RULES AND REGULATIONS

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 63]

[L-00030163]

Changing Local Service Providers

The Pennsylvania Public Utility Commission, on May 5, 2005, adopted a final rulemaking order which sets forth regulations establishing an orderly process for customer migration between local service providers within the telecommunications industry.

Executive Summary

The advent of competition in the local telephone market in this Commonwealth has created situations that the Commission's current regulations do not address. Specifically, consumers have encountered a variety of problems when they attempt to change local service providers (LSPs) in the competitive market. In April 2002, recognizing the need for both short-term and long-run solutions to problems associated with migrating local phone service, the Commission approved Interim Guidelines addressing the issues raised by the changes. Later in 2002, the Commission held collaborative sessions that involved telecommunications carriers and other interested parties in discussions of the issues. Two of the collaborative groups focused on issues related to changing local service providers and quality of service. The participants in these two groups agreed to combine the issues into one rulemaking. The collaborative participants addressed proposals for regulations and proposed solutions to the problems created by the changing telecommunications marketplace.

By Order entered on October 3, 2003, at Docket No. L-00030163, the Commission adopted a Proposed Rulemaking Order to amend Chapter 63, consistent with the order and recommendations of the collaborative participants, the Bureau of Consumer Services and the Law Bureau. The intent of the proposed rulemaking was to promulgate a regulation to establish general rules, procedures, and standards to ensure that customers can migrate from one LSP to another without confusion, delay, or interruption of their basic telephone service.

Comments to the proposed rulemaking were filed, and the Commission addressed all comments and entered a final rulemaking order on February 9, 2005. A petition for reconsideration was timely filed and granted in part by the Commission by Order entered on May 5, 2005. The May 5, 2005, Order replaces the February 9, 2005, Order in its entirety.

The new regulation applies to all LSPs and network service providers (NSPs) operating in this Commonwealth. Although the new regulations do not apply to mass migrations of customers brought about by the selling or transferring of a customer base of one LSP to another, an LSP that has properly proceeded with the abandonment of service to its customer base, Digital Subscriber Line migration, or line sharing/splitting arrangements, the rules may provide guidance for those transactions.

The regulations recognize the right of a telephone customer to migrate from one LSP to another and address the responsibilities of old LSPs, new LSPs and NSPs throughout the migration process. The old and new LSPs are to work together to minimize or avoid problems associated with migrating a customer's account. The Commission will establish an industry work group to develop and update migration guidelines that LSPs and NSPs are to follow to facilitate migration of a customer's local telephone service.

Prospective new LSPs will need verified authorization from a customer to obtain the customer's service information from the current LSP. The current LSP is to provide specific customer service information within a specified time frame to the prospective new LSP when the customer has indicated a desire to switch LSPs. The prospective new LSP may not process a change in LSPs for a customer who has a local service provider freeze in effect. LSPs are to provide various methods for customers to lift or remove local service provider freezes.

An old LSP may not refuse to port a customer's telephone number to a new LSP unless the old LSP has terminated or discontinued service for that number prior to the migration request. In addition, an old LSP shall issue a final bill within 42 days to any customer who has requested to switch service providers and the old LSP shall stop billing the customer for any recurring charges as of the date of the change to the new LSP.

LSPs and NSPs are to follow specific procedures when preexisting service at a location prevents a new LSP from reusing the existing telephone facilities to serve a new customer. If the problem cannot be resolved, the new LSP is to inform the consumer of various options for obtaining service including paying for the installation of new facilities.

In the event of a migration dispute between LSPs or between an LSP and an NSP, the Commission will make available a nonadversarial, expedited dispute process within the Commission to address the dispute and suggest a resolution.

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. 1784 (April 3, 2004), to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Committee on Consumer Affairs and the Senate Committees 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 July 13, 2005, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(c) of the Regulatory Review Act, IRRC met on July 14, 2005, and approved the final-form rulemaking.

Public Meeting held
May 5, 2005

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

Rulemaking Re Changing Local Service Providers; L-00030163

Final Rulemaking Order
Order on Reconsideration

By the Commission:

On October 3, 2003, the Commission entered a Proposed Rulemaking Order to promulgate regulations to establish an orderly process for customer migration between local service providers (LSPs) within the telecommunications industry. The final-form regulations apply to all LSPs and all network service providers (NSPs) operating in Pennsylvania and are not mandatory with respect to mass migrations of customers brought about by the selling or transferring of customer base from one LSP to another, to an LSP that has properly proceeded with the abandonment of service to its customer base, to Digital Subscriber Line migration, or to line sharing or line splitting arrangements.

History

The October 3, 2003 Order was published in the *Pennsylvania Bulletin* on April 3, 2004, at 34 Pa.B. 1784. The Commission received written comments from the Independent Regulatory Review Commission (IRRC); the Office of Consumer Advocate (OCA); the Office of the Attorney General (OAG), the Pennsylvania Telephone Association (PTA); AT&T Communication of Pennsylvania, LLC. (AT&T); Curry Communications, Inc. (Curry); Full Service Network (FSN); MCI WorldCom Network Services, Inc. (MCI); and Verizon Pennsylvania Inc./ Verizon North Inc. (Verizon).

On February 9, 2005, this Commission entered an Order addressing the comments and setting forth final regulations. On February 24, 2005, before the Order and final-form regulations were transmitted to IRRC for final review prior to publication, Verizon filed and served[1] a timely Petition for Reconsideration seeking review of three points:

(1) Migration and restoration coordination responsibilities. (P/R at ¶9). Specifically, the new LSP (NLSP), rather than the network service provider (NSP), should be responsible for coordinating migrations of service and restorations of service if the migration fails.

(2) The non-contact period by current LSPs with potentially departing customers. (P/R at ¶10). Specifically, Federal Communications Commission (FCC) regulations provide that this period does not expire.

(3) Confirmation or rejection of a Local Service Request (LSR). (P/R at ¶11). Specifically, the § 63.202(d) interval should be shortened, the section should apply to the old LSP (OLSP), and "or rejection" should be deleted from the section.

On March 15, 2005, Metropolitan Telecommunications (MetTel) filed a letter in lieu of answer generally supporting reconsideration on Verizon PA's first and third points. MetTel did not address the second point.

The substance of Verizon's concerns raised in its Petition for Reconsideration, coupled with MetTel's support and the lack of any formal opposition to reconsideration or Verizon's concerns, persuade us to consider their merit under the standard enunciated in *Duick v. Pa. Gas & Water*, 56 Pa PUC 553 (1982).

This Final Rulemaking Order/Order on Reconsideration and Annex A replace the February 9, 2005 Order and regulations in their entirety, address the comments to the February 3, 2003 Order, address the Petition for Reconsideration, and adopt and set forth in Annex A revised final regulations.

Discussion

As a preliminary matter, we note that it is well settled that we are not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. P.U.C.*, 625 A.2d 741 (Pa. Cmnwlth. 1993); *U. of Pa. v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmnwlth. 1984). Accordingly, any comment, issue, or request for reconsideration that we do not specifically address herein has been duly considered and rejected and will not be further discussed. Further, ministerial edits, which do not have a substantive effect, have been included in this order without specific discussion.

Subchapter M. CHANGING LOCAL SERVICE PROVIDERS

General Comments

Several parties provided comments about some general aspects of the proposed regulations. AT&T suggested that the Commission should withdraw the proposal until the market evolves. According to AT&T, the proposed rulemaking is a bad solution in search of an unproven problem and may create problems in a process that is working well. The Commission's experience, however, has been that existing procedures for migration do not always work well. The Commission's Bureau of Consumer Services (BCS) has recorded numerous complaints from frustrated consumers for whom the process has not worked. At times, consumers are faced with the inability to migrate their local service to an LSP of their choice. Other complaints include the inability to port telephone numbers when they change LSPs, continued billing from an OLSP after switching to a NLSP, lack of communication about the migration process, lack of cooperation among the entities involved in the migration process, delays in service migrations, and even loss of telephone service. Such complaints prompted the Commission to establish interim guidelines for changing LSPs and for quality of service, and to arrange collaborative meetings with interested parties. Additionally, numerous intercarrier disagreements as to processes for migrations surfaced during the collaborative process. From its review of consumer complaints and the issues raised in the collaborative sessions, this Commission finds it must disagree with AT&T's suggestion and will, therefore, proceed with the rulemaking.

FSN agreed with the goal of the Commission's proposed regulations to establish consistent procedures and standards for customer migration between LSPs that will enable consumers to switch LSPs without confusion, abuse, delay, or service interruptions but feared that the proposed rules will have the opposite result. FSN alleged that "loopholes" and ambiguity in the proposed regulations could encourage abuse and discourage competition. As discussed in greater detail as follows, the Commission has made adjustments to the proposed rules in response to the comments of the parties. Those adjustments, as well as the protections that are already in place through other regulations and statutes, will serve to plug the "loopholes" and prevent the potential abuses about which FSN is concerned.

[1] Verizon served the active parties at this docket and provided a copy of the petition to IRRC.

GENERALLY

§ 63.191. Statement of purpose and policy.

IRRC commented that the final-form rulemaking should specify that the regulations apply to both residential and business customers. Based on this comment, we added language to subsection (a) and (b) to indicate that the purpose of the subchapter is to ensure that residential and business customers can migrate from one LSP to another without confusion, delay, or interruption of local service. As discussed more fully in regard to § 63.192, we replaced "basic service" with "local service" in the last sentence under subsection (a), as recommended by IRRC, and we revised the proposed regulations to use "local service" when appropriate throughout the final-form regulations.

§ 63.192. Definitions.

IRRC noted that the proposed rulemaking uses "telephone service," "local service," "local basic service," "service," "vertical service," "optional services," and "telecommunications service" throughout the regulations, yet "local service" was the only term that appeared in the definitions. IRRC recommended that "local service" be used throughout the regulations. We have modified the regulations to insert "local" before service where this addition is appropriate. We also substituted "local service" in place of "local basic service" and "telecommunications service" where "local service" is appropriate. However, since "vertical services" and "optional services," are not interchangeable with "local service," we added definitions for "optional services," and "vertical services" and clarified other terminology to be consistent in usage. Based on IRRC's further recommendation, we have added a number of other terms to this section: "appropriate retained documentation," "authorized agent," "facilities," "interLATA," "intraLATA," "LATA," "local loop," "network serving arrangements," "recording verifying permission," "third party verification," "UNE (unbundled network element)," "UNE-P (UNE-platform)," and "unbundled loop." We also added "line loss notification."

We have also made numerous changes and additions to this section based on comments by IRRC, AT&T, and OAG, coupled with our own efforts to add clarity and consistency to the regulations. We deleted the definition of "LSP-to-LSP end user migration guidelines or migration guidelines" because we have removed the provisions relating to these guidelines from the final-form regulations.[2] We also deleted "local service reseller" from the definitions because this term does not appear in the final-form regulations. Further, we changed "new LSP" to "NLSP" and "previous LSP" to "OLSP" in several locations.

Both the OAG and AT&T noted that the proposed definition of "applicant" did not include or make reference to applicants who would be business customers. The OAG noted that the use of the term "dwelling" within the definition connoted residential service only. We agreed with these comments and revised the definition to add that "applicant" includes "association, partnership, corporation, or government agency." We also clarified the definition to include an entity "making a written or oral request for the commencement of local service." Further, we inserted "local" before "service" throughout the definition and changed "dwelling" to "location" since "location" is appropriate for both residential and business classes of service. We also inserted "same" before "LSP" to improve the clarity of this definition.

Based on comments from IRRC regarding customer service records (CSRs) and network service arrangements, as well as technical clarification from industry participants, we included "network serving arrangements" in the definition of "CSR" to specify that a customer's network serving arrangements should be part of the information that is included in the customer's CSR. "Network serving arrangements" is now also listed as one of the 13 requisite elements of a CSR in the renumbered § 63.203(e) in the final-form regulations.

Our agreement with IRRC's suggestion to add "local" before "service" throughout the regulations was the basis for our adding "local" to the definition of "interfering station."

Comments of both AT&T and IRRC prompted us to revise the definition of "LOA—Letter of authorization" so as to make the definition less ambiguous and vague. We deleted the first part of the definition that appeared in the proposed rulemaking as IRRC suggested and also deleted "The term is used to indicate" from the second part. Finally, we replaced "document" with "written or electronic record" to improve the relevance of this definition to today's environment.

