm claiming an exemption under section 8.9(g)(3) of the CPA Law shall submit one of the following: (i) a physician's statement that a specified medical condition prevents the firm from completing a timely peer review; (ii) a statement from the appropriate military authority that military service prevents the firm from completing a timely peer review; or (iii) a notarized statement from the firm setting forth exigent circumstances that prevent the firm from completing a timely peer review.

Finally, IRRC questioned whether § 11.82(d)'s requirement that a multistate firm claiming an exemption under section 8.9(g)(1) of the CPA Law demonstrate that its internal inspection or monitoring procedures require the firm's personnel from an out-of-State office to perform an inspection of the firm's offices in this Commonwealth every 3 years is equivalent to a peer review and, if so, how can such an inspection constitute an independent peer review required by the CPA Law. The internal inspection is complementary of, and not a substitution for, the statutory requirement that the multistate firm have completed a qualifying out-of-State peer review. The limitation of an out-of-State peer review of a multistate firm is that while the peer review team is able to evaluate a firm's quality control policies, it cannot offer assurances that the firm's offices in this Commonwealth are in compliance with those policies. The requirement that a multistate firm provide for a periodic internal inspection of its offices in this Commonwealth by its personnel from an out-of-State office furnishes an adequate level of assurance that the offices in this Commonwealth are in compliance with quality control policies.

§ 11.83. (Administering organizations for peer review; firm membership not required).

Proposed § 11.83(a) provided that the following organizations are deemed approved to administer a peer review program: (1) the AICPA's Securities and Exchange Practice Section and the Private Companies Practice Section; and (2) any State society or institute that participates in the AICPA Peer Review Program. Proposed § 11.83(b) provided that a firm that is subject to peer review will not be required to become a member of the AICPA or another administering organization.

IRRC asked the Board to explain the function of the administering organization in the peer review process. The administering organization ensures that all aspects of the peer review program are carried out. These functions include selecting qualified persons to serve on peer review teams, scheduling peer reviews, evaluating peer review reports, and recommending remedial or corrective action as needed.

Both IRRC and the PSPA recommended that the Board add provisions to permit organizations other than those proposed § 11.83(a) to qualify as administering organizations for peer review. IRRC further commented that the language in proposed § 11.83(a) appeared to limit multistate or National organizations, excepting AICPA, from being eligible for deemed approval status. IRRC also recommended that proposed § 11.83(b) be clarified to prohibit an administering organization from requiring membership as a precondition to conducting a peer review of a firm.

In response, the Board has revised § 11.83(a) to provide that any organization of licensed certified public accountants or licensed public accountants that participates in the AICPA Peer Review Program is deemed approved to administer a peer review program and does not require prior approval from the Board. As the Board stated in its notice of proposed rulemaking, because the AICPA Peer Review Program is universally recognized in the public accounting profession as the preeminent model for peer review, the least costly and most efficient way to implement peer review in this Commonwealth is to grant deemed approval status to any organization of licensed accounting professionals that employs the AICPA peer review model.

The Board has adopted the suggestion of IRRC and the PSPA to establish a regulatory mechanism by which peer review programs other than the AICPA's can be evaluated for appropriateness. To this end, the Board has revised § 11.83(b) to provide that an organization of licensed certified public accountants or licensed public accountants that does not qualify for deemed approval status under § 11.83(a) may apply to the Board for approval to serve as an administering organization. The Board will evaluate the application based on the following factors: (i) whether the organization has adequate financial and other resources to administer a peer review program; (ii) whether the organization has the technical competence to administer a peer review program; and (iii) whether the organization has an oversight peer review committee whose members are subject to and have successfully completed peer reviews and that is capable of retaining qualified peer reviewers, scheduling peer reviews, reviewing the results of peer reviewers, and recommending remedial action for firms that do not receive unqualified peer review reports.

The Board has added a new § 11.83(c) that restates proposed § 11.83(b) in a manner consistent with the recommendation of IRRC.

§ 11.84. (Peer review standards).

The Board has made editorial changes to § 11.84, which requires that a peer review be conducted in accordance with the AICPA's Peer Review Standards.

§ 11.85. (Qualifications of peer reviewers).

Proposed § 11.85(a) stated that, except as provided in subsections (b) and (c), a peer reviewer shall possess the qualifications set forth in the AICPA's Peer Review Standards. Proposed § 11.85(b) provided that a licensed public accountant who otherwise satisfies the requirements of proposed § 11.85(a) shall be qualified to serve as a peer reviewer; proposed § 11.85(c) provided that a sole practitioner with a public accounting or auditing practice who otherwise satisfies the requirements of proposed § 11.85(a) and who is enrolled in a peer review program

shall be qualified to serve as a peer reviewer. Proposed § 11.85(d) provided that a peer reviewer shall be independent from, and have no conflict of interest with, the firm being reviewed.

IRRC commented that the proposed regulations do not specify how the Board would determine whether a prospective peer reviewer is qualified. IRRC also questioned the meaning of the phrase "who otherwise satisfies the requirements of subsection (a)" in proposed § 11.85(b) and (c).

To state with greater clarity who is eligible to serve as a peer reviewer, the Board has consolidated proposed § 11.85(a)—(c) into a revised § 11.85(a), which provides that a peer reviewer shall be a licensed certified public accountant or licensed public accountant, whether a sole practitioner or part of a group practice, who is enrolled in a peer review program and who possesses the qualifications in the AICPA's Peer Review Standards. The Board has also revised § 11.85(b) to state that the peer review administering organization shall be responsible for ensuring that its peer reviewers are qualified. The Board has also renumbered § 11.85(d) as § 11.85(c).

Statutory Authority

Section 8.9(c) of the CPA Law empowers the Board to promulgate regulations approving peer review programs and standards, establishing qualifications of peer reviewers and prohibiting unauthorized disclosure of information obtained during peer review.

Fiscal Impact and Paperwork Requirements

The final-form regulations will have a fiscal impact on licensed public accounting firms subject to peer review. The Board cannot accurately estimate the cost of completing a peer review. The scope, and thus cost, of a peer review may vary widely depending on the size of the firm and the nature of the attest engagements that are being reviewed. The cost could range from less than $1,000 for an offsite review to hundreds of thousands of dollars and more for an onsite review of the Nation's largest firms.

The final-form regulations will cause the Board to incur minor costs in processing license renewal applications and initial license applications of firms subject to peer review. The Board anticipates that these costs will be defrayed by application and renewal fees.

The final-form regulations will require firms subject to peer review to provide the Board with proof of completion of a peer review or information substantiating entitlement to an exemption. The regulations also will require the Board to revise its forms for initial licensure and license renewal. The regulations will not impose new paperwork requirements on the Commonwealth's other agencies or its political subdivisions.

Compliance with Executive Order 1996-1

In accordance with Executive Order 1996-1 (relating to regulatory review and promulgation), the Board, in developing the regulations, solicited comments from the major professional associations representing the public accounting profession in this Commonwealth.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Board submitted copies of the notice of proposed rulemaking, published at 29 Pa.B. 4448, to IRRC and the House and Senate Committees for review and comment.

In adopting final-form regulations, the Board considered comments from IRRC, the House Committee and the general public. The Board did not receive comments from the Senate Committee.

On September 25, 2000, the Board submitted the final-form regulations to IRRC and the House and Senate Committees for review. On October 6, 2000, under authority of section 5.1(g)(1) of the Regulatory Review Act (71 P. S. § 745.5a(g)(1)), the Board tolled the review period to correct an error in the final-form regulations, and submitted revised final-form regulations on that date. Under section 5.1(g)(3) of the Regulatory Review Act, the revised final-form regulations were approved by the House Committee on October 11, 2000, and deemed approved by the Senate Committee on October 16, 2000. The final-form regulations were approved by IRRC on October 19, 2000.

Additional Information

Individuals who desire additional information about the regulations are invited to submit inquiries to Steven Wennberg, Esq., Counsel, State Board of Accountancy, P. O. Box 2649, Harrisburg, PA 17105-2649.

Findings

The Board finds that:

(1) Public notice of the Board's intention to amend Chapter 11, by this order 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 final-form regulations adopted by this order are necessary and appropriate for the administration of the CPA Law.

