RULES AND REGULATIONS

Title 4—ADMINISTRATION

STATE EMPLOYEES' RETIREMENT BOARD

[4 PA. CODE CHS. 243 AND 249]

Optional Alternate Retirement Plans

The State Employees' Retirement Board (Board) amends §§ 243.3 and 249.58 (relating to optional alternate retirement program). The final-form rulemaking deletes the transitional provisions for electing to participate in an optional alternate retirement program or plan in §§ 243.3 and 249.58. The transitional provisions are no longer needed, read broadly and may conflict with 24 Pa.C.S. Part IV (relating to Public School Employees' Retirement Code) (Retirement Code), because the Retirement Code (Retirement Code) does not allow current members to opt out of the State Employees' Retirement System (SERS).

A. *Effective Date*

The final-form rulemaking will go into effect upon publication in the *Pennsylvania Bulletin*.

B. *Contact Person*

For further information, contact Sean Sanderson, Director of Communications, State Employees' Retirement System, 30 North Third Street, P. O. Box 1147, Harrisburg, PA 17108, (717) 787-9657; or M. Catherine Nolan, Assistant Counsel, State Employees' Retirement System, 30 North Third Street, P. O. Box 1147, Harrisburg, PA 17108, (717) 783-7317.

C. *Statutory Authority*

This final-form rulemaking is being made under the authority of 71 Pa.C.S. § 5902(h) (relating to administrative duties of the board).

D. *Background and Purpose*

When amended in 1974, the Retirement Code, for the first time, permitted certain school employees to choose an alternate retirement plan. The Retirement Code applies to new employees. The Board promulgated §§ 243.3 and 249.58 to implement this Retirement Code provision. Sections 243.3 and 249.58, among other things, contained transitional provisions, granting to existing employees an opportunity to elect an alternate retirement plan. Section 249.58 provided that vested members make an election on or before November 1, 1975. Active members who had not vested as of November 1, 1975, had 60 days from becoming eligible to vest to elect. The transitional provisions of §§ 243.3 and 249.58 were added because the existing employees never had the opportunity to select an alternate plan. At the time of enactment of §§ 243.3 and 249.58, the only alternate plan allowed was Teachers Insurance and Annuity Association-College Retirement Equities Fund.

The act of June 22, 2001 (P. L. 530, No. 35) allowed the State System of Higher Education (SSHE) to add insurance companies or mutual funds as additional alternate plans for its employees. Sections 243.3 and 249.58, as written, could be interpreted to allow existing employees, who already had a choice under the Retirement Code to elect an alternate retirement plan, to make an additional election and to opt out of SERS each time a new alternate plan is approved by SSHE. The Board, however, has always interpreted §§ 243.3 and 249.58 as providing a one-time opportunity for these employees, not a continual choice each time a new alternate plan is approved by the employer. Deleting the language clarifies the intent of the Board and eliminates a potential conflict between §§ 243.3 and 249.58 and the Retirement Code, because the Retirement Code does not allow current members to opt out of the system.

The Public School Employees' Retirement System (PSERS) is proposing a similar revision of its regulation that parallels § 249.58. This amendment will harmonize the regulations of the SERS and PSERS with regard to election of alternate retirement plans. SSHE supports the final-form rulemaking.

E. *Benefits, Costs and Compliance*

Benefits

This final-form rulemaking removes expired transitional provisions, clarifies the Board's intent regarding the election of alternate retirement plans and eliminates a potential conflict between the Retirement Code and the regulations.

Costs

The final-form rulemaking formalizes the Board's longstanding interpretation that the transitional provisions of §§ 243.3 and 249.58 have expired. The final-form rulemaking, therefore, maintains the status quo, and has no associated cost.

Compliance Costs

The final-form rulemaking will not impose any additional compliance costs on State employees or employers.

F. *Sunset Review*

Not applicable.

G. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 3, 2003, the Board submitted a copy of the notice of proposed rulemaking, published at 33 Pa.B. 892 (February 15, 2003), to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House State Government Committee and the Senate Finance Committee 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 the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

On April 17, 2003, IRRC identified several sentences or phrases that could be deleted or reformatted to improve clarity. The Board has complied with the comments identified by IRRC.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on February 9, 2005, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, the final-form rulemaking was deemed approved by IRRC on February 10, 2005.

H. *Public Comments*

The Board received no public comments.

I. *Findings*

The Board finds that:

(1) Public notice of the 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) The amendments to the rules and procedures herein are necessary and appropriate for the administration of the code.

J. *Order*

The Board, acting under the Retirement Code and the act of July 31, 1968 (P. L. 769, No. 240) known as the Commonwealth Documents Law, including particularly those sections specified in the several authority sections herein specified with respect to each provision of the rules and procedures of SERS modified by this order, orders:

(a) The regulations of the Board, 4 Pa. Code Chapters 243 and 249, are amended by amending §§ 243.3 and 249.58 to read as set forth in Annex A.

(b) The amendments shall be submitted to the Office of Attorney General for approval as to legality as required by law.

(c) The Secretary of 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 immediately upon publication in the *Pennsylvania Bulletin*.

ERIC HENRY,
Secretary

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 35 Pa.B. 1487 (February 26, 2005).)

Fiscal Note: Fiscal Note 31-2 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 4. ADMINISTRATION

PART X. STATE EMPLOYEES' RETIREMENT BOARD

CHAPTER 243. MEMBERSHIP, CREDITED SERVICE, CLASSES OF SERVICE AND ELIGIBILITY FOR BENEFITS

§ 243.3. Optional alternate retirement program.

School employees, limited to certain designated employees and officers of the Pennsylvania State University, Indiana University of Pennsylvania, the State System of Higher Education and the Department of Education, shall be permitted to join an optional alternate retirement program in lieu of membership in the system. The program shall be an independent retirement program approved by the employing agency head, provided that the employer is not contributing at a rate greater than that provided in section 5508(b) of the code (relating to actuarial cost method).

CHAPTER 249. ADMINISTRATION, FUNDS, ACCOUNTS, GENERAL PROVISIONS

Subchapter E. GENERAL PROVISIONS

§ 249.58. Optional Alternate Retirement Program.

Under section 5301 of the code (relating to mandatory and optional membership), certain school employees may elect not to join the System in favor of an optional alternate retirement program approved by the employer.

(1) Every employee, who is eligible for membership in the optional alternate retirement program, shall make the election within 30 days of the first date of active employment. Employees not exercising the option to join the optional alternate retirement program shall be deemed to have chosen to commence active membership in the System, unless they have elected membership in the Public School Employees' Retirement System.

(2) When an eligible employee elected to participate in the optional alternate retirement program in accordance with the provisions of paragraph (2) as it existed on April 15, 2005, or paragraph (4) as it existed on April 15, 2005, or elects to participate in the optional alternate retirement program in accordance with current paragraph (1), the election shall be final and binding so long as the employee remains eligible to remain in the optional alternate retirement program. If the employee later becomes employed by the Commonwealth in a capacity which does not qualify him for membership in the optional alternate retirement program, the employee shall, upon meeting the qualifications for membership in this System, make contributions to the fund, and if eligible, the employee may reinstate former credited service for which contributions had been withdrawn. Remittance of contributions or reinstatement of former credited service shall be made in accordance with the applicable provisions of the code. Service, salary or other compensation paid to an employee while a member of the optional alternate retirement program will not be credited toward membership in or retirement benefit from this System.

(3) Each year, the Board will certify to the Secretary of Education or the governing bodies of employing institutions the percentage rate of the employer normal contribution as determined in accordance with section 5508(b) of the code.

[Pa.B. Doc. No. 05-700. Filed for public inspection April 15, 2005, 9:00 a.m.]

Title 22—EDUCATION

PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

[22 PA. CODE CH. 215]

Optional Alternate Retirement Plans

The Public School Employees' Retirement Board (Board) amends Chapter 215 (relating to general administration) to read as set forth in Annex A. The final-form rulemaking deletes the transitional provisions for electing to participate in an optional alternate retirement plan in § 215.36 (relating to optional alternate retirement programs). The transitional provisions are no longer needed, read broadly and may conflict with 24 Pa.C.S. Part IV (relating to Public School Employees' Retirement Code) (Retirement Code), because the Retirement Code does not allow current members to opt out of the system.

A. *Effective Date*

The final-form rulemaking will go into effect upon publication in the *Pennsylvania Bulletin*.

B. *Contact Person*

For further information, contact Frank Ryder, Director of Government Relations, Public School Employees' Re-

tirement System, 5 North Fifth Street, P. O. Box 125, Harrisburg, PA 17108, (717) 720-4733; or Charles K. Serine, Deputy Chief Counsel, Public School Employees' Retirement System, 5 North Fifth Street, P. O. Box 125, Harrisburg, PA 17108, (717) 720-4679.

C. *Statutory Authority*

This final-form rulemaking is being made under the authority of 24 Pa.C.S. § 8502(h) (relating to administrative duties of board).

D. *Background and Purpose*

When amended in 1975, the Retirement Code, for the first time, permitted certain school employees to choose an alternate retirement plan. The Retirement Code applies to new employees. The Board promulgated § 215.36 to implement this Retirement Code provision. Section 215.36, among other things, contained a transitional provision granting to existing employees an opportunity to elect an alternate retirement plan. This transitional provision was added because the existing employees never had the opportunity to select an alternate plan. At the time of enactment of § 215.36, the only alternate plan allowed was the Teachers Insurance and Annuity Association—College Retirement Equities Fund.

The act of June 22, 2001 (P. L. 530, No. 35) allowed the State System of Higher Education (SSHE) to add insurance companies or mutual funds as additional alternate plans for its employees. Section 215.36, as written, could be interpreted to allow existing employees, who already had a choice under the Retirement Code to elect an alternate retirement plan, to make an additional election and to opt out of the Public School Employees' Retirement System (PSERS) each time a new alternate plan is approved by SSHE. The Board, however, has always interpreted § 215.36 as providing a one-time opportunity for these employees, not a continual choice each time a new alternate plan is approved by the employer. Deleting the language clarifies the intent of the Board and eliminates a potential conflict between § 215.36 and the Retirement Code, because the Retirement Code does not allow current members to opt out of the system.

The State Employees' Retirement System (SERS) is proposing a similar revision of its regulation that parallels § 215.36. This repeal will harmonize the regulations of PSERS and SERS with regard to election of alternate retirement plans. SSHE supports the amendment of these sections.

E. *Benefits, Costs and Compliance*

Benefits

This final-form rulemaking removes an expired transitional provision, clarifies the Board's intent regarding the election of alternate retirement plans and eliminates a potential conflict between the Retirement Code and § 215.36.

Costs

The final-form rulemaking will formalize the Board's long-standing interpretation that the transitional provisions of § 215.36 have expired. The final-form rulemaking, therefore, maintains the status quo and has no associated cost to the Commonwealth, its citizens, school employers, school employees or PSERS.

Compliance Costs

The final-form rulemaking will not impose any additional compliance costs on school employees or employers.

F. *Sunset Review*

No sunset date has been set.

G. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on January 31, 2003, the Board submitted a copy of the notice of proposed rulemaking, published at 33 Pa.B. 882 (February 15, 2003), to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Education Committee and the Senate Finance Committee 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 the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

On April 17, 2003, IRRC identified several sentences or phrases that could be deleted or reformatted to improve clarity. The Board has complied with the comments identified by IRRC.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on February 8, 2005, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, the final-form rulemaking was approved by IRRC on February 10, 2005.

H. *Public Comments*

There have been no public comments.

I. *Findings*

The Board finds that:

(1) Public notice of the 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) The amendment to the rules and procedures are necessary and appropriate for the administration of the code.

J. *Order*

The Board, acting under The Administrative Code of 1929 and the act of July 31, 1968 (P. L. 769, No. 240) known as the Commonwealth Documents Law, including particularly those sections specified in the several authority sections herein specified with respect to each provision of the rules and procedures of PSERS deleted by this order, orders that:

(a) The regulations of the Board, 22 Pa. Code Chapter 215, are amended by amending § 215.36 to read as set forth in Annex A.

(b) The amendment shall be submitted to the Office of Attorney General for approval as to legality as required by law.

(c) The Secretary of 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 immediately upon publication in the *Pennsylvania Bulletin*.

JEFFREY B. CLAY,
Secretary

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 35 Pa.B. 1487 (February 26, 2005).)

Fiscal Note: Fiscal Note 43-9 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 22. EDUCATION

PART XIII. PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

CHAPTER 215. GENERAL ADMINISTRATION

MISCELLANEOUS PROVISIONS

§ 215.36. Optional alternate retirement programs.

(a) Under section 8301(a)(1) of the Retirement Code (relating to mandatory and optional membership), certain school employees may elect not to join the System in favor of an optional alternate retirement program approved by the employer.

(1) Every employee who is eligible for membership in the optional alternate retirement program shall make the election within 30 days of the first date of active employment. Employees not exercising the option to join the optional alternate retirement program shall be deemed to have chosen to commence active membership in this System, unless they have elected membership in the State Employees' Retirement System.

(2) When an eligible employee elected to participate in the optional alternate retirement program in accordance with the provisions of paragraph (2) as it existed on April 15, 2005, or paragraph (4) as it existed on April 15, 2005, or elects to participate in the optional alternate retirement program in accordance with paragraph (1), the election is final and binding so long as the employee remains eligible to remain in the optional alternate retirement program. When an employee later is employed in a capacity which does not qualify for membership in the optional alternate retirement program, the employee shall, upon meeting the qualifications for membership in the System, either make contributions to the fund or reinstate the former credited service for which contributions had been withdrawn. Remittance of contributions or reinstatement of former credited service shall be made in accordance with the applicable provisions of the Retirement Code. Service, salary or other compensation paid to an employee while a member of the optional alternate retirement program will not be credited toward membership in, or retirement benefit from, this System.

(b) Retirement Code reference: Section 8326 of the Retirement Code.

[Pa.B. Doc. No. 05-701. Filed for public inspection April 15, 2005, 9:00 a.m.]

Title 25—ENVIRONMENTAL PROTECTION

DEPARTMENT OF ENVIRONMENTAL PROTECTION

[25 PA. CODE CH. 121]

Corrective Amendment to 25 Pa. Code § 121.1

The Department of Environmental Protection has discovered a discrepancy between the agency text of 25 Pa. Code § 121.1 (relating to definitions) as deposited with the Legislative Reference Bureau and published at 31 Pa.B. 6921 (December 21, 2001) and the official text of 25 Pa. Code § 121.1 as codified in the March 2002 *Pennsylvania Code Reporter* (Master Transmittal Sheet No. 328), and as currently appearing in the *Pennsylvania Code*. When the amendments at 31 Pa.B. 6921 were codified, the definition of the term "solvent" was inadvertently deleted.

Therefore, under 45 Pa.C.S. § 901: The Department of Environmental Protection has deposited with the Legislative Reference Bureau a corrective amendment to 25 Pa. Code § 121.1. The corrective amendment to 25 Pa. Code § 121.1 is effective as of March 2, 2002, the date the defective official text was announced in the *Pennsylvania Bulletin*.

The correct version of 25 Pa. Code § 121.1 appears in Annex A, with ellipses referring to the existing text of the regulation.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE III. AIR RESOURCES

CHAPTER 121. GENERAL PROVISIONS

§ 121.1. Definitions.

The definitions in section 3 of the act (35 P. S. § 4003) apply to this article. In addition, the following words and terms, when used in this article, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Solid film lubricant—A very thin coating, applied to aerospace vehicles or components, consisting of a binder system which contains as its chief pigment material one or more of the following:

(i) Molybdenum.

(ii) Graphite.

(iii) Polytetrafluoroethylene (PTFE).

(iv) Other solids that act as a dry lubricant between faying surfaces.

Solvent—Organic compounds which are liquid at standard conditions and which are used as dissolvers, viscosity reducers or cleaning agents.

Solvent/air interface—For a vapor cleaning machine, the location of contact between the concentrated solvent layer and the air. This location of contact is the midline height of the primary condenser coils. For a cold cleaning machine, the location of contact between the liquid solvent and the air.

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[Pa.B. Doc. No. 05-702. Filed for public inspection April 15, 2005, 9:00 a.m.]

Title 37—LAW

DEPARTMENT OF CORRECTIONS

[37 PA. CODE CHS. 91, 93 AND 94]

Administration, State Correctional Institutions and Facilities and Release and Prerelease Programs

The Department of Corrections (Department) amends Chapters 91, 93 and 94 (relating to administration; State correctional institutions and facilities; and release and prerelease programs). The Department is acting under the authority of section 506 of The Administrative Code of 1929 (71 P. S. § 186). This final-form rulemaking revises outdated material.

Purpose

The final-form rulemaking amends Chapter 91 to update the section on use of force and restraints. The final-form rulemaking amends Chapter 93 to revise the section on inmate correspondence to provide alternative procedures for privileged correspondence. The sections on inmate visiting privileges and religious activities are updated. The section on inmate discipline is revised to change the procedures for inmate hearings. The section on prison medical services is revised to clarify examination procedures and increase medical co-pay fees. The final-form rulemaking amends Chapter 94 to clarify prerelease procedures.

Summary of Comments and Responses on Proposed Rulemaking

1. *§ 91.6. Use of force and restraints.*

The Independent Regulatory Review Commission (IRRC) commented as follows. Subsection (a)(2)(i) allows for the use of deadly force if an inmate attempts to "escape from a correctional facility or while in immediate pursuit of an inmate escaping from a correctional facility." The term "correctional facility" is not defined. The term "facility" is defined in this section as "An institution, motivational boot camp or community corrections center operated or contracted by the Department." The Department has indicated that this provision does not apply to an escape from a community corrections center. For clarity, the final-form rulemaking should define the term "correctional facility" and it should not include the term "community corrections center." Alternatively, the defined term "facility" should be substituted for "correctional facility" and subsection (a)(2)(i) should be amended to specifically exempt community corrections centers.

Response: The Department agrees and has amended subsection (a)(2)(i) to specifically exempt community corrections centers.

IRRC commented that subsection (a)(2)(ii) allows the use of deadly force if an inmate who has been convicted of a forcible felony attempts to "escape from a work detail, transport or other approved temporary absence when deadly force is necessary to prevent the escape. . . ." The term "forcible felony" is not defined in regulation or statute. However, it is defined in Department Policy Statement No. DC-ADM 201—Use of Force as "an offense involving the threat of physical force or violence against any individual." The Department should include this definition in the final-form regulation.

Response: The Department agrees and has added this definition in subsection (a)(2)(ii).

IRRC commented that subsection (c) establishes the procedures for the use of chemical munitions. It requires staff to follow procedures in Administrative Directives. The Department should include the name and form number of the applicable documents in the final-form rulemaking.

Response: The Department agrees and has added a reference to DC-ADM 201—Use of Force—to this subsection.

The Pennsylvania Institutional Law Project commented that the proposed amendments unnecessarily expand the type of situation in which force can be used to include failure to comply with rules and where other methods are ineffective. The proposed amendments also expand the use of deadly force to include situations in which an inmate is attempting to escape from a facility.

Response: The changes are not an expansion of the existing regulations, which provide for use of force for legitimate penological objectives and for use of deadly force. Department staff has the legal authority to use a reasonable amount of force to bring about compliance with rules. The language in this section has been revised to further clarify when force can be used. The authority to use deadly force to prevent an escape is clearly provided in 18 Pa.C.S. § 508(c) (relating to use of force in law enforcement). The authority to use force to comply with rules is clearly provided in 18 Pa.C.S. § 509(5)(i) (relating to use of force by persons with special responsibility for care, discipline or safety of others).