IRRC commented that the definition of "LSC—Local service confirmation" in the proposed rulemaking included the undefined term "unbundled loop connections." In response, we have modified the definition of "LSC," replacing "telecommunications service activities such as unbundled loop connections" with "the migration of local service." This change makes the definition simpler and clearer.

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. AT&T suggested language for the new definitions. In response, we modified the definition of "LSP" and added "NLSP" and "OLSP" as separately defined terms. We defined "NLSP" as "The company that will provide local service to a customer after a migration." "OLSP" is defined as "The company that provides local service to a customer prior to a migration." Although we did not totally adopt AT&T's suggested language, the new definitions in the final-form regulations reflect AT&T's suggestion.

IRRC and AT&T also each noted that the definition of "LSP" contained the undefined term "nonjurisdictional services." Upon review, we determined that the sentence containing "nonjurisdictional services" was unnecessary and did not add clarity; we therefore deleted the sentence. This revision is consistent with the definition of "LSP" that appears in the final-form regulations pertaining to the Local Service Provider Abandonment Process (LSP Abandonment) at Docket L-00030165, as approved by the Commission on January 13, 2005.

AT&T commented that the definition of "LSR—Local Service Request" inappropriately requires the LSP to issue the LSR to the NSP. We deleted the phrase "issued by LSPs to NSPs" from the first section of the definition to accommodate AT&T's concern. We also replaced "document" with "electronic or paper form" to recognize the industry's use of electronic transmission of information or order.

[2] Nevertheless, we remain committed to fostering industry guidelines to respond to the needs of this technologically evolving industry. See our discussion of the former § 63.203.

In response to IRRC's comment that the definition of the term "NSP—Network service provider" contained the undefined term "carrier," we replaced "carrier" with "telecommunications provider." This change is consistent with the definition of "NSP" in the LSP Abandonment final-form regulations.

MIGRATION

§ 63.201. General migration standards.

AT&T commented that § 63.201(a) was inconsistent with other aspects of the proposed regulations in that it says that customers have a right to migrate while § 63.191(c) states that DSL customers, line share/splitting customers, and customers under special contracts do not have the right to migrate. We hasten to point out that the provisions of § 63.191(c)(1)—(3) do not preclude customers under the listed circumstances from migrating services, filing a complaint with the Commission, or porting their telephone numbers; they merely list circumstances in which the instant rulemaking is not mandatory. We find that AT&T's interpretation misconstrues the language and intent of § 63.191(c)(1)—(3). We did not revise subsection § 63.201(a).

Both IRRC and AT&T pointed out that the proposed rules at § 63.202(a) restated the § 63.201(b) requirement that the NLSP communicate and explain the migration process and timetable to the migrating customer. Each also expressed concern with the use of "when applicable" in the proposed § 63.201(b). In response, we revised the original language in § 63.201(b) and eliminated the redundancy in § 63.202.

AT&T and IRRC also voiced concerns with § 63.201(c). AT&T alleged that the section was confusing and that "[i]t should go without saying that a [service provider] can act in accordance with Commission regulations." IRRC asked how an OLSP could protect itself from loss and stated that the section should include a citation to applicable regulations. Our intention in including this subsection was to make clear that an OLSP is able to use available statutes and regulations to make sure that a migrating customer cannot use migration as a tool to avoid payment for services rendered. We agree with AT&T's comment that § 63.201(c) states the obvious. As a result, we deleted § 63.201(c) from the final-form regulations, rendering IRRC's comment moot.

AT&T commented that proposed § 63.201(d), now § 63.201(c), should extend good faith obligations to the NSP as well as to the OLSP and the NLSP. We agree and have inserted "NSP" into the renumbered § 63.201(c).

FSN commented that the word "facilities" is too broad as it is used in proposed § 63.201(e), § 63.201(d) and that it might be better to replace it with "loops." Rather than replace "facilities" with "loops," we added "facilities" to the definitions section to address FSN's concerns. In addition, we realized that an appropriate forum for resolving conflicts over the reuse of facilities may be the expedited dispute process under § 63.222 and have added a reference to that process to this subsection in the final-form regulations. IRRC recommended adding a reference to the interfering stations sections, which we have done. Conversely, AT&T advocated deleting the interfering stations provisions from the regulations, which would make the reference to the interfering station provisions inappropriate. However, because interfering stations are continually being brought to the Commission's attention, we retained the interfering stations provisions and the cross-reference in the renumbered § 63.201(d).

Based on comments from AT&T, FSN, and IRRC, we revised the language of proposed § 63.201(f), now § 63.201(e), to place the responsibility expressly on the NLSP for notifying the appropriate entities about 9-1-1 and directory listings. The final-form regulations direct the NLSP to notify the 9-1-1 host carrier[3] and the directory listings/white pages provider of the changes. We also added language that the NLSP must notify these entities at the end of each working day regarding changes that came about as a result of the day's work. This provision now appears at renumbered § 63.201(e).

Regarding proposed § 63.201(g), now § 63.201(f), we have incorporated the suggestion of AT&T to require each LSP and NSP to post a company contact list on a publicly accessible website and to supply the website address to the Commission. The Commission will post the addresses on its website so that they are available to any entity that needs them. The revised language appears in the renumbered § 63.201(f).

§ 63.202. Migration responsibilities of NLSPs and NSPs.

IRRC recommended that we should also list the responsibilities of an OLSP in this section. Our purpose in § 63.202 is to identify general responsibilities of the service providers involved in the migration process. Accordingly, we have revised the title and content of this section to include OLSP responsibilities when contacted by a prospective NLSP. As explained in our previous discussion regarding § 63.201(b), we eliminated the redundant iteration of the NLSP responsibility in § 63.202(a). The revised § 63.202(a) now specifies that the OLSP is responsible for responding to a prospective NLSP's request for a CSR and that the response is to be consistent with the requirements of § 63.203, which lists the required elements of a CSR. We note, however, that the listing of migration responsibilities in § 63.202 does not include all the potential confirmations, inquiries, and other communications that may be part of a migration. It would be excessive to spell out scenario-specific duties for OLSPs since at present there are at least 16 different scenarios. The steps required of the OLSP vary considerably depending on the type of migration (e.g., such as those involving bundled service arrangements, those involving unbundled service arrangements, those for full facilities-based LSPs, and so forth). A scenario-specific listing of duties is more appropriately left to industry migration guidelines, which can be revised more easily than regulations as industry practices change.

The proposed regulations placed responsibility on the NLSP to coordinate with the OLSP to fulfill the NLSP's LSR. In comments to the proposed § 63.202(b), AT&T suggested that the NSP should have that coordination responsibility. IRRC questioned how a prospective NLSP can be responsible for coordinating a migration that depends on the cooperation of the OLSP. In light of AT&T's comments and IRRC's inquiry, we adopted AT&T's suggestion in the February 9, 2005 Order.

In its Petition for Reconsideration, however, Verizon points out that throughout Verizon territories and in the New York Migration Guidelines (which have been mandated by the NY Public Service Commission), the NLSP manages the entire migration process from start to finish. Verizon maintains that the NLSP's customer expects the NLSP to coordinate a proper and timely transition of the customer from the OLSP to the NLSP. Verizon notes that it is the NLSP who has the most incentive to ensure that the migration goes smoothly and that the NSP should not

[3] The 9-1-1 host carrier is the incumbent LSP that provides service to the public service answering point (PSAP) for the end-user's geographic location.

be "stuck in the middle" between the OLSP and the NLSP. Verizon suggests that it is the responsibility of the NLSP to take appropriate action to make a balking OLSP fulfill its migration responsibilities, up to and including instituting legal action against the OLSP. Verizon further points out that an NSP has no more leverage over an OLSP regarding migration than a NLSP does. In support of the Verizon Petition for Reconsideration, MetTel states that it also believes that the NLSP is the entity that has a relationship with the customer and, as such, must engage in any necessary coordination between both the NSP and the OLSP.

Upon reconsideration, we agree with Verizon and MetTel. We find that our original proposal is the correct one—the NLSP is the entity with the contractual obligations to the customer. The NLSP has more information about the migrating customer's services and can convey more information to the customer about the migration process when communicating directly with the OLSP as well as with the NSP. Further, as Verizon points out, the NLSP has a variety of options to ensure compliance from the OLSP and the NSP. Therefore, as we originally proposed, the NLSP shall be responsible for coordinating between the NSP(s) and the OLSP to make a customer's service migration as seamless as possible. In the event that the entities cannot resolve a dispute, we designed the expedited process for resolution of migration disputes between service providers, to be codified at § 63.222, so that LSPs could use this process to resolve such issues. Further, the Commission's mediation process under §§ 69.391—69.397 is available to the parties should the expedited dispute process fail. Accordingly, we shall retain § 63.202(b) as originally proposed.

In comments to the proposed § 63.202(d), IRRC suggested changing "working days" to "business days." We note that §§ 63.1—63.102 (Chapter 63) consistently uses the term "working days" rather than "business days." To avoid confusion, we chose to continue using this term. We did, however, add "working day" to the list of terms in the definitions section and revised the proposed regulations to use the term "working days" throughout. We also retained the interval of 5 working days from the proposed regulations.

In its Petition for Reconsideration of § 63.202(d), Verizon suggests that the response intervals of this subsection should apply to OLSPs as well as to NSPs since some LSRs, such as requests to port customer telephone numbers, are submitted to OLSPs. We agree with this suggestion that the response interval should apply to OLSPs as well as NSPs and have made the necessary adjustments to the language of this subsection.

Verizon also reiterates its comments that the dramatic increase in local competition plus rising customer expectations of speedy LSP changes call for a reduction in the time frame specified in the February 9, 2005 Order for processing LSRs. Verizon proposes that rather than five days, the interval for an NSP to provide a Local Service Confirmation (LSC) be set at 48 hours, and, after one year to allow time for increased mechanization, reduced to 24 hours. MetTel suggests that the time intervals be reduced progressively in 6-month intervals beginning with four days and decreasing to 24 hours to allow LSPs a phase-in period.

We agree with Verizon that consumer demand for prompt migrations calls for an accelerated migration process. However, we are concerned that some companies may not be able to process LSRs at times other than normal business hours. Further, we find that MetTel's suggestion to about give LSPs a phase-in period is valid although the suggested length of the phase-in is too lenient. As a result, we have taken a compromise position regarding the response time to an LSR. The final rulemaking specifies that for the first six months from the effective date of the final rulemaking, the NSP or OLSP shall issue an LSC within 3 working days. For 6 months to 1 year after the effective date, the NSP or OLSP shall issue an LSC within 2 working days from the date it receives a valid LSR from the prospective NLSP. Thereafter, the NSP or OLSP shall issue an LSC within one working day.

Verizon further recommends that the words "or rejection" be deleted from this subsection since it makes reference to a "valid LSR" and, thus, there would be no need to reject the request. We carefully weighed this suggestion that we delete "or rejection" from this subsection because an NSP or OLSP would not reject a valid LSR. However, our intention in this subsection is to make certain that the NSP or OLSP acts on each LSR in a timely fashion, whether or not the LSR is valid. If the LSR is not valid, the NLSP would want to be able to quickly resolve the issues that render it invalid, if possible, in order to begin serving the new customer. To do this, the NLSP must be made aware by the NSP or the OLSP that the LSR is not valid. Rather than accept Verizon's suggestion to remove "or rejection" from this subsection, we chose to delete the term "valid" as a modifier of "LSR." Thus, the NSP or the OLSP must issue either an LSC or a rejection for each LSR within the time frame specified in this subsection.

The proposed § 63.202(e) placed responsibility for coordinating a service restoration on the NLSP. AT&T and FSN commented that the responsibility for coordinating a service restoration should be the responsibility of the NSP, not the NLSP. In light of AT&T's comments, we adopted AT&T's suggestion in the February 9, 2005 Order. However, Verizon maintains in its Petition for Reconsideration that, as with coordination of migrations, it should be the NLSP's role to coordinate any service restoration that may become necessary due to difficulties caused by the migration process. The customer has entrusted the NLSP to provide the customer's local service and, thus, expects that the NLSP will handle all migration problems, including restoration of service if that becomes necessary.

Upon reconsideration, we agree with Verizon. The customer, in fact has no interaction with an NSP and may not even be cognizant of an NSP's existence. A customer should be able to handle any problems or questions regarding a migration of service (or restoration if the migration is problematic and the old service must be restored) with a single entity, the NLSP. Accordingly, the revised § 63.202(e) gives the NLSP the responsibility of coordinating between the customer and other entities on behalf of the customer when restoration of service is necessary.