Order

The Board, acting under its authorizing statute, orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 11, are amended by adding §§ 11.81—11.86 to read as set forth in Annex A.

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

(c) The Board 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*.

THOMAS J. BAUMGARTNER, CPA,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 30 Pa.B. 5807 (November 4, 2000).)

Fiscal Note: Fiscal Note 16A-556 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 11. STATE BOARD OF ACCOUNTANCY

PEER REVIEW

§ 11.81. Definitions.

The following words and terms, when used in this section and §§ 11.82—11.86 (relating to peer review),

have the following meanings, unless the content clearly indicates otherwise:

Administering organization—An entity that meets the standards specified by the Board for administering a peer review program.

Audit engagement—An audit as defined in the AICPA's Statement on Auditing Standards.

Firm—A licensee who is a sole practitioner or a licensee that is a qualified association as defined in section 2 of the act (63 P. S. § 9.2).

Offsite peer review—An engagement review as defined in the AICPA's Standards for Performing and Reporting on Peer Reviews, including interpretations thereof, excepting a study of the associated working papers.

Onsite peer review—A system review as defined in the AICPA's Standards for Performing and Reporting on Peer Review, including interpretations thereof.

Peer reviewer—An individual who conducts an onsite or offsite peer review. The term includes an individual who serves as captain of an onsite peer review team.

Review engagement—A review as defined in the AICPA's Statement of Standards on Accounting and Review Services.

Sole practitioner—A licensed certified public accountant or licensed public accountant who practices public accounting on his own behalf.

§ 11.82. Effective dates for peer review compliance; proof of compliance or exemption.

(a) Unless subject to an exemption under section 8.9(g) of the act (63 P. S. § 9.8i(g)), a firm that performs an audit engagement after May 1, 1998, shall complete an onsite peer review before the license biennium that begins May 1, 2002.

(b) Unless subject to an exemption under section 8.9(g) of the act, a firm that performs a review engagement, but not an audit engagement, after May 1, 1998, shall complete an offsite peer review before the license biennium that begins May 1, 2006.

(c) A nonexempt firm that performs an audit or review engagement shall submit with its application for initial licensure or license renewal a letter from the peer review administering organization that evidences the firm's completion of a peer review.

(d) A firm that performs an audit or review engagement is entitled to an exemption from peer review if any of the three conditions in section 8.9(g) of the act apply. A firm claiming an exemption shall submit with its application for initial licensure or license renewal information that substantiates its entitlement to an exemption as follows:

(1) *Exemption under section 8.9(g)(1) of the act.* Both of the following:

(i) A letter from an out-of-State peer review administering organization evidencing the firm's completion of a peer review, within 3 years prior to the date of the application, that meets the requirements of the act and this chapter.

(ii) A statement that the firm's internal inspection or monitoring procedures require that the firm's personnel from an out-of-State office to perform an inspection of the firm's Pennsylvania offices at least once every 3 years.

(2) *Exemption under section 8.9(g)(2) of the act.* A notarized statement from the firm that the following conditions have been met:

(i) The firm has not accepted or performed any audit or review engagement during the preceding 2 years.

(ii) The firm does not intend to accept or perform any audit or review engagement during the next 2 years.

(iii) The firm agrees to notify the Board within 30 days of accepting an audit or review engagement and to undergo a peer review within 18 months of commencing the engagement.

(3) *Exemption under section 8.9(g)(3) of the act.* One or more of the following:

(i) A physician's statement that a specified medical condition prevents the firm from completing a timely peer review.

(ii) A statement from the appropriate military authority that military service prevents the firm from completing a timely peer review.

(iii) A notarized statement from the firm setting forth unforeseen exigent circumstances that prevent the firm from completing a timely peer review.

§ 11.83. Administering organizations for peer review; firm membership not required.

(a) The following organizations are deemed qualified to administer peer review programs and do not require prior approval from the Board:

(1) The Securities and Exchange Commission Practice Section and the Private Companies Practice Section of the AICPA.

(2) Any organization of licensed certified public accountants or licensed public accountants that participates in the AICPA Peer Review Program.

(b) An organization of licensed certified public accountants or licensed public accountants that does not qualify as an administering organization under subsection (a) may apply to the Board for approval to serve as an administering organization. In determining whether to grant approval. The Board will consider the following factors:

(1) Whether the organization has adequate financial and other resources to administer a peer review program.

(2) Whether the organization has the technical competence to administer a peer review program.

(3) Whether the organization has a peer review oversight committee that meets the following conditions:

(i) Whose members are subject to and have successfully completed peer reviews.

(ii) That is capable of retaining qualified peer reviewers, scheduling peer reviews, reviewing the results of peer reviews and recommending appropriate remedial action for firms that do not receive unqualified peer review reports.

(c) An administering organization may not require a firm to become a member of the administering organization as a precondition for the administering organization to conduct a peer review of the firm.

§ 11.84. Peer review standards.

A peer review shall be conducted in accordance with the AICPA's "Standards for Performing and Reporting on Peer Reviews" including interpretations thereof.

§ 11.85. Qualifications of peer reviewers.

(a) A peer reviewer shall be a licensed certified public accountant or licensed public accountant, whether a sole practitioner or part of a group practice. Who is enrolled in a peer review program and who possesses the qualifications set forth in the AICPA's "Standards for Performing and Reporting on Peer Reviews" including interpretations thereof.

(b) The administering organization shall ensure that its peer reviewers are qualified under subsection (a).

(c) A peer reviewer shall be independent from, and have no conflict of interest with, the firm being reviewed.

§ 11.86. Confidentiality of peer review reports.

(a) Peer review reports and related information shall remain confidential except as provided in section 8.9(e) and (h)(3) of the act (63 P. S. § 9.8i(e) and (h)(3)) and subsection (b).

(b) The Board has the right to inquire of an administering organization whether a peer review report has been accepted.

[Pa.B. Doc. No. 00-2059. Filed for public inspection December 1, 2000, 9:00 a.m.]

STATE REAL ESTATE COMMISSION
[49 PA. CODE CH. 35]

[Correction]

Licensure Requirements

An error occurred in the document amending § 35.271(b)(3) (relating to examination of broker's license), which appeared at 30 Pa.B. 5954, 5958 (November 18, 2000). Subparagraph (ii) was inadvertently dropped from the paragraph. The correct version of subsection (b)(3) appears in Annex A, with ellipses referring to the existing text of the section.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 35. STATE REAL ESTATE COMMISSION

Subchapter C. LICENSURE

LICENSURE REQUIREMENTS

§ 35.271. Examination for broker's license.

* * * * *

(b) The Commission will apply the following standards in determining whether an examination candidate has met the education requirement of subsection (a)(4):

* * * * *

(3) To be counted toward the education requirement, a real estate course shall have been offered by:

(i) An accredited college, university or institute of higher learning, whether in this Commonwealth or outside this Commonwealth.

(ii) A bachelor's degree from an accredited college, university or institute of higher learning, having completed coursework equivalent to a major in real estate.

(iii) A real estate school outside this Commonwealth that has been approved by the real estate licensing authority of the jurisdiction where the school is located. The course transcript or certificate of completion shall state that the course is approved by the licensing authority of the jurisdiction where the school is located.

(iv) A real estate industry organization outside this Commonwealth, if the course is approved by the licensing jurisdiction of another state. The course transcript or certificate of completion shall state that the course is approved by the licensing jurisdiction which has approved it.

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[Pa.B. Doc. No. 00-1977. Filed for public inspection November 17, 2000, 9:00 a.m.]

STATE BOARD OF EXAMINERS OF NURSING HOME ADMINISTRATORS
[49 PA. CODE CH. 39]
Fees

The State Board of Examiners of Nursing Home Administrators (Board) amends § 39.72 (relating to fees) to read as set forth in Annex A, by revising those fees related to applications and services.

A. Effective Date

The amendment will be effective upon publication in the *Pennsylvania Bulletin*.

B. Statutory Authority

Section 7.1(a) of the Nursing Home Administrators License Act (act) (63 P. S. § 1107.1(a)), requires the Board to set fees by regulation. The same provisions require the Board to increase fees to meet or exceed projected expenditures if the revenues raised by fees, fines and civil penalties are not sufficient to meet expenditures.