2. *§ 93.2. Inmate correspondence.*

IRRC commented that subsection (f) relates to the rejection of correspondence. It states, in part, "The letter may be held for at least 7 business days after mailing of the notification to permit reasonable opportunity to protest the decision." The word "may" suggests that this provision is optional. The Department has indicated that they routinely hold letters for 7 business days. The final-form rulemaking should make this provision a requirement by changing the word "may" to "will."

Response: The Department agrees and has made the suggested change.

The Pennsylvania Institutional Law Project commented as follows: "There are situations that were considered legal mail and not subject to search outside the presence of the inmate under the old rules that are not included in this new criteria and as such will now be inspected outside the inmate's presence."

Response: No change to definition of "legal mail" is being made at this time. This comment addresses prior amendments to these regulations.

3. *§ 93.3. Inmate visiting privileges.*

IRRC commented that in subsection (a), regarding the approved list of visitors, the opening sentence is being amended to state "A list of approved visitors may contain at least 20 names or more if permitted by the Department." This change seems to require an inmate to have at least 20 visitors on the list. To avoid this confusion, the Department should retain the existing language that stated, in part, "A list of approved visitors may contain up to 20 names . . . ."

Response: The Department agrees and has made the suggested change.

IRRC commented that under the existing regulation, a child under 12 years of age may visit an inmate when accompanied by an adult. The proposed amendment would require a child under 18 years of age to be accompanied by a parent, legal guardian or county

children/youth services agency staff. The Department's current policy statement and handbook are inconsistent with this provision in the proposed rulemaking.

IRRC further commented that section (VI)(A)(2)(f) of Department Policy Statement No. DC-ADM 812—Inmate Visiting Privileges—provides that an immediate family member approved by the parent or legal guardian may accompany a minor when visiting an inmate. In addition, section (VI)(C)(2) of DC-ADM 812 allows a minor to visit only when accompanied by a parent/legal guardian, county children/youth services agency staff or an adult approved by the parent/legal guardian.

IRRC also commented that the *Handbook for the Families and Friends of Pennsylvania Department of Corrections Prison Inmates* permits an adult on an inmate's approved visiting list to accompany a child visiting an inmate. The Department should explain the inconsistencies between the proposed rulemaking and the documents previously noted.

Response: The Department will retain the existing regulation language except to add that an adult that accompanies the child must be approved by the parent or legal guardian. The Department will ensure that both DC-ADM 812 and the *Handbook for the Families and Friends of Pennsylvania Department of Corrections Prison Inmates* are consistent with the final-form rulemaking.

IRRC commented that the provision regarding the removal of visitors from an approved list is being amended by deleting the phrase "for good cause." The Department should retain this phrase, or explain the basis on which the facility manager will remove the name of a visitor.

Response: The Department agrees and will retain this language.

IRRC made the following comments about subsections (b), (c) and (j), regarding visitations by religious advisers, attorneys and media representatives. They all contain the phrase " . . . the total designated by the Department." The Department has indicated that they do not "designate" lists of visitors. Instead, they approve lists of visitors. These subsections should be amended to read " . . . the total approved by the Department."

Response: The Department agrees and has made the suggested changes.

IRRC made the following comments on subsection (h)(1) and (2), which provides that visiting days and hours will be "at the discretion of the facility manager." Representative Kathy Manderino, a member of the House Judiciary Committee, is concerned that this new language would make it more difficult for family members to visit inmates who are confined to facilities far from their homes. She suggests the Department establish minimum standards for all facilities that would allow reasonable access for family visits. IRRC agrees that visiting days and hours should reasonably accommodate family members.

Response: The Department agrees and has amended the final-form rulemaking to require that visiting days and hours reasonably accommodate family members.

4. *§ 93.6. Religious activities.*

IRRC and the Pennsylvania Council of Churches made the following comments on subsection (a), which is being amended to delete language which permits inmates to "possess approved religious items" and be granted "reasonable accommodation for dietary restrictions." The Department should explain the reason for deleting this language.

Response: The Department has withdrawn the amendments.

IRRC and the Pennsylvania Council of Churches made the following comments on subsection (b), which relates to religious advisers. The rulemaking is deleting a provision that allows qualified representatives of a faith from the outside community to hold regular services in the correctional facility if the facility contains a sufficient number of inmates of the same faith. This provision is being replaced with the following sentence: "Staff or volunteers will be permitted to hold services that are consistent with the security needs and orderly administration of the facility." The Department has indicated that qualified representatives who have received endorsement from their faith group will still be allowed to hold services. The final-form rulemaking should be amended to reflect this fact.

Response: The Department has amended the final-form rulemaking to retain existing language and to clarify that qualified representatives, staff and volunteers may all hold services.

IRRC and the Pennsylvania Council of Churches made the following comments on subsection (c) in the existing regulation, which specifies how requests for accommodations of faith will be handled. Why is this subsection being deleted?

Response: The subsection in question has been revised to state that accommodation requests will be processed according to DC-ADM 819—Religious Activities, which sets for the process for reviewing the requests.

5. *§ 93.7. Telephone calls.*

IRRC commented on subsection (a), which references 18 Pa.C.S. Chapter 57 (relating to wiretapping and electronic surveillance). The Department has indicated that the applicable provision is 18 Pa.C.S. § 5704 (relating to exceptions to prohibition of interception and disclosure of communications). The final-form rulemaking should be amended to include a reference to 18 Pa.C.S. § 5704.

Response: The Department agrees and has made the suggested change.

6. *§ 93.9. Inmate complaints.*

IRRC and the Pennsylvania Institutional Law Project made a comment on this section, which has been amended to add that an inmate who submits a "frivolous" grievance may be subject to appropriate disciplinary procedures. The definition of "frivolous grievance" is in DC-ADM 804—Inmate Grievance System. The final-form rulemaking should include this definition. Also, the Department should reference DC-ADM 804, which explains who determines if a grievance is frivolous and when that determination is made.

Response: The Department agrees and has made the suggested change.

7. *§ 93.10. Inmate discipline.*

IRRC made a comment on subsection (a) which states, in part, that "Rules which define expectations and prohibitions for inmate behavior will be established by the Department and *made available* to the inmate population." (Emphasis added.) This sentence implies that rules will be established sometime in the future. However, the Department indicated that rules have been established and are in the *Department of Corrections Inmate Handbook (Handbook)*. The final-form rulemaking should include a reference to that document.

Response: The Department agrees and has edited the final-form rulemaking to state that the rules will be disseminated to the inmate population.

IRRC noted that Representative Manderino has expressed concern over the insertion of the phrase "made available," which replaces the existing term "distributed." The concern is that since inmates will be held responsible for complying with the rules and may be disciplined for infractions, they should receive a complete copy of the rules. We agree.

Additionally, we note that the phrase "made available" or "available" appears in subsection (b)(2), as well as in the proposed definition of "contraband" in § 91.1 (relating to definitions) and proposed §§ 93.2(e)(1), 93.3(h)(6) and 94.3(a)(1) and (6) (relating to inmate correspondence; inmate visiting privileges; and procedures for participation in prerelease programs). The same concern applies to these sections. The final-form rulemaking should specify when the complete *Handbook* will be provided to inmates and how inmates will be informed of updates to the *Handbook* and other Department policy statements.

Response: The Department agrees and has added a definition of the inmate handbook to § 91.1, which explains how it is updated. The language "made available" has been replaced with the word "disseminated."

IRRC and the Pennsylvania Institutional Law Project commented on subsection (b)(2) adding language pertaining to an "informal resolution process" for inmate misconduct charges. The Department should explain how this process will be implemented.

Response: The Department agrees and has added a reference to DC-ADM 801 and a brief description of the process.

IRRC and the Pennsylvania Institutional Law Project commented that under existing subsection (b)(5), written statements of a decision and the reasoning of the hearing body must be based on the "preponderance of the evidence." The Department is proposing to replace "preponderance of the evidence" with "some evidence." However, "some evidence" is not a legal standard for basing a finding of guilt. The Department should explain why it is not substituting another legal standard, such as "substantial evidence," on which a finding of guilt will be based.

Response: The Department has withdrawn this amendment.

8. *§ 93.12. Prison Medical Services Program.*

IRRC commented that subsection (d) lists medical services that will be provided to an inmate without charge. Subsection (d)(8) states that "Infirmary care in a Department facility excluding organ transplantation." Based on discussion with Department staff, IRRC understands that this provision was intended to address organ donation by an inmate. However, this procedure would not take place in a Department facility. Therefore, the exclusion listed in this subsection is unnecessary and should be deleted.

Response: The Department has withdrawn this change.

IRRC, the Pennsylvania Institutional Law Project and two inmates made comments that under subsection (e), the fee for medical services is being increased from $2 to $3 with subsequent increases of an additional $1 on July 1, 2005, and July 1, 2007. The Department should explain the basis for the fee increases.

Response: The basis for the fee increase is that the co-payment has not been adjusted since the implementation of the co-pay system despite the fact that costs for inmate health care are increasing significantly. The cost increased 16% from 2002 to 2004, from $152,249,000 to $176,913,000, or over $24 million over a 2-year period. The projected co-pay increase will result in a increase of only $130,000 over a 2-year period. Maintaining a fair co-payment in the face of increasing costs will continue to serve the intended purpose of eliminating unnecessary health care visits by inmates. This purpose would not be achieved if the co-pay remained stagnant in the face of increasing costs. This increase is also consistent with increases in individual co-payment amounts in the private and public sector employee health care contracts, although the increases for inmates are much smaller than those experienced by non-incarcerated individuals.

9. *§ 94.3. Procedures for participating in prerelease programs.*

IRRC commented that subsection (a) establishes the criteria for eligibility for prerelease programs. Subsection (a)(1) is being amended to add that inmates sentenced to "other offenses as specified in State or Federal statutes or specified by the Department in the *Department of Corrections Inmate Handbook*" are not eligible. The final-form rulemaking should include references to the applicable State and Federal statutes.

Response: The Department has amended this section to delete the reference to applicable State and Federal statutes. Because these statutes will be referenced in the Department directive on prerelease, this language has been substituted with a reference to that policy, DC-ADM 805—Policy and Procedures for Obtaining Pre-release.

10. *Section 94.5. Notification process.*

IRRC commented that subsection (b) establishes the procedures to be followed if a judge or court objects to the prerelease of an inmate. If the Department and the judge or court cannot reach an agreement, the Department will refer the matter to the Board for "a hearing." The existing regulation uses the word "arbitration." Why has "arbitration" been replaced with "a hearing"? Also, what does the arbitration process entail?

Response: The term "arbitration" has been replaced with the term "hearing" because that is the term used in section 2 of the act of July 16, 1968 (P. L. 351, No. 173) (61 P. S. § 1052). A reference to this statute has been included so that the regulated community can be directed to further information about the Board of Pardon's hearing process. Because that process is within the authority of the Board, not the Department, it is not for the Department's regulations to elaborate upon what the process entails.

Fiscal Impact and Paperwork Requirements

Since the Department currently operates the State prison system substantially in accordance with the final-form rulemaking, it does not expect the final-form rulemaking to have a fiscal impact on, or to create new paperwork requirements for, the Commonwealth, its political subdivisions or the private sector.

Effective Date

The rulemaking shall be effective upon final-form publication in the *Pennsylvania Bulletin*.

Sunset Date

No sunset date has been assigned; however, every facet of the final-form rulemaking will be continuously reviewed for effectiveness, clarity and whether it is serving the greater interests of citizens of this Commonwealth.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on June 2, 2004, the Department submitted a copy of the notice of proposed rulemaking, published at 34 Pa.B. 3010 (June 12, 2004), to IRRC and the Chairpersons of the House and Senate Judiciary 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 the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on March 9, 2005, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on March 10, 2005, and approved the final-form rulemaking.

Contact Person

Further information is available by contacting John S. Shaffer, Ph.D., Executive Deputy Secretary, 2520 Lisburn Road, P. O. Box 598, Camp Hill, PA 17001-0598.

Findings

The Department finds that:

(1) Public notice of intention to adopt the amendments adopted 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 promulgated thereunder, 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 the final-form rulemaking in response to comments received do not enlarge the purpose of the proposed rulemaking published at 34 Pa. B. 3010.

(4) The modifications that were made to the final-form rulemaking in response to additional comments received do not enlarge the purpose of the proposed rulemaking published at 34 Pa.B. 3010.

(5) The adoption of the final-form rulemaking 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 that:

(a) The regulations of the Department, 37 Pa. Code Chapters 91, 93 and 94, are amended by amending §§ 93.303, 93.307 and 94.2 to read as set forth at 34 Pa.B. 3010 and by amending §§ 91.1, 91.6, 93.2, 93.3, 93.6, 93.7, 93.9, 93.10, 93.12, 94.3, 94.5 and 94.6 to read as set forth in Annex A

(b) The Secretary of the Department shall submit this order, 34 Pa.B. 3010 and Annex A to the Office of General Counsel and to the Office of Attorney General for review and approval as to legality and form, as required by law.

(c) The Secretary of the Department shall certify this order, 34 Pa.B. 3010 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*.

JEFFREY A. BEARD, Ph.D.,
Secretary

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 35 Pa.B. 1942 (March 26, 2005).)

Fiscal Note: Fiscal Note 19-6 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 37. LAW

PART III. AGENCIES AND OFFICES

Subpart B. DEPARTMENT OF CORRECTIONS

CHAPTER 91 ADMINISTRATION

§ 91.1. Definitions.

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

Board—Pennsylvania Board of Probation and Parole.

Community corrections center—A minimum-security community-oriented facility operated or contracted by the Department for the purpose of facilitating special programs.

Contraband—Material listed as contraband in 18 Pa.C.S. §§ 5122 and 5123 (relating to weapons or implements for escape; and contraband), the *Department of Corrections Inmate Handbook*, or any Department document that is disseminated to inmates, such as material that an inmate is prohibited from possessing or material that an inmate is permitted to possess that has been altered or is being used for something other than its intended purpose.

Department—The Department of Corrections.

Department of Corrections Inmate Handbook—A document that is to be disseminated to inmates that contains all rules that an inmate shall follow to avoid discipline. It is updated through dissemination of written materials to inmates that describe the rule change when a change is made, or by dissemination of a revised handbook.

Diagnostic and classification center—Facilities designated to receive and classify persons who have been committed to the custody of the Department.

Facility—An institution, motivational boot camp or community corrections center operated or contracted by the Department.

Facility manager—The chief administrator of a facility, that is, the superintendent of an institution, the commander of a motivational boot camp or the director of a community corrections center.

Inmate—A person committed to the custody of or confined by the Department.

Resident—An inmate assigned to a community corrections center.

Secretary—The Secretary of the Department.

§ 91.6. Use of force and restraints.

(a) Force and restraints will be used by corrections personnel only to accomplish legitimate penological and law enforcement objectives.

(1) A staff member may not use any greater force against an inmate than is necessary to protect the staff member or others from bodily harm or to protect property from damage or destruction or to prevent a criminal act or to effect compliance with rules when other methods of control are ineffective.

(2) A staff member may only use deadly force against an inmate when that force is necessary to prevent death, serious bodily harm to the staff member or others, or to prevent one or more of the following:

(i) An escape from a correctional facility other than a community corrections center or while in immediate pursuit of an inmate escaping from a correctional facility other than a community corrections center.

(ii) An escape from a work detail, transport or other approved temporary absence when deadly force is necessary to prevent the escape and the inmate has been convicted of an offense involving the threat of physical force or violence against any individual.

(3) A staff member may use force against an inmate when he reasonably believes that force is necessary to prevent the escape of an inmate or to recapture an escaped inmate.

(4) Instruments of restraint will only be used as a precaution against escape, as protection against an inmate injuring himself or others or on medical grounds at a doctor's direction.

(b) Neither force nor restraints will be used for punishment or revenge.

(c) Use of chemical munitions will be closely controlled. Appropriate medical attention will be provided for any person involved in an incident where chemical munitions were used. Staff will follow the procedures set forth in DC-ADM 201—Use of Force—as to the availability and storage, method of use, training, medical staff role and reporting of the use of chemical munitions.

CHAPTER 93. STATE CORRECTIONAL INSTITUTIONS AND FACILITIES

Subchapter A. RIGHTS AND PRIVILEGES

§ 93.2. Inmate correspondence.

(a) *Permitted correspondence.* Inmates are permitted to correspond with friends, family members, attorneys, news media, legitimate business contacts and public officials. There may be no limit to the number of correspondents.

(b) *Restrictions.* The following restrictions apply:

(1) Correspondence with inmates of other facilities, former inmates, probationers or victims of the criminal acts of the inmate will not be permitted except upon approval of the facility manager or a designee.

(2) Correspondence containing threatening or obscene material, as well as correspondence containing criminal solicitation or furthering a criminal plan or institution misconduct is prohibited.

(3) An inmate shall refrain from writing to persons who have stated in writing that they do not wish to receive mail from the inmate. This will not be interpreted to restrict the right of inmates to correspond with public officials with respect to the official duties of the latter.

(4) Correspondence with prohibited parties through a third party is also prohibited.

(5) Mail addressed to an inmate organization will not be accepted unless the facility manager and Secretary have approved the organization and it is addressed to the staff coordinator of the organization.

(c) *Incoming mail.* Mail sent to a facility will be opened and examined for contraband in the facility's mailroom or designated area except when permitted under paragraph (1).

(1) The Department may permit sealed mail to be opened in the presence of an inmate under the following conditions:

(i) An attorney or authorized representative/designee may hand-deliver a sealed confidential client communication to an inmate if the attorney is unable to communicate through alternative means, if the following conditions are met:

(A) The person making the delivery does so during normal business hours unless granted permission in advance by the Secretary or a designee.

(B) The person making the delivery shall provide valid identification and information sufficient to verify that the person is the inmate's attorney or authorized representative of the attorney.

(C) The person making delivery shall present the documents for inspection for contraband, unsealed and unbound.

(D) Upon inspection, the documents will be sealed and delivered to the inmate where they will be unsealed and searched again for contraband.

(ii) An attorney may obtain a control number from the Department's Office of Chief Counsel if the attorney wishes to have correspondence addressed to an inmate client opened in the presence of the inmate.

(A) An attorney shall submit a written request for a control number to the Office of Chief Counsel. The request shall include the attorney's name, address, telephone and facsimile numbers, State attorney identification number and a verification subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities) that all mail sent to inmates using the control number will contain only essential, confidential, attorney-client communication and will contain no contraband.

(B) The attorney shall place the control number on each envelope that the attorney wishes to have opened in an inmate's presence. The number is confidential. It shall only be placed on the outside of the envelope so that it can be obliterated before it is delivered to an inmate client.

(C) If a control number does not appear on the envelope, the mail will be treated as regular mail and opened in the mailroom unless the procedures in subparagraph (i) are followed.

(D) The Department may change the control number for any reason upon notice to the attorney who requested it.

(iii) A court may direct delivery of court documents sealed from public disclosure to an inmate by specific order. The court's representative shall deliver the sealed documents and the specific court order to the facility. Under no circumstances will documents filed in a court of public record be delivered sealed to an inmate.

(2) Contraband in the form of money orders, certified checks, cash or other negotiable instruments will be recorded indicating the nature of the receipt, the sender, the amount received and the date. Personal checks, unless certified, will be returned to the sender. The facility is not responsible for cash sent through the mails. Confiscated coins and currency will be deposited in the Inmate General Welfare Fund. Contraband not specifically addressed in this section will be returned to the sender or destroyed.

(d) *Outgoing mail.* Sealed outgoing mail from an inmate will not be examined except as set forth in subsection (e).

(e) *Scrutiny of correspondence.*

(1) The facility manager or a designee may read incoming or outgoing mail, except mail sealed in accordance with subsection (c)(1), when there is reason to believe that it may reveal or discuss illegal or unauthorized activity or for reasons set forth in any Department document that is disseminated to inmates.