We added § 63.202(f) to specify that the old NSP has the responsibility of notifying the OLSP that the migration of the customer to the NLSP has been completed. In the industry, this is generally known as a "line loss notification." It is the Commission's expectation that the NSP will issue the line loss notification to the OLSP within a reasonable period of time. As previously noted, we defined "line loss notification" in § 63.192.

§ 63.203 (now deleted). Migration guidelines and industry work group.

This aspect of the proposed regulations received considerable attention during the collaboratives. While there were challenges during the collaboratives, it appeared that there was substantial interest in developing a consensus document that would not take years to amend yet could be recognized as addressing, in a standard, concise, timely, and uniform fashion, the myriad questions regarding migration as processes and systems evolve. As a result, the proposed rulemaking was designed to facilitate this process. We received, however, a number of comments about the proposed migration guidelines and industry work group provisions. These comments led us to delete this section from the final-form regulations. Nevertheless, we remain firm in our commitment to encourage the formation of an industry working group that will formulate industry guidelines to identify and address the myriad and evolving intricate details associated with customer migrations within this technologically evolving industry.

§ 63.204 (now § 63.203). Standards for the exchange of customer service records.

IRRC and MCI commented that the title of this section should be changed to "Standards for the exchange of customer service records" since the term "customer service record" is defined in § 63.192 while "customer service information" is not. We agree and have changed the section title accordingly. Further, due to the elimination of § 63.203 as it appeared in the proposed rulemaking, the proposed § 63.204 is renumbered as § 63.203 in the final-form regulations.

Comments from IRRC and others regarding § 63.204 (a) and (d), now § 63.203(a) and (d), questioned the need for a 2-year retention period for customer authorization and verification of that authorization. This length of time is necessary to allow the Commission to properly investigate customer complaints about the exchange of CSRs and migrations. The Commission's experience is that it often takes longer than a year for a customer complaint investigation to take place and the 2-year retention period will allow the LSP to have adequate records to provide to the Commission in response to a customer complaint. Further, the FCC requires a submitting carrier to maintain and preserve certain records of verification of subscriber authorization for a minimum period of 2 years. 47 CFR 64.1120(c)(3)(iv). For these reasons, we will retain the 2-year requirement.

FSN commented that the access to customer records afforded by renumbered § 63.203(a) contains a potential for abuse that "could endanger its customers' proprietary information and work product." FSN noted that a carrier must have the discretion from time to time, as circumstances may warrant, to require a copy of the LOA from the requesting NLSP before releasing the customer's CSR. FSN further noted that the provisions of this subsection discourage "commercial end user customers from developing special telecommunications arrangements to further their business knowing that their competitor . . . could fraudulently request and receive their sensitive CSR information through a competing LSP." FSN suggested that the regulations should afford LSPs the opportunity to place a "proprietary records" protection indicator on customers' records as a protection against unscrupulous NLSPs and other customers. IRRC further asked what guarantees are in place to protect confidential customer information. We note in response that the Commission's regulations at §§ 63.131—63.137, relating to confidentiality of customer communications and information, establish minimum standards to ensure that public utilities providing regulated telecommunication services maintain the confidentiality of customer communications and customer information. Failure to do so can lead to penalties. Additionally, the Commission does not prohibit LSPs from offering a "proprietary records" protection service to customers as may be applicable and as requested by and agreed to by individual customers.

In response to the proposed § 63.204(a)(5) and § 63.204(d)(4), now § 63.203(a)(5) and § 63.203(d)(4), IRRC questioned the use of the phrase "Additional procedures as may be authorized by the FCC or the Commission." IRRC asked why the prospective procedures from this Commission are not included in this rulemaking and how the additional procedures will be developed and communicated to affected parties. Our intention when we included this language was to recognize that the function of verification should not be constrained by the technology of today. The reference in the final-form regulations to prospective verification techniques will accommodate new methodologies as they become accepted in the ordinary course of commerce as well as in dispute resolution. We did not include a delineation of prospective verification techniques in the final-form regulations because the new methodologies have not been identified or developed. If the parties cannot resolve a specific controversy over whether a verification process not delineated is acceptable and effective, they have recourse to this Commission's dispute resolution processes. The burden would be on the party desiring to rely on an alternative method of verification to establish that the customer had actually granted the authority in question. For clarification purposes, we did make two small changes to these sections by inserting "verification" before "procedures" in the renumbered § 63.203(a)(5) and § 63.203(d)(4).

Regarding proposed § 63.204(a)(2), (3) and (4), now § 63.203(a)(2), (3) and (4), IRRC commented that we should explain or define the terms "third-party verification," "recording verifying permission," and "appropriate retained documentation." In response, we added these terms and their meanings to § 63.192.

In comments to proposed § 63.204(c), now § 63.203(c), IRRC raised three questions: why is the protection needed? when does this prohibition expire so the LSP can attempt to regain the customer? and what constitutes contact? In the February 9, 2005 Order, we revised the proposed regulations to define "contact" and added a 45-day limit to the prohibition.

Verizon's Petition for Reconsideration maintains that the prohibitions in the proposed regulations were designed to reflect a pre-existing Federal prohibition.[4] Verizon asserts that the Federal prohibition has no expiration date or time constraint and bars only contacts to retain or keep the customer that are made as a result of carrier change information from a potential NLSP. Verizon's request is based upon language that the FCC describes as a "rule that a carrier executing a change for another carrier 'is prohibited from using such information to attempt to change the subscriber's decision to switch to another carrier.'" *FCC CPNI* at para. 131. Specifically, the FCC explained in footnote 302 that:

[4] In footnote 7 of Verizon's Petition for Reconsideration, the citation to paragraph 31 actually refers to paragraph 131 of the FCC's *Customer Proprietary Network Information Third Report and Order*, FCC Dkt No. 02-214, 17 FCC Rcd 14860, 2002 FCC Lexis 3663 (July 25, 2002) (*FCC CPNI Order*).

> [C]ompetition is harmed if *any* carrier uses carrier-to-carrier information . . . to trigger marketing campaigns, and consequently [the FCC] prohibit[s] such actions accordingly. . . . Thus, where a carrier exploits advance notice of a customer change by virtue of its status as the underlying network-facilities or service provider to market to that customer, it does so in violation of section 222(b) [47 USC § 222(b)].

(internal citations omitted).

Upon reconsideration, in melding IRRC's concerns with the parameters of the Federal requirements, the final regulations prohibit any type of contact with the customer specially designed "to retain or keep the customer," consistent with Federal requirements, and without a time limitation. Sending new rate information generally available to all customers of the same class of service or other mass advertising contacts could, however, be permissible under this prohibition. Accordingly, we have retained this subsection as it was originally proposed.

In its comments to proposed subsection § 63.204(d), now § 63.203(d), IRRC recommended that we clarify "network serving arrangements." In response, we added this term and definition to the definitions section at § 63.192. In addition, we removed "network serving arrangements" from the renumbered § 63.203(d) and added it to the renumbered § 63.203(e)(11) in place of "service configuration information" since the two terms are interchangeable.

Regarding the renumbered § 63.203(d), IRRC also asked how consumers and OLSPs will be protected from illegal business practices such as "slamming." We find that the FCC's slamming liability regulations at 47 CFR 64.1140—64.1180 are adequate to protect customers from the practice of "slamming." The FCC slamming liability rules take the profit out of slamming and offer incentives for other service providers to go after slammers. The FCC provisions also ensure that if the FCC finds that a slam occurred, the consumer will receive financial compensation from the unauthorized service provider. Regarding other possible illegal business practices, our response to FSN's similar concerns is equally applicable here. The Commission's rules at §§ 63.131—63.137 relating to Confidentiality of Customer Communications and Information provide prohibitions to any LSP that may be tempted to abuse its right to obtain customer information without being required to have and produce, as required, evidence of a customer's authorization to obtain the customer's service record.

In its comments to § 63.204(e), now § 63.203(e), IRRC noted concerns regarding the 13 items listed in the subsection as the composite parts of a CSR. IRRC suggested that there may be no need to list the items separately if the items are typically part of a CSR. If they are not typically part of a CSR, IRRC suggested that they be located in the definition of CSR at § 63.192. IRRC further asked about the relationship between network serving arrangements and the 13 elements of a CSR. We appreciate IRRC's recommendation but chose to retain the list in subsections § 63.203(e)(1)—(13) in the final-form regulations. In our opinion, the items serve as a checklist for the current LSP to use when making sure that it sends the necessary information to a prospective NLSP. These items do not merely describe or define the CSR; rather they are what an LSP must provide to be in compliance with the regulations. It has been the Commission's experience that in cases where we must rely upon a definition to list required elements or actions, it is difficult to cite a company for failure to comply with requirements contained only in the definition section of regulations. The subsections as originally proposed serve a valuable purpose in identifying exactly what a current LSP must produce and send to a prospective NLSP when the prospective NLSP requests a CSR to migrate a customer's service. This construction will also aid the Commission in citing an OLSP's non-compliance with this aspect of the migration process. "Network serving arrangements" is now listed as one of the 13 CSR elements, having replaced the synonymous term "service configuration information" in the renumbered § 63.203(d).

IRRC commented that the final-form regulations should define several of the elements listed in proposed § 63.204(e), now § 63.203(e). We agree and added the following terms and definitions to § 63.192: "InterLATA," "IntraLATA," "LATA," "Network serving arrangements," "Unbundled loop," "UNEs (unbundled network elements)," and "UNE-P (UNE Platform)."

MCI commented that we should add "circuit IDs" to the list of required elements. We do not agree that circuit identification information should be required on all CSRs and, thus, did not add this to the list of required elements. Although a NLSP needs circuit identification when a loop must be migrated, it is not required for all migrations. Further, providing the circuit identification to the NLSP by the OLSP traditionally has served as notice to the NLSP that the NLSP may reuse facilities. Since the facilities are not always available for reuse, it is counterproductive for the circuit identification to be part of the CSR.

Consistent with our earlier discussion, we also removed "basic" from "local basic service" in § 63.204(e)(6) and (7), now § 63.203(e)(6) and (7), as recommended by IRRC, and we also replaced "service configuration information" with "network serving arrangements" in subsection § 63.203 (e)(11) since we confirmed with the telephone industry that these terms have the same meaning. We defined "network serving arrangements" in § 63.192.

Finally, in regard to this section, the timetable at now-renumbered § 63.203(f) drew comments from several parties. IRRC queried whether the timetable applies to both CSRs and network serving arrangements, or just to CSRs. PTA commented that its member companies do not have the resources to provide requested CSRs in less than 24 hours. PTA proposed that the timetable be revised to set the 24-hour standard to be effective within 12 months. Verizon proposed that all requested CSRs be provided within 2 business days initially and within one business day after 6 months. Verizon also recommended that the final-form regulations include a provision to cover situations when an OLSP has a legitimate reason for needing more time to produce CSRs such as migrations involving a business customer with complex or numerous CSRs. IRRC asked why the proposed regulations use hours rather than days as to when the OLSP is to provide the CSR. IRRC also pointed out that in proposed subsection § 63.204(f)(3) the word "day" should be modified with either "business" or "calendar."

We made several changes to this subsection based on these comments. In the new § 63.203(f)(1) and (2) containing these provisions, we changed the time requirements to "working days" rather than "hours," choosing "working" days rather than "business" days to be consistent with other subchapters of Chapter 63. Since network serving arrangements are part of CSRs, they are on the same timetable as CSRs. We did not make the change that Verizon requested that all CSRs be required within 2 working days initially and then within 1 working day at

the end of 6 months. In addition, we did not accept Verizon's suggestion that we develop a new subsection for exceptions such as complex CSRs that might take longer than the prescribed time limit. We structured the 80% requirement as originally proposed to allow for the exceptional cases, and thus we chose to retain this percentage in subsections (f)(1) and (f)(2). Similarly, we did not revise the language that requires all OLSPs to provide CSRs by the same day if the request is made by noon of that day, or by noon the next day if requested after noon. It is important that the migration process be as expeditious as possible in order to foster competition. We recognize that the varying capabilities of the smaller companies may require some time until they are able to meet the requirements of this subsection now at § 63.203(f)(3) and that is why we gave the companies 1 year from the effective date of the final-form regulations to modify their systems so they can meet the terms of this subsection.

§ 63.205 (now § 63.204). Removal or lifting of Local Service Provider Freezes (LSPFs).