C. Background and Purpose

General operating expenses of the Board are funded through biennial license renewal fees. Expenses related to processing individual applications or providing certain services directly to individual licensees or applicants are excluded from general operating revenues and are funded through fees in which the cost of providing the service forms the basis for the fee. The fee is charged to the person requesting the service.

A recent systems audit of the operations of the Board within the Bureau of Professional and Occupational Affairs (Bureau) determined that the current fees did not reflect the actual cost of processing applications and performing the services. The amendment updates the fees to accurately reflect the cost of processing the applications and providing the services. The background of the

amendment and a description of the fees and services was published at 29 Pa.B. 2582 (May 15, 1999).

D. Summary of Comments and Responses on Proposed Rulemaking

Notice of proposed rulemaking was published at 29 Pa.B. 2582. Publication was followed by a 30-day public comment period. The Board did not receive comments from the general public. Following the close of the public comment period, the Board received comments from the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC). The following is the Board's response to those comments.

1. *Certification and Verification Fees.*

The HPLC questioned under what circumstances the Board certifies an examination score. Both the HPLC and IRRC requested an explanation of the difference between the administrative overhead costs for certification of scores and the administrative overhead costs for other services.

The certification of a score is made at the request of a licensee when the licensee is seeking to obtain licensure in another state based upon a license in this Commonwealth which was issued on the basis of a uniform National or regional examination which was taken in this Commonwealth. Generally, the state of original license is the only source of the score of the licensee, as testing agencies do not maintain this information. The licensing laws of many states include provisions that licensure by reciprocity or endorsement based on a license in another state will be granted only if the board or agency determines that the qualifications are the same or substantially similar. Many state agencies have interpreted this provision to require that licensees have attained a score equal to or exceeding the passing rate in that jurisdiction at the time of original licensure. For this reason, these states require that the Board and other licensing boards certify the examination score the applicant achieved on the licensure examination.

The difference between the verification and certification fees is the amount of time required to produce the document requested by the licensee. States request different information when making a determination as to whether to grant licensure based on reciprocity or endorsement from another state. The Bureau has been able to create two documents from its records that will meet all of the needs of the requesting state. The licensee, when the applicant applies to the other state, receives information as to what documentation and form is acceptable in the requesting state. The Bureau then advises the licensee of the type of document the Bureau can provide and the fee. In the case of a "verification" the staff produces the requested documentation by a letter, usually computer-generated, which contains the license number, date of original issuance and current expiration date, and status of the license. The letters are printed from the Bureau's central computer records and sent to the Board staff responsible for handling the licensee's application. The letters are sealed, folded and mailed in accordance with the directions of the requestor. The Bureau estimates the average time to prepare this document to be 5 minutes. The Bureau uses the term "certification fee" to describe the fee for a request for a document, again generally to support reciprocity or endorsement applications to other states, territories or countries, or for employment or training in another state. A certification document contains information specific to the individual requestor. It may include dates or locations where examinations were taken, or scores achieved or hours and location of training. The information is entered onto a document which is usually supplied by the requestor. The average time to prepare a certification is 45 minutes. This is because a number of resources, such as files, microfilm and rosters must be retrieved and consulted to provide the information requested. The Board staff then seals and issues this document.

2. *Administrative Overhead*

IRRC requested that the Bureau and the boards thoroughly examine its cost allocation methodology for administrative overhead and itemize the overhead cost to be recouped by the fees. IRRC commented that although the Bureau's method was reasonable, there is no indication that the fees will recover the actual overhead cost because there is no relationship to the service covered by the fees and because the costs are based upon past expenditures rather than projected expenditures. IRRC expressed the view that there is no certainty that the projected revenues of the new fees will meet or exceed projected expenditures as required under the Board's enabling statutes. The HPLC requested an explanation regarding why the proposed fees are rounded up and are not the actual cost of services as estimated by the Board.

In computing overhead charges, the boards and the Bureau include expenses resulting from service of support staff operations, equipment, technology initiatives or upgrades, leased office space and other sources not directly attributable to a specific board. Once determined, the Bureau's total administrative charge is apportioned to each board based upon that board's share of the total active licensee population. In turn, the board's administrative charge is divided by the number of active licensees to calculate a "per application" charge which is added to direct personnel cost to establish the cost of processing. The administrative charge is consistently applied to every application regardless of how much time the staff spends processing the application.

This method of calculating administrative overhead to be apportioned to fees for services was first included in the biennial reconciliation of fees and expenses conducted in 1988-89. In accordance with the regulatory review, the method was approved by the Senate and House Standing Committees and IRRC as reasonable and consistent with the legislative intent of statutory provisions which require the Board to establish fees which meet or exceed expenses.

IRRC suggested that within each Board, the administrative charge should be determined by the amount of time required to process each application. For example, an application requiring 1/2 hour of processing time would pay one-half as much overhead charge as an application requiring 1 hour of processing time. The Bureau concurs with IRRC that by adopting this methodology the Bureau and the boards would more nearly and accurately accomplish their objective of setting fees that cover the cost of the service. Therefore, in accordance with IRRC's suggestions, the Bureau conducted a test to compare the resulting overhead charges obtained by applying the IRRC suggested time factor versus the current method. This review of a licensing board's operation showed that approximately 25% of staff time was devoted to providing services described in the regulations. The current method recouped 22% to 28% of the adminis-

trative overhead charges versus the 25% recouped using a ratio-based time factor. However, when the time factor is combined with the licensing population for each Board, the resulting fees vary widely even though different licensees may receive the same services. For example, using the time-factor method to issue a verification of licensure would cost $34.58 for a landscape architect as compared with a cost of $10.18 for a cosmetologist. Conversely, under the Bureau method the administrative overhead charge of $9.76 represents the cost of processing a verification application for all licensees in the Bureau. Also, the Bureau found that employing a time factor in the computation of administrative overhead would result in a different amount of overhead charge being made for each fee proposed.

With regard to IRRC's suggestions concerning projected versus actual expenses, the licensing boards note that the computation of projected expenditures based on amounts actually expended has been the basis for biennial reconciliations for the past 10 years. During these five biennial cycles, the experience of both the licensing boards and the Bureau has been that using established and verifiable data, which can be substantiated by collective bargaining agreements, pay scales and cost benefit factors, provides a reliable basis for fees. Also, the fees are kept at a minimum for licensees, but appear adequate to sustain the operations of the boards over an extended period. Similarly, accounting, recordkeeping and swift processing of applications, renewals and other fees were the primary basis for "rounding up" the actual costs to establish a fee. This rounding up process has in effect resulted in the necessary but minimal cushion or surplus to accommodate unexpected needs and expenditures. Details of the Board's analysis of the cost of each fee are attached to the Regulatory Review Form, which is available upon request.

For these reasons, the boards have not made changes in the method by which they allocate administrative expenditures and the resulting fees will remain as proposed.

The Board believes that this rulemaking will not put the Commonwealth at a competitive disadvantage with other states. Other states which are funded by fees (New Jersey, Maryland, Ohio and Delaware) seem to anticipate and include the costs of many of these services in their application fees for licensure and renewal fees. As a result, these two combined fees biennially range from $200 (Maryland) to $570 (Ohio) and are significantly higher than the Commonwealth's which is $138. Details of the Board's analysis are in the Regulatory Analysis Form, which is available upon request.

E. Compliance with Executive Order 1996-1, Regulatory Review and Promulgation

The Board reviewed this rulemaking and considered its purpose and likely impact upon the public and the regulated population under the directives of Executive Order 1996-1, Regulatory Review and Promulgation. The final-form regulation addresses a compelling public interest as described in this Preamble and otherwise complies with Executive Order 1996-1.

F. Fiscal Impact and Paperwork Requirements

This final-form regulation will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The fees will have a modest fiscal impact on those members of the private sector who apply for services from the Board. The amendment will not impose additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector.

G. Sunset Date

The Board continuously monitors the effectiveness of its regulations. Therefore, no sunset date has been set.

H. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Board submitted a copy of the notice of proposed rulemaking, published at 29 Pa.B. 2582, to IRRC and to the Chairpersons of the HPLC and the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) for review and comment.