(2) The facility manager or a designee may read mail sealed in accordance with subsection (c)(1), only upon the written order of the facility manager with the written approval of the Secretary when there is reason to believe that there is a threat to facility security or criminal activity.

(f) *Rejection of correspondence.* An item of correspondence which appears to violate subsection (b) may be rejected by facility mailroom staff. The inmate and the sender, in cases when the inmate is not the sender, will be notified when the letter is rejected. The letter will be held for at least 7 business days after mailing of the notification to permit reasonable opportunity to protest the decision. If the letter is rejected, it will be returned to the sender.

(g) *Incoming publications.*

(1) A publication review committee consisting of staff designated by and reporting to the facility manager or a designee shall determine whether an inmate may receive a publication.

(2) Publications shall be received directly from a publisher, bookstore, book club, distributor or department store. Newspapers shall be mailed directly from the publisher.

(3) Publications may not be received by an inmate if they:

(i) Contain information regarding the manufacture of explosives, incendiaries, weapons, escape devices, poisons, drugs or intoxicating beverages or other contraband.

(ii) Advocate, assist or are evidence of criminal activity, inmate misconduct, violence, insurrection or guerrilla warfare against the government.

(iii) Threaten the security of a facility.

(iv) Contain obscene material as defined in 18 Pa.C.S. § 5903 (relating to obscene and other sexual materials and performances).

(v) Constitute a bulk mailing specifically intended for the purpose of advertising or selling merchandise.

(4) An inmate under 18 years of age may not receive explicit sexual materials as defined in 18 Pa.C.S. § 5903.

(5) A publication will not be prohibited solely on the basis that the publication is critical of penal institutions in general, of a particular facility, staff member, or official of the Department, or of a correctional or penological practice in this or any other jurisdiction.

(6) An inmate may receive only one copy of any publication unless granted permission by the publication review committee.

(7) Small letter sized pamphlets may be received in regular correspondence.

(8) Covers of hardbound publications may be damaged or removed during inspection in the discretion of mailroom staff.

§ 93.3. Inmate visiting privileges.

(a) *Approved list of visitors.* A list of approved visitors may contain up to 20 names or more if permitted by the Department. Inmates who can show that they have more than the number of visitors permitted by the Department may be permitted to add additional names to their approved lists. Except for members of an inmate's immediate family, a minor's name may be placed on the approved list only with permission of the minor's parents or guardian. Children under 18 years of age may visit only when accompanied by an adult approved by his parent or legal guardian and need not be placed separately on the official list. A person may not be on more than one inmate's visiting list except in cases when the person is part of the immediate family of more than one inmate, unless special permission is granted by the facility manager. Changes or additions to the approved list may be made in accordance with established procedures. The name of a visitor may be removed for good cause upon authorization by the facility manager.

(b) *Religious advisor.* Designation by an inmate of a religious advisor as defined in § 93.6 (relating to religious activities) may be made at any time. The designation shall be in addition to the names on the approved list and will not be counted against the total approved by the Department.

(c) *Attorneys.* An inmate may designate attorneys for whom the inmate desires visiting privileges at any time. The designation shall be in addition to the names on the approved list and will not be counted against the total approved by the Department.

(1) The confidentiality of the attorney-client relationship will be honored. Personnel will not be stationed in a manner as to be able to overhear normal conversation.

(2) An attorney who has been designated by an inmate as the inmate's legal advisor may permit persons, such as law students or investigators to visit the inmate to act as the attorney's agents. Each person shall present to the facility at the time of the visit a written statement signed by the attorney on the letterhead of the firm of the attorney identifying each person as the attorney's agent and attesting that the visit is for the purpose of a legal consultation.

(3) Attorneys and their agents are subject to the same rules and regulations as other visitors.

(d) *Former inmates.* A former inmate may visit only with special permission of the facility manager.

(e) *Prerelease inmates.* Inmates in prerelease status may visit other inmates only with the approval of the Secretary or a designee. Application for permission to visit shall be made by both inmates through their respective facility managers.

(g) *Initial visits.* The inmate's first visit after admission should be scheduled following the medical quarantine period and may be held in the presence of a staff caseworker.

(h) *Number, time and place of visits.* Inmates shall be permitted to have visits as often as the situation at the facility will allow.

(1) *Visiting days.* Visits may be permitted every day of the year at the discretion of the facility manager and shall reasonably accommodate family members.

(2) *Visiting hours.* Morning and afternoon visiting hours will be maintained at the discretion of the facility manager. Evening visits may be maintained at the discretion of the facility manager. Visiting hours shall reasonably accommodate family members.

(3) *Length of visits.* Visits should be at least 1 hour in duration. The length of a visit depends on the inmate's program status and available space.

(4) *Frequency of visits.* One visit per inmate per week will be permitted. Additional visits may be permitted.

(5) *Number of visitors at one time.* The number of visitors an inmate may have at any one time may be limited depending upon the available space.

(6) *Place.* Inmates in the general population will be permitted contact visits in a relaxed setting, under official supervision unless otherwise restricted as set forth in the *Department of Corrections Inmate Handbook*, or any Department document that is disseminated to inmates.

(7) *Special visit.* Provisions will be made for the approval of a special visit by persons who may not be on the approved list who have come a substantial distance and of a family visit to a seriously ill or injured inmate. Special visits will be approved only by the facility manager or a designee. Absent this approval, only those persons on the approved visiting list may visit.

(i) *Restriction of visitation privileges.*

(1) If a visit is a threat to the security and order of the facility, the visit may be terminated or disallowed.

(2) Outside visitors are subject to search before and after visiting.

(3) A visitor who cannot produce identification or who falsifies identifying information will not be allowed in the facility.

(4) Visitation may be restricted or suspended or special security precautions imposed for violation of visiting rules or as warranted by the temperament of the inmate involved.

(5) Restriction of visiting privileges will not be used as a disciplinary measure for an unrelated facility rule infraction. However, visiting privileges may be restricted as a result of changes in housing or program status made as a result of unrelated infractions.

(6) Normal visitation will be suspended during a state of emergency.

(j) *Media representatives.* Media representatives will have the same visiting privileges as visitors on an inmate's approved list of visitors as described in Department policy concerning inmate visitation. A media representative will not be in addition to the names on the approved list and will be counted against the total approved by the Department.

(1) Media representatives may obtain a copy of the Department's policy regarding inmate visitation on the Department's website (www.cor.state.pa.us).

(2) Media representatives and inmates will abide by all applicable rules, regulations and policies of the Department while on facility property. Violations of any rules, regulations or policies of the Department may result in the visit being denied, termination of the visit, suspension of visiting privileges or revocation of visiting privileges.

(3) Visits with a media representative shall be subject to the frequency of visit limitations contained in subsection (h)(4).

(4) For inmates under a sentence of death and prior to the Governor's warrant being issued, media representatives will only be permitted to have noncontact visits with the inmate. After the Governor's warrant has been issued, noncontact visits will only be entertained if the media representative has obtained an order of court of competent jurisdiction granting the relief and has properly served the Department with the court documents seeking or requesting the relief prior to obtaining the order.

(5) Media representatives for the purpose of this section include: representatives of general circulation newspapers; magazines of general circulation sold through newsstands or mail subscriptions to the general public; and National/international news services or radio/television stations holding a Federal Communications Commission license.

§ 93.6. Religious activities.

(a) *Department responsibilities.* The Department will permit inmates to possess approved religious items and make reasonable accommodations for dietary restrictions. The Department will provide chapel facilities at each facility and will permit inmates to request religious accommodations not already being permitted.

(b) *Religious advisors.*

(1) If the facility contains a sufficient number of inmates of the same faith, a qualified representative of that faith from the outside community will be appointed and approved by the facility manager. Qualified representative means a person from the outside community who has received endorsement from his faith group authority. Qualified representatives, staff and volunteers will be permitted to hold services that are consistent with the security needs and orderly administration of the facility.

(2) Each inmate will be permitted to select a religious advisor from the outside community subject to security needs and orderly administration of the facility. This person will be permitted to visit the inmate on an individual basis in accordance with general rules governing visitation.

(c) *Accommodation of faiths.* Requests for accommodation of faiths will be made according to DC-ADM 819—Religious Activities—which provides a process for inmates to request accommodations not already being provided and for staff review of the requests.

§ 93.7. Telephone calls.

(a) Inmates in general population may make phone calls in accordance with 66 Pa.C.S. § 2907 (relating to state correctional institutions) and the *Department of Corrections Inmate Handbook*. Phone calls, except confidential communications between attorneys and inmates, will be subject to monitoring in accordance with 18 Pa.C.S. § 5704 (relating to exceptions to prohibition of interception and disclosure of communications).

(b) Phone calls to inmates will be permitted only if approved in advance by the facility manager or a designee.

§ 93.9. Inmate complaints.

(a) The Department will maintain an inmate grievance system which will permit any inmate to seek review of problems which the inmate experiences during the course of confinement. The system will provide for review and resolution of inmate grievances at the most decentralized level possible. It will also provide for review of the initial decision making and for possible appeal to the Central Office of the Department. An inmate will not be disciplined for the good faith use of the grievance systems. However, an inmate who submits a grievance for review which is false, frivolous or malicious may be subject to appropriate disciplinary procedures. A frivolous grievance is one in which the allegations or the relief sought lack any arguable basis in fact as set forth in DC-ADM 804—Inmate Grievance System, which is disseminated to inmates.

(b) Inmates may also pursue available remedies in State and Federal court.

§ 93.10. Inmate discipline.

(a) Rules which define expectations and prohibitions for inmate behavior will be established by the Department and disseminated to the inmate population. There shall be two classes of misconduct charges, Class I and Class II.

(1) Inmates found guilty of Class I misconduct charges may be subjected to one or more of the following sanctions:

(i) Reduction of the classification of the misconduct to a Class II and any sanction permitted for Class II misconducts.

(ii) A sanction permitted for Class II misconducts, without change in class of misconduct.

(iii) Change of cell assignment, including placement in the restricted housing unit or restrictive confinement in a general population cell for a period not to exceed 90 days for any one misconduct charge.

(iv) Change of program level.

(2) Inmates found guilty of Class II misconducts may be subjected to one or more of the following sanctions:

(i) Reprimand.

(ii) Suspension of privileges for a specified period of time.

(iii) Payment of the fair value of property lost or destroyed or for expenses incurred as a result of the misconduct.

(iv) Change of cell assignment excluding placement in the restricted housing unit.

(v) Change, suspension or removal from job.

(b) Written procedures which conform to established principles of law for inmate discipline including the following will be maintained by the Department and disseminated to the inmate population:

(1) Written notice of charges.

(2) Hearing before an impartial hearing examiner or an informal resolution process for charges specified by the Department in the *Department of Corrections Inmate Handbook*, or any Department document that is disseminated to inmates. The informal resolution process is described in DC-ADM 801—Inmate Discipline. The process gives inmates the option to meet with staff to resolve a misconduct rather than proceed with a hearing.

(3) Opportunity for the inmate to tell his story and to present relevant evidence.

(4) Assistance from an inmate or staff member at the hearing if the inmate is unable to collect and present evidence effectively.

(5) Written statement of the decision and reasoning of the hearing body, based upon the preponderance of the evidence.

(6) Opportunities to appeal the misconduct decision in accordance with procedures in the *Department of Corrections Inmate Handbook*.

§ 93.12. Prison Medical Services Program.

(a) Every institution will establish procedures to permit inmates to have access to health care professionals, prescribed treatment for serious medical needs, appropriate nutrition, exercise and personal hygiene items.

(b) The following words and phrases, when used in this section, have the following meanings unless the context clearly indicates otherwise:

Fee—The portion of the actual cost of a medical service provided to an inmate which the Department has determined shall be charged to the inmate.

Health care professional—

(i) Any physician, physician assistant, nurse, dentist, optometric professional or other person licensed to provide health care under the laws of the Commonwealth.

(ii) The term does not include a corrections health care administrator performing the administrative duties of that position.

Inmate—A person confined to a correctional institution, motivational boot camp, community corrections center or other facility operated by the Department, its agent or contractor.

Medical service—

(i) The diagnosis, evaluation, treatment or preservation of the health of the human body, including its organs, structures and systems.

(ii) The term includes diagnostic testing, prescribing and administering medication, surgical procedures, dental care, eye care, the furnishing of prosthetics and any other type of treatment or preventative care, whether performed on an inpatient or outpatient basis.

(c) The Department will charge a fee to an inmate for any of the following:

(1) Nonemergency medical service provided to an inmate at the inmate's request.

(2) Medical service provided to the inmate as the result of a self-inflicted injury or illness, including emergency medical service provided to the inmate as the result of a self-inflicted injury or illness.

(3) Initial medication prescription except as provided in subsection (d)(2), (14), (16) and (17).

(4) Medical service provided to another inmate as a result of assaultive conduct engaged in by an inmate to be charged the fee.

(5) Medical service provided to an inmate as a result of an injury or illness arising from the inmate's participation in a sport.

(6) Medical service provided to an inmate to determine whether the inmate's physical condition is suitable for participation in a sport unless the medical service is provided as part of an inmate's physical examination scheduled by the Department.

(d) The Department will not charge a fee to an inmate for any of the following:

(1) Physical, dental or mental health screening provided to an inmate upon intake.

(2) Immunization, tuberculosis test, Hepatitis B vaccination or other treatment initiated by the Department for public health reasons.

(3) Institution transfer screening.

(4) Physical and dental examination scheduled by the Department.

(5) Medical service provided to an inmate during a follow-up appointment scheduled by a health care professional employed by the Department or its contractors.

(6) Mental health treatment.

(7) Medical treatment for a chronic or intermittent disease or illness.

(8) Infirmary care in a Department facility.

(9) Hospitalization outside of a Department facility.

(10) Long-term care to an inmate not in need of hospitalization, but whose needs are such that they can only be met on a long-term basis or through personal or skilled care because of age, illness, disease, injury, convalescence or physical or mental infirmity.

(11) Medical referral ordered by a health care professional employed by the Department or its contractors.

(12) Medical service provided to an inmate during a medical emergency unless the medical emergency resulted from a self-inflicted injury or illness as determined by the health care professional providing the medical service.

(13) Laboratory test, electrocardiogram, dressing change or other treatment ordered by a health care professional employed by the Department or its contractors.

(14) Prenatal care.

(15) Medical service provided as a result of an injury or illness arising from an inmate's institutional work assignment.

(16) Medication prescription subsequent to the initial medication prescription provided to an inmate for the same illness or condition.

(17) Social service program including, but not limited to, substance abuse groups and counseling.

(18) Psychotropic medication.

(19) Medication prescribed for an inmate for public health reasons.

(20) Physical, dental and mental health screening performed at the request of the Department.

(21) Medical service provided to an inmate to determine whether his physical condition is suitable for an institutional work assignment.

(22) Eyeglass prescription.

(23) Dentures.

(24) Prosthetic devices excluding customized items.

(e) The fee for any medical service in subsection (c) is $3. This amount will be increased to $4 on July 1, 2005, and $5 on July 1, 2007, except that an inmate is required to pay a fee equivalent to the total cost of medical services provided to another inmate as a result of the inmate's assaultive conduct.

(1) The fee will be assessed each time a medical service in subsection (c) is provided to an inmate, except when multiple services are performed at one visit at the discretion of the health care professional.

(2) Each inmate shall receive 60 days written notice of the implementation of the Prison Medical Services Program.

(3) Each inmate shall receive written notice of any changes in medical service fees and payment procedures at least 60 days after the effective date of a regulation that modifies the fee for medical services and payment procedures.

(f) Payment for any medical service in subsection (c) shall be accomplished according to the following procedures:

(1) At the time any medical service is to be provided to an inmate, the inmate will be informed by the Department or a health care professional contracted by the Department whether a fee will be charged for the medical service and will be provided with an authorization form. The authorization form will describe the medical service to be provided and authorize the institution to deduct the fee from the inmate's account.

(2) An inmate who wishes to receive a medical service after being advised that a fee will be charged for the medical service, shall sign the authorization form acknowledging that his inmate account will be debited for the fee. An inmate who refuses to sign the authorization, who does not sign a refusal of treatment form and who accepts medical treatment will receive the services and his account will be debited. An inmate will not be denied access to medical services because of an inability to pay the required fee. If an inmate lacks sufficient funds to pay a medical service fee, the inmate's account will be debited and the fee recouped as soon as sufficient funds are deposited in the inmate's account.

(3) The Department may seek to recover any amount owed for medical services fees by an inmate upon release under section 5 of the Prisoner Medical Services Act (61 P. S. § 1015).

(g) An inmate who has medical insurance shall pay for his own medical needs through that insurance by cooperating with the Department in submitting the proper paperwork to the insurance carrier.

(h) The Department will include an explanation of the program in the *Department of Corrections Inmate Handbook*.

CHAPTER 94. RELEASE AND PRERELEASE PROGRAMS

§ 94.3. Procedures for participation in prerelease programs.

(a) The criteria for eligibility for prerelease programs are as follows:

(1) Inmates who have been sentenced to death or life imprisonment or other offenses specified by the Department in the *Department of Corrections Inmate Handbook*, DC-ADM 805—Policy and Procedures for Obtaining Prerelease—or any Department document that is disseminated to inmates are not eligible.

(2) Time-served requirements are as follows:

(i) To be time-eligible for placement in a community corrections center or group home, the inmate shall have completed at least one-half of the inmate's minimum sentence, be within 1 year of completing his minimum sentence, have no outstanding detainers, and have served at least 9 months in a facility. Exceptions may be made with written approval of the Secretary or a designee, when early transfer is necessary to assist in the inmate's access to medical or mental health care or to provide longer period of participation for an inmate who has been confined for an unusually long period of time. A contact may not be made with the court until the approval is obtained.

(ii) For other prerelease programs, the inmate is time-eligible after the inmate has completed one-half of the inmate's minimum sentence or one-half of the period ending with anticipated release date of an indeterminate sentence and has served at least 9 months in a facility. The inmate may have no detainers lodged against him for an untried offense or for a sentence with a maximum term in excess of 2 years. Inmates who are otherwise time-eligible who have detainers lodged against them for less than 2 years can be time-eligible for a prerelease program except community corrections center or group home upon written approval of the Secretary or a designee. No contact may be made with the court until the approval is obtained.

(3) The inmate shall have favorable recommendation of the correctional facility staff—for example, counselor, work supervisor, housing officer, education/vocational supervisor and deputy facility managers for treatment and operations.

(4) The inmate may have had no Class I misconduct and no more than one Class II misconduct during the 9 months prior to application, and have sustained no Class I misconduct and no more than one Class II misconduct from the time of application to the time of transfer.

(5) The inmate shall obtain a medical clearance by the facility medical officer.

(6) The inmate's application shall be approved by the facility manager and by the Secretary or regional director of the Department, or both, if an inmate is serving a sentence for an offense specified in the *Department of Corrections Inmate Handbook*, or any Department document that is disseminated to inmates that requires approval.

(7) If the inmate has not completed his minimum sentence, the notice process in § 94.5 (relating to notification process) shall be followed.

(8) Applications for transfer to community corrections require evaluation and concurrence by the staff of the appropriate region of community corrections and approval by the Director of Community Corrections.

(9) The inmate shall execute a written acknowledgement that he is required to abide by the rules and regulations of the prerelease program. In the case of community corrections placement, the written agreement shall be signed prior to transfer.

(10) After transfer into a prerelease program, the inmate may continue to participate in the program only while adequate resources are available to provide care, custody and control for the inmate within the program to which the inmate has been admitted. The inmate's privilege to participate in prerelease programs may be suspended or revoked for administrative or disciplinary reasons. The Department will establish procedures to govern the revocation of prerelease privileges.