We received a number of comments regarding this section of the proposed regulations. Both IRRC and FSN questioned the use of "appropriate" as modifying agent in proposed § 63.205(a)(2), now § 63.204(a)(2). To clarify our intentions, we substituted "appropriate" with "authorized" and have defined "authorized agent" as "any adult designated by an applicant or a customer to act on the behalf of the applicant or customer" in the definitions at § 63.192, consistent with the FCC definition at 47 CFR 64.1100(h).

We note that the discussion of the removal or lifting of LSPFs in our October 3, 2003 Order created an ambiguity with respect to proposed § 63.205, now § 63.204. The Order indicated that a "NLSP" could act as the "appropriate agent" to contact the OLSP to have the LSPF lifted, and the proposed regulations indicated that a "prospective NLSP" could not. As specified in the Federal rules, one LSP may not authorize the removal of an LSPF on behalf of a customer when that entity is acting solely as a prospective NLSP.

IRRC commented that the final-form regulations should clearly establish who can authorize lifting an LSPF and, if that authority can be delegated, the specific customer protections required in such a circumstance. Additionally, MCI pointed out that a customer does not physically remove an LSPF but rather authorizes its removal. MCI recommended that this be clarified in the regulations. At renumbered § 63.204(a), we specified that the applicant or the applicant's authorized agent must contact the OLSP to have an LSPF lifted. To protect customers, we expanded this section to require that the OLSP confirm appropriate verification data such as the customer's date of birth, social security number, or mother's birth name with the applicant or the applicant's authorized agent before processing the request to lift the LSPF. An authorized agent must have this information when acting on the customer's behalf. These revisions also clarify that the applicant or the authorized agent authorizes the "lifting" of the LSPF but does not actually "lift" the LSPF.

Curry commented that the Commission should amend this section to give the current LSP the right to refuse to remove the LSPF until an account is satisfied for past due amounts. Neither we nor the FCC agree with Curry, and we did not make the amendment as requested. The LSPF is not a collection tool to protect the LSP; it is instead a tool available to the customer for protection against slamming.

AT&T commented that this subsection requires that a customer lift an existing LSPF at the time of application in order that the prospective NLSP may process a change in LSP; however, the customer may forget that there is an LSPF on the account. According to AT&T, the customer should be able to take steps at a later time to lift an LSPF. We agree and have removed the phrase "at the time of application" from new § 63.204(a). The applicant may authorize the removal of an existing LSPF at any time. The prospective NLSP may not learn of the existence of an LSPF until it receives a CSR from the applicant's current LSP. At that time, the prospective NLSP should contact the applicant and remind the applicant that the LSPF must be lifted before the migration can take place.

AT&T also argued against imposing a duty on each NLSP to inform prospective customers of the three requirements, as prescribed by proposed § 63.205(a)(1)—(3), now § 63.204(a)(1)—(3). We do not agree with AT&T. This is important information for customers to have when they are contemplating a change in LSPs. We did not make the suggested revision.

In its comments to § 63.205(c), now § 63.204(c), AT&T argued that it should not be necessary for an LSP to provide methods of lifting an LSPF if the LSP does not offer an LSPF. We agree with AT&T and revised subsection (c) to include language that limits the requirements of this section to LSPs that offer LSPFs to their customers.

IRRC advised that the final-form regulations should include a list of the methods of lifting freezes or provide a reference to where those methods can be found. We agree. LSPs must follow the requirements of the FCC as set forth in 47 CFR Subpart K. The final-form regulations include a citation to the FCC regulations. We also deleted "the Commission" from this subsection since the Commission has established no required methods that LSPs must offer customers for lifting freezes and we do not currently anticipate doing so.

AT&T commented that this Commission does not have jurisdiction over intra- and interLATA freezes, notwithstanding the reference to lifting them in § 63.205, now § 63.204)(b). Our reference to lifting intra- and interLATA freezes is not an attempt to exert jurisdiction on them but rather to recognize that the various telecommunications service providers often bundle jurisdictional and non-jurisdictional services. The reference allows service providers and customers an opportunity, if they so chose, to lift all freezes at the same time.

§ 63.206 (now § 63.205). Porting telephone numbers.

PTA commented that a customer should not be permitted to port his or her telephone number to another LSP if the current LSP has suspended the account for nonpayment or if there is an outstanding balance owed to the current LSP. This comment is very similar in intent to the Curry comment regarding LSPFs. For the same reasons we declined to adopt the Curry suggestion, we cannot accept PTA's recommendation. Control of porting is not a collection tool for the LSPs. Further, such a proposal conflicts with Federal porting requirements.

AT&T recommended that because the old NSP receives and processes LSRs, the regulations should be amended to include the NSP. We agree and added language to the final-form regulations to also prohibit NSPs from refusing to port a number to a NLSP unless the account has been terminated or discontinued under §§ 64.1—64.213 (Chapter 64). We also deleted the word "lawful" from this section as AT&T recommended.

§ 63.207 (now § 63.206). Discontinuance of billing.

AT&T, Curry, FSN, MCI, and IRRC all commented that using the receipt of a request to migrate as the trigger for a final bill, as originally proposed, was inappropriate. Based on comments from several parties, we revised the proposed § 63.207(b), now § 63.206(b), to make the receipt of a line loss notification from the NSP the trigger that generates a final bill from the OLSP. We added language to renumbered § 63.206(c) and § 63.206(d) to cover cases in which only partial migrations occur. Finally, we added language to renumbered § 63.206(d) as recommended by AT&T, to reflect the applicability of tariff or contract terms that may affect the customer's billing cycle.

§ 63.208 (now § 63.207). Carrier-to-carrier guidelines and performance assurance plans.

AT&T commented that we should add language to this proposed section to specifically include ILECs. We note that the use of "LSP" indicates that the section includes all LECs, i.e., both incumbents (ILECs) and competitive entrants (CLECs). Thus, to make this addition would be redundant and perhaps confusing. Therefore, we did not adopt this recommended change. We added the language "than otherwise specified under this subchapter" to provide a reference for the comparison.

INTERFERING STATIONS

General Comments

AT&T commented that it finds the entire interfering stations section to be fundamentally infirm and argued that it should be deleted in its entirety. According to AT&T, the circumstances under which the problem exists are not broad enough to warrant a regulation. In response to AT&T's comments, we note that the Commission receives a large number of consumer complaints that involve interfering station conditions that keep consumers from getting telephone service.

MCI also requested that the Commission eliminate this process from the final-form regulations because the process is not one that has been tested. MCI suggested that the Commission permit parties to use procedures that they have already developed or work together to develop new procedures. MCI also proposed that, in lieu of eliminating the procedures, the Commission give companies the option of using either the procedures outlined in regulations or procedures that the company has used successfully such as those MCI and Verizon currently use. Under the Verizon/MCI Procedure, the NLSP must call the applicant to obtain the landlord's name and telephone number if the service address is a rental property. Then the NLSP is to call the landlord to verify that the previous occupant has moved out and the new customer has taken over. If it is not a rental property, the NLSP must call the city or town assessor to verify the transfer of property ownership. Until the landlord or assessor makes the confirmation, the request for service cannot be processed. While this procedure may work for Verizon and MCI, industry participants and other interested parties discussed the procedure during the collaborative sessions but could come to no agreement about its use. In addition, representatives of consumer groups objected to aspects of the Verizon/MCI Procedure based on privacy concerns. We also envision delays in resolving the interfering station condition using the Verizon/MCI Procedure because it involves more parties (landlords and assessors). Further, certain steps in the Verizon/MCI Procedure may be beyond our jurisdiction to order. Thus, we declined to incorporate the Verizon/MCI Procedure into these regulations.

Verizon suggested that the interfering station procedures should be eliminated from the final-form rules and placed in the migration guidelines contemplated by the provisions originally proposed at § 63.203, which has since been eliminated. We find that the problems involving interfering stations are extensive enough to merit enforceable regulations rather than voluntary guidelines. The migration guidelines were conceived to be a fluid document to address items or processes that are likely to involve evolving technology over time. We do not see that an interfering station process requires such fluidity. As a result, we have retained these sections with some modifications in the final-form regulations.

§ 63.211. Duties of OLSPs and NSPs when an interfering station condition is identified.

AT&T commented that assigning responsibility to both the OLSP and the NSP for informing the prospective NLSP about the interfering condition may allow a situation in which neither party informs the prospective NLSP. IRRC agreed with AT&T's position and advised that we should establish parameters that would clearly indicate which party must perform the required duty. Based on these comments we made several revisions to this section and to the subsections that follow. We delegated the responsibility to the NSP of informing the prospective NLSP of the interfering station condition by the end of the next working day after the NSP identifies that the condition exists. We eliminated reference to the OLSP in § 63.211(a).

Regarding § 63.211(b), AT&T commented that the OLSP has no right to review the NLSP's LSR, which is submitted to the NSP. Regarding § 63.211(b)(1), AT&T commented that the OLSP is not able to cancel the NLSP's LSR to the NSP because the OLSP is not a party to the transaction. Verizon suggested a revision to the language of (b)(1), replacing "is cancelled" with "cannot be fulfilled." We revised the language of § 63.211(b) and (b)(1) as AT&T and Verizon proposed; accordingly, now the NSP has the responsibility of reviewing the LSR information with the prospective NLSP. As suggested by Verizon, we replaced "cancelled" with "cannot be fulfilled."

PTA commented that in § 63.211(b)(2) the issuing NLSP should have the responsibility for correcting the information where an error is found in the LSR. AT&T commented that the OLSP cannot and should not have any role in correcting the NLSP's LSR. IRRC asked what the need is for the OLSP to review the LSR. Based on these comments and question, we revised this subsection to give the responsibility of correcting the LSR to the prospective NLSP who shall "correct the information and resubmit the LSR to the NSP."

§ 63.212. Duties of the prospective NLSP and the applicant when an interfering station condition is identified.

IRRC and PTA commented that § 63.212(c) and (d) should be combined into one provision and § 63.212(e) and (f) should be merged into one provision. We agree with these comments and merged the sections as proposed. We also revised the construction of § 63.212(f), now § 63.212(d)(1)—(3). PTA commented that former § 63.212(f)(2) should be clarified to reinforce the intention that there be no disclosure of confidential proprietary customer information. We note that Commission regulations in §§ 63.131—63.137 ensure that regulated telecommunications services maintain the confidentiality of customer information. However, it has been our experience that the interfering station condition is sometimes caused by a departing roommate, spouse, or other individual

with whom the applicant has had a shared-domicile connection. In these instances, we find that it is appropriate for the applicant to attempt to resolve the problem with the customer of record. Based on PTA's comment and for clarification, we added "if known to the applicant" to the provision in former subsection (f)(2). In addition, we clarified the pronoun "it" in § 63.212(a) by replacing "it" with "NLSP." Further, in § 63.212(d)(3)(ii), we deleted "lawful" as a modifier of "tariff rates."

§ 63.213. Duties of the OLSP if notified by the prospective NLSP that an interfering station exists at a location where existing service is provided by the OLSP and the applicant has shown proof of ownership or right of occupancy.

PTA commented that the title of this section should be modified to include the requirement that in addition to proof of ownership, the applicant has also shown proof of identity. We agree and added "identity" to the title. In § 63.213(a) we added "the" before "notification." Verizon had suggested the addition of "such," but "such" is not consistent with proper regulatory language. For consistency with other Chapter 63 provisions, we also changed "business days" to "working days."

IRRC queried whether 7 days was a sufficient amount of time for a customer of record to respond to a termination notice. This interval is consistent with § 64.71, relating to general notice provisions.

IRRC and Verizon each commented on § 63.213(b). IRRC asked us to explain the reason for removing the customer of record from billing. Our response is that generally the OLSP may no longer bill a customer for services that are not being rendered. The applicant intends to become the customer of record, and sometimes an interfering station condition involves the same LSP. However, for clarification purposes, we modified this subsection to require the OLSP to "terminate the customer's service and take appropriate action to release the customer's facilities to the prospective NLSP." Verizon suggested some minor language changes to this subsection so that the provision would read: "If it is not contacted by the customer of record by the termination date, the OLSP . . . ." Verizon also recommended changing § 63.213(c) so as to read: "If the customer of record contacts the OLSP by the termination date . . . ." We accepted these recommendations and made the changes.

§ 63.214. Duties of the prospective NLSP when the OLSP is unable to resolve the interfering station condition at the applicant's service location.

In its comments to § 63.214(b)(1), MCI proposed that the regulations should expressly provide that the Commission will reject complaints that entail private disputes between customers and applicants and thus prevent companies from incurring additional and unnecessary costs and expenses associated with responding to these complaints.