In compliance with section 5(c) of the Regulatory Review Act, the Board also provided IRRC and the Committees with copies of comments received, as well as other documentation. In preparing this final-form regulation the Board has considered the comments received from the Committees, IRRC 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 HPLC on October 11, 2000, and deemed approved by the SCP/PLC on October 23, 2000. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 2, 2000, and approved the final-form regulation in accordance with section 5.1(e) of the Regulatory Review Act.

I. Contact Person

Further information may be obtained by contacting Melissa Wilson, Board Administrator, State Board of Examiners of Nursing Home Administrators, P. O. Box 2649, Harrisburg, PA 17105- 2649, (717) 783-7200.

J. Findings

The Board finds that:

(1) Public notice of proposed rulemaking was 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 promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and all comments were considered.

(3) This amendment does not enlarge the purpose of proposed rulemaking published at 29 Pa.B. 2582.

(4) This amendment is necessary and appropriate for administration and enforcement of the authorizing acts identified in Part B of this Preamble.

K. Order

The Board, acting under its authorizing statutes, orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 39, are amended by amending § 39.72 to read as set forth in Annex A.

(b) The Board shall submit this order and Annex A to the Office of General Counsel and to the Office of the Attorney General as required by law.

(c) The Board 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 on publication in the *Pennsylvania Bulletin*.

ROBERT H. MORROW,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 30 Pa.B. 6020 (November 18, 2000).)

Fiscal Note: Fiscal Note 16A-626 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 39. STATE BOARD OF EXAMINERS OF NURSING HOME ADMINISTRATORS

FEES

§ 39.72. Fees.

The following is a schedule of fees charged by the Board:

Biennial renewal of nursing home administrators license	$108
License application fee	$40
N.A.B. examination fee	$235
State rules and regulations examination	$87
Complete nursing home administration examination	$322
Temporary permit fee	$145
Certification of examination scores	$25
Verification of licensure or temporary permit	$15
Continuing education provider application fee	$40
Continuing education program application fee per credit	$15
Continuing education individual program application fee	$20

[Pa.B. Doc. No. 00-2060. Filed for public inspection December 1, 2000, 9:00 a.m.]

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 53]

[L-00940095]

Updating and Revising Existing Filing Requirement

The Pennsylvania Public Utility Commission (Commission) on June 2, 2000, adopted a final rulemaking order amending existing regulations to lessen the regulatory burdens on all jurisdictional telecommunications providers. The contact persons are Gary Wagner, Bureau of Fixed Utility Services (717) 783-6175 and Carl Hisiro, Law Bureau (717) 783-2812.

Executive Summary

In 1994, the Commission entered an order that initiated a rulemaking proceeding to revise and streamline existing filing requirements for all telecommunications providers so as to lessen their regulatory burden and promote competition. Since then, many significant events have occurred to effectuate the deregulation of the telecommunications industry and the promotion of competition in its stead, including the enactment of the Federal Telecommunications Act of 1996.

The rulemaking went through three advance notices published in the *Pennsylvania Bulletin*, and the Commission received comments from a number of parties. This rulemaking was then subsequently included in the proceeding to consider global resolution of telecommunications issues at P-00991648 and P-00991649. In the global proceeding, all participating incumbent and competitive local exchange carriers and interexchange carriers supported the same set of proposed regulations that were approved as final, with minor modifications, in this rulemaking.

The regulations streamline filing requirements by reducing the review period from 60 days to either 30, 10, or 1 day, depending generally on whether the filing is made by an incumbent or competitive local exchange carrier and on whether the proposed rates represent increases or decreases from existing rates or are for new services. The regulations also streamline filing requirements for intraLATA toll rates, bundled service packages and promotional offerings.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on November 29, 2000, the Commission submitted a copy of the notice of proposed rulemaking, published at 29 Pa.B. 6257 (December 11, 1999), 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 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 October 1, 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 October 19, 2000, and approved the final-form regulations.

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

Public Meeting
June 2, 2000

Final Rulemaking Order

By the Commission:

On October 7, 1999, the Commission entered an order proposing to amend its regulations relating to existing tariff filing requirements imposed upon telecommunications providers. The Commission proposed these amendments at least partially in response to recent State and Federal efforts to effectuate the deregulation of, and the promotion of competition in, the telecommunications industry.

The October 7, 1999, Order was published at 29 Pa.B. 6257 (December 11, 1999). Comments were hereafter received from Bell Atlantic-Pennsylvania, Inc. (BA-PA), the Pennsylvania Telephone Association (PTA) with the exception of members GTE and Sprint who did not join in the filing of comments, and the Independent Regulatory Review Commission (IRRC).[1] While the October 7, 1999,

[1] AT&T Communications of Pennsylvania, Inc. submitted a letter in lieu of formal comments concerning the proposed Rulemaking Order supporting the adoption of the proposed regulations but noting that other steps are necessary to promote the ability of new entrants to compete with incumbent local exchange carriers (ILECs).

Order did not contemplate the filing of reply comments, three parties—the Office of Consumer Advocate (OCA), the Office of Trial Staff (OTS), and MCI WorldCom, Inc. (MCI)—filed reply comments. All three parties ask the Commission to accept their reply comments in order to respond to issues raised in the BA-PA and PTA comments.

The three parties that filed reply comments object to the fact that BA-PA and the PTA are now complaining about specific provisions of the proposed regulations which BA-PA and the individual members of the PTA previously supported in the Commission's Global proceeding at Docket Nos. P-00991648 and P-00991649. OCA Reply Comments at 3-4; OTS Reply Comments at 1-2; MCI Reply Comments at 1-7. They each contend that BA-PA's current comments particularly should not be considered because the proposed regulations adopted by this Commission are identical to the filing requirement proposal offered by BA-PA itself in the Global proceeding.

On March 1, 2000, BA-PA filed a response to MCI's reply comments stating that BA-PA's petition in the Global proceeding was expressly conditioned on the Commission approving the entire petition without modification. Because that petition was not accepted, BA-PA argues that it should not be bound by its own proposal.

This Final Rulemaking Order discusses the comments and reply comments received and sets forth, in Annex A, final amendments to the Commission's regulations regarding updating and streamlining existing filing requirements for telecommunications utilities. As an initial matter, we agree with the three reply commentators that BA-PA should not now be heard to complain about specific provisions of the regulations that BA-PA itself submitted for approval in the Global proceeding. Furthermore, for the most part, the issues BA-PA raises in its comments were addressed in the October 7, 1999, Order and rejected. We see no need to resurrect them again in this order.

General Comments

IRRC raises the concern that §§ 53.57 (in the definition of "Lifeline Plan"), 53.59(e)(3), 53.60(a)(2), 53.60(b)(1) and (b)(2) and 53.60(c) each require compliance with "directives" and/or "guidelines." IRRC recommends that references to these terms should be deleted and replaced, if appropriate, with specific statutory requirements that the applicable within the final regulation. IRRC states that "guidelines," by definition, are nonbinding and should not be required in a regulation. While IRRC does not give a specific reason why the word "directive" is of concern, we assume the reason is that there is ambiguity as to the mandatory nature of the term "directive."

We agree with IRRC's recommendation and will make the following changes to the affected subsections. In § 53.57's definition of "Lifeline Plan," the language in the final rulemaking will be changed from "in accordance with applicable directives and guidelines of the Commission and of the Federal Communications Commission" to read "in accordance with applicable state or federal law or regulations." The language in § 53.59(e)(3) (as discussed below, this subsection becomes § 53.59(f)(7) in the final rulemaking) will be changed from "a statement of compliance with all applicable guidelines . . ." to read "a statement of compliance with all applicable regulations . . ." Sections 53.60(a)(2), 53.60(b)(2), and (c) will simply delete the reference to "and a statement of compliance with applicable guidelines" as unnecessary. Finally, § 53.60(b)(1) will be modified from "shall meet the applicable guidelines that have issued by the Commission in the form of regulations, orders or other directives regarding cost justification . . ." to read "shall meet any applicable state law or regulation regarding cost justification . . ."

Section 53.57. Definitions.