(b) The process of obtaining prerelease transfer is initiated when an inmate submits an application to the inmate's counselor for participation in work/educational/vocational release, or for a temporary home furlough or for transfer to a community corrections placement. An inmate will not be granted prerelease transfer for any purpose unless the inmate satisfies all of the criteria in this section. Satisfying the eligibility criteria for prerelease transfer does not mean the inmate will automatically be permitted to participate in prerelease programs. Other considerations such as the staff's evaluation of the inmate's progress, the relevancy of the particular prerelease program to the inmate's reintegration, the safety of the community and the victim of the inmate's crime and the availability of space will be taken into consideration. Approval for participation in one prerelease program does not imply clearance for, or preclude application for participation in any other program. The application must specify a particular prerelease program.

(c) Special exception to subsection (a) or (b), other than subsection (a)(1), (2)(ii) and (6)—(9), may be recommended in writing by a facility manager to the Secretary or a designee.

(d) Inmates serving Federal sentences in facilities shall be eligible for prerelease transfer under rules and regulations established by the United States Department of Justice, Federal Bureau of Prisons, and subject to subsections (a) and (b), and the subsequent approval of Federal and State authorities.

(e) Inmates serving sentences from other jurisdictions under the Interstate Corrections Compact (61 P. S. §§ 1061—1063) are eligible subject to subsections (a) and (b) and the sending state's written approval.

§ 94.5. Notification process.

(a) If the facility manager approves an inmate's application for prerelease transfer, the facility manager shall notify the sentencing judge or if the sentencing judge is unavailable, the sentencing court, and the prosecuting district attorney's office by certified mail, of the inmate's proposed prerelease program. Comments will be considered.

(b) If the inmate has not finished his minimum sentence and an objection is received from the judge, or court, if the judge is unavailable, within 30 days of the receipt of the proposed prerelease plan, representatives of the Department will contact the judge or court and if necessary arrange for a meeting to attempt to resolve the disagreement. If, within 20 days of the Department's receipt of the objections, the judge or court does not withdraw the objection and the Department does not withdraw its proposal for transfer, or the judge and the Department do not agree on an alternate proposal for transfer, the Department will refer the matter to the Board for a hearing in accordance with section 2 of the act of July 16, 1968 (P. L. 351, No. 173) (61 P. S. § 1052).

§ 94.6. Staff responsibilities.

(a) It is the primary responsibility of the inmate's counselor to process the inmate's application for participation in prerelease programs.

(1) The inmate's counselor is responsible for obtaining, integrating and coordinating the information necessary to determine the inmate's eligibility or noneligibility for participation in a prerelease program.

(2) The inmate's counselor will accept and review the inmate's application. If necessary, the counselor may help the inmate initiate this process. The inmate's counselor will also be responsible for having the housing officer, work supervisor and other appropriate staff complete relevant portions of the application and make recommendations concerning prerelease programming.

(3) The inmate's counselor shall verify, with the record officer, the necessary information with respect to the inmate's sentence and detainer status.

(4) The inmate's counselor will review and verify available information relevant to eligibility—for example, presentence investigation report, judge's sentencing notes, classification and reclassification summary records and cumulative adjustment record.

(5) The inmate's counselor will request proper psychological and psychiatric evaluations for those applicants who have a history of mental or emotional disorders, violent crimes or other situations when deemed advisable. The inmate's counselor may contact other persons and agencies to acquire additional information.

(6) When the necessary information has been obtained, the inmate's counselor will refer the application to his supervisors for review.

(b) It is the primary responsibility of the Corrections Classification Program Manager (CCPM) or other staff person designated by the facility manager to coordinate the staff evaluation and recommendation process.

(1) The CCPM or other staff person designated by the facility manager will chair a meeting of designated facility staff who shall make recommendations regarding prerelease programs. The inmate shall be present at this staff meeting for input.

(2) The staff's findings, recommendations and rationale shall be forwarded to the facility manager through both the Office of the Deputy Superintendent for Centralized Services and the Deputy Superintendent for Facilities Management, with comments by both.

(c) It is the responsibility of the facility manager to give final approval or disapproval of recommendations regarding prerelease programs. The inmate will be advised by the unit manager, in the presence of the inmate's counselor, of the final decision and its rationale. The decision and rationale will be documented in the cumulative adjustment record.

(d) Letters to judges and district attorneys shall be signed by the facility manager or a designee.

(e) The inmate's counselor shall discuss with the inmate prior to the commencement of the program, the objectives, rules and regulations of the program and obtain written agreement as provided for in § 94.3(a)(9) (relating to procedures for participation in prerelease programs). The counselor shall review the program objectives on the inmate's cumulative adjustment record.

[Pa.B. Doc. No. 05-703. Filed for public inspection April 15, 2005, 9:00 a.m.]

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 63]

[L-00030165]

Establishing Local Service Provider Abandonment Process for Jurisdictional Telecommunications Companies

The Pennsylvania Public Utility Commission, on January 13, 2005, adopted a final rulemaking order establishing an orderly process to follow when a local service provider abandons local telephone service.

Executive Summary

The advent of competition in the local telephone market in Pennsylvania has created situations that the Commission's current regulations do not address. To comply with certain aspects of the Telecommunications Act of 1996, the Commission implemented a streamlined application process to modify traditional entry procedures applicable to telecommunications carriers. Specifically, the Commission's telecommunication procedures allow new entrants to commence service upon filing and service of the application, which must contain an interim tariff. These entry procedures apply to all carriers whether they are facilities-based, interconnected or reseller competitive local exchange carriers (CLECs). CLECs that are not facilities-based and rely either completely or partially for their underlying service on the incumbent local exchange carrier (ILEC) are considered resellers. If the CLEC fails to pay the underlying ILEC for the service it resells to its end-use customers, the CLEC's wholesale telephone service will be terminated. This results in the termination of dial tone service to the end-use customer—effectively a de facto abandonment of service by the CLEC. Although a public utility must seek prior approval to abandon service, the Commission's rules under Chapters 63 and 64 (relating to telephone service and standards and billing practices for residential telephone service) do not cover abandonment of utility services nor do they address the notification of the end-use customers.

In April 2002, recognizing the need for both short-term and long-run solutions to problems associated with de facto abandonment, the Commission approved Interim Guidelines addressing the issues raised by this regulatory oversight. Later in 2002, the Commission held collaborative sessions that involved telecommunications carriers and other interested parties in discussions of the issues. The collaborative participants addressed proposals for regulations and proposed solutions to the problems created by the changing telecommunications marketplace.

By Order entered on December 23, 2003 at Docket No. L-00030165, the Commission adopted a Proposed Rulemaking Order to amend 52 Pa. Code Chapter 63, consistent with the order and recommendations of the collaborative participants, the Bureau of Consumer Services and the Law Bureau. See 34 Pa.B. 1795 (April 3, 2003). The intent of the proposed rulemaking is to promulgate regulations to establish general rules, procedures, and standards to provide for an orderly process when a local service provider exits the market. By Order entered September 16, 2004, the Commission adopted a Final Rulemaking Order.

Verizon Pennsylvania, Inc. and Verizon North, Inc. (collectively Verizon) submitted comments to IRRC that opposed the Final Rulemaking Order. On November 17,

2004, the Commission notified IRRC that the agency was withdrawing the regulation from consideration. On December 3, 2004, the Commission issued a Secretarial Letter notifying interested parties that the Commission may amend its Final Rulemaking Order to address the comments submitted to IRRC by Verizon and any replies received pursuant to the notice. Replies were received from United Telephone Co. of Pennsylvania d/b/a Sprint and the OSBA. On January 13, 2005, the Commission adopted a Revised Final Rulemaking Order which addressed Verizon's and the parties' concerns.

The final regulations apply to all local service providers (LSPs) and network service providers (NSPs) operating in Pennsylvania. The final regulations will provide for an orderly process when a NSP intends to embargo and terminate service to a LSP, when the Commission has issued an order to revoke a LSP's certificate of public convenience and when a LSP has filed an application to abandon a certificate of public convenience for the provision of local service. In particular, the regulations will ensure that customers do not lose service when their LSP exits the market and customers are provided ample notice and the opportunity to select a new LSP of their choice. Moreover, the regulations will ensure that an abandoning LSP provides sufficient network information so that customers are able to be migrated seamlessly and also that an abandoning LSP coordinates with 9-1-1 service providers and the North American Numbering Plan Administrator. Finally, the regulations apply to a LSP that provides local service to residential or business customers.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 18, 2004, the Commission submitted a copy of the notice of proposed rulemaking, published at 34 Pa.B. 1795 (April 3, 2004), to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Committee on Consumer Affairs and the Senate Committee on Consumer Protection and Professional Licensure for review and comment.

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

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on March 9, 2005, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on March 10, 2005, and approved the final-form rulemaking.

Public Meeting
held January 13, 2005

Commissioners Present: Wendell F. Holland, Chairperson; Robert K. Bloom, Vice Chairperson; Glen R. Thomas, Recusing; Kim Pizzingrilli

Rulemaking Re Establishing Local Service Provider Abandonment Process for Jurisdictional Telecommunication Companies; L-00030165

Revised Final Rulemaking Order

By the Commission:

On December 23, 2003, the Commission entered a Proposed Rulemaking Order to promulgate a regulation to establish general rules, procedures, and standards to provide for an orderly process when a local service provider exits the market. The proposed regulation applies to all local service providers (LSPs) and network service providers (NSPs) operating in Pennsylvania. The proposed regulation will provide for an orderly process when a NSP intends to terminate service to a LSP, when the Commission has issued an order to revoke a LSP's certificate of public convenience, and when a LSP has filed an application to abandon a certificate of public convenience for the provision of local service.

The December 23, 2003 Order was published April 3, 2004 at 34 Pa. B. 1795. The Commission received written comments from the Independent Regulatory Review Commission (IRRC), MCI WorldCom Network Services, Inc. (MCI), AT&T Communications of Pennsylvania, LLC. (AT&T) and Verizon Pennsylvania Inc. (Verizon). At Public Meeting on September 10, 2004 the Commission adopted the Final Rulemaking Establishing Local Service Provider Abandonment Process for Jurisdictional Telecommunication Companies. The Final Rulemaking Order which was entered September 16, 2004, discussed the comments and set forth, in Annex A, regulations.

On October 15, 2004, the Commission submitted the final rulemaking to the Independent Regulatory Review Commission (IRRC) and legislative standing committees. The regulation was scheduled for consideration and action at IRRC's Public Meeting on November 18, 2004.

Verizon Pennsylvania Inc. and Verizon North Inc. (collectively Verizon) submitted comments to IRRC that opposed the Final Rulemaking Order. Verizon's comments to IRRC were accompanied by proposed language revisions to the regulations. On November 17, 2004, the Commission notified IRRC that the agency was withdrawing the subject regulation from consideration.

On December 3, 2004, the Commission issued a Secretarial Letter notifying interested parties that we may amend our September 16, 2004 Final Rulemaking Order, pursuant to Section 703(g) of the Public Utility Code, to address the comments submitted to IRRC by Verizon and any replies received pursuant to the notice. The Commission received written replies from United Telephone Company of Pennsylvania d/b/a Sprint (Sprint) and the Office of Small Business Advocate (OSBA). The comments of Verizon and replies of Sprint and OSBA will be discussed in the sections pertaining to their subject matter.

General Comments of Feasibility, Implementation Procedures, Economic Impact and Reasonableness

IRRC provided comments about some general aspects of the proposed regulations that were not identified with particular sections. We shall address these comments here. IRRC commented that the proposed regulations require the abandoning LSP to perform multiple functions over a period of several months. They commented that further protection of the end-use customer is needed if that process breaks down and that the final-form regulation should include provisions to reassign functions if the abandoning LSP is unable to, or fails to, perform its required duties.

The final-form regulations address IRRC's concerns by dramatically shortening the required timeframe in which a NSP is required to notify the LSP in advance of the termination date. This timeframe had been shortened from 110 days to 45 days. This shortened timeframe should enable a LSP to perform its required duties more quickly, thus providing for a more feasible process. At the same time, we think that we have struck a reasonable

balance of protections for the LSP through dispute provisions and have maintained a 20-day period for end-user customers to shop for a new LSP.

IRRC's comment to include provisions in the regulations to reassign functions in the event the abandoning carrier is unable to, or fails to, perform its required duties is a more difficult issue to address in formal regulations. The Commission is promulgating these regulations precisely because some LSPs have abandoned service without providing customer notice. The final-form regulations are meant to send the message that such irresponsible actions to exit the market are not acceptable and to lay out a reasonable process to exit the market. All too frequently the Commission, with the assistance of the NSP, has had to serve in the backup role and notify customers when the abandoning LSP failed to do so. We do not view this to be the proper role of the Commission or the NSP. At the same time, the Commission does not believe there exists another entity that should be required to notify customers because the abandoning carrier has failed to do so. Finally, we believe that to incorporate a backup provision into the regulation may inadvertently invite its use which would be in conflict with sending the message that it is the abandoning carrier's responsibility to exit the market in a responsible manner. We have, however, incorporated provisions into the final-form regulations for the NSP to extend the wholesale customer's termination date should the Commission determine that a significant number of end-user customers have yet to select a new LSP by the scheduled abandoning carrier's exit date. We will continue to be vigilant to make sure that customers are notified when a LSP abandons services.

A second general comment from IRRC about the proposed regulations noted that the regulation should address how implementation of the new regulatory requirements will affect existing and future interconnection agreements and whether the regulations supercede existing agreements. In our view, the overlap in interconnection agreement provisions and the content of the final-form regulations occurs in four general areas: payment default provisions, bill dispute provisions, dispute rights with the Commission, and the advance notice time period that is required for a NSP to terminate a LSP's service. Our review of interconnection agreements revealed that the more recent interconnection agreements have payment default notice provisions, bill dispute provisions and provisions for a NSP to seek the Commission's intervention to resolve a dispute. In preparing the final-form regulations, we have strived to strike a balance between incorporating reasonable provisions of interconnection agreements where they exist and making sure that the regulations provide basic provisions for adequate notice of billing disputes and payment defaults, reasonable time periods to resolve the issues, and the timely filing of disputes with the Commission. We reiterate the message contained in the proposed regulations that it is our desire that the entities seek to resolve their differences and incorporate whatever provisions they feel are necessary into their interconnection or other agreements and only seek the Commission's involvement in dispute resolution as a last resort. We have included what we view as basic provisions to resolve differences in the regulations to foster resolution between the entities so that if the Commission is asked to resolve disputes we can facilitate a quick resolution knowing that the basic processes have already taken place.

In our review of the interconnection agreements as to the time period accorded from the NSP notice of termination to the termination date, we note that the regulations require 45 days advance notice whereas the interconnection agreements typically contain a 30-day notice period. We have developed the 45-day requirement allowing for up to 10 days after NSP notification for the abandoning LSP to develop and file their abandonment plan with the PUC and develop their customer notice, allowing up to five days for the notice of abandonment to reach end-user customers, allowing up to 20 days for end-user customers to shop and choose a new LSP, and allowing up to 10 days for customer migration to the new LSP. As noted above, we have dramatically reduced the overall time period from 110 days to 45 days but do not believe less than 45 days allows adequate time for these necessary events to take place.

In general, we note that where provisions of interconnection or other agreements are inconsistent with the regulatory requirements in the final-form regulations, the provisions of regulations supercede the existing agreements, if such regulations are not inconsistent with the provisions of Telecommunications Act of 1996 (TA-96). 47 U.S.C. section 261(b). Certainly some interconnection agreements have additional provisions that go beyond those contained in the regulations and we view them as accepted upon Commission approval of the agreements.

§ 63.301. Statement of Purpose and Policy

We received comments on this section from IRRC and Verizon. We have also made minor wording revisions to add clarity or to reflect changes made in other parts of the Annex. Under § (a)(1) of the Purpose, we eliminated the reference to embargo consistent with our removal of any reference to embargo in the Annex. In § (a)(2), we adopted IRRC's comment and added the words "any of" to specify that the regulations apply to any of the circumstances noted under (i)(iii). Under § (a)(2)(i), we substituted the word "interconnection" for "service" to clarify that the NSP is intending to terminate a LSP's interconnection agreement rather than a service agreement.

Based on Verizon's comments, we deleted § (3) that read to "Ensure that customers do not lose service when their LSP exits the market." This revision is accompanied by another revision recommended by Verizon to new § (3) whereby we added language stating "and thereby not lose local service when the LSP exits their market." These revisions reflect our approach to abandonment whereby we seek to provide customers advance notice of abandonment and an opportunity to select another LSP. In some cases, customers may receive a second notice if they have not responded to a first notice. However, absent a customer responding to an abandonment notice and selecting a new LSP, we cannot ensure that the abandoning LSP will maintain service indefinitely and that unresponsive end-user customers will never lose local service. Under subsection (b), Application, we have revised (2) to clarify that the subsection applies to wholesale "local" service versus the more generic "telephone" service as recommended by IRRC. We have also eliminated the reference to "embargo" and added clarifying language that the NSP is terminating the LSP's service "for breach of an interconnection agreement."

§ 63.302. Definitions

We have made several changes to this section based on comments by IRRC, Verizon and our own efforts to add clarity to the regulations. IRRC noted that the definition of Local Service Provider included undefined terms such as "unbundled network elements" and recommended that these terms be defined in the final-form regulations. In

response to IRRC's comments we have added definitions for "UNE (unbundled network element), UNE-L (local loop) and UNE-P (UNE-platform)." Based on our own analysis, we have added definitions for the terms "Full Facilities," "Interconnection Agreement," "NANPA," "Preferred Carrier Freeze" and "Resale" to add clarity for terms used in the regulations.

Comments provided by Verizon were the basis for deleting two definitions of terms that were used and defined in the proposed regulations but do not appear in the final-form regulation. We have deleted the definition of "Default LSP" consistent with removing the default LSP provisions and we have deleted the definition of "Embargo" as the embargo provisions that were in the proposed regulations were replaced by "Pre-Termination Provisions" that do not refer to the term embargo.

The definitions that appear in the final-form regulations also contain several revisions based on comments from the parties. IRRC questioned whether the phrase "in a service area" was needed in the definition of abandoning LSP. We concluded that the phrase was not necessary and removed it from the definition. IRRC also commented that the definition of "NSP-Network Service Provider" contains the undefined term "carrier." We have replaced the term "carrier" with "telecommunications provider" in the definition of NSP and removed the term "carrier" from the final-form regulations.

IRRC commented that the terms "NLSP (new local service provider)," and "OLSP (old local service provider)" that appeared under the definition of "LSP-local service provider" should have stand alone definitions. We addressed IRRC's comments by deleting this reference under the definition of LSP. The term "OLSP" was only used in this definition but not elsewhere in the regulation and therefore was unnecessary. We chose to delete the term "NLSP" and replace it with "new LSP," thereby eliminating an abbreviation that could potentially be confused with NSP (network service provider). We believe that the term "new LSP" will be understood in the context of the regulation which generally addresses the need for customers to find another or new LSP to replace their abandoning LSP.

A final comment on the definition of LSP that was provided by IRRC pertained to the term "nonjurisdictional services" being undefined. Upon review, we determined that the entire sentence that contained the term "nonjurisdictional services" was unnecessary and did not add clarity in the context of this regulation and we therefore deleted "§ (ii) A LSP may also provide other telecommunication services, as well as nonjurisdiction services."

Verizon commented that the definition of acquiring LSP should specify that the acquiring LSP "voluntarily" undertakes to provide local service. Therefore we have inserted the word "voluntarily" into the definitions of acquiring LSP as suggested.