The Commission understands MCI's concerns about the costs of handling consumer complaints; however, it is the Commission's policy to address every complaint separately on its merit. For this reason, we did not change this subsection based on MCI's concerns. The process for handling interfering stations complaints as established in the final-form regulations will significantly reduce the number of consumer complaints to the Commission about the issue of interfering stations. We did make some changes to the construction of § 63.214(b)(2) and former § 63.214(b)(3), now § 63.214(b)(2)(ii), in the final-form regulations to clarify the intent of these subsections. We also deleted "lawful" as modifier of "tariff rates" in § 63.214(b)(3).

DISPUTES

§ 63.221. Customer complaint procedures.

AT&T and MCI commented that the dispute provisions are unnecessary since similar provisions already appear in Chapter 64. We acknowledge that Chapter 64 does contain provisions for handling disputes from residential customers. However, there are no provisions that pertain to complaints from business customers. Because of this, we retained these provisions in the final-form regulations.

IRRC commented that the title of the subsection at § 63.221 contains the word "consumer" which is not defined and not used anywhere in the section. IRRC recommended changing the title to "Customer complaint procedures." We agree and revised the title as recommended.

In its comments to our proposed regulations, the OAG suggested that in § 63.221(a), "subscriber" should be replaced with "applicant" to be consistent with subsections (b) and (c). We agree with this suggestion and made the change.

Regarding the citation to Chapter 64 in subsection (b), IRRC asked if the citation should be §§ 64.131—64.182 rather than §§ 64.141—64.182. We agree and amended the citation.

IRRC and the OAG each commented that the final-form regulations should provide timeframes to indicate when the Commission or a service provider must perform the required duty as described in § 63.221(c) and (d). We have responded by adding language to (c) that provides for the Commission to transmit a summary of a complaint to the LSP within 1 working day of receiving a complaint covered by this subchapter. Regarding the duties of LSPs, § 64.153(b)(1) specifies that, in response to residential customer complaints, LSPs are to supply information and documents to the Commission within 30 days of the date the LSP receives the complaint summary. Since commercial accounts are often more complex than residential accounts they may require a longer time to gather the information needed to respond to the complaint. Therefore, we did not require LSPs to respond with the information and documents in the same 30-day window in all cases. In those cases where the LSP will need more than 30 days, it must advise the Commission of that need and establish a reasonable timeline for the production of the information and documents. We also inserted new language into § 63.221(d) to require an LSP to advise the Commission within 10 days of the resolution when a complaint has been resolved between the LSP and the complaining party. We did not insert language into the regulations specifying the time period within which the Commission will close a complaint resolved by the parties. Variations in complaint volumes and staffing levels make it impractical for the Commission to be able to specify a timeframe in which the Commission will be able to verify and act on this information from the LSP. As with all customer complaints, the Commission will close out these complaints as expeditiously as possible.

The proposed § 63.221(c) discusses a complaint from an applicant, customer or third party. IRRC asked who would be a "third party." A "third party" might be, for example—a spouse, agent, or consenting individual designated to act on the customer's part such as an employee of a business or the adult children of an elderly customer.

Any of these individuals may contact the Commission on the part of the customer of record to file a complaint.

§ 63.222. Expedited process for resolution of migration disputes between service providers.

MCI commented that it supports the Commission's proposal regarding an expedited dispute process. IRRC asked if a customer or applicant could file a complaint under this section. This process addresses only disputes between service providers, including LSPs and NSPs. To clarify our intent, we amended the title of this section to "Expedited process for resolution of migration disputes between service providers" and added similar language to § 63.222(a). IRRC also asked if the contact persons designated by the Commission in this subsection will be employees of the Commission. Our response is that the Commission will designate members of its staff as contact persons. To clarify this subsection, we have added language that indicates that the Commission will designate "Commission staff as" contact persons through which LSPs may request expedited resolution of problems.

IRRC further questioned the reference in § 63.222(d) of the proposed regulations to the Commission's alternate dispute resolution process. The correct reference and citation to this process is the Commission's mediation process under §§ 69.391—69.397. We amended the language of this subsection to include the appropriate citation.

Conclusion

Accordingly, under sections 501 and 1501 of the Public Utility Code, 66 Pa.C.S. §§ 501 and 1501; sections 201 and 202 of the 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 §§ 7.231—7.235, we find that the regulations establishing general rules, procedures, and standards to provide for the orderly migration of customers between LSPs at §§ 63.191—222 should be approved as set forth in Annex A; *Therefore*,

It Is Ordered That:

1. The Petition for Reconsideration filed by Verizon Pennsylvania Inc. on February 24, 2005, is granted in part and denied in part, consistent with this Order.

2. This Final Rulemaking Order/Order on Reconsideration and Annex A replace in their entirety the Commission's Order and Annex A entered on February 9, 2005, at this docket.

3. The regulations of the Commission, 52 Pa. Code Chapter 63, are amended by adding §§ 63.191, 63.192, 63.201—63.207, 63.211—63.214, 63.221 and 63.222 to read as set forth in Annex A.

4. 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 the Independent Regulatory Review Commission.

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

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

7. 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, the Office of Trial Staff, the Office of Consumer Advocate, the Small Business Advocate and active parties to this proceeding.

8. 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. 4270 (July 30, 2004).)

Fiscal Note: Fiscal Note 57-230 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 M. CHANGING LOCAL SERVICE PROVIDERS

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GENERALLY

§ 63.191. Statement of purpose and policy.

(a) The purpose of this subchapter is to establish general rules, procedures and standards governing the migration of customers between LSPs, including porting telephone numbers, resolving interfering stations, exchanging customer records and the transition of billing accounts. The primary objective of this subchapter is to establish standards to ensure that residential and business customers can migrate from one LSP to another LSP without confusion, delay or interruption to their local service.

(b) This subchapter applies to:

(1) LSPs and NSPs for migration of residential and business customers between LSPs.

(2) LSPs and NSPs when interfering station conditions are encountered.

(c) This subchapter does not apply to:

(1) Mass migrations of customers brought about by the selling or transferring of a customer base of one LSP to another.

(2) An LSP that has properly proceeded with the abandonment of service to its customer base.

(3) DSL migration.

(4) Line sharing/splitting arrangements.

(d) To the extent that other regulations do not address circumstances as described in subsection (c), this subchapter may provide guidance for those transactions.

§ 63.192. Definitions.

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

Applicant—

(i) A person, association, partnership, corporation or government agency making a written or oral request for the commencement of local service, other than a transfer of local service from one location to another within the local service area of the same LSP or a reinstatement of local service following a discontinuation or termination.

(ii) The term does not apply to a customer who is subject to special contractual arrangements and has otherwise agreed to different conditions of local service that do not contradict Commission rules or regulations.

Appropriate retained documentation—Proof accompanying a customer's order, request for a change in telephone service or service providers, or permission to obtain the customer's CSR that uses a unique identifier associated with the customer, such as the customer's city of birth, Social Security number, mother's birth name or tax identification code.

Authorized agent—An adult designated by an applicant or a customer to act on the behalf of the applicant or customer.

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

Commission review—Includes informal or formal review, evaluation or adjudication, staff-level review or alternate dispute resolution.

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

DSL—Digital subscriber line—A dedicated, high-speed, always-on service, frequently used in the context of "ADSL" or "XDSL."

Discontinuation of service—The temporary or permanent cessation of service upon the request of a customer.

Facilities—The equipment (for example—local loop, network interface device, transport facilities, and the like) necessary to provide local service to a customer.

Freeze—A designation elected by a customer that restricts a third party's ability to change the customer's choice of preferred service providers.

Interfering station—Preexisting local service that prevents the reuse of existing telephone facilities by an NLSP to serve a new customer at a location where the prior customer did not notify the OLSP to disconnect the local service. The OLSP and the NLSP may be the same company.

InterLATA—Originating in one LATA and terminating in another LATA. For example—an interLATA telephone call is a call that is placed from a telephone in one LATA to a telephone located in another LATA.

IntraLATA—Originating and terminating within the same LATA. For example—an intraLATA telephone call is a call that is placed from a telephone in one LATA to a telephone located within the same LATA.

LATA—Local access and transport area—One of the 196 geographical areas designated in 1984 by the decree that broke up AT&T into seven telephone operating companies. At that time, a LATA was the area within which one of the existing local service providers could offer either local or long distance service.

LOA—Letter of authorization—A specific written or electronic record signed by a customer granting a NLSP the authority to act as the customer's agent.

LSC—Local service confirmation—Documentation issued by the NSP to inform the LSP of the confirmed scheduled completion date for work affecting the migration of local service.

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.

LSPF—Local service provider freeze—A designation elected by a customer that restricts a third party's ability to change a customer's choice of preferred LSP.

LSR—Local service request—The electronic or paper form that contains all the information required to arrange for installation of, change in or disconnection of local services.

(i) The LSR is sent by an LSP to an NSP, for example—to request the activation of number portability, the installation of an unbundled loop facility, or the disconnection of loop facilities and migration of a number.

(ii) The NSP uses the LSR to create the internal directives, for example—a service order, to cause the work to be performed as ordered.

Line loss notification—The report the old NSP issues upon completion of a migration to inform the OLSP that the OLSP no longer provides local service to a customer on a particular line.

Line sharing—The sharing of facilities by an LSP and an NSP in the provision of voice and data services to a given location over the same facilities.

Line splitting—The sharing of facilities by two LSPs, when neither is the NSP, in the provision of voice and data services to a given location over the same facilities.

Local loop—The wires and cable between the customer's premise and the central office of the local telephone company.

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.

Migration—The movement of a customer from one LSP to another LSP at the same service location.

NLSP—New local service provider—The company that will provide local service to a customer after a migration.

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.

(i) An NSP may also be referred to as an underlying carrier.

(ii) An NSP may also be an LSP.

Network serving arrangements—The service platform (for example—resale, unbundled loop, full facilities, UNE-P) to provide local service to a customer. Network serving arrangements may also be referred to as service configuration information.

OLSP—Old local service provider—The company that provides local service to a customer prior to migration.

Optional services—

(i) Telecommunications services in addition to local service that are offered by LSPs at a cost per individual service or as part of a package of services.

(ii) Examples include toll blocking, 900/976 blocking, inside wiring maintenance plans and extensions off premise.

(iii) The term also includes vertical services.

Preferred service provider—The company chosen by a customer to provide particular telecommunications services. A preferred service provider is sometimes referred to as a "preferred carrier."

Porting—The process that allows customers to keep their telephone numbers when changing LSPs.

Recording verifying permission—An auditory documentation of a customer's voice made when the customer ordered local service, requested a change in local service or local service providers or granted permission to a local service provider to obtain the customer's CSR.

Service provider—A generic term to include LSPs and NSPs.

Termination of service—Permanent cessation of service after a suspension without the consent of the customer.

Third party verification—The process by which an independent entity confirms that a customer ordered local service, authorized a change in local service or local service providers or granted permission to a local service provider to obtain the customer's CSR.

UNEs—Unbundled network elements—Various physical and functional parts of an 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-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.

Vertical services—Telecommunications features available to local service customers at either an added cost or as part of a service package. Vertical services refer to the way in which a telephone line works and include customer calling features such as call forwarding and call waiting.

Unbundled loop—A local loop that is leased by one service provider from another service provider to provide local service to a customer.

Working day—A day except Saturday, Sunday or legal holiday.

MIGRATION

§ 63.201. General migration standards.

(a) A customer has the right to migrate from one LSP to another LSP.

(b) The prospective NLSP shall communicate and explain to the customer the migration process and the migration timetable for the local service and for any other service the customer may order.

(c) The OLSP, the NLSP and the NSP shall work together in good faith to minimize or avoid problems associated with migrating the customer's account.

(d) The OLSP may not prohibit the NLSP from reusing facilities that are no longer needed by the OLSP to provide local service to the migrating customer or other customer. If the OLSP has a conflict over the use of the facilities, it may be resolved using the interfering station procedures under §§ 63.211—63.214 (relating to interfering stations) or the expedited dispute process under § 63.222 (relating to expedited process for resolution of migration disputes between service providers).

(e) At the end of each working day, the NLSP shall notify the 9-1-1 host carrier and the Directory Listings/ White Pages providers of that day's changes to these databases.