The terms "cost support" and "documentary support" are used throughout the proposed regulation without being defined. IRRC believes that it would improve clarity if these terms were defined in the final regulation.

In the context of this rulemaking, we believe that these terms do not need to be more fully defined. These terms have been used for a number of years by Commission staff in eliciting data from telecommunications carriers to justify tariff changes. Telecommunications carriers are familiar with the meaning of these terms. Furthermore, as various telecommunications markets open up to competition over time, both the type and amount of documentary and cost support information demanded by the Commission to justify tariff revisions may change. We are satisfied, therefore, that these terms do not require further definition in the final regulation.

IRRC also suggests that subsection (i) of the definition for "joint or bundled service packages" should be amended to change "composed by" to "composed of." We agree with the change and incorporate it, along with the elimination of the phrase "that may be" before the word "composed" as unnecessary, into the phrase "that may be" before the word "composed" as unnecessary, into the final regulations.

The other suggested change offered by IRRC in the definition section is to move subsection (ii) of the "promotional service offerings" definition to § 53.60 (relating to supporting documentation for promotional offerings). Specifically, subparagraph (ii) provides that promotional service offerings may not be longer than 6 months in any rolling 12-month period. IRRC contends that this is a substantive requirement that should not be included within the definition.

We agree in part with IRRC that the time-limitation aspect of promotional service offerings is a substantive requirement which should be covered in § 53.60. IRRC's concern, however, also prompted us to reconsider the definition of "promotional service offering" in toto. This review has led us to provide a clearer, more concise definition of the term "promotional service offering," spelling out that promotional services are designed to increase usage and are only of limited duration. This change should further satisfy IRRC's concern.

§ 53.58. Offering of competitive services.

Section 53.58(a) and (c) provide that when a service is designated "competitive" by the Commission, that service may then be offered by any CLEC or ILEC as a competitive service in the relevant service territory. IRRC asserts that § 53.58(a) and (c), to the extent they are interpreted to relieve competitive local exchange carriers (CLECs) from the requirements for filing a petition for an alternative form of regulation or a network modernization plan, appear to be inconsistent with sections 3003—3005 of Chapter 30 of the Public Utility Code. 66 Pa.C.S. §§ 3003—3005. IRRC asks the Commission to explain its statutory authority for these two provisions.

As an initial matter, we should state that our primary goal in this rulemaking is to establish streamlined tariff filing requirements for both CLECs and ILECs and not to

provide a definitive statement on the applicability of Chapter 30's provisions to CLECs. In undertaking this task to streamline our tariff filing requirements, we have incorporated the "competitive service" designation under Chapter 30 as one of the mechanisms for streamlining the tariff filing requirements. This rulemaking proceeding does not otherwise affect our recent holdings that telecommunications providers are required to submit a network modernization plan unless the company can show good cause why it has not done so, *Petition of Hancock Telephone Co. for Waiver of Sections 3003 and 3006 of Chapter 30 of the Public Utility Code*, Docket No. O-00981445 (Order entered November 8, 1999); *Petition of Citizens Telecommunications Co. of New York, Inc. d/b/a Citizens Communications Services Co. for Waiver of Sections 3003 and 3006 of chapter 30 of the Public Utility Code*, Docket No. P-00981444 (Order entered November 8, 1999).

However, as we explained in our October 7, 1999 Order, the adoption of the instant regulation is necessitated, in large part, by our responsibility to implement the Federal Telecommunications Act of 1996 (TA-96), 47 U.S.C.A. §§ 251—276, and its goal (and that of Chapter 30 as well) of promoting a competitive telecommunications market. As we further explained at pages 16-17 of our Order:

> [W]e do not believe that the proposed regulations contradict the statutory requirements of Chapter 30. Indeed, . . . the absence of an alternative or streamlined regulation plan for a new entrant CLEC does not in any way damage the public interest. In reality, CLEC operations are not currently regulated on the basis of a rate base/rate-of-return method . . . Thus, the filing of a Chapter 30 alternative or streamlined regulation plan by a CLEC would simply formalize existing regulatory parameters, albeit at a rather high administrative cost for the CLEC concerned and for this Commission.

TA-96 preempts State or local statutes or regulations that erect barriers to entry among telecommunications providers in the provision of any telecommunications service. 47 U.S.C.A. § 253. Indeed, the United States Court of Appeals for the Tenth Circuit just this past January affirmed the Federal Communications Commission's preemption of a Wyoming statute that unreasonably restricted competition in rural markets. *RT Communications, Inc. v. F.C.C.*, 2000 U.S. App. Lexis 430 (10th Cir. January 13, 2000).

In proposing that a service designated competitive for an ILEC or CLEC under Chapter 30 can be offered by any other CLEC or ILEC as a competitive service in the same service territory, the Commission was cognizant of the preemption provision in TA-96 and the necessity of promulgating regulations that do not restrict entry, especially for CLECs. This could be construed as the case, however, if the Commission's regulation interpreted Chapter 30 to require a CLEC to file for a competitive classification under Chapter 30 (with the 9-month statutory period normally required for the disposition of a Chapter 30 petition) after an ILEC had already obtained such a classification for the service. Similarly, if the Commission's regulation required a CLEC to file an alternative regulation plan when CLECs are currently not regulated on a rate base/rate-of-return basis, the statute or regulation could conceivably be construed as a barrier to entry, thereby invoking the section 253 preemption provision.

Thus, we find that the adoption of § 53.58(a) and (c), without modification, is consistent with the competitive goals of both Chapter 30 and TA-96.[2]

The PTA requests that subsection (a) be expanded so as to require a new entrant to provide the ILEC with a courtesy copy of the tariffs and price lists referenced in subsection (d) that the new entrant intends to offer in the ILEC's service territory. The PTA contends that this change will give the ILEC an opportunity to prepare to make "services" available to the new entrant by the time the services are needed. Final Comments of PTA at 3.

We decline to accept this recommendation as there is no evidence that adopting such a price exchange will materially aid the availability of services such as the leasing of network elements to new entrants. In addition, the exchange of current prices among competitors could facilitate collusive activity in violation of the Federal and State antitrust laws. *See, e.g., United States v. Container Corp.*, 393 U.S. 333, 335 (1969) (Court held that exchanges of information concerning the "most recent price charged or quoted" among sellers of corrugated containers unlawfully stabilized prices in violation of the Sherman Act).

Next, IRRC states that subsection (b) contains negative phrasing that makes this provision confusing. We will revise the language consistent with the suggestion offered by IRRC.

IRRC also requests that we clarify in subsection (e) that the "proceeding" to reclassify a service from competitive to noncompetitive would be a complaint, and that we clarify the process, procedure and parties that are permitted to participate by including a reference to the Commission's existing regulations on filing formal complaints. We believe both of IRRC's concerns can be fully resolved by adding the phrase, "Pursuant to Chapter 5 (relating to formal proceedings)," at the beginning of the first sentence in the subsection.

IRRC further suggests that the Commission should explain any factors that it uses to determine the "level of dominant market power" under subsection (e). After carefully considering IRRC's position, we conclude that the phrase "level of dominant market power" is not necessary and have removed it from the regulation. We find that the language in section 3005(d) of the Public Utility Code, 66 Pa.C.S. § 3005(d), sufficiently explains the factors and process the Commission will use to determine if a reclassification is necessary and have added language to that effect in the regulation.

IRRC also suggests that subsection (e)(4)(vii), providing that the Commission will consider "other factors deemed relevant by the Commission," is too vague and is in need of further clarification. We disagree. The catchall language in question was extracted verbatim from regulations that are already in force in § 63.106(d)(5) for reclassifying competitive and noncompetitive services of-

[2] IRRC also asserts that the phrase "subject to §§ 53.57, 53.59, 53.59, 53.60 and this section" in both subsections (a) and (c) of section 53.58 is confusing. As originally proposed, the phrase in question read simply "subject to the provisions in this subpart." The Legislative Reference Bureau changed the language before publishing the text of the proposed rulemaking language in the *Pennsylvania Bulletin* in an effort to clarify the meaning of the word "subpart." We will revise the language so that it reads "subject to this section" to achieve the meaning originally intended in the October 7, 1999 Order and at the same time eliminating any confusion created by the subsequent language appearing in the *Pennsylvania Bulletin*.

fered by interexchange telecommunications carriers. In an ever-changing market, we believe it would be unwise not to include the generic, catchall provision for reclassifying competitive and noncompetitive services for other telecommunications providers that subsection (e)(4)(vii) provides.