Finally, IRRC commented that we should be consistent in the use of "Local Service" which is defined in the regulation. We have adopted their comment and deleted the use of "Telephone Service" and "Telecommunications Service" where local service is appropriate.

§ 63.303 NSP Embargo Process

We received very significant, substantive comments about the NSP Embargo Process in the proposed regulations. These comments led us to re-evaluate the need for, and form of, the embargo process that was designed to precede the NSP issuing a termination notice to a LSP (wholesale customer).

We realize there are very important issues in this pre-termination process, among them fairness, due process, potential financial exposure for the NSP as well as due consideration for the customers who may ultimately be impacted. Among the significant, substantive comments were those filed by Verizon, AT&T, MCI and IRRC. Verizon commented that we should not require an embargo process per se, but in it's place maintain the ability of the Commission to extend the NSP's termination date for the LSP if necessary. AT&T commented that the 10-day embargo notice is too short and the rules should defer to the interconnection agreements for dispute and notice provisions. MCI also noted that the embargo period is too short and that we should require that a 30-day embargo period precede the delivery of a termination notice from the NSP. IRRC also commented that the 10-day embargo period is short. IRRC, in general comments, also noted that the time frames and requirements in the proposed regulations may differ from existing agreements between the LSP and NSP and questioned how implementation of the regulations will affect interconnection agreements.

We examined several interconnection agreements filed with the Commission over the past few years to determine if and how they addressed pre-termination embargo provisions, payment defaults, dispute rights and termination notice periods. Our review determined that embargo provisions were not typically contained in the interconnection agreements. We noted that recent interconnection agreements contain more developed pre-termination billing dispute resolution and NSP payment default provisions including general dispute provisions. However, the provisions lacked the degree of consistency among agreements that would have enabled the Commission to defer to the agreements in lieu of regulatory provisions or to incorporate a set of basic provisions in the regulations that would always be consistent with all existing interconnection agreements. At the same time, we are interested in the NSPs and LSPs having basic, reasonable provisions to identify and potentially resolve differences among themselves prior to seeking the Commission's intervention to resolve disputes or impacting the service provided to customers.

Our resolution to the comments provided about the proposed embargo process and our review of pre-termination processes in interconnection agreements is twofold. First, we will not incorporate an embargo process in the final-form regulations as initially proposed. Doing so may be perceived as adding a whole new set of pre-termination provisions that are not currently an agreed upon part of the process. Second, we will replace the proposed NSP Embargo Process with Pre-Termination Provisions containing Wholesale Customer Billing Dispute Resolution and NSP Payment Default Resolution Processes. These processes should provide reasonable due process provisions for handling the types of circumstances that are likely to give rise to NSPs serving LSPs with termination notices and requests for dispute resolution before the Commission.

While we have deleted the NSP Embargo Process from the final-form regulations, we have maintained many of the specific provisions of the embargo process in the two new pre-termination processes we have replaced the embargo process with. We have also considered many of the comments provided in response to the proposed

embargo process, as well as some of the pertinent comments to § 63.304, NSP Termination process for wholesale customers, as applicable to the new pre-termination processes.

Wholesale Customer Billing Dispute Resolution Process

For the new section § 63.303(a) we accord wholesale customers the opportunity to dispute NSP charges prior to the NSP terminating service. As we noted above, most interconnection agreements contain such provisions. Our new language in § (a) contains the provision that "a wholesale customer is obligated to pay amounts not under complaint or dispute" so that filing a dispute on a portion of charges does not become grounds for not meeting the payment obligation of charges unrelated to the dispute. Provisions (1) and (2) are consistent with language contained in the proposed regulation at §§ (c)(i) and (c)(ii) pertaining to the use of written notices being sent to the NSP's designee. Provision (3) responds to IRRC's comment to the proposed regulations at §§ 63.303(c)(2) that a notice should require a breakdown of the amount owed. Provision (4) language requiring the NSP to provide the wholesale customer with a written acknowledgement of the wholesale customer's written billing dispute responds to IRRC's comments to the proposed regulations at § 63.304(a) as to how a wholesale customer will be notified of a properly filed dispute with the NSP. Provision (5) responds to comments from IRRC and MCI that 10 days to respond to an embargo notice is too short of a time frame. Therefore we have provided for 30 calendar days to resolve the dispute. We have also provided that the NSP shall not pursue termination during the resolution period for the disputed amounts similar to language contained in the proposed regulations at § 63.304(a)(3). Provision (6) in the billing dispute resolution process accords dispute rights with the Commission after the NSP and wholesale customer have attempted to resolve the dispute. The Commission dispute rights respond to IRRC's comments to § 63.303(a) in the proposed regulations where IRRC asks what remedy does the wholesale customer have if they disagree with the NSP that the interconnection agreement terms have not been upheld by the wholesale customer.

In their comments to § 63.304(a), IRRC asked how parties are to know if the dispute was properly filed and if not, what opportunities exist to correct the filing. We believe that § (a)(1) requiring a written dispute notice from the wholesale customer and § (a)(4) requiring the NSP to provide the wholesale customer with a written acknowledgement of receipt of the dispute notice accord the parties the opportunity to raise issues about the adequacy of the notices.

New provision (7) in the billing dispute resolution process is included in the final-form regulations so that disputes are timely filed with the Commission. We believe these disputes should generally precede the time when customers receive abandonment notices to prevent potential customer confusion and unnecessary migrations. Provision (8) prohibits the NSP from terminating the wholesale customer's service for matters contained in a dispute before the Commission. This language is similar to that in the proposed regulations at §§ 63.304(a)(3).

We deleted § 63.303(a), Authorized reasons for a NSP to embargo service, because we are no longer requiring a NSP embargo process. However, much of the content of this section will be transferred to § 63.304(a), Authorized reasons for a NSP to terminate service.

In comments to IRRC, Verizon stated that the dispute provisions need to be changed in order to prevent nonpaying LSPs from gaming the system to avoid collection action being taken against them by an NSP. Verizon comments that since there are no qualifications contained in the language at § 63.303(a), the regulations will encourage LSPs to game the pre-termination/termination process by raising multiple and often baseless disputes on the same invoice. Verizon wants the regulations revised to make it clear that LSPs cannot abuse the process in such a manner. Verizon notes that in compliance with their interconnection agreements, LSPs must raise billing disputes only once and can go through only one thirty-day dispute period for each invoice. Consistent with their comments Verizon recommends that the Commission add language to § 63.303(a) (Wholesale Customer Billing Dispute Resolution Process) stating that: "Accordingly, a wholesale customer must either dispute or pay all charges on an invoice from the NSP by the due date on the invoice."

Our review of some of the newer Verizon interconnection agreements as well as some of those dating back a few years reveals that the agreements do not contain the specific language that a wholesale customer must either dispute or pay all charges on an invoice by the due date. While the interconnection agreements do contain a section on billing, payment and disputed amounts, the language of the provisions are crafted differently from the language Verizon is proposing. If the Commission were to incorporate the specific language proposed by Verizon into the regulations, the regulations may be viewed as overriding the terms of existing interconnection agreements that would significantly alter the rights of the parties. This is precisely the result that Verizon objects to in their comments to IRRC regarding the pre-termination/termination process elsewhere in the regulations.

We disagree with Verizon that by incorporating a provision that wholesale customers shall have the opportunity to dispute charges for the provision of service with the NSP that the regulations therefore encourage LSPs to game the process by raising multiple and baseless disputes on the same invoice. The dispute process provision is a common and useful provision contained in interconnection agreements, including those between Verizon and numerous LSPs. If Verizon wishes to have qualifications regarding the legitimacy of disputes, the timeframes in which they should be raised and the number of disputes per invoice, then we encourage Verizon to include such specificity in its interconnection agreements.

We wish to emphasize that the Commission and its regulations do not support attempts by LSPs to game the pre-termination/termination process to avoid paying the NSP for services provided and accurately billed. In lieu of adopting the language proposed by Verizon for § 63.303(A), which may go beyond the language in interconnection agreements, we will add clarifying language to the regulation that "Disputes shall be raised by a LSP on a timely basis consistent with the language in applicable interconnection agreements." We will also revise the wording in 63.303(A) to read that "a wholesale customer is obligated to pay amounts not under dispute" rather than not under "complaint or dispute" consistent with Verizon's comments to IRRC.

NSP Payment Default Resolution Process

The second pre-termination process we added to the final-form regulations in place of the embargo process is the NSP Payment Default Resolution Process. Our review of several interconnection agreements revealed that most agreements contained such provisions. We included this section to ensure that the parties are aware of payment

defaults and seek to engage in a reasonable process to resolve them prior to the NSP terminating the wholesale customer's service or filing a complaint with the Commission to resolve a payment default dispute. The provisions in § (b)(1—2) are similar to those contained in the proposed regulations in § 63.303(c)(1—2) but we have substituted the words "payment default" or "default notice" for the words "embargo" or "embargo notice." In response to IRRC's question in their comments to § 63.303(a) as to who makes the determination that the wholesale customer has failed to abide by the agreement, we note that the NSP makes that initial determination and communicates that by providing the wholesale customer with a written notice of payment default.

We have revised the language in § (2)(i) to note that the payment default notice shall contain the specific accounts and invoices that are in default consistent with IRRC comments to § 63.303(c) in the proposed regulations pertaining to the embargo notice requiring a breakdown of the amount owed. We have added provisions in § (2)(ii) and (iii) in response to IRRC and MCI's comments that a notice should include the exact reason for the NSP's notification and any possible ways of curing the default. Provision (iv) is the same as that contained in the proposed regulations at § 63.303(c)(2)(iii) with the exception that we deleted the reference to "embargo issuing."

New provision (3) responds to comments from IRRC and MCI that 10 days to respond to an embargo notice is too short of a time frame. Therefore, we have provided for 30 calendar days to resolve the payment default. The language in provision (4) requiring the wholesale customer to provide the NSP with written confirmation of receipt of the NSP's payment default notice is intended to ensure that both parties are aware of the payment default situation and the need to take action to resolve the problem in a timely manner.

Based on our earlier discussion about deleting the embargo process we have eliminated proposed § 63.303(b), Unauthorized reasons for a NSP to embargo service and (c), Embargo notification provisions. The content of these subsections will be transferred, where applicable, to § 63.304(a), Authorized reasons for a NSP to terminate service and § 63.304(c), Termination notice provisions.

§ 63.304 NSP Termination Process for Wholesale Customers

In their comments, MCI noted that they were not clear whether the termination process is different from the embargo process. The embargo process in the proposed regulations was a pre-termination process that after 10 days led into the termination process. In the proposed regulations we advanced § 63.303(a), Authorized reasons for a NSP to embargo service and (b), Unauthorized reasons for a NSP to embargo services as major parts of the overall NSP embargo process. To the extent that the embargo process preceded and led into the termination process, the authorized and unauthorized reasons for embargoing services applied to termination as well. In the final-form regulations we eliminated the embargo process per se and substituted two new pre-termination processes. However, we believe that the authorized and unauthorized reasons that formerly were applied to embargoes should now apply to the NSP termination, and therefore, we have transferred the provisions that appeared in § 63.303(a) and (b) of the proposed regulations into § 63.304 NSP termination process for wholesale customers. In response to MCI's comment, the pre-termination (formerly embargo) and termination processes should now be distinct.

In § 63.304(a) we adopted language formerly in § 63.303(a). In § 63.304(a)(1) we added language in response to IRRC's comment to § 63.303(a) that we should clarify when the 30-day period begins. We have specified that the period begins 30 days after the "date of the bill." We also respond to IRRC's comment to § 63.305 about not initiating abandonment when a dispute has been filed by adding language restricting termination if the bill has been disputed in accordance with § 63.303(a) or (b).

The provisions in § 63.304(a)(2) were transferred from § 63.303(a)(2) of the proposed regulations with the addition of clarifying language recommended by Verizon about "other governing" agreements provided that such agreements have been approved by the Commission. The remaining provisions in § 63.304(a)(3 & 4) are transferred from § 63.303(a)(3 & 4) of the proposed regulations.

The provisions in § 63.304(b)(1—4) are transferred from § 63.303(b)(1—4) of the proposed regulations with the language in § (b) being revised to apply to unauthorized reasons for a NSP to "terminate" service rather than "embargo" service. We deleted § 63.303(b)(5) because similar language now appears in § 63.303(a).

We have expanded § 63.304 to include new language in § (c), Termination notice provisions, and incorporate language from § 63.304(b), Termination notice from the proposed regulations. In § (c)(1) we have directed that a NSP shall provide a wholesale customer with a written notice at least 45 calendar days prior to the termination date. In subsection (c)(2—4) we have transferred language from § 63.303(c)(i—iii) pertaining to sending an "embargo" notice and modified the language to now pertain to sending the "termination" notice. In subsection (c)(2) we have substituted the words "interconnection or other governing" for "service" agreement based on comments from Verizon. We eliminated the subheading (b), Termination notice from the proposed regulations and renumbered subsection (b)(1) to be (c)(5). We adopted the same language that was in the proposed regulations at § 63.304(b)(1)(i—iv) under the final-form regulations at § 63.304(c)(5)(i—iv) that pertains to the information to be included in a termination notice. The provision that was in § 63.304(b)(2) about the Commission being provided with a copy of the termination notice is now at § 63.304(c)(4).

We deleted proposed § 63.304(a), Termination process initiation, because we have included similar language noting when a NSP is authorized and not authorized to terminate a wholesale customer's service under § 63.304(a)(5) and (8). Language noting that termination cannot proceed if the grounds for the termination are disputed with the NSP or the Commission is contained in § 63.303(a)(5) and (8).

In comments to IRRC, Verizon opposed a provision in the regulations at §§ 63.303(B)(1) which requires a NSP to first issue a payment default notice to a nonpaying LSP at least 30 days before sending a termination notice. As required in § 63.304(C), the termination notice must be provided to the LSP at least 45 calendar days prior to the effective date of the intended termination. Verizon proposed that the requirement for the thirty day payment default resolution period that precedes the 45-day termination period not be mandated in all cases. Instead, Verizon requests the option, where its interconnection

agreements with the LSP permit, to send a single notice specifying a shorter period than the combined 75 days for the default and termination notices. In their comments, Verizon proposed to maintain the minimum 45-day termination period that is consistent with § 63.304(C). Verizon avers that in some cases, the combined default/termination notice process would allow for more effective collection of past due balances. Specific language is offered by Verizon in their comments:

Combined Default/Termination Notice

Notwithstanding any contrary provision in §§ 63.303 and 63.304, where authorized by the provisions of its interconnection or other agreement with a wholesale customer, an NSP may provide the wholesale customer with a single notice of default and of termination that specifies that termination will occur in less than the minimum 75 calendar days provided for in §§ 63.303 and 63.304, provided that such termination will occur in not less than the 45-day termination period provided for in § 63.304.

In replies submitted pursuant to our Secretarial Letter, Sprint supported Verizon's position for a combined default/termination notice. Sprint comments that the instant rulemaking should not mandate two separate notices before the NSP can terminate service to the LSP. In Sprint's view, if the NSP and the LSP have an interconnection agreement that includes a minimum 45-day default/termination period in total, then the notice arrangements agreed to by those contracting parties should apply in lieu of the proposed rules. Sprint also comments that if the NSP and the LSP do not have an interconnection agreement, then the proposed rules should be modified such that a single 45-day minimum default/termination period is required.

We initially incorporated the pre-termination payment default resolution process in the rules so that the parties would use the notice provision to trigger discussion and hopefully resolution of payment defaults prior to the NSP terminating the LSP's wholesale service. Thirty-day payment default provisions were common elements of Verizon interconnection agreements approved by the Commission. In fact, the majority of the Verizon interconnection agreements approved by the Commission over the past few years contained such provisions. Based on the history, we saw no conflicts between the rules and Verizon interconnection agreements.

However, the most recent Verizon interconnection agreements no longer contain the separate payment default notice provisions. Based on past experience, Verizon has revised their interconnection agreement terms in favor of a shorter process when a LSP has defaulted on payment terms. Accordingly, we will revise the regulations as suggested by Verizon and supported by Sprint to allow for a combination default/termination process when applicable interconnection agreements contain such provisions. We will adopt the language proposed by Verizon, with minor changes reflecting proper regulatory language, to accommodate this option and insert it as § 63.304(D).

We will not make further revisions to the rules as proposed by Sprint for cases where the NSP and LSP do not have an interconnection agreement. We will decline to require a single 45-day minimum default/termination period where there is no interconnection agreement stating that the parties agree to such a provision.

§ 63.305 Initiation of Abandonment

We have revised wording in the opening sentence of the section to clarify that the LSP shall initiate abandonment of service when a "LSP receives a notice from the NSP" of a termination of a LSP's service. In response to comments from IRRC and MCI, we note that the NSP's termination shall be consistent with the dispute provisions contained in § 63.303. We have also added language to address the situation where a LSP has applied to the Commission to abandon "some or all of a LSP's local service customers." This language allows for situations involving a partial abandonment where a LSP may wish to cease serving some customers but not others. AT&T comments that the reference to "some" of its local customers should be deleted because the rules could be construed to apply when the LSP is not abandoning the market, but rather is simply managing its products by terminating certain offerings that may be replaced with improved or newer products. We want to clarify that the rules apply to abandonment as defined in § 63.302 where a LSP will cease to provide local service to existing customers. If AT&T, in managing its products and offerings, will cease to provide local service to some or all of its customers, then these rules apply.

In § 63.305(1)(i), we clarify that the LSP "is a wholesale customer" of the NSP. We have also added language that the NSP notice to the LSP should be provided electronically and by first class mail "unless other methods of delivery have been agreed to as part of the interconnection or other governing agreement between the NSP and LSP" consistent with comments provided by Verizon. We also note that the notice should be provided in not less than "45" calendar days in advance of the scheduled termination consistent with shortening our overall time frame for abandonment. In § 63.305(1)(ii), we clarify language that the Commission may require an extension of the LPS's termination date until the LSP's customers "have been properly notified." We have also revised the time period that a LSP shall file an application with the Commission from 90 days to 35 days consistent with shortening our overall time frame. IRRC comments that the LSP should file an application to abandon service whether or not "financial or operational data indicates there is a likelihood that the LSP may be unable to provide service to some or all of its customers." In response to IRRC's comment, we have deleted this qualifying language at the end of § 63.305(3).

§ 63.306. Abandoning LSP Obligations for Abandonment

AT&T comments that this entire section of the regulations should be deleted and instead the Commission should rely on the Federal Communication Commission's (FCC) streamlined process. We disagree with AT&T on the lack of need for the provisions in this section and note that the FCC's streamlined process only pertains to situations in which customers will be transferred to an acquiring LSP. While we are hopeful that abandoning LSP's will seek to make arrangements with an acquiring LSP, we cannot be certain that this will always be the case.

In § 63.306(a) we have substituted "LSP" for the word "carrier" as requested by IRRC. In subsection (b) we changed the time when an abandoning LSP must file an abandonment plan with the Commission from 90 to 35 calendar days in advance of abandoning service consistent with our overall reduction in the abandonment time frame. We have substituted the word "facilitate" for "ensure" in subsection (b)(3) as an abandoning LSP may

not be able to ensure continuation of service when customers do not respond to abandonment notices and select a new LSP.

In § 63.306(b)(5), we revised the language to provide the Commission a list of customers that will be abandoned rather than a plan to do so at a later date. The revision is consistent with shortening the overall time frame for abandonment. In subsection (b)(6), we deleted references to "a draft of" the notice that is "an initial letter" to be sent to customers thereby leaving the requirement to provide the Commission with "the notice that is to be sent to customers." With the overall shortened abandonment time frame, the customers will be receiving one termination notice unless the Commission requires a second notice subject to the provisions at new § 63.310(b).