(f) Each LSP and NSP shall maintain a company contact and escalation list for use in resolving migration problems and interfering station conditions. The companies shall update the lists to ensure that the information is current and accurate. LSPs and NSPs shall post the list on a publicly accessible website and supply the website address to the Commission. The Commission will post the address on its website.

§ 63.202. Migration responsibilities of OLSPs, NLSPs and NSPs.

(a) The OLSP shall be responsible for responding to the prospective NLSP's request for a CSR, consistent with the requirements of § 63.203 (relating to standards for the exchange of CSRs).

(b) The prospective NLSP shall be responsible for coordinating the migration of the customer's local service with its NSP, if any, and with the OLSP.

(c) The prospective NLSP shall provide the LSR information to affected service providers, as applicable.

(d) The timetable for issuing an LSC is as follows:

(1) By August 13, 2005, the NSP or OLSP shall issue an LSC or rejection within 3 working days from the date the NSP or OLSP receives an LSR from the prospective NLSP.

(2) After February 13, 2006, the NSP or OLSP shall issue an LSC or rejection within 2 working days from the date the NSP or OLSP receives an LSR from the prospective NLSP.

(3) After August 14, 2006, the NSP or OLSP shall issue an LSC or rejection within 1 working day from the date the NSP or OLSP receives an LSR from the prospective NLSP.

(e) The NLSP shall be responsible for coordinating a customer's service restoration that may become necessary due to problems with the migration.

(f) After a migration has been completed, the old NSP shall provide notification to the OLSP that the customer has migrated to the NLSP.

§ 63.203. Standards for the exchange of CSRs.

(a) Prospective NLSPs may not acquire CSRs without a verified customer authorization. The prospective NLSP shall use one of the following verification procedures and shall retain the authorization and verification for 2 years:

(1) An LOA from the customer of record to review the customer's account.

(2) A third-party verification of the customer's consent.

(3) A recording verifying permission from the customer.

(4) Oral authorization documented with appropriate retained documentation.

(5) Additional verification procedures as may be authorized by the Federal Communications Commission (FCC) or the Commission.

(b) The prospective NLSP shall indicate to the customer's current LSP that it has a verified authorization for access to the CSR. The NLSP is not required to provide a copy of the authorization or verification to the current LSP.

(c) A current LSP may not contact a customer to retain or keep that customer as a result of a request from another LSP for the customer's CSR.

(d) When a prospective NLSP has verified authorization from the customer to switch the customer's LSP, the prospective NLSP shall request the customer's CSR from the OLSP. The prospective NLSP is not required to provide proof to the OLSP of the authorization or verification at the time of migration. The prospective NLSP shall use one of the following types of verification and shall retain the authorization and verification for 2 years:

(1) An LOA from the customer to switch LSPs.

(2) A third-party verification of the customer's request.

(3) An electronic verification of the customer's request to switch LSPs that contains unique identifying information.

(4) Additional verification procedures as may be authorized by the FCC or the Commission.

(e) A customer's current LSP shall provide the following information when the CSR is requested to migrate a customer's local service:

(1) Billing telephone number and working telephone number.

(2) Complete customer billing name and address.

(3) Complete service address, including floor, suite unit and any other unique identifying information.

(4) 9-1-1/E-9-1-1 information.

(5) Directory listing information, including address, listing type and all other pertinent information.

(6) Preferred service providers for interLATA, intraLATA, local service and other services.

(7) Provider freeze status by interLATA toll, intraLATA toll, local service and other services.

(8) Listing of all vertical services (for example—custom calling, hunting, and the like) to which the customer currently subscribes.

(9) Listing of all optional services (for example—900 blocking, toll blocking, remote call forwarding, off-premise extensions, and the like) to which the customer currently subscribes.

(10) Tracking number or transaction number (for example—purchase order number).

(11) Network serving arrangements (for example—resale, UNE-P, unbundled loop).

(12) Identification of NSPs.

(13) Identification of any line sharing/line splitting on the migrating customer's line.

(f) Timetable for providing CSRs, minimum requirements:

(1) By August 13, 2005, OLSPs shall provide 80% of requested CSRs within 2 working days.

(2) After February 13, 2006, OLSPs shall provide 80% of requested CSRs within 1 working day.

(3) After August 14, 2006, OLSPs shall provide 80% of requested CSRs the same day if the request is made by noon of that day, or by noon of the next working day if requested after noon.

§ 63.204. Removal or lifting of LSPFs.

(a) An applicant shall authorize the removal of an existing LSPF before a prospective NLSP may process a change in LSP. The prospective NLSP shall inform the applicant of the following at the time of application:

(1) If the applicant has an LSPF, the applicant shall authorize the removal of the LSPF before the request for a change of the customer's LSP can be processed.

(2) The applicant or the applicant's authorized agent shall contact the OLSP to have an LSPF lifted. Before processing the lifting of the LSPF, the OLSP shall confirm appropriate verification data such as the customer's date of birth, Social Security number or mother's birth name with the applicant or the applicant's authorized agent.

(3) A prospective NLSP may not authorize the removal of an applicant's LSPF.

(b) When the prospective NLSP is also seeking to provide other services, (for example, interexchange, intraLATA, interLATA, interstate or international toll) covered by freezes, authorizations to lift the freezes may be transmitted in one process, if the applicant expressly requests that each freeze be lifted. The prospective NLSP shall inform the applicant of the distinctions among the services and of the requirement that service may not be migrated unless the customer expressly lifts each freeze.

(c) LSPs that offer LSPFs to their customers shall provide various methods to customers for lifting LSPFs, as required by the Federal Communications Commission as set forth in 47 CFR Part 64, Subpart K (relating to changes in preferred telecommunications service providers).

§ 63.205. Porting telephone numbers.

An OLSP or NSP may not refuse an otherwise valid request to port a number to a NLSP unless the number is for local service that has been terminated or discontinued under Chapter 64 (relating to standards and billing practices for residential telephone service) for residential customers or consistent with the LSP's tariff for other customer classes.

§ 63.206. Discontinuance of billing.

(a) LSPs shall minimize overlap in billing during the migration between LSPs.

(b) Within 42 days of the receipt of a line loss notification from the NSP, the customer's OLSP shall issue the customer a final bill for services rendered.

(c) Once the customer has paid the charges on the final bill, the OLSP shall immediately remove the customer from its billing system and discontinue billing, unless the OLSP provides other services to the customer.

(d) Subject to the terms of an applicable tariff or customer specific pricing arrangement, the OLSP shall stop billing the customer for any recurring charges associated with the migrated services as of the date of the migration.

(e) This subchapter does not affect a customer's debtor/consumer rights or an LSP's creditor's remedies, as may be otherwise permitted by law.

§ 63.207. Carrier-to-carrier guidelines and performance assurance plans.

For an LSP or NSP subject to State or Federal carrier-to-carrier guidelines or performance assurance plans, if the carrier-to-carrier guidelines or performance assurance plan provide a more explicit or a narrower window for performance than otherwise specified under this subchapter, the carrier-to-carrier guidelines or performance assurance plan shall control for that LSP or NSP.

INTERFERING STATIONS

§ 63.211. Duties of NSPs and NLSPs when an interfering station condition is identified.

(a) The NSP shall inform the prospective NLSP of an interfering station condition by the end of the next working day after the NSP identifies that an interfering station condition exists.

(b) The NSP shall review the LSR information with the prospective NLSP to determine possible errors:

(1) Upon confirmation that the LSR information is correct, the NSP shall inform the prospective NLSP that the LSR cannot be fulfilled because there is preexisting local service at the service location.

(2) If the LSR information is incorrect, the prospective NLSP shall correct the information and resubmit the corrected LSR to the NSP.

§ 63.212. Duties of the prospective NLSP and the applicant when an interfering station condition is identified.

(a) The prospective NLSP shall notify the applicant that there is preexisting local service at the service location within 1 business day of the date the NLSP receives notice of the interfering station condition. The prospective NLSP shall contact the applicant by telephone, email, first class mail or in person to request that the applicant verify the address at the service location.

(b) If the applicant fails to respond to the notice within 5 days, the prospective NLSP may cancel the application.

(c) If the applicant informs the prospective NLSP that the address is incorrect, the prospective NLSP shall correct the information on the application, submit a new LSR and provide the new local service installation date.

(d) If the applicant verifies that the address is correct, the prospective NLSP shall explain that new local service is not able to be installed using the same facilities due to preexisting local service at the address and request the applicant to provide proof of ownership or right of occupancy.

(e) If the applicant provides proof of ownership or right of occupancy, the prospective NLSP shall advise the applicant of the following options:

(1) The applicant may authorize the prospective NLSP to contact the OLSP to confirm abandoned service.

(2) The applicant may attempt to resolve the interfering station condition with the customer of record, if known to the applicant.

(3) The applicant may arrange for the installation of new facilities.

(i) If inside wiring is required, the applicant shall provide proof of installation before the prospective NLSP is able to proceed with the LSR.

(ii) If new facilities (for example—outside wiring or a network interface device (NID)), are required, the prospective NLSP shall advise the applicant that the applicant shall pay for the installation of the new facilities pursuant to tariff rates and that the installation may take longer than 5 days.

(4) The applicant may cancel the application.

§ 63.213. Duties of the OLSP if notified by the prospective NLSP that an interfering station exists at a location where existing local service is provided by the OLSP and the applicant has shown proof of identity and of ownership or right of occupancy.

(a) Within 3 working days of the notification, the OLSP shall issue a termination notice to the customer of record in the OLSP's billing system. The notice of termination must state the reason for termination, date of termination and what the customer of record is required to do to prevent termination. The termination date must be 7 days from the date of the mailing of the notice by first class mail.

(b) If the customer of record does not contact the OLSP, the OLSP shall terminate the customer's service and take appropriate action to release the customer's facilities to the prospective NLSP.

(c) If the customer of record contacts the OLSP by the termination date and does not agree to the termination of service, the OLSP shall notify the prospective NLSP of the inability of the OLSP to release the facilities to be used by the prospective NLSP.

§ 63.214. Duties of the prospective NLSP when the OLSP is unable to resolve the interfering station condition at the applicant's service location.

(a) The prospective NLSP shall contact the applicant and explain that the preexisting customer will not agree to the termination of service and that the prospective NLSP is not able to use the existing facilities.

(b) The prospective NLSP shall inform the applicant of the following options to obtain local service:

(1) The applicant may pursue any disputes between co-tenants, owners and occupants before an appropriate forum for the remedy. The prospective NLSP shall inform the applicant that neither the prospective NLSP, the OLSP nor the Commission is responsible for or available to resolve private disputes between customers and applicants.

(2) The applicant may arrange for the installation of new facilities.

(i) If inside wiring is required, the applicant shall provide proof of installation before the prospective NSLP is able to proceed with the LSR.

(ii) If new facilities (for example—outside wiring or a NID) are required, the applicant shall pay for the installation of the new facilities pursuant to tariff rates and the installation may take longer than 5 days.

DISPUTES

§ 63.221. Customer complaint procedures.

(a) *Records of complaints.* An LSP covered by or operating under this title shall preserve written or recorded complaints showing the name and address of the applicant or complainant, the date and character of the complaint, the action taken and the date of final disposition. Records of complaints for residential customers shall be kept in accordance with § 64.192 (relating to record maintenance).

(b) *Commission review.* If a customer or applicant expresses dissatisfaction with the LSP's decision or explanation, the LSP shall inform the customer or applicant of the right to have the dispute considered and reviewed by the Commission and shall provide the name, address and telephone number of the appropriate Commission bureau. This subsection shall be read in conjunction with Chapter 64, Subchapters G and H (relating to disputes; informal and formal complaints; and restoration of service) for residential service.

(c) *Investigations.* Within 1 working day of receiving a complaint covered by this subchapter from an applicant, customer or third party, the Commission will transmit a summary of the complaint to the LSP. When complaints are referred to the LSP through the Commission, the LSP and the Commission will work to process and resolve the complaints. An LSP shall make a full and prompt investigation of complaints made to it through the Commission by the applicant, customer or third party. For complaints involving commercial service, if the LSP needs more than 30 days to respond to the Commission, the LSP shall advise the Commission of that need within 30 days of the date it receives the complaint summary and indicate when it will send its response to the Commission.

(d) *Resolutions.* If a complaint is resolved between the LSP and the complaining party, the LSP shall advise the Commission within 10 working days of the resolution and submit a copy of the service order or other documentation of satisfaction which identifies the action taken by the LSP to resolve the complaint. The LSP may not consider the complaint closed until the Commission advises the LSP that the Commission has closed the complaint.