Finally, on our own motion the Commission has amended § 53.58(d) to include ministerial administrative tariff changes, which typically involve non-price, nonsubstantive type changes. The amendment also clarifies that tariff filings involving competitive services are effective on 1-day's notice, which simply codifies existing practice.

Section 53.59. Cost support requirements and effective filing dates for tariff filings of noncompetitive services.

In subsection (a), IRRC recommends that we replace the phrase "is relieved from any obligation" with the phrase "is not required" to increase clarity. This suggestion is incorporated in the final regulations.

IRRC next raises a concern with subsections (b) and (c) which apply to CLEC tariff filings for new services or for existing services when the proposed rates are higher than ILEC rates for the same service. If the rulemaking's purpose is to encourage competition, IRRC asks why we require a 30-day notice period for a CLEC that wants to reduce its rate to a rate that is still above the ILEC's rate. IRRC suggests that the regulation should specify instead the 1-day's notice provided in subsection (a).

Generally, one would expect a CLEC's rates to be at or below those of the ILEC if the CLEC expects to take market share away from the ILEC and be a successful long-term competitor in the ILEC's service territory. As we stated in our October 7, 1999, Order, however, some CLECs operating in Pennsylvania "are offering their services to targeted end-user customers with poor credit histories at rates that are higher than those charged by ILECs and other CLECs for the same services." *Proposed Rulemaking Order and Final Interim Guidelines,* Dockets No. L-00940095, *et al.,* at 18 (Order entered October 7, 1999). We concluded that tariff changes form these CLECs "should be subjected to an additional degree of scrutiny in order to afford the necessary protection for its 'high-risk' end-user customers" *Id.* at 19.

Moreover, our interest in protecting these customers, who may also be economically disadvantaged, is the same even if the CLEC is proposing to reduce its rates to a level that is still above those offered by the ILEC serving the same service territory. This is because price is not, and should not, be the only factor we look at in these circumstances. We are equally concerned that the CLEC not change other terms and conditions in a way that may be burdensome or misleading to the customer. For example, the CLEC could lower its rate at a level that is still above the corresponding ILEC's rate, but the CLEC could also add a tie-in provision requiring the consumer to take an unwanted service as part of a required service package. We believe that a 30-day review period in these circumstances properly balances our desire to protect consumers and the public interest goal of reducing regulatory burdens while still giving our staff sufficient review time.

Finally, we also think it is significant that this provision was universally accepted by all participants, including many CLECs, in the Global proceeding, and that not one CLEC filed comments objecting to this provision in the present proceeding. For all these reasons, we decline to adopt the IRRC recommendation.

Both IRRC and the PTA assert that the final regulation should include a notice and review period regarding ILECs filing for new services. Subsection (c)(2) requires a 30-day notice and review period for new services offered by CLECs, but there is no parallel provision for ILECs. The inclusion of the phrase "new services" was first raised by one or more CLECs during the Global proceeding and was incorporated into the proposed rulemaking without objection from any party.

We agree with this suggestion and will incorporate language in subsection (f)(3) of the final rulemaking so that the same 30-day notice and review standard applies to ILECs and to CLECs for new services. We believe it was simply an oversight that identical language was not incorporated into the subsection relating to ILECs during the Global proceeding. Applying the same standard is also supported by the fact that introducing a new service in a market is generally viewed as promoting competition in that market; therefore, a shortened notice and review period is appropriate for both CLECs and ILECs.[3]

IRRC also suggests that subsections (e)(1), now subsection (f) in the final regulations, should be broken down into separate paragraphs to improve clarity. In order to improve the clarity of not only this subsection but subsection (c) as well, we have incorporated this change in the final regulations.

In its comments, the PTA questions the reasonableness of the "in person" notice requirement stated in subsections (c)(1) and (e)(1),[4] complaining that it is unnecessarily burdensome. Final Comments of PTA at 2-3. Both the OCA and OTS strongly object to the PTA's position on this issue in this proceeding as its members had the opportunity to object to this provision during the Global proceeding but did not do so. OCA Reply Comments at 7-8; OTS Reply Comments at 3-5. They assert that in return for agreeing to this "in person" notice provision, the PTA members and other ILECs received the abbreviated 10- and 30-day notice and review periods established in the original subsection (e). The notice and review period contained in subsection (c) simply modeled after the language agreed to in subsection (e). Both the OCA and OTC suggest, however, that the PTA's proposal to use e-mail instead of "in-person" service may be acceptable so long as the party filing the tariff immediately following its e-mail with service by mail on each of the statutory parties.

We agree with the OCA and OTC that the "in person" notice requirement was the quid pro quo for these parties agreeing not to oppose the shortening of the review process to 30 or 10 days, depending on whether the ILEC tariff filing represented a rate increase or a rate decrease. The "in person" notice requirement was meant to ensure that these agencies would receive the tariff filing on the same date that it is filed with the Commission. Especially for the 10-day notice period, an in-hand type notice requirement was acknowledged during the Global proceeding as being critically important to ensuring that the statutory agencies have sufficient time to review the tariff before it becomes effective.

We believe, however, that there are other service avenues available to the telecommunications carriers

[3] In IRRC's comments on this issue, IRRC states that "[c]onsistent with Subsection (c), the PUC should revise this subsection to establish a 10-day waiting period for tariff filings for new services." IRRC Comments at 3. As discussed above, however, subsection (c) actually establishes a 30-day waiting period for tariff filings by CLECs for new services. IRRC's comments make clear they were looking for consistency between the two subsections so we assume adopting the same 30-day period for both CLECs and ILECs will satisfy IRRC's concerns.

[4] As revised in the final regulations, the language in question that appeared in original subsection (e)(1) now appears in subsection (f)(5).

other than the "in person" approach that would satisfy the in-hand requirement that was of concern to the statutory agencies. For example, the provider could send the statutory agencies its tariff filing the day before filing with the Secretary's Bureau by an overnight delivery service, or the provider could utilize e-mail so long as it verified that the tariff filing was actually received by the three agencies. We, therefore, have changed the language in § 53.59(c)(3) and (f)(5) to require that the tariff filing be "received" by the statutory agencies on the date the filing is filed with the Secretary's Bureau.

Moreover, as advocated by the OCA and OTS, the Commission has clear authority under section 1308(a), authority under section 1308(a) of the Public Utility Code, 66 Pa.C.S. § 1308(a), to adopt an "in hand" notice requirement. Section 1308(a) provides that a utility must give notice of proposed rate changes "to other interested parties as the commission in its discretion may direct."[5]

IRRC also recommends that the misspelling of "Lifeline" in old subsection (g), now subsection (h), be corrected. This was a typographical error that occurred when the proposed rulemaking was re-printed in the *Pennsylvania Bulletin*. We will endeavor to ensure that the spelling is corrected in the final printing that will appear in the *Pennsylvania Bulletin*.[6]

Finally, similar to the changes we made in § 53.58(d), we have added new § 53.59(d) and (f)(4) to address CLEC and ILEC ministerial administrative changes affecting noncompetitive service offerings. CLEC ministerial changes will be effective on 1-day's notice and ILEC ministerial changes will be effective on 10-day's notice.

Section 53.60. Supporting documentation for promotional offerings, joint or bundled service packages, and toll services.

IRRC asserts that the phrase "do not have an automatic obligation" in subsection (a) is confusing and should be replaced with "are not required." We agree. This change is incorporated into the final regulations.

Next, IRRC contends that subsection (a)(1)'s requirement on ILECs and CLECs to give advance notice to resellers of a promotional service offering contradicts accepted practice in a competitive marketplace. IRRC suggests that we delete this provision or explain why any competitor should get preferential treatment.