In § 63.306(b)(7) we have deleted language requiring "a plan for follow-up notification arrangements . . ." for a second notice to be filed with the abandonment plan. However, we do have language in new § 63.310(b) about the LSP sending a second notice after consultation with the Commission if such notice is needed. We have inserted new language in subsection(b)(7) to require the abandoning LSP to include in their abandonment plan to be filed with the Commission "the beginning and ending dates for the period in which customers are to shop and select a new LSP (customer choice period)." We further specify that "customers shall be allowed up to 20 calendar days after receiving a customer notice of abandonment to shop and select a new LSP." It is important for the Commission to be aware of the customer shopping and selection period in the event customers contact the PUC's call center with questions about the abandonment. We have also used this section to specify that customers are to have 20 calendar days to shop for a new LSP, consistent with the customer shopping time frame in the proposed regulations.

In § 63.306(b)(8) we added new language requiring the abandoning LSP to include in their abandonment plan "the beginning and ending dates of the customer migration period." We also included language specifying that the customer migration period falls between the customer choice period and the exit date. The language at subsection (8) enabled us to delete the former (9) from the final-form regulations that required "a date when customers shall select a carrier" because that is contained in (7) as the ending date for the customer shopping period.

We have responded to IRRC's comments to § 63.306(b)(13) by providing definitions in § 63.302 of UNE, UNE-P, UNE-L, Full Facilities and Resale. We clarified in subsection (b)(14) that we want the abandonment plan to contain a "list" of customer "names and contact information" when the abandoning LSP is the only provider of facilities. "Based on IRRC's comments" we substituted "LSP" for "carrier." In subsection (b)(15) we specified that the number of customers impacted refers to impacted by the abandonment. We deleted language in (b)(15) requiring customer service record (CSR) information. As requested in comments by IRRC, we added a reference to the provisions that describe the transfer of assets or control. We also revised the numbering in subsection (b)(16—21) on the final-form regulations.

Based on comments by Verizon and IRRC that are addressed in § 63.310, we deleted the NSP obligations to serve as the default LSP at (b)(22). We also note that IRRC's comment to § 63.306(b)(22) is no longer applicable with the deletion of (b)(22).

In § 63.306(c)(1) we have used "New LSP" instead of NSLP as discussed in § 63.302 pertaining to the definition of LSP. In response to IRRC's comments about a more specific reference to NENA standards we have specified that we are referring to "recommended data standards for service providers going out of business."

In response to comments from IRRC we revised the title of § 63.306(d)(2) to "NANPA abandonment notice" to be consistent with the format of paragraph (1). Verizon provided comments and suggested improved wording for § 63.306(d)(2) which we adopted. The revised wording also negated the need for subsections (d)(2)(i) and (ii). In order to be consistent with our revised overall abandonment time frame we substituted "35" days for "66" days as the minimum time that NANPA shall be provided with notice of number resources to be released.

Consistent with comments from IRRC, we deleted the word "carrier" and substituted "LSP" to refer to the abandoning LSP in § 63.306(e)(1). We also substituted "30 calendar" days prior to the exit date for "60" days as the required time to notify customers about the abandonment. In subsection (e)(2) we specify that the abandoning LSP shall provide customers with a list of "all" services that will no longer be provided as of the exit date. In response to comments by IRRC, customers will be directed to "obtain whatever services they wish to have going forward" rather than "replace the services" that the abandoning LSP has been providing. IRRC points out that the wording should leave customers free to add or delete services from those they have been receiving.

In response to comments from Verizon and our removal of the default provisions at § 63.310, we have removed language at subsection (e)(3) regarding automatically transferring customers to a default carrier. We have inserted new language at (e)(3) to direct the abandoning LSP to "lift all existing preferred carrier freezes on the services to be abandoned" so that customers with freezes do not encounter any barriers to changing their LSP.

We have made several revisions to subsection (e)(4) for clarity. In response to a comment by IRRC, we have replaced the word "teaser" with "message" on the envelope and notice. In subsection (e)(4)(ii) we require that the customer notice "list other services provided by the LSP that will no longer be provided upon abandonment of local service." In subsection (e)(4)(iv), a statement to customers shall direct customers to select another LSP on or before a specific date 10 calendar days prior to the exit date rather than 30 days prior. The revised period is consistent with our reduction in the overall abandonment time frame.

We have deleted proposed subsection (e)(4)(vii) that required the abandoning LSP to provide customers with a list of alternative LSPs that serve customers in their area. IRRC questioned how such a list could be obtained and noted that in order to be competitively fair the list should be all inclusive. MCI questioned the availability of a current, reliable and accurate list and suggested that the Commission maintain such a data base. Upon review we determined that while the Commission has information about what LSPs have been certificated to serve in Pennsylvania and the areas they are certificated to serve in, we do not have current information as to where they are actually serving or accepting new customers for local service. Therefore we conclude that providing such a list is not feasible. As an alternative to providing a list to customers, we have added language to subsection (4)(v) that customers shall be notified that they can "check their telephone directory . . ." for information about LSPs serv-

ing their area. In subsection (e)(4)(vii) we have responded to IRRC's comments by adding language that customers can contact the abandoning LSP if they have questions, need more information "or have a problem with changing your services."

We have added new language at subsection (e)(4)(ix) that "customers who have preferred carrier freezes on their accounts shall be directed to contact their new LSP to arrange for new preferred carrier freezes if they wish to have this protection going forward."

§ 63.307 Abandonment Process Management

In § 63.307(b)(3), Verizon commented that we should delete the reference to default LSP. We have adopted that change consistent with removing the NSP obligation to serve as the default LSP at proposed § 63.310. Based on IRRC's comment asking why customers do not appear in the list of the parties that the program manger should be accountable to, we have added "abandoning LSP's customers" to subsection (b)(3).

§ 63.308. Commission Consideration and Action.

IRRC commented that the Commission's website address should be included at § 63.308(a). We accept IRRC's comments and will add the Commission's website address to this section. We also deleted the word "default" from section § 63.308(b) because we eliminated proposed § 63.310 NSP obligations to serve as the default LSP. Therefore, any reference to default LSP will be eliminated in the final-form regulations and annex. For a full explanation of why we eliminated the default LSP provisions, see the discussion under § 63.310, NSP obligations to serve as the default LSP of this order.

§ 63.309. Acquiring LSP Provisions and Obligations.

We received comments from IRRC, AT&T and Verizon regarding the acquiring LSP provisions and obligations. IRRC comments that the Commission should include a provision in the customer notice that would make customers aware of their right to choose either the acquiring LSP or select another LSP of their choice. We have added new language in the final-form regulations at § 63.306(e)(4) which directs the abandoning LSP to include a statement in the customer notice that customers may "select any LSP that serves their area or take no action and their service will be transferred to the acquiring LSP." IRRC also comments that multiple notices may be confusing especially if customers receive the acquiring LSP's notice before receiving the abandoning LSP's notice. IRRC suggests that we combine the two customer notices into one notice and have the abandoning LSP send the notice. We have adopted IRRC's comments and have merged the notice provisions for the acquiring LSP and the abandoning LSP into joint notice provisions in the final-form regulations (See § 63.306(e)(4)(vi)). We believe that a joint notice from the abandoning LSP and the acquiring LSP will decrease customer confusion about the abandonment and transfer of the local service. As a result of these changes, we have eliminated § 63.309(a) and (b) from the final-form regulations.

In regard to § 63.309(c), IRRC comments that the Pennsylvania slamming provisions at 52 Pa Code § 64.23(b) should be cross referenced in this section. We have adopted IRRC's comments and added the following language to this section. "This provision does not relieve the abandoning LSP of any requirements imposed by the Federal Communications Commission's (FCC) anti-slamming rules or state rules at 52 Pa. Code § 64.23(b)." In addition, we have added the words "customer has not selected another LSP during the 20-day customer choice period" to further clarify what is not considered slamming under the final-form regulations.

AT&T comments that § 63.309(d) pertaining to carrier change charges is contrary to the FCC requirements and that it should be changed to reflect the FCC rules. We agree with AT&T's comments and have eliminated this section in the final-form regulations. With the elimination of § 63.309(d) from the final-form regulations, abandoning LSPs will not be required to pay the carrier change charges. Under the FCC rules,[1] the acquiring LSP is responsible for the carrier change charges associated with the transfer of customers. IRRC asks whether an acquiring LSP can bill customers for carrier change charges if that abandoning LSP refuses or is unable to pay these charges. In response to IRRC's question, the FCC rules are clear that these charges are to be paid by the acquiring carrier (LSP), not customers.

IRRC comments that § 63.309(e) should specify the circumstances under which an acquiring LSP would be permitted to make the determination that it is unable or unwilling to provide service. We wish to clarify that the purpose of this section is to ensure that the Commission has an opportunity to intervene on the customer's behalf before the abandoning LSP's exit date should the migration of customers from the abandoning LSP to the acquiring LSP take longer than anticipated for some unforeseen reason. At this stage of the abandonment process, the acquiring LSP has already agreed to transfer customers, through a business arrangement with the abandoning LSP. However, the transfer of customers from one LSP to another LSP can be difficult depending on the LSP service arrangements. For example, if the abandoning LSP provides service through a resale arrangement, then the acquiring LSP must also have an interconnection agreement with the same NSP so it can transfer the abandoning LSP's customers. This would delay the transfer of customers. The acquiring LSP may also encounter problems with the processing of customers' records which can also impede the migration of an abandoning LSP's customers. The customer's credit history should not affect the migration of customers with this type of business arrangement. We are simply directing the acquiring LSP to make the Commission aware of any migration problems, (processing or technical) early on so the customer or the Commission may address them in a timely manner. For these reasons stated above, we changed the word "migrate" to "provide" for clarity in the final-form regulations.

AT&T objects to the provision in § 63.309(e) that would require the abandoning LSP to continue providing service for an unspecified period of time when customers haven't selected another LSP or the acquiring LSP backs out of providing service. AT&T believes that it is unreasonable to expect a failing LSP to maintain active service indefinitely. The Commission has no interest in requiring an abandoning LSP to maintain active service indefinitely or in prolonging the abandonment process when it is unreasonable. In recognition of the complex nature of migrating local telephone service, the final-form regulation will give the Commission some flexibility to address special situations or circumstances within a reasonable time frame. IRRC asks what happens if the abandoning LSP discontinues service anyway. If the abandoning LSP discontinues services before a customer is able to select a new LSP, then the Commission will attempt to assist the customer with finding a new LSP or suggest alternative arrangements for telephone service.

[1] 47 U.S.C. § 64.1120(3)(iii)

§ 63.310. NSP Obligations to Serve as the Default LSP

Several parties either objected to or questioned the need for the NSP to serve as the default LSP when the abandoning LSP has been serving as a reseller. AT&T comments that this section should be stricken in its entirety and there should be no presumption under which customers are "transferred back" to the ILEC before going to someone else. AT&T notes that all carriers that are active in the market should receive an equal shot at winning the abandoning CLEC's customers. AT&T comments that the ILEC should not obtain an additional marketing benefit through these rules.

Verizon also comments that network service providers such as Verizon should not be default LSPs in abandonment situations. In Verizon's view, to automatically assign a subset of customers to the NSP is antithetical to the workings of a competitive market and the free choice that underlines this market. Verizon also cites financial reasons as to why they and other NSPs do not want to serve as the default LSP. They note that forced transfers deprive the NSPs of any ability to access the creditworthiness of such customers and forces NSPs to accept customers they would otherwise not accept. In Verizon's experience, may of the customers who leave Verizon for CLECs, or who attempt to come back to Verizon from CLECs, often do so because they are payment troubled.

In their comments, IRRC notes, as we have above, that a NSP and a LSP oppose the default LSP provisions in the proposed regulations. IRRC notes that the PUC should explain the need for this section in a competitive market. IRRC also questions that if an acquiring LSP is permitted to reject customers who are not paying their bills, would the NSP serving as the default LSP also be allowed to reject payment-troubled customers.

We are persuaded by the comments of the parties and will delete proposed § 63.310, NSP obligations to serve as the default LSP. It is not our intent to provide any LSP with a competitive advantage over another. However, we are concerned that abandonments do not leave large numbers of customers without local service. To accomplish this objective, we will rely on provisions at § 63.305(1)(ii) that "the Commission may require a NSP to extend a LSP's termination date until the LSP's customers have been properly notified." This provision will be used by the Commission if progress reports from the abandoning LSP, as required by new § 63.310, indicate that a large number of customers have not migrated to a new LSP as the scheduled exit date approaches. We will also rely on the option contained in new § 63.310 for a second abandonment notice to be sent and may use the provision in § 63.305(1)(ii) to extend the termination date to provide time for the second notice to reach customers, enable them to choose another LSP and allow sufficient time for migration prior to the abandoning LSPs exit date so customers do not experience the loss of local service.

Although we did not receive initial comments in this rulemaking from OSBA, they did offer comments pursuant to our Secretarial Letter on subject matter unrelated to Verizon's comments to IRRC. The OSBA noted the bankruptcy/abandonment of NorVercence Inc, when small business customers had to scramble when NorVercence ceased providing service without providing proper notice to its end-user customers. OSBA fears that there may be more such exits and recommends that the Commission reopen this rulemaking or, in the alternative, initiate a separate proceeding to prevent a LSP from exiting the market without providing adequate customer notice and time for customers to acquire a new telecommunications provider.

We do not believe that NorVercence Inc. provided any regulated local service in Pennsylvania. However, we are sympathetic to the issue raised by OSBA and any inconvenience that small business customers may experience when a LSP exits the market without properly notifying its customers. This very rulemaking is meant to address this shortcoming by requiring sufficient customer notice, adequate time for customers to shop for another provider and time to have service migrated before their current LSP abandons service. We believe that these rules, when final, will set clear expectations for orderly abandonments. We will monitor the impact this rulemaking has on abandonments and reassess our options in the future if our expectations are not met.

§ 63.311. Abandoning LSP Follow-up Obligations.

Verizon provides suggested language changes for proposed section § 63.311(b) that would delete the words "or default service with a NSP" and replace these words with, "by another LSP." Verizon also suggests that we delete the word "service" and replace it with "second." We accept Verizon's proposed language changes for this section, which is now new § 63.310. We added the word "abandonment" after the word "second" for further clarity. In addition, we substituted the words "after consultation with the Commission" for the words "30 days before the exit date" to give the Commission more flexibility in addressing different circumstances. The resulting language reads "the second abandonment notice shall be sent after consultation with the Commission."

AT&T comments that the provision for a second notice should be deleted because it is unnecessary and costly. The company believes that the requirement for multiple notifications impose a significant burden on the abandoning LSP. We disagree with AT&T's assertion that this provision is unnecessary because we believe that customer notification is critical. Selectively requiring an abandoning LSP to send more that one notice will increase the likelihood of customers choosing a new LSP and avoiding the loss of their local service.

Conclusion

Accordingly, under sections 501, 1501 and 3001—3009 of the Public Utility Code, 66 Pa.C.S. §§ 501, 1501 and 3001—3009; 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 at 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 745.5 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 at 4 Pa. Code §§ 7.251—7.235, we find that the regulations establishing general rules, procedures and standards to provide for an orderly process when a local service provider exits the market at 52 Pa. Code §§ 63.301—63.310 should be approved as set forth in Annex A; *Therefore,*

It Is Ordered That:

1. The regulations, 52 Pa. Code Chapter 63, are amended by adding §§ 63.301—63.310 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, the Pennsylvania Cable & Telecommunications Association, The North American Numbering Plan Administrator, National Emergency Numbering Association, all jurisdictional telecommunications utilities, the Office of Trial Staff, the Office of Consumer Advocate and the Small Business Advocate.

7. The final regulations 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 35 Pa.B. 1942 (March 26, 2005).)

Fiscal Note: Fiscal Note 57-232 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 63. TELEPHONE SERVICE

Subchapter N. LOCAL SERVICE PROVIDER ABANDONMENT PROCESS

Sec.

§ 63.301. Statement of purpose and policy.

(a) *Purpose.* The purpose of this subchapter is to:

(1) Provide for an orderly process when a NSP intends to terminate service to a LSP.

(2) Provide for an orderly process when a LSP seeks to stop the provision of existing service to residential and business customers under any of the following circumstances:

(i) A NSP that provides part or all of the services necessary to provide local service is intending to terminate a LSP's interconnection agreement.

(ii) The Commission has issued an order to revoke a LSP's certificate of public convenience.

(iii) A LSP has filed an application to abandon a certificate of public convenience for the provision of local service.

(3) Ensure that customers are provided ample notice and the opportunity to select a new LSP of their choice and thereby not lose local service when the LSP exits their market.

(4) Coordinate information flow and activities through a project management team.

(5) Ensure that an abandoning LSP provides sufficient network information so that customers are able to be migrated seamlessly.

(6) Ensure that an abandoning LSP coordinates with 9-1-1 service providers and the North American Numbering Plan Administrator.

(b) *Application.*

(1) This subchapter applies to a LSP that provides local service to residential or business customers.

(2) This subchapter applies to a NSP that provides wholesale local service to a LSP and intends to terminate the LSP's service for breach of an interconnection agreement.

§ 63.302. Definitions.

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

Abandon—To cease providing local service to existing customers. The term does not include discontinuance as a result of a customer's request or a temporary change in the provision of service that may arise from maintenance, repair or failure of a LSP's equipment or facilities.

Abandoning LSP—A LSP that seeks to abandon providing local service to existing customers.

Acquiring LSP—A LSP that voluntarily undertakes to provide local service to customers of the abandoning LSP after the abandoning LSP is permitted to alter or abandon providing local service.

CSR—Customer service record—Documentation indicating the customer's name, address, contact telephone number, quantity of lines, services, features and other information associated with a customer account.

Customer—The end-user recipient of telephone service provided by a LSP.

Exit date—The date upon which an abandoning LSP intends to cease providing telecommunications service.

Full facilities—The term used when the LSP has all the services and equipment (that is, central office switches, local loops, trunk lines, and the like) necessary to provide telephonic communications between telephones connected to it or to other central offices.

Interconnection agreement—An agreement to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.

LSP—Local service provider—A company, such as a local exchange carrier (LEC), that provides local service by resale, by unbundled network elements (with or without platform) or through its own facilities, or by a combination of these methods of providing local service to a customer.

Local service—Telecommunications service within a customer's local calling area.

(i) The term includes the customer's local calling plan, dial tone line, touch-tone and directory assistance calls allowed without additional charge.

(ii) The term also includes services covered by the Federal Line Cost Charge, Pennsylvania Relay Surcharge, Federal Universal Service Fund Surcharge, Local Number Portability Surcharge, Public Safety Emergency Telephone Act (9-1-1) Fee and applicable Federal and State taxes.

Local service reseller—A LSP that resells another company's wholesale telephone services to provide local service to customers.

NANPA—North American Numbering Plan Administration—The organization that holds overall responsibility for the neutral administration of North American telephone numbering resources, subject to directives from regulatory authorities in the countries that share the North American telephone numbering resources. NANPA's responsibilities include assignment of telephone numbering resources, and, in the United States and its territories, coordination of area code relief planning and collection of utilization and forecast data.

NSP—Network service provider—A telecommunications provider that interacts with LSPs and provides the facilities and equipment components needed to make up a customer's telecommunications service. A NSP may be referred to as an underlying carrier, and may also be a LSP.

Preferred carrier freeze—A designation elected by a customer that restricts a third party's ability to change a customer's choice of preferred telecommunication service provider.

Resale—The term used when a LSP does not have its own facilities, but purchases telecommunications services at wholesale rates to sell to the public. Typically, the telecommunications services are purchased from a NSP.