§ 63.222. Expedited process for resolution of migration disputes between service providers.

(a) The Commission will provide a nonadversarial, expedited dispute process to address migration disputes between service providers. The Commission will designate Commission staff as contact persons through which LSPs and NSPs may request expedited resolution for alleged problems between service providers or compliance with this title.

(b) An LSP or NSP that has a dispute under this subchapter with another LSP which cannot be resolved between the entities may refer the dispute to the expedited dispute process for a suggested resolution in a nonadversarial context.

(c) The Commission designee will review the dispute within 2 working days of the date the dispute was received, attempt to contact the involved entities and suggest a nonbinding resolution of the dispute, consistent with § 1.96 (relating to unofficial statements and opinions by Commission personnel).

(d) If the expedited dispute process fails to resolve the dispute, the parties may resort to the Commission's mediation process under §§ 69.391—69.397 (relating to mediation process) or formal dispute resolution processes.

(e) The expedited dispute process is neither mandatory nor a prerequisite to the Commission's mediation or formal dispute resolution processes.

[Pa.B. Doc. No. 05-1513. Filed for public inspection August 12, 2005, 9:00 a.m.]

Title 55—PUBLIC WELFARE

DEPARTMENT OF PUBLIC WELFARE

[55 PA. CODE CH. 1187]

Nursing Facility Services; Metropolitan Statistical Area

The Department of Public Welfare (Department), under the authority of sections 201(2), 206(2), 403(b), 443.1(5) and 454 of the Public Welfare Code (code) (62 P. S. §§ 201(2), 206(2), 403(b), 443.1(5) and 454), as amended by the act of July 7, 2005 (P. L. 177, No. 42) (Act 42), amends § 1187.94 (relating to peer grouping for price setting) to read as set forth in Annex A.

Act 42 amended, among other things, provisions of the code regarding payment for nursing facility services under the Medical Assistance (MA) Program. More specifically, Act 42 added paragraph (5) to section 443.1 of the code. This new paragraph provides that on or after July 1, 2004, and until regulations are otherwise adopted by July 1, 2006, payments to MA nursing facility providers shall be calculated and made as specified in the Department's regulations in effect on July 1, 2003, except as may be otherwise required by the Commonwealth's approved Title XIX plan for nursing facility services and regulations promulgated by the Department under section 454 of the code.

Section 454, which was also added to the code by Act 42, authorizes the Department to promulgate regulations to establish provider payment rates. Section 454 of the code specifies that, until December 31, 2005, notwithstanding any other provision of law including section 814-A of the code (62 P. S. § 814-A), provider payment

rate regulations must be promulgated under section 204(1)(iv) of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. § 1204(1)(iv)), known as the Commonwealth Documents Law (CDL), which permits an agency to omit or modify proposed rulemaking when the regulation pertains to Commonwealth grants or benefits. In addition, section 454 of the code expressly exempts these provider payment rate regulations from review under the Regulatory Review Act (71 P. S. §§ 745.1—745.15), and from review by the Attorney General under section 205 of the CDL (45 P. S. § 1205) and section 204(b) of the Commonwealth Attorneys Act (71 P. S. § 732-204(b)).

Justification for Adoption of Final-Omitted Rulemaking

In accordance with sections 443.1(5) and 454 of the code, the Department is adopting the final-omitted rulemaking because:

- As recognized by section 454(b) of the code, the final-omitted rulemaking regards MA provider payments, which are Commonwealth grants or benefits.

- The final-omitted rulemaking regards payments for MA nursing facility services provided on or after July 1, 2004.

- The final-omitted rulemaking is necessary to conform the Department's regulations to the Commonwealth's approved State Plan for nursing facility services.

Purpose

The Department is amending § 1187.94 to specify that the Department will use the Metropolitan Statistical Areas (MSA) group classification published in the Federal Office of Management and Budget (OMB) Bulletin No. 99-04 (relating to revised statistical definitions of Metropolitan Areas and guidance on uses of Metropolitan Area definitions) to classify nursing facilities into peer groups instead of the most recent MSA group classification published on or before April 1 of each year. This final-omitted rulemaking conforms § 1187.94 to the Commonwealth's approved State Plan for nursing facility services.

Background

Under its case-mix payment system regulations, the Department computes net operating peer group prices annually using the nursing facility cost report data available in the Nursing Home Information System database. See § 1187.94 and § 1187.95 (relating to general principles for rate and price setting). The Department's case-mix regulations specify that, in setting net operating prices, the Department will classify each nursing facility participating in the MA Program, except those nursing facilities that meet the definition of a "hospital-based nursing facility" or "special rehabilitation facility" as defined in § 1187.2 (relating to definitions), into one of 12 mutually exclusive peer groups based on MSA group classification and the nursing facility's certified bed complement. See § 1187.94(1). The regulations further state that "the Department will use the most recent MSA group classification, as published by the OMB on or before April 1 of each year" to make the peer group classifications. See § 1187.94(1)(i).

Prior to 2003, the OMB categorized MSAs into three levels based on the total population of the counties in the MSA: Level A (areas with a total population of 1 million or more); Level B (areas with a total population of 250,000 to 999,999); and Level C (areas with a total population of 100,000 to 249,999). The Department's case-mix payment system regulations, § 1187.94(1)(iii), make explicit reference to the three MSA groups (A, B and C) in identifying the 12 peer groups into which nursing facilities are classified under the case-mix payment system.[1]

On June 6, 2003, the OMB published OMB Bulletin No. 03-04 (relating to revised definitions of Metropolitan Statistical Areas, new definitions of Micropolitan Statistical Areas and Combined Statistical Areas, and guidance on uses of the statistical definitions of these areas) that revised the definitions of MSAs. In publishing these revised MSA definitions, the OMB added definitions for "Micropolitan Statistical Areas" and "Combined Statistical Areas" based on Federal Census Bureau data derived from the 2000 census. However, the OMB eliminated the use of the MSA group levels A, B and C that are specifically referenced in § 1187.94(1)(iii).

The OMB's elimination of the three MSA group levels made it impossible for the Department to apply the existing language of § 1187.94(1) in classifying nursing facilities into peer groups. More specifically, the Department could not use the most recent MSA group classifications published by the OMB, as required by § 1187.94(1)(i), and also classify nursing facilities into the 12 peer groups identified in § 1187.94(1)(iii). To address this problem, the Department undertook the necessary steps to amend both the Commonwealth's approved State Plan and the language of § 1187.94.

The Department published an advance public notice at 34 Pa.B. 1863 (April 3, 2004) announcing its intent to amend its State Plan to specify that, for rates effective July 1, 2004, the Department will use the MSA group classifications published in OMB Bulletin No. 99-04 and inviting public comment. To ensure the July 1, 2004, effective date, the Department submitted a proposed State Plan Amendment to the Federal Centers for Medicare and Medicaid Services (CMS) on June 11, 2004. Subsequently, while the proposed State Plan Amendment was pending with the CMS, the Department published a proposed rulemaking at 34 Pa.B. 4465 (August 14, 2004) to make a corresponding change in § 1187.94 and again invited interested parties to comment.

On January 27, 2005, the CMS notified the Department that the State Plan Amendment incorporating the provisions of this final-omitted rulemaking into the Commonwealth's State Plan was approved effective July 1, 2004. This final-omitted rulemaking now conforms the text of § 1187.94 to the approved State Plan.

Affected Individuals and Organizations

Nursing facilities enrolled in the MA Program are affected by this rulemaking, except nursing facilities that meet the definition of "hospital-based nursing facility" or "special rehabilitation facility" in § 1187.2. This final-omitted rulemaking simply preserves the manner in which peer groups are classified under the existing case-mix payment system and therefore has a neutral effect on nursing facility reimbursement rates.

Accomplishments and Benefits

The Department is amending § 1187.94(1)(i) in conformity with the Commonwealth's approved Title XIX State Plan to specify that the Department will use the MSA group classification published in OMB Bulletin No. 99-04 to place nursing facilities into peer groups. By using the MSA classification in OMB Bulletin No. 99-04, the Department maintains the historical MSA groups which classify each MA nursing facility as MSA A, B or C or as

[1] Nursing facilities that are located in counties that are not included in one of the three MSA group levels are classified in a "non-MSA" peer group under the regulations. See § 1187.94(1)(iii).

non-MSA. Although the language of § 1187.94 is amended, the effect of this final-omitted rulemaking is to preserve the status quo. The final-omitted rulemaking enables the case-mix payment system to continue to take into account variables that may impact the cost of providing nursing facility services while maintaining reasonable and appropriate reimbursement rates to nursing facility providers.

Fiscal Impact

No fiscal impact will result from this final-omitted rulemaking since the effect is to preserve the status quo by maintaining the same MSA group classification method which the Department has used to assign nursing facilities into peer groups since the case-mix payment system was implemented in January 1996. No cost to the Commonwealth, local government, general public or nursing facility providers is anticipated as a result of this final-omitted rulemaking.

Paperwork Requirements

No new or additional paperwork requirements result from adoption of this final-omitted rulemaking.

Public Comment

On November 26, 2003, and December 23, 2003, the Department met with representatives of the four nursing home associations, Pennsylvania Association of Non-Profit Homes for the Aging, Pennsylvania Health Care Association, Hospital and Healthsystem Association of Pennsylvania and Pennsylvania Association of County Affiliated Homes, to discuss the implications of the Federal changes to the MSA definitions and whether the Department should adopt the changes for rate-setting purposes. The Department also discussed and solicited comments on the proposed changes at the Long-Term Care Subcommittee of the Medical Assistance Advisory Committee (MAAC) on February 11, 2004, April 14, 2004, October 13, 2004, and December 1, 2004.

As previously noted, the Department published an advance public notice at 34 Pa.B. 1863, announcing its intent to amend its State Plan and to specify that the Department will use the MSA group classifications published in OMB Bulletin No. 99-04. The Department provided for a 30-day comment period on the proposed amendment to the State Plan. The Department received a total of five comment letters in response to the notice. After receipt and consideration of these comments, the Department submitted a proposed State Plan Amendment to the CMS to change the Commonwealth's approved State Plan.

While the proposed State Plan Amendment was pending with the CMS, the Department published a proposed rulemaking at 34 Pa.B. 4465. The Department received a total of 12 public comment letters regarding the proposed rulemaking. Comments were also received from the Independent Regulatory Review Commission (IRRC) and a State Senator.

Subsequent to the publication of the proposed rulemaking, the General Assembly enacted Act 42 directing the Department to promulgate provider payment rate regulations in accordance with Act 42. Although not required by Act 42, the Department considered all public comments received in response to its advance public notice and proposed rulemaking.

Discussion of Comments and Major Changes

Following is a summary of the comments received by the Department following publication of the advance public notice and the proposed rulemaking and the Department's response to those comments.

§ 1187.94 Peer grouping for price setting.

Comment

Two nursing facility associations sent comments endorsing the proposed rulemaking. They believed that the use of the new OMB classifications for peer grouping purposes would create significant disruption and hardship in the nursing facility provider community.

Response

The Department initiated discussions with affected stakeholders regarding a more comprehensive overhaul of the case-mix payment system in early 2004. Until those discussions are completed and larger systemic reforms are developed and adopted, the Department agrees with the associations that this amendment creates the least amount of disruption and hardship in the nursing facility provider community. Before publishing both the proposed and final rulemaking, the Department analyzed the potential reimbursement impact of adopting the new MSA definitions for peer-grouping purposes using the various rate-setting databases that were available. Each analysis confirmed that, while some providers would benefit if the new definitions were used, the majority of nursing facility providers would suffer some adverse impact—the payment rates of the majority of nursing facility providers would be reduced if the Department used the new Federal definitions to assign nursing facilities to peer groups. The Department determined that maintaining the historical MSA group classification and, thereby preserving the status quo, was a more preferable alternative than reducing the payment rates of the majority of nursing facility providers. Therefore, the Department finds that this approach is consistent with the best interests of consumers and the MA Program.

Comment

Several commentators disagreed with the Department's position that the June 2003 OMB MSA changes made it impossible for the Department to apply its existing peer grouping regulation. The commentators suggested that the Department can implement the OMB Bulletin No. 03-04 MSA changes within current regulatory language. They claimed that OMB Bulletin No. 03-04 does not eliminate MSA Group Levels or repeal the MSA Group Level criteria defined by the OMB's 1990 standards. Although the commentators acknowledged that the OMB no longer includes Group Level classifications A—D in the updated MSAs, they contended that the Group Level classifications can be incorporated by reference to known population data, publicly available from the Census Bureau and the 1990 standard criteria. The commentators suggested that the Department issue an interpretation of general applicability adopting their proposed construction of the existing regulation instead of amending the regulation as specified in the proposed rulemaking.