This provision was suggested during the Global proceeding by resellers who were fearful that, without this notice provision, they would not be able to compete effectively with the ILEC or CLEC from whom they purchase the promotional service offering for resale. No CLEC or ILEC objected then or in the comments filed herein when we incorporated the language in the proposed rulemaking. We, therefore, conclude that this provision should remain in the final regulations.[7]

The last comment offered by IRRC relates to subsection (a)(3). IRRC believes there is an inconsistency between the definition of "promotional service offerings" in § 53.57, which defines these services as noncompetitive, and subsection (a)(3), which provides that there are no filing requirements for promotional service offerings involving competitive services.

We agree that there is an apparent discrepancy. The new definition of "promotional service offering" in § 53.57 and revised language in the final rulemaking, however, addresses this concern. In addition, we changed the order of the old subsection (a)(3) and (4) to improve clarity as well.[8]

Conclusion

Accordingly, under sections 501 and 1501 of the Public Utility Code, 66 Pa.C.S. §§ 501 and 1501; sections 201 and 202 of the Commonwealth Documents Law (45 P. S. §§ 1201 and 1202), and the regulations promulgated thereunder in 1 Pa. Code §§ 7.1, 7.2 and 7.5; section 204(b) of the Commonwealth Attorneys Act (71 P. S. § 732.204(b)); section 5 of the Regulatory Review Act (71 P. S. § 745.5); and section 612 of The Administrative Code of 1929 (71 P. S. § 232); and the regulations promulgated thereunder in 4 Pa. Code §§ 7.251—7.235, we find that the regulations governing tariff filing requirements for the telecommunications industry in §§ 53.52—53.53 should be amended by adding §§ 53.57—53.60 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 §§ 53.57—53.60 to read as set forth in Annex A.

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 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 submit this order and Annex A for review by the 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 Telephone Association, all jurisdictional telecommunications utilities, the Office of Trial Staff, the Office of Consumer Advocate and the Small Business Advocate.

7. The final regulations embodied in Annex A shall become effective upon publication in the *Pennsylvania Bulletin*.

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. 5807 (November 4, 2000).)

Fiscal Note: Fiscal Note 57-209 remains valid for the final adoption of the subject regulations.

[5] We also, for the sake of clarity, have changed the phrase "when all consumers subject to the rate increase shall have received notice to each individual consumer" in both subsections (c)(1) and (f)(2) to read "when all consumers subject to the rate increase shall have received individual notice."

[6] On our own motion, we added the word "affected" before "CLEC" and "ILEC," respectively, in subsections (c)(4) and (e)(5).

[7] We are not concerned with the *United States v. Container Corp.*-type price exchange issue noted above in this context because it is generally acknowledged that resellers of telecommunications services in the current marketplace do not have market power. We believe the advance-notice requirement here will have a procompetitive effect by creating a more level playing field for resellers competing against the more established market participants. If it later develops that this provision may be having a price-setting or price-stabilizing effect or other anticompetitive effect in the market, we can revisit the issue at that time to determine if the provision has outlived its usefulness and should be repealed.

[8] Again, on our own motion, we changed the phrase "effective with a 1-day's notice" in subsections (a)(1) and (c) to "effective on 1-day's notice" to improve clarity and to be consistent with the language used elsewhere in the final regulations.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PENNSYLVANIA PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 53. TARIFFS FOR NONCOMMON CARRIERS

TARIFF FILING REQUIREMENTS FOR INCUMBENT LOCAL EXCHANGE CARRIERS AND COMPETITIVE LOCAL EXCHANGE CARRIERS

§ 53.57. Definitions.

The following words and terms, when used in this section and §§ 53.58—53.60, have the following meanings, unless the context clearly indicates otherwise:

CLEC—Competitive local exchange carrier—A telecommunications company that has been certificated by the Commission as a CLEC under the Commission's procedures implementing the Telecommunications Act of 1996, the act of February 8, 1996 (Pub.L. No. 104-104, 110 Stat. 56), or under the relevant provisions of 66 Pa.C.S. § 3009(a) (relating to additional powers and duties).

Competitive service—A service or business activity offered by an ILEC or CLEC that has been classified as competitive by the Commission under the relevant provisions of 66 Pa.C.S. § 3005 (relating to competitive services).

ILEC—Incumbent local exchange carrier—A telecommunications company deemed to be an ILEC under section 101(a)(h) of the Telecommunications Act of 1996 (47 U.S.C.A. § 251(h)).

Joint or bundled service packages—

(i) Service packages composed of one or more distinct categories of noncompetitive and competitive services and service options or features, inclusive of toll services, when the service packages are offered by CLECs and ILECs under a single rate or charge and a unified set of terms and conditions for service as defined in a tariff approved by the Commission.

(ii) The term does not include ILEC or CLEC tariff filings that involve simultaneous changes in rates and charges for noncompetitive services in a revenue neutral manner.

Lifeline plan—A tariffed service offering, approved by the Commission, which provides telecommunications services to qualified low-income end-user consumers at reduced rates and charges in accordance with applicable State or Federal law or regulations.

New service—A service that is not substantially the same or functionally equivalent with existing competitive or noncompetitive services.

Noncompetitive service—A protected telephone service as defined in 66 Pa.C.S. § 3002 (relating to definitions) or a service that has been determined by the Commission as not a competitive service.

Promotional service offerings—A service offered by a CLEC or ILEC at rates, terms and conditions that are designed to promote usage and available for a duration of no longer than 6 months in any rolling 12-month period.

§ 53.58. Offering of competitive services.

(a) ILEC services that have been classified as competitive under the relevant provisions of 66 Pa.C.S. § 3005 (relating to competitive services), may also be offered by CLECs as competitive services without prior competitive determination and classification by the Commission subject to this section.

(b) Under § 53.59 (relating to cost support requirements and effective filing dates for tariff filings of noncompetitive services), a CLEC may offer services classified as noncompetitive in an ILEC service territory when the CLEC has been certificated to offer service.

(c) When the Commission approves a CLEC petition under the relevant provisions of 66 Pa.C.S. § 3005 for classification of a noncompetitive service to a competitive service, the ILEC serving that petitioning CLEC's service territory and other certificated CLECs within the petitioning CLEC's service territory may offer the service approved by the Commission as a competitive service subject to this section.

(d) CLECs and ILECs offering services classified by the Commission as competitive shall file with the Commission appropriate informational tariffs, price lists, and ministerial administrative tariff changes. These filings will become effective on 1-day's notice.

(e) Under Chapter 5 (relating to formal proceedings), the Commission may initiate a proceeding for the potential reclassification from competitive to noncompetitive a service that is offered by either or both an ILEC and CLECs in a specific service territory under the relevant provisions of 66 Pa.C.S. § 3005(d).

(1) The Commission will decide which competitive service of an ILEC or CLEC warrants reclassification to noncompetitive status under relevant provisions of 66 Pa.C.S. § 3005(d).

(2) The Commission will provide an opportunity to participate in the proceeding to the ILEC and to those CLECs that offer substantially the same or functionally equivalent competitive service within the service territory of the ILEC or specific CLEC for which there is a reclassification proceeding.

(3) The Commission will separately determine whether the substantially same or functionally equivalent service that is offered by the competing ILEC or CLECs in the relevant service territory will continue to be classified as a competitive service.

(4) When reviewing whether a service should be reclassified, the Commission will consider the following factors:

(i) The ease of entry by potential competitors into the market for the specific service at issue.

(ii) The presence of other existing telecommunications carriers in the market for the specific services at issue.

(iii) The ability of other telecommunications carriers to offer the service at competitive prices, terms and conditions.

(iv) The availability of like or substitute service alternatives in the relevant geographic area for the service at issue.

(v) Whether the service is provided under conditions that do not constitute unfair competition.

(vi) Whether the service, including its availability for resale under the relevant provisions of the Telecommunications Act of 1996, the act of February 8, 1996 (Pub.L. No. 104-104, 110 Stat. 56), is provided on a nondiscriminatory basis.

(vii) Other factors deemed relevant by the Commission.

§ 53.59. Cost support requirements and effective filing dates for tariff filings of noncompetitive services.

(a) *CLEC services priced below ILEC rates.* A CLEC that offers services that are substantially the same or functionally equivalent with noncompetitive services by an ILEC in the service territory of the ILEC, at rates and charges that are at or below the level of the corresponding rates and charges of the ILEC for these services, is not required to provide cost support for tariff filings and rate changes involving these services. These tariff filings will be effective on 1-day's notice if the following apply:

(1) The CLEC offers these services in the same service territory as the ILEC.