UNE—Unbundled network element—Various physical and functional parts of a NSP's infrastructure that may be leased to another LSP. These components include things such as local switching, local loops, interoffice transmission facilities, signaling and call-related databases, operator services, directory assistance, and the like.

UNE-L—Local Loop—The telephone line (copper or fiber), that runs from the local telephone company to a customer's premise. A LSP may own a local switch and lease the local loop from the NSP.

UNE-P—UNE-Platform—A combination of unbundled network elements that facilitates end-to-end service delivery. A typical arrangement includes at least a local loop and switching.

Wholesale customer—A LSP that provides local service by resale or by unbundled network elements (with or without platform).

§ 63.303. Pretermination provisions.

(a) *Wholesale customer billing dispute resolution process.* Wholesale customers shall have the opportunity to dispute charges for the provision of service with the NSP. A wholesale customer is obligated to pay amounts not under dispute. Disputes shall be raised by a LSP on a timely basis consistent with the language in applicable interconnection agreements.

(1) When disputing NSP charges, the wholesale customer shall provide the NSP with a written dispute notice unless other methods of delivery have been agreed to as part of an interconnection or other governing agreement.

(2) The dispute notice must be addressed to the NSP's designee.

(3) The dispute notice must provide the NSP with the amounts that form the grounds for the dispute as well as the specific accounts and bills that are being disputed.

(4) Within 5 calendar days of receiving a written dispute notice from a wholesale customer, the NSP shall provide written acknowledgement of the receipt of the notice to the wholesale customer's contact.

(5) Upon receiving a dispute notice from a wholesale customer, the NSP and the wholesale customer shall make a good faith effort to resolve the dispute within 30 calendar days unless a longer dispute resolution period is provided for in an interconnection or other governing agreement. During this dispute resolution period, the NSP may not pursue termination of the wholesale customer's service unless it is based on other indebtedness that is not disputed.

(6) If resolution of the dispute is not achieved to the satisfaction of the NSP and the wholesale customer at the conclusion of the dispute resolution period, either party may file a complaint with the Commission to resolve the dispute.

(7) The NSP and the wholesale customer shall seek to file a complaint with the Commission to resolve a billing dispute prior to the time when retail customers are to be notified of the pending abandonment.

(8) The NSP may not pursue termination of the wholesale customer's service while a complaint to resolve the dispute is pending with the Commission unless the termination is based on other indebtedness that is not disputed.

(b) *NSP payment default resolution process.*

(1) Prior to a NSP issuing a termination notice to a wholesale customer for a payment default, the NSP shall:

(i) Provide the wholesale customer with a written notice of payment default.

(ii) Send the default notice by first class mail unless other methods of delivery have been agreed to as a part of the interconnection or other governing agreement or are provided for in an applicable tariff.

(iii) Address the default notice to the wholesale customer's designee.

(iv) Send a copy of the default notice to the Secretary of the Commission and to the Commission's Bureau of Consumer Services.

(2) The default notice to a wholesale customer shall include the following:

(i) The amount owed that forms the grounds for the payment default as well as the specific accounts and invoices that are in default.

(ii) A statement of the terms of the interconnection or other governing agreement that forms the grounds for the NSP's notification of payment default.

(iii) Available methods the wholesale customer may use to cure the payment default.

(iv) The NSP's contact information to be used by the wholesale customer for payment of the NSP's bill.

(3) Allow at least 30 calendar days from the date of the default notice for resolution of the payment default prior to issuing a termination notice. If interconnection or other governing agreements between the NSP and the wholesale customer allow for a longer dispute resolution period

prior to the NSP issuing a termination notice, the time periods in the agreement govern.

(4) Within 5 calendar days of receiving a written notice of payment default, the wholesale customer shall provide written acknowledgement of the receipt of the notice to the NSP's contact.

§ 63.304. NSP termination process for wholesale customers.

(a) *Authorized reasons for a NSP to terminate service.* A NSP may terminate service to a wholesale customer for one or more of the following reasons:

(1) Failure of the wholesale customer to pay an undisputed delinquent amount for services necessary to provide customers with local service when that amount remains unpaid for 30 calendar days or more after the date of the bill unless the bill has been disputed in accordance with the provisions in § 63.303(a) or (b) (relating to pretermination provisions).

(2) Failure of the wholesale customer to abide by the terms and conditions of an interconnection or other governing agreement related to the provision of local service that has been approved by the Commission.

(3) Failure of the wholesale customer to comply with the terms of a payment agreement related to the provision of local service.

(4) Failure of the wholesale customer to comply with a Commission order related to the provision of local service.

(b) *Unauthorized reasons for a NSP to terminate service.* Unless specifically authorized by the Commission, a NSP may not terminate service for the following reasons:

(1) Failure of a wholesale customer to pay a charge unrelated to the provision of local service, for example, a charge for a LSP's own directory advertising in a NSP's yellow pages directory.

(2) Failure of a wholesale customer to pay a charge that was not previously billed prior to the due date of the current bill.

(3) Failure of a wholesale customer to pay a charge that is under a payment agreement prior to the date of payment set forth in the agreement.

(4) Failure of a wholesale customer to pay a charge that is at issue in a complaint before the Commission unless termination is specifically authorized by the Commission.

(c) *Termination notice provisions.*

(1) A NSP shall provide a wholesale customer with a written termination notice at least 45 calendar days prior to the date that the NSP intends to cease providing the service that enables the wholesale customer to serve end-user customers.

(2) A NSP shall send the termination notice by first class mail unless other methods of delivery have been agreed to as part of the interconnection or other governing agreement or are provided for in an applicable tariff.

(3) A NSP shall address the termination notice to the wholesale customer's designee.

(4) A NSP shall send a copy of the termination notice to the Secretary of the Commission, to the Commission's Bureau of Consumer Services and the Law Bureau.

(5) A termination notice from a NSP to a wholesale customer shall include the following:

(i) The date of the notification and reason for termination.

(ii) The date services shall be terminated unless payment is received or other mutually acceptable arrangements are made.

(iii) The amount owed, if applicable.

(iv) A contact telephone number and name for the NSP.

(d) *Combined default/termination notice provisions.* A NSP, when authorized by the provisions of its interconnection or other agreement with a wholesale customer, may provide the wholesale customer with a single notice of default and of termination that specifies that termination shall occur in less than the minimum 75 calendar days provided for in § 63.303 and this section, provided that the termination may not occur in less than the 45-day termination period provided for in subsection (c)(1).

§ 63.305. Initiation of abandonment.

A LSP shall initiate abandonment of service when a LSP receives a notice from the NSP of a termination of a LSP's service consistent with the pretermination dispute provisions in § 63.303 (relating to pretermination provisions), when the Commission issues an order to revoke a LSP's certificate of public convenience or when a LSP has made proper application to the Commission to abandon some or all of a LSP's local service customers.

(1) *NSP initiation.*

(i) A NSP that intends to terminate the service of a LSP that is a wholesale customer and serves residential or business customers shall provide prior notice to the LSP and the Commission electronically and by first class mail unless other methods of delivery have been agreed to as part of the interconnection or other governing agreement between the NSP and the LSP, not less than 45 calendar days in advance of the scheduled termination.

(ii) The Commission may require a NSP to extend a LSP's termination date until the LSP's customers have been properly notified.

(2) *Commission initiation.* The Commission may initiate the abandonment of a LSP's service through the issuance of a Commission order that revokes the LSP's certificate of public convenience.

(3) *LSP initiation.* A LSP may initiate the voluntary abandonment of some or all of its local service customers by filing with the Commission an application to abandon service to some or all of its existing customers. A LSP shall file an application to abandon service at least 35 calendar days prior to the exit date.

§ 63.306. Abandoning LSP obligations for abandonment.

(a) *General.* Upon receiving a termination notice from a NSP, or upon receiving a Commission order notifying a LSP of an effective date for revoking its certificate of public convenience, or upon a LSP's voluntary filing of an application to abandon service, the abandoning LSP shall make a good faith effort to secure an acquiring LSP to serve the customers it plans to abandon.

(b) *Abandonment plan.* The abandoning LSP shall file an abandonment plan with the Commission at least 35 calendar days in advance of abandoning service. The

abandonment plan shall contain the following information:

(1) An identification of the telecommunications services, either facilities-based or through resale, to be abandoned or curtailed in the associated service territory.

(2) An explanation of reasons for the abandonment of service.

(3) A detailed outline of the procedures a LSP shall use to facilitate continuation of service for its affected customers. The abandoning LSP shall demonstrate that the abandonment will not deprive the public of necessary telecommunications services.

(4) The notices required by this section.

(5) A list of current customers that will be abandoned.

(6) The abandonment notice that is to be sent to customers.

(7) The beginning and ending dates for the period in which customers are to shop and select a new LSP (customer choice period). Customers shall be allowed up to 20 calendar days after receiving a customer notice of abandonment to shop and select a new LSP.

(8) The beginning and ending dates for the customer migration period when the business arrangements are to be completed for the transfer of service to the new LSP. The customer migration period shall immediately follow the customer choice period, allow 10 calendar days for migration, and immediately precede the exit date.

(9) A proposed exit date. If the abandonment is initiated by termination by a NSP or by Commission order, the proposed exit date may not be later than the termination date provided by the NSP or the date the certificate of public convenience is to be revoked.

(10) Contact names and telephone numbers for a LSP's program manager, the regulatory contact and other pertinent contacts, for example, the contact for customer service records (CSR) or provisioning contacts.

(11) If applicable, the arrangements made for an acquiring carrier.

(12) The procedures to be taken with NANPA to transfer NXX codes or thousand number blocks (if applicable) while preserving number portability for numbers within the code.

(13) The name of the NSP and the current customer serving arrangements, for example, UNE-P, resale, UNE-L or Full Facilities.

(14) A list of customer names and contact information when the abandoning LSP is the only provider of facilities to a customer or group of customers.

(15) The number of customers to be impacted by the abandonment.

(16) The details of a transfer of assets or control that requires Commission approval under 66 Pa.C.S. § 1102(a)(3) (relating to enumeration of acts requiring certificate).

(17) A request to modify or cancel tariffs.

(18) A plan for processing customer deposits, credits and termination liabilities or penalties.

(19) A plan for unlocking the E-9-1-1 records.

(20) A plan for maintaining toll-free telephone access to an abandoning LSP's call center (including customer service and billing records) so that a customer is able to contact the LSP to inquire about or dispute final bills and refunds.

(c) *Transfer of customers' 9-1-1/E-9-1-1 records.*

(1) *Transfers to a new LSP.* An abandoning LSP shall unlock all of its telephone numbers in the 9-1-1/E-9-1-1 records to provide a new LSP with access to the abandoning LSP's customers' 9-1-1/E-9-1-1 records. The abandoning LSP shall unlock the 9-1-1/E-9-1-1 records in compliance with the National Emergency Numbering Association's (NENA) recommended data standards for service providers going out of business.

(2) *Transfers after abandonment.* An abandoning LSP shall submit a letter to the appropriate 9-1-1/E-9-1-1 service provider authorizing the 9-1-1/E-9-1-1 service provider to unlock remaining 9-1-1/E-9-1-1 records after the LSP has abandoned the market. The abandoning LSP shall provide this letter at least 30 days prior to abandoning the market.

(d) *Notification to the industry and NANPA.*

(1) *Industry abandonment notice.* An abandoning LSP shall provide written notice to:

(i) Telecommunications corporations providing the abandoning LSP with essential facilities or services or UNEs that affect the abandoning LSP's customers.

(ii) Telecommunications corporations providing the abandoning LSP with resold telecommunications services, if resold service is part of the telecommunications services provided to the abandoning LSP's affected customers.

(2) *NANPA abandonment notice.* An abandoning LSP which has NXX or thousand block number resources from NANPA shall provide written notice to NANPA identifying and authorizing the release of all of its used and unused number resources to an acquiring carrier, other LSPs or NANPA, as applicable. When number resources are to be released to an acquiring carrier, the notice to NANPA shall be provided at least 35 days prior to the abandoning LSP's exit date.

(3) The notice shall include identification of all working telephone numbers assigned to the customers, identification of all unassigned or administrative numbers available for reassignment to other providers and the date the unassigned telephone numbers shall be available for reassignment.

(4) The abandoning LSP shall authorize the release of each individually assigned customer telephone number to the subsequent provider selected by the customer. The abandoning LSP may not abandon NXX codes or thousand block numbers if a number within the relevant range of numbers has not been completely ported.

(e) *Abandoning LSP notification to customers.*

(1) The abandoning LSP (and acquiring LSP if applicable) shall notify customers by letter at least 30 calendar days in advance of the exit date.

(2) The abandoning LSP shall provide customers with a list of all services (for example—local basic, regional toll and long distance toll) that the abandoning LSP is currently providing to the customer that will no longer be provided as of the exit date. The abandoning LSP shall direct customers to choose a new LSP to obtain whatever services they wish to have going forward.

(3) The abandoning LSP shall lift all existing preferred carrier freezes on the services to be abandoned.

(4) The notice of pending abandonment of service to residential and business customers shall contain the following:

(i) A printed message on the envelope and the notice containing the words "Important Notice, Loss of Local Telephone Service" printed in bold letters with a font size of at least 14 points, conspicuously displayed on the front of the envelope to attract the attention of the reader.

(ii) A statement on the notice: "At this time, (LSP name) provides you with local telephone service, (list other services provided by the LSP that will no longer be provided upon abandonment of local service)."

(iii) A statement on the notice: "As of (the exit date) (LSP name) will no longer provide your local telephone service and you must take action."

(iv) A statement on the notice: "To prevent the loss of your local telephone service, you must select another local telephone service provider on or before (list a specific date 10 calendar days prior to the exit date). If you act by this date there will be enough time for the new local service provider you choose to start your new service before your current service ends."

(v) A statement on the notice: "Please remember that customers may choose the provider of their local telephone service. You may select any company that is offering service in your area." Customers shall be notified that they can check their telephone directory yellow pages under "telephone service providers" or in the front of the directory under the heading of "other local phone companies" for information about LSPs serving their area.

(vi) If the abandoning LSP has arranged for an acquiring LSP to serve customers, the abandoning LSP customer notice provisions shall reflect these arrangements. Specifically, the written notice to customers shall be a joint notice from the abandoning and acquiring LSPs. The joint notice shall be sent to customers in an envelope from the abandoning LSP. The joint notice shall inform customers that they may select any LSP that serves their area by (date of the end of customer choice period) or they may take no action and their service will be transferred to the acquiring LSP no later than (exit date). The joint notice shall also include information about the acquiring LSP's rates and terms and conditions of service.

(vii) A statement on the notice: "This is an important notice (the word "important" in bold) about the loss of your local telephone service. If you have any questions, need more information or have problems with changing your services, contact (LSP contact information including a toll-free telephone number)."

(viii) Information to customers outlining the procedure for obtaining refunds of credits and deposits, obtaining final bills and addressing questions or complaints.

(ix) Customers who had preferred carrier freezes on their accounts shall be directed to contact their new LSP to arrange for new preferred carrier freezes if they wish to have this protection going forward.

§ 63.307. Abandonment process management.

(a) The abandoning LSP shall appoint a program manager to coordinate the abandonment process. The program manager shall be selected from the abandoning LSP or, if applicable, the acquiring LSP.

(b) The program manager shall be accountable to each of the parties involved in the abandonment. The individual parties involved in the migration may be:

(1) The abandoning LSP.

(2) The acquiring LSP.

(3) The abandoning LSP's customers.

(4) The Commission.

(c) The parties involved in the abandonment shall appoint a project manager who will work with the program manager to ensure that the abandonment process flows in a seamless manner.

§ 63.308. Commission consideration and action.

(a) The Commission will post information of an impending abandonment on its website at www.puc.state.pa.us under "Local Service Telephone Provider Abandonment Notification."

(b) If necessary, Commission staff may establish an industry conference call to address potential problem areas and procedures with the abandoning LSP, as well as with the acquiring or other LSPs as applicable.

§ 63.309. Acquiring LSP provisions and obligations.

(a) An abandoning LSP and acquiring LSP may change the customer's local service provider without being considered to have engaged in slamming if the customer has not selected another LSP during the 20-day customer choice period and the acquiring LSP does not change a customer's preferred interexchange carrier designation without the customer's authorization. This provision does not relieve the abandoning LSP or the acquiring LSP of any requirements imposed by the Federal Communications Commission's (FCC) antislamming rules or State rules in § 64.23(b) (relating to standardizing LEC responses to customer contacts alleging unauthorized charges added to the customer's bill (cramming) and unauthorized changes to the customer's long distance carrier (slamming)).

(b) If an acquiring LSP determines that it will be unable to migrate service to a customer by the abandoning LSP's exit date, the acquiring LSP shall notify the Commission, the customer and the abandoning LSP within 24 hours of the determination. If the customer is unable to select another available LSP, the abandoning LSP shall continue to provide service until the date on which a LSP is able to provide service or a date ordered by the Commission, whichever is earlier.

§ 63.310. Abandoning LSP follow-up obligations.

(a) An abandoning LSP shall track the progress of migrations and provide Commission staff with progress reports on the number of customers that have and have not migrated to a new LSP. The frequency of the updates will vary with the magnitude of the mass migration and will be determined by the Commission on a case by case basis.

(b) An abandoning LSP shall send a second abandonment notice to a customer who is not subject to acquisition by another LSP and has not taken action to select a new LSP. The second abandonment notice shall be sent after consultation with the Commission. The form of the second notice is left to the discretion of the abandoning LSP and may be the following:

(1) First class mail.

(2) A telephone call.

(3) A bill insert.

(4) Any other means of direct contact with the customer.

[Pa.B. Doc. No. 05-704. Filed for public inspection April 15, 2005, 9:00 a.m.]

Title 58—RECREATION

GAME COMMISSION

[58 PA. CODE CH. 141]

Use of Cable Restraints for Taking Certain Furbearers

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission), at its January 25, 2005, meeting, adopted the following rulemaking:

Amend § 141.63 (relating to definitions) to expand the listed definitions and add § 141.66 (relating to cable restraints) to permit the use of cable restraints for taking certain furbearers.

This final-form rulemaking will have no adverse impact on the wildlife resources of this Commonwealth.

The authority for this final-form rulemaking is 34 Pa.C.S. (relating to Game and Wildlife Code) (code).

Notice of proposed rulemaking was published at 34 Pa.B. 6547 (December 11, 2004).

1. *Purpose and Authority*

Trappers in this Commonwealth have requested that the use of cable restraints be permitted to take certain furbearers, namely coyotes and foxes. The Commission has weighed this public input against wildlife management interests and determined that the use of this additional device for these specific furbearers can be reasonably permitted. To make cable restraints lawful for taking these specific furbearers the Commission expanded the list of definitions found in § 141.63 to include and specifically define "cable restraint" and also added § 141.66 to establish the lawful methods, uses and periods during which cable restraints may be used.

Section 2102(d) of the code (relating to regulations) authorizes the Commission to "promulgate regulations stipulating the size and type of traps, the type of firearms and ammunition and other devices which may be used, the manner in which and the location where the devices may be used, the species the devices may be used for and the season when the devices may be used." Section 322(c)(5) of the code (relating to powers and duties of the commission) specifically empowers the commission to "Fix the type and number of devices which may be used to take game or wildlife." Section 2102(b)(1) of the code (relating to regulations) authorizes the commission to "promulgate regulations relating to . . . the number and types of devices and equipment allowed, the identification of devices and the use and possession of devices." Section 2102(a) of the code (relating to regulations) provides that "The commission shall promulgate such regulations as it deems necessary and appropriate concerning game or wildlife and hunting or furtaking in this Commonwealth, including regulations relating to . . . the ways, manner, methods and means of . . . furtaking . . . in this Commonwealth." The amendments to §§ 141.63 and 141.66 were adopted under this authority.