(2) The CLEC tariff filing does not contain any material changes in the CLEC's tariff rules, terms or conditions.

(3) The CLEC specifically states in its accompanying cover letter that the filing is being made on 1-day's notice in accordance with this subsection, and that the tariff filing does not contain material changes in the CLEC tariff rules, terms or conditions.

(4) The CLEC provides copies of the ILEC's effective tariffs designating the corresponding rates and charges of the same or functionally equivalent noncompetitive services.

(b) *CLECs operating in multiple ILEC territories.* When a CLEC offers services in the service territories of more than one ILEC, and the rates and charges for these services satisfy the criteria of subsection (a), the CLEC may file separate tariff schedules when the rates and charges for these services correspond to the rates and charges of the different ILECs in their respective service territories.

(c) *CLEC services priced above ILEC rates and CLEC new services.*

(1) CLEC tariff filings for services that are substantially the same or functionally equivalent with noncompetitive services offered by an ILEC in the same service territory of the ILEC, at rates and charges that are higher than the corresponding rates and charges of the ILEC, will become effective as filed if the Commission does not take any action within 30 days from the date when all consumers subject to the rate increase shall have received individual notice.

(2) CLEC tariff filings for new services will become effective as filed if the Commission does not take any action within 30 days from the date the tariff filing is filed with the Commission.

(3) The tariff filings in this subsection shall be received by the Office of Consumer Advocate, the Office of Small Business Advocate and the Commission's Office of Trial Staff on the date of filing with the Commission's Secretary's Bureau.

(4) The Commission may extend the review period in this subsection by up to an additional 30 days upon notice to the Office of Consumer Advocate, the Office of Small Business Advocate, the Commission's Office of Trial Staff and the affected CLEC.

(5) The CLEC shall include the following summary documentation for tariff filings involving the services:

(i) A brief statement indicating whether the CLEC offers these services solely on the basis of resale of an ILEC's retail services, through its own facilities, or a combination of both.

(ii) A brief statement indicating whether the tariff filing represents an increase or decrease in existing rates and charges.

(iii) A summary justification of the tariff filing, including an explanation of whether the proposed changes have been caused by a corresponding change in rates and charges of the resold services of the underlying ILEC.

(d) *CLEC ministerial administrative changes.* CLEC ministerial administrative tariff filings for services that are substantially the same or functionally equivalent with noncompetitive services offered by an ILEC in the same service territory of the ILEC, will be effective on 1-day's notice.

(e) *Cost support for CLEC filings.* When new or revised CLEC rates for service are higher than those of the ILEC in that ILEC's service territory, the Commission may request relevant documentary support, including cost support and a statement of compliance with applicable guidelines. The requests can be made either before or after the rates become effective, and will only occur when it is necessary to protect consumers such as, without limitation, when the service is targeted to the economically disadvantaged or customers with poor credit histories.

(f) *ILEC rate changes.*

(1) *Rate reductions.* ILEC tariff filings for noncompetitive services that represent rate reductions from current rates and charges of that ILEC, will become effective as filed if the Commission does not take any action within a 10-day notice and review period. To obtain the 10-day notice and review period, the ILEC shall provide copies of its current tariff for the noncompetitive service for which it seeks a rate reduction.

(2) *Rate increases.* ILEC tariff filings for noncompetitive services that represent rate increases from current rates and charges of that ILEC will become effective as filed if the Commission does not take any action within 30 days from the date when all consumers subject to the rate increase shall have received individual notice.

(3) *New services.* ILEC tariff filings for new services will become effective as filed if the Commission does not take any action within 30 days from the date the tariff filing is filed with the Commission.

(4) *Ministerial administrative changes.* ILEC ministerial administrative tariff filings for noncompetitive services will be effective on 1-day's notice.

(5) *Notice.* The tariff filings in this subsection shall be received by the Office of Consumer Advocate, the Office of Small Business Advocate and the Commission's Office of Trial Staff on the date of filing with the Commission's Secretary's Bureau.

(6) *Extension of review period.* The Commission may extend the review period in this subsection by up to an additional 30 days upon notice to the Office of Consumer Advocate, the Office of Small Business Advocate, the Commission's Office of Trial Staff and the affected ILEC.

(7) *Documentary support.* Nothing in this subsection affects the type of documentary support, including cost support and a statement of compliance with all applicable regulations, that will be necessary for an ILEC to file with the Commission for approval of tariff filings involving noncompetitive service offerings.

(g) *Executive overview.* ILECs and CLECs that file tariff filings in accordance with subsection (c) or (f) shall file an executive overview summarizing the reason for the

filing. The executive overview shall include relevant information regarding the safety, adequacy, reliability and privacy considerations related to the proposed or revised service.

(h) *Lifeline plan statement.* When a CLEC proposes increases in rates and charges for any of its basic local exchange services, the CLEC shall also state whether it has implemented a Lifeline Plan that has been approved by the Commission.

§ 53.60. Supporting documentation for promotional offerings, joint or bundled service packages, and toll services.

(a) *Promotional offerings.* CLECs and ILECs are not required to provide cost support for tariff filings involving a promotional service offering for noncompetitive services so long as the promotional offering does not result in any type of price increase to customers.

(1) ILEC and CLEC tariff filings involving a promotional service offering for noncompetitive services will become effective on 1-day's notice. ILECs and CLECs shall provide a 10-day advance notice to any resellers that purchase the promotional service offering from the ILEC or CLEC making the tariff filing.

(2) The Commission may request relevant documentary support, including cost support for tariff filings involving promotional service offerings for noncompetitive services.

(3) CLECs and ILECs that file promotional service offerings for noncompetitive services under this subsection shall confirm in their filing that subscribers to the promotional service offerings will be required to respond affirmatively at any time the promotional service is being offered if they wish to continue the service beyond the promotional period.

(4) Promotional service offerings may not have a duration of longer than 6 months in any rolling 12-month period which commences as of the effective date of the filed promotion.

(5) No filing requirements exist for promotional service offerings involving competitive services.

(b) *Joint or bundled service packages.* CLECs and ILECs are relieved from an automatic obligation to provide cost support for tariff filings involving the offering of joint or bundled service packages.

(1) When ILEC joint or bundled service packages include both competitive and noncompetitive services, these service packages shall meet any applicable State law or regulation regarding cost justification, discrimination and unfair pricing in joint or bundled service package offerings, and their component competitive and noncompetitive services.

(2) The Commission may request relevant documentary support, including cost support, for tariff filings involving joint or bundled services.

(3) No filing requirements exist for the offering of joint or bundled service packages composed entirely of competitive services.

(c) *Toll services.* CLECs and ILECs may file tariffs with changes in their rates and charges for existing noncompetitive toll services alone that can become effective on 1-day's notice. A 16-day notice period is required for the filing of a new toll service or the specific noncompetitive services defined in 66 Pa.C.S. § 3008(a) (relating to interexchange telecommunications carrier). For tariff filings and rate changes involving noncompetitive toll services, the Commission may request relevant documentary support, including cost support.

[Pa.B. Doc. No. 00-2061. Filed for public inspection December 1, 2000, 9:00 a.m.]

Title 58—RECREATION

GAME COMMISSION

[58 PA. CODE CH. 141]

[Correction]

Use of Muzzleloading Firearms in Southeast and Southwest Special Regulations Areas

An error occurred in the document amending § 141.1 which appeared at 30 Pa.B. 5960 (November 18, 2000). Subsection (d)(1) had been amended since the proposal at 30 Pa.B. 1262, 1264 (March 4, 2000). Therefore, the text should have appeared as follows:

§ 141.1. Special regulations area.

* * * * *

(d) *Permitted acts.* It is lawful to:

(1) Hunt and kill deer through the use of a muzzleloading firearm or a shotgun, at least .410 gauge (rifled barrels permitted), including semiautomatics which, upon discharge, propel a single projectile.

* * * * *

[Pa.B. Doc. No. 00-1979. Filed for public inspection November 17, 2000, 9:00 a.m.]