2. *Regulatory Requirements*

This final-form rulemaking will specifically define "cable restraint" in § 141.63 and will establish the lawful methods, uses and periods during which cable restraints may be used in § 141.66.

3. *Persons Affected*

Persons who wish to use cable restraints for the taking of certain furbearers, namely coyotes and foxes, will be affected by this final-form rulemaking.

4. *Comment and Response Summary*

One-hundred and forty-five official written comments were received regarding this final-form rulemaking. These comments were comprised of 129 comments in favor and 16 comments in opposition of this final-form rulemaking. These 16 comments received in opposition to this rulemaking were primarily comprised of comments challenging the safety of cable restraints for collateral victims such as dogs. The remaining opposition comments received challenged the Commission's allowance of trapping in general.

Specifically, the majority of these comments claim there would be an unacceptable danger of injury or death for dogs inadvertently caught in these traps. Although the Commission recognizes the legitimate concerns of hunting dog owners and standard dog owners alike, it has concluded that if these cable restraints are set in a lawful manner and during the lawful seasons, the collateral risk to hunting dogs or other dogs at large is nominal.

5. *Cost and Paperwork Requirements*

This final-form rulemaking should not result in additional cost or paperwork.

6. *Effective Date*

This rulemaking will be effective upon final-form publication in the *Pennsylvania Bulletin* and will remain in effect until changed by the Commission.

7. *Contact Person*

For further information regarding this final-form rulemaking, contact Michael A. Dubaich, Director, Bureau of Law Enforcement, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

Findings

The Commission finds that:

(1) Public notice of intention to adopt the administrative amendments adopted 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. §§ 1202 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The adoption of the amendments of the Commission in the manner provided in this order is necessary and appropriate for the administration and enforcement of the authorizing statute.

Order

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

(a) The regulations of the Commission, 58 Pa. Code Chapter 141, are amended by amending §§ 141.63 and by adding 141.66 to read as set forth at 34 Pa.B. 6547.

(b) The Executive Director of the Commission shall certify this order and 34 Pa.B. 6547 and deposit them with the Legislative Reverence Bureau as required by law.

(c) This order shall become effective upon final-form publication in the *Pennsylvania Bulletin*.

VERNON R. ROSS,
Executive Director

[Pa.B. Doc. No. 05-705. Filed for public inspection April 15, 2005, 9:00 a.m.]

GAME COMMISSION
[58 PA. CODE CH. 147]
Special Permits; Bobcats

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission), at its January 25, 2005, meeting, adopted an amendment to § 147.701 (relating to general).

The final-form rulemaking will have no adverse impact on the wildlife resources of this Commonwealth.

The authority for the final rulemaking is 34 Pa.C.S. (relating to Game and Wildlife Code) (code).

Notice of proposed rulemaking was published at 34 Pa.B. 6549 (December 11, 2004).

1. *Introduction*

The Commission amended § 147.701 to permit the Executive Director to set application submission period requirements for bobcat hunting-trapping permits to facilitate a more convenient and standardized application process for permit applicants.

2. *Purpose and Authority*

Formerly, the Commission maintained specific submission and post marking requirements regarding bobcat hunting-trapping permits within its regulations. To make the process of applying for bobcat hunting-trapping permits more convenient for applicants and also standardize the procedures for paper and online applications among different species, the Commission amended § 147.701 to require all applications to be submitted in accordance with periods set by the Executive Director. The final-form rulemaking continues to give applicants the option of applying for bobcat hunting-trapping permits on-line, using the Commission's Outdoor Shop or applying through the mail.

Section 2901(b) of the code (relating to authority to issue permits) provides "the commission may, as deemed necessary to properly manage the game or wildlife resources, promulgate regulations for the issuance of any permit . . . ." Section 2102(a) of the code (relating to regulations) provides that "The commission shall promulgate such regulations as it deems necessary and appropriate concerning game or wildlife . . . in this Commonwealth, including regulations relating to the protection, preservation and management of game or wildlife . . . in this Commonwealth." The amendment to § 147.701 was adopted under this authority.

3. *Regulatory Requirements*

The final-form rulemaking will require applicants for bobcat hunting-trapping permits to abide by submission requirements established by the Executive Director to facilitate a more convenient and standardized application process for applicants.

4. *Persons Affected*

Persons who wish to apply for a bobcat hunting-trapping permit will be affected by the final-form rulemaking.

5. *Comment and Response Summary*

There were no official comments received regarding this final-form rulemaking.

6. *Cost and Paperwork Requirements*

The final-form rulemaking should not result in additional cost or paperwork.

7. *Effective Date*

The final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin* and will remain in effect until changed by the Commission.

8. *Contact Person*

For further information regarding the final-form rulemaking, contact Michael A. Dubaich, Director, Bureau of Law Enforcement, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

Findings

The Commission finds that:

(1) Public notice of intention to adopt the administrative amendment adopted 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 adoption of the amendment of the Commission in the manner provided in this order is necessary and appropriate for the administration and enforcement of the authorizing statute.

Order

The Commission, acting under authorizing statute, orders that:

(a) The regulations of the Commission, 58 Pa. Code Chapter 147, are amended by amending § 147.701 to read as set forth in Annex A.

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

(c) This order shall become effective upon final-form publication in the *Pennsylvania Bulletin*.

VERNON R. ROSS,
Executive Director

Fiscal Note: Fiscal Note 48-198 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 58. RECREATION

PART III. GAME COMMISSION

CHAPTER 147. SPECIAL PERMITS

Subchapter S. BOBCAT HUNTING-TRAPPING PERMIT

§ 147.701. General.

This section provides for permits to be issued for the hunting and trapping of bobcat during the season established and in areas designated under § 139.4 (relating to seasons and bag limits for the license year).

(1) A permit will only be issued to residents of this Commonwealth who possess a valid resident furtakers license, junior combination license, senior combination license or qualify for license and fee exemptions under section 2706 of the act (relating to resident license and fee exemptions) or to persons who qualify under section 2363 of the act (relating to trapping exception for certain persons).

(2) The fee for an application for a permit to take a bobcat is $5.

(3) Applications shall be submitted on a form supplied by the Commission or by using an electronic application on the Commission's Internet website and shall contain the required information as requested. For the purpose of

having a unique identifier assigned to each individual in the database, permitting a crosscheck for duplicates, applicants shall provide their Social Security number on the application, or hunter ID number. A $5 application fee shall accompany the application and is nonrefundable. Applications shall be submitted to the Commission's Harrisburg Headquarters.

(4) Applications shall be submitted in accordance with periods set by the Director.

(5) Only one application per person may be submitted. Anyone submitting more than one application for a permit will have all applications rejected.

(6) The selection of applications will be made by random drawing from all eligible applications submitted. Incomplete, illegible or duplicate applications will not be included in the drawing. The drawing will be held at the Commission's Harrisburg Headquarters on the second Friday in September and shall be open to the public.

(7) A special permit authorizing the lawful taking of one bobcat will be delivered to successful applicants by standard first class mail through and by the United States Postal Service. Permits shall be mailed by the first Friday in October. The number of permits issued shall be set by the Executive Director no later than the first day of June.

(8) Tagging requirements are as follows:

(i) A permitted person taking a bobcat shall immediately, before removing the bobcat from the location of the taking, fully complete a temporary carcass tag furnished with the permit, which contains in English the person's name, address, special permit number, date of harvest, county and township of harvest, wildlife management unit of harvest and method of harvest and attach the tag to the bobcat. The bobcat carcass shall remain intact, that is, with entrails, until examined and tagged by a Commission representative. The temporary carcass tag shall remain attached to the animal until it is tagged with a numbered permanent interlocking tag. The person taking the bobcat may remove the pelt provided the pelt is kept with the carcass for examination and tagging.

(ii) A permitted person taking a bobcat shall contact the Commission within 48 hours of the taking by telephoning the number specified on the permit to arrange for carcass examination, data collection and tagging.

(iii) A bobcat taken under authority of a special permit shall be tagged with a numbered permanent interlocking tag no later than 4 p.m. on the 10th day following the closing of the bobcat season.

(iv) The tag shall remain attached to the bobcat until it is mounted, tanned, made into a commercial fur or prepared for consumption.

(9) An applicant issued a bobcat hunting-trapping permit is not permitted to apply for another bobcat hunting-trapping permit the next license year. Applications from current applicants who have applied in the 2003-2004 license year and proceeding years will be included in the drawing until the applicant is successfully drawn and issued a permit.

(10) A bobcat guide permit will be issued as follows:

(i) A person who assists another person to hunt or take bobcats in any manner shall first secure a bobcat guide permit from the Commission.

(ii) The fee for a bobcat guide permit is $10 for residents and $25 for nonresidents.

[Pa.B. Doc. No. 05-706. Filed for public inspection April 15, 2005, 9:00 a.m.]

GAME COMMISSION

[58 PA. CODE CH. 147]

Special Permits; Possession of Deer Accidentally Killed by a Motor Vehicle

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission), at its January 25, 2005, meeting, adopted an amendment to § 147.142 (relating to possession of deer accidentally killed by a motor vehicle).

The final-form rulemaking will have no adverse impact on the wildlife resources of this Commonwealth.

The authority for the final-form rulemaking is 34 Pa.C.S. (relating to Game and Wildlife Code) (code).

Notice of proposed rulemaking was published at 34 Pa.B. 6549 (December 11, 2004).

1. *Introduction*

The Commission amended § 147.142 to permit the issuance of permit "numbers" rather than "paper" permits to validate lawful possession of road-killed deer and facilitate cost and personnel timesavings for the Commission.

2. *Purpose and Authority*

Formerly, any individual who wished to take possession of an accidentally road-killed deer had to apply for a possession permit through their local Commission regional office within 24 hours of taking possession of the deer. After the Commission received an application for a permit, its personnel had to commit time to completing and issuing the "paper" permit and recording its information. The cumulative cost of the time spent executing these tasks in addition to the postage costs for mailing a "paper" permit to each applicant was quite substantial. To promote cost and personnel timesavings, as well as streamline and simplify the permitting process, the Commission amended § 147.142 to allow the issuance of permit "numbers" by phone rather than "paper" permits by mail. This should make it easier for applicants to receive a permit as well as make it less costly and time consuming for the Commission to issue the same.

Section 2901(b) of the code (relating to authority to issue permits) provides "the commission may, as deemed necessary to properly manage the game or wildlife resources, promulgate regulations for the issuance of any permit and promulgate regulations to control the activities which may be performed under authority of any permit issued." Section 2102(a) of the code (relating to regulations) provides that "The commission shall promulgate such regulations as it deems necessary and appropriate concerning game or wildlife . . . in this Commonwealth, including regulations relating to the protection, preservation and management of game or wildlife . . . in this Commonwealth." The amendment to § 147.142 was adopted under this authority.

3. *Regulatory Requirements*

The final-form rulemaking will require possession permit applicants to obtain a permit "number" rather than a

"paper" permit to validate lawful possession of an accidentally road-killed deer.

4. *Persons Affected*

Persons who wish to take possession of an accidentally road-killed deer will be affected by the final-form rulemaking.

5. *Comment and Response Summary*

One official written comment was received in opposition to this final-form rulemaking.

6. *Cost and Paperwork Requirements*

The final-form rulemaking should reduce cost and paperwork related to possession permits for accidentally road-killed deer.

7. *Effective Date*

The final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin* and will remain in effect until changed by the Commission.

8. *Contact Person*

For further information regarding the final-form rulemaking, contact Michael A. Dubaich, Director, Bureau of Law Enforcement, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

Findings

The Commission finds that:

(1) Public notice of intention to adopt the administrative amendment adopted 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 adoption of the amendment of the Commission in the manner provided in this order is necessary and appropriate for the administration and enforcement of the authorizing statute.

Order

The Commission, acting under authorizing statute, orders that:

(a) The regulations of the Commission, 58 Pa. Code Chapter 147, are amended by amending § 147.142 to read as set forth at 34 Pa.B. 6549.

(b) The Executive Director of the Commission shall certify this order and 34 Pa.B. 6549 and deposit them with the Legislative Reference Bureau as required by law.

(c) This order shall become effective upon final-form publication in the *Pennsylvania Bulletin*.

VERNON R. ROSS,
Executive Director

Fiscal Note: Fiscal Note 48-197 remains valid for the final adoption of the subject regulation.

[Pa.B. Doc. No. 05-707. Filed for public inspection April 15, 2005, 9:00 a.m.]

Title 64—SECURITIES

SECURITIES COMMISSION

[64 PA. CODE CHS. 203, 303, 304 AND 404]

Investment Advisors; Exchange Transactions

The Securities Commission (Commission), under sections 203(r), 303(a) and (d), 304(b) and 404 of the Pennsylvania Securities Act of 1972 (70 P. S. §§ 1-203(r), 1-303(a) and (d), 1-304(b) and 1-404) (act), amends and adopts regulations concerning the subject matter of the act to read as set forth in Annex A.

Publication of Notice of Proposed Rulemaking

The proposed rulemaking was published at 34 Pa.B. 5168 (September 18, 2004).

Public Comments

No public comments were received.

Comments of the Independent Regulatory Review Commission (IRRC)

By letter dated November 17, 2004, IRRC advised that it had no objections, comments or suggestions with respect to the proposed rulemaking.

Changes Made by the Commission on Adoption

The Commission has made no changes to the proposed rulemaking.

Summary and Purpose of Rulemaking

§ 203.203 (relating to certain Rule 144A exchange transactions exempt)

The Commission adopts § 203.203 to provide a self-executing exemption for certain exchange transactions of debt securities in which certain accredited investors receive registered debt securities of the issuer in exchange for the issuer's debt securities that originally were issued in a private transaction under SEC Rule 144A (Rule 144A Exchange Transactions).

§ 303.012 (relating to investment adviser registration procedure)

Since the American Institute of Certified Public Accountants no longer permits its members to issue management responsibility letters, the Commission amends this section to delete use of a management responsibility letter in lieu of an audit report where the investment adviser applicant is a certified public accountant (CPA) or a firm consisting of CPAs. The Commission also deletes the definition of "principal" which was used to define who could sign a management responsibility letter. Also, the Commission deletes the ability of public accountants to render an audit report which is required by changes made to section 609(c) of the act by the act of November 24, 1998 (P. L. 829, No. 109) (Act 109).

§ 303.032 (relating to examination requirements for investment advisers and investment adviser representatives)

The Commission amends this section to require CPAs and attorneys to notify the Commission of their eligibility for a waiver of the examination requirement for investment advisers and investment adviser representatives. Applications for registration as an investment adviser or investment adviser representative are processed electronically through the web based Investment Adviser Registration Depository (IARD). The IARD only recognizes exam waivers for certain uniform designations which do not include attorneys or CPAs. Therefore, the only way the Commission knows that those applicants are eligible for a waiver of the exam requirement is to impose a notification requirement on the applicant.

§ 303.042 (relating to investment adviser capital requirements)

The Commission amends this section to make it clear that an investment adviser will not be deemed to have custody of client's funds or securities and thereby be

subject to a higher net worth requirement solely due to the investment adviser receiving a fee directly from the assets of the client, serving as a general partner of a pooled investment vehicle or serving as a trustee of a family beneficial trust if the investment adviser meets certain conditions.

§ 304.022 (relating to investment adviser required financial reports)

Since the American Institute of Certified Public Accountants no longer permits its members to issue management responsibility letters, the Commission amends this section to delete use of a management responsibility letter in lieu of an audit report when the investment adviser applicant is a CPA or a firm consisting of CPAs. Also, the Commission deletes the ability of public accountants to render an audit report which is required by changes made to section 609(c) of the act by Act 109. The Commission deletes the definition of principal which was used to define who could sign a management responsibility letter. Lastly, the Commission exempts investment advisers with custody of clients' funds or securities from filing an annual audited balance sheet if they only inadvertently held clients' funds or securities and returned them to the client within 3 business days.

§ 404.013 (relating to investment adviser custody or possession of funds or securities of clients)

The Commission amends this section to permit an investment adviser to send itemized client statements to another person authorized by the client or to reasonably rely on a qualified custodian of the client's funds or securities to send an itemized statement to the client.

Persons Affected by the Final-Form Rulemaking

Investment advisers who are required to be registered with the Commission and have custody of clients' funds or securities, which the Commission estimates to be less than ten registrants, will be affected by this final-form rulemaking. Also affected will be issuers that engage in a Rule 144A Exchange Transaction with a holder of debt securities located in this Commonwealth.

Fiscal Impact

The new exemption for Rule 144A Exchange Transactions will eliminate a current requirement that the transactions be registered under section 205 or section 206 of the act (70 P. S. §§ 1-102 and 1-206). The Commission anticipates an annual revenue loss to the General Fund of approximately $7,500. The amendments applicable to the few investment adviser registrants who have custody of clients' funds or securities will not impose significant additional recordkeeping costs beyond those which currently exist.

Paperwork

The next exemption for Rule 144A Exchange Transactions will eliminate the filing of Commission Form R. The Commission eliminates Form 203-I. The amendments applicable to the few investment adviser registrants who have custody of clients' funds or securities will require some new recordkeeping.

Effective Date

The rulemaking will become effective upon final-form publication in the *Pennsylvania Bulletin*.

Regulatory Review

Under Section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 1, 2004, the Commission submitted a copy of the proposed rulemaking published at 34 Pa.B. 5168 to IRRC and the Chairpersons of the House Commerce Committee and the Senate Committee on Banking and Insurance for comment and review. In addition to submitting the amendments, the Commission has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis form prepared by the Commission. A copy of this material is available upon request.

By letter dated November 17, 2004, IRRC stated that it did not have any objections, comments or suggestions to offer on the proposed rulemaking. The Commission has made no changes to the proposed rulemaking when preparing the final-form regulations. The final-form rulemaking was submitted on February 1, 2005, to IRRC and the Chairpersons of the Committees. The final-form rulemaking was deemed approved by the Committees on February 23, 2005. The final-form rulemaking was deemed approved by IRRC under section 5(g) of the Regulatory Review Act, effective February 23, 2005.

Availability in Alternative Formats

This final-form rulemaking may be made available in alternative formats upon request. The Commission also will receive comments on the final-form rulemaking in alternative formats. TDD users should use the AT&T Relay Center (800) 854-5984. To make arrangements for alternative formats, contact Sam Dengel, ADA Coordinator (717) 787-6828.

Contact Person

The contact person is Mary E. Peters, Deputy Chief Counsel, Securities Commission, Eastgate Building, 1010 N. Seventh Street, 2nd Floor, Harrisburg, PA 17102-1410, (717) 783-4186.

Order

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

(a) The regulations of the Commission, 64 Pa. Code Chapters 203, 303, 304 and 404, are amended by amending §§ 303.012, 303.032, 303.042, 304.022 and 404.013 and by adding § 203.203 to read as set forth at 34 Pa.B. 5168.

(b) The Secretary of the Commission shall submit this order and 34 Pa.B. 5168 to the Office of Attorney General for approval as to form and legality as required by law.

(c) The Secretary of the Commission shall certify this order and 34 Pa.B. 5168 and deposit them with the Legislative Reference Bureau as required by law.

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

JEANNE S. PARSONS,
Secretary

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission relating to this document, see 35 Pa.B. 1734 (March 12, 2005).)

Fiscal Note: Fiscal Note 50-119 remains valid for the final adoption of the subject regulations.

[Pa.B. Doc. No. 05-708. Filed for public inspection April 15, 2005, 9:00 a.m.]