Response

The Department disagrees with the commentators. Prior to 2003, the OMB used a grouping system that classified MSAs into "Group A," "Group B" and "Group C." However, as plainly stated in its June 3, 2003, notice, the OMB abandoned the A-B-C grouping system and has, instead, begun using a new classification system.

As previously noted, Department regulations make explicit reference to the A-B-C grouping system by requiring the Department to classify nursing facilities into peer groups based in part on whether they are located in MSA Groups A, B, C or in a non-MSA Group. See § 1187.94(1)(iii). As written, therefore, the clear intent of the regulation was to incorporate the A-B-C grouping system that was in effect at the time the case-mix regulations were adopted while recognizing modifications in classifications under that grouping system.

When the OMB ceased using the A-B-C grouping system as of June 3, 2003, the Department determined that § 1187.94(1)(i) and (iii) was plainly inconsistent in that subparagraph (i) requires the Department to use the most recent OMB MSA group classification while subparagraph (iii) requires the Department to classify facilities based upon the now defunct A-B-C grouping system. Consequently, the Department determined that the regulation was impossible to apply as written. After consulting with representatives of all nursing home associations, the Department proposed to eliminate that inconsistency by amending the State Plan and its regulations to expressly require the determination of peer groups to be based upon the last OMB MSA group classification that still used the A-B-C grouping system. This final-omitted rulemaking adopts the necessary amendment. Its effect is to maintain the status quo in a manner that is consistent with the original intent of the regulation and that conforms to the Commonwealth's approved State Plan.

Even if the Department were to accept the commentators' position that § 1187.94(1) may be applied unchanged, despite the OMB's elimination of the A-B-C grouping system, the Department would still proceed with the amendment. Act 42 requires, among other things, that the Department calculate and make payments to providers are required by the Commonwealth's approved State Plan. This final-omitted rulemaking ensures that result. Moreover, as previously discussed, the Department has determined that the payment rates of a majority of nursing facilities would be reduced if the Department were to take the approach recommended by the commentators. To avoid this result, the Department has concluded that maintaining the existing MSA classifications is warranted and appropriate.

Comment

IRRC and several commentators raised concern that the proposed rulemaking is inconsistent with the design of the case-mix system and that nursing facility providers located in areas that have undergone significant economic changes are being denied the rate recognition of those changes. They suggested that the proposed amendment deprives nursing facility providers with atypical labor-related costs of any opportunity for reclassification and fails to consider relevant factors supporting reclassification. The commentators noted that the Medicare Program decided to implement the OMB MSA updates in determining payment rates for inpatient hospital programs and suggested that the Department take the same approach because they believed that the new MSA group classifications more accurately reflect current costs associated with operating a nursing facility.

Response

The Department disagrees with the commentators' view that the existing peer groups do not accurately classify providers or recognize provider costs. Although not required by either State or Federal law, historically, the Department has used MSA classifications to peer group nursing facilities for rate-setting purposes to account for variables that may impact the cost of providing nursing facility services. When the OMB issued its new MSA definitions in June 2003, however, the OMB recommended that the new definitions not be used for the development or implementation of any Federal, state or local nonstatistical programs without full consideration of the effects that the changes would have on the programs. Following the OMB's recommendation, the Department analyzed and considered the implications of adopting the new Federal definitions and using 2000 census data to establish peer groups.

For analysis and comparison purposes, each county was assigned to a new 2000 MSA group based on the 2000 OMB MSA definitions and the 1990 OMB level A, B and C subgroups definitions. Census data from 2000 for the counties were used to determine the subgroups. This approach resulted in six counties (Armstrong, Columbia, Lebanon, Mercer, Pike and Somerset) changing from their 1990 MSA group to a different 2000 MSA group.

Using the databases compiled for Year 8 (Fiscal Year (FY) 2002-03) and Year 9 (FY 2003-04), the Department then calculated rates for the nursing facilities in the reconfigured peer groups and compared those rates to the rates it had computed for the nursing facilities using the existing peer groups. The Department determined that the payment rates of more than 400 nursing facilities would be reduced in both rate years. Although the Department has not set final payment rates for Year 10 (FY 2004-05) pending the publication of this final-omitted rulemaking, the Department's preliminary estimates using the Year 10 database indicate the same trend would continue-more than 400 nursing facilities would have lower payment rates in Year 10 if the Department were to use the new MSA definitions and census data.

In addition to determining the impact on payment rates, the Department also evaluated the implications of both maintaining the existing peer groups and reconfiguring the peer groups using the new MSA definitions and 2000 census data from a cost perspective. Prior to publishing both the proposed rulemaking, the Department conducted an analysis of labor costs related to direct care staff as reported by nursing facilities on their MA cost reports. Labor costs represent the biggest portion of the Resident Care component of nursing facility case-mix payment rates. The Resident Care rate component is, in turn, the single largest component of payment rates, typically accounting for over 60% of the total nursing facility payment rates.

To conduct the labor cost analysis, nursing facilities' reported labor costs were compiled and summarized by county and by MSA group. For each of the affected six counties (Armstrong, Columbia, Lebanon, Mercer, Pike and Somerset), the median labor costs for the county were compared to the median labor costs for both the county's 1990 MSA group and 2000 MSA group. The data indicated that the 1990 MSA groups were more representative of labor costs for the six affected counties than the 2000 MSA groups.

Given that use of the new definitions and data would adversely impact the majority of providers and that use of the existing peer groups would continue to properly account for labor cost variables, the Department has concluded that it is in the best interests of consumers, nursing facility providers and the MA Program to maintain the historical MSA classifications while the Department and affected stakeholders undertake a more comprehensive review of the case-mix payment system.

Comment

Several commentators from Armstrong County alleged that the proposed rulemaking will have ill effects on facilities in their county. The Armstrong County Health Center (ACHC) claimed that it may lose approximately $200,000 to $500,000 per year by being kept at the rural MSA designation and that the proposed amendment will harm the quality of care of the residents and the quality of life of the caregivers at ACHC. The Armstrong County commentators also suggested that Armstrong County's close proximity to Pittsburgh creates a competitive job market, especially for professional and licensed personnel, and that the proposed rulemaking ignores the economic realities of their county. They claimed that Armstrong County is being discriminated against based solely on the population of the county and an arbitrary formula that rewards counties smaller than Armstrong County. Another commentator suggested that the Department ignored impact analysis provided on behalf of nursing facilities in the affected counties that demonstrate that they will receive significant payment increases if the new MSA definitions are used. The commentators opposed adoption of the proposed rulemaking because they believe that it would permit the Department to ignore its regulations and the changes in OMB MSA designations for Armstrong County and the other affected counties.

Response

The Department does not dispute that the three MA nursing facility providers in Armstrong County, including ACHC, as well as some nursing facility providers in other affected counties, would receive increased payment rates if the Department were to adopt the new MSA definitions and use 2000 census data to peer group nursing facilities. That these nursing facilities would receive higher rates if peer groups were reconfigured, however, does not mean that the nursing facilities will receive payment rates that are unreasonable or inadequate if the existing peer group classification system is maintained. In evaluating whether to adopt the new MSA definitions, the Department must consider the overall impact on MA nursing facility providers, and not just the impact on nursing facilities in the affected counties. In this instance, the Department has concluded that the adverse rate impact that would be felt by the majority of nursing facilities must outweigh the beneficial impact to the remaining nursing facilities even though the Department recognizes that, for a very few nursing facilities, that beneficial impact may be substantial.

The Department also disagrees that Armstrong County nursing facilities' costs are more like the costs of Allegheny County nursing facilities than those of nursing facilities in their existing peer group. As previously noted, the Department's cost analysis indicates that median labor costs for Armstrong County are more typical of the median labor costs of the county's 1990 MSA group, than the county's reconfigured 2000 MSA group, which would include Allegheny County. In addition, the Department's preliminary estimates using the Year 10 database and maintaining the existing MSA classifications indicate that 12 of the 15 MA nursing facility providers in Armstrong, Mercer and Pike Counties with audited costs in the database will receive payment rates that exceed their average inflated per diem costs. Nine of those 15 facilities have average inflated cost per diems that are less than the estimated prices for their existing peer group in all three net operating categories and all but 1 of the 15 have average resident care cost per diems that are less than the resident care price for their peer group. Thus, the Department finds that payment rates under the existing peer grouping methodology for nursing facilities in the affected counties, including all three Armstrong County nursing facilities, are both reasonable and adequate.

Comment

IRRC and several commentators raised concern that the proposed July 1, 2004, effective date of the rulemaking was inconsistent with § 1187.95(a) which requires prices and rates to be established prospectively prior to the beginning of the rate-setting year. In addition, the commentators suggested that providers' right to receive payments vested on July 1, 2004, and the Department is improperly attempting to change the providers' vested rights retroactively by adopting the amendment to its regulation. The commentators also claimed that Federal law prohibits the Department from making the amendment effective July 1, 2004.

Response

The Department disagrees with the commentators' view that the final-omitted rulemaking will deprive them of any vested rights to payment. The commentators' view is based upon the faulty premise that the existing regulatory language requires the Department to use the June 2003 OMB classification without regard to the fact that the classification no longer uses the A-B-C grouping system required by Department regulations. As previously discussed, the regulation does not require the use of that classification. Therefore, the change made by this final-omitted rulemaking will not affect any vested property rights. By amending § 1187.94 to make OMB Bulletin No. 99-04 the standard for determining MSA groupings, the Department is merely preserving the status quo and ensuring that no further changes on the part of OMB can disrupt the case-mix payment system.

The Department also disagrees with the commentators' suggestions that the July 1, 2004, effective date is prohibited by Federal law or other Department regulations. As required by Federal law, the Department undertook a public process before adopting the amendment to § 1187.94(1). After the OMB published its new MSA definitions in June 2003, the Department analyzed the change, developed a recommendation, drafted proposed regulations and discussed the change with the Long-Term Care Subcommittee of the MAAC and the nursing facility industry. Subsequently, the Department published an advance public notice in the Pennsylvania Bulletin announcing its intent to amend the method by which peer groups are established under the case-mix payment system. On June 11, 2004, the Department submitted the necessary State Plan amendment to the CMS to make a corresponding change in the Commonwealth's State Plan. The Department notes, however, that applicable Federal regulations specifically permit a State Plan amendment to be "retroactively" effective to the first day of the calendar quarter in which an approvable amendment is submitted. See 42 CFR 447.256(c) (relating to procedures for CMS action on assurances and State plan amendments). Therefore, the Department could have submitted its State Plan Amendment as late as September 30, 2004, and still maintained the July 1, 2004, effective date. Ultimately, the CMS approved the State Plan amendment authorizing the Department to make the change in its methods and standards for payment of MA nursing facility services effective with the FY 2004-05.

The Department also disagrees with the commentators' suggestion that the amendment is precluded by other Department regulations which specify the time period in which the Department generally computes rates. This final-omitted rulemaking eliminates an inconsistency in the regulatory language and enables the Department to issue nursing facility provider payment rates for FY 2004-05.

Comment

A commentator raised concern that the proposed amendment, which effectively freezes nursing facility peer groups, would preclude the Department from making realignments based on later updates to OMB MSA assignments, or permitting "good cause" reclassifications of facilities or counties, such as those permitted under the Medicare payment methodology for inpatient hospital providers. The commentator also claimed that the amendment would preclude the Department's consideration of the new reclassification system for Medicare SNFs which will be developed in accordance with section 315 of the Federal Benefits Improvements and Protections Act (BIPA) of 2000 (Pub. L. No. 106-554). The commentator suggested that the Medicare reclassification system could significantly dampen the negative impact of the new MSA definitions on rural providers. The commentator also suggested that the Department's cost-based mandate is best met when the Department retains flexibility in the rate-setting and price-setting process.

Response

As previously noted, the Department and stakeholders have already begun discussions aimed at effecting a more comprehensive review and overhaul of the case-mix payment methodology. As part of that process, the Department expects that, together with stakeholders, it will evaluate whether and how nursing facilities should be assigned to peer groups. Among other things, the Department expects to consider whether the new Medicare SNF reclassification system, developed under section 315 of BIPA, is appropriate for the Pennsylvania MA Program. The Department will also explore and consider other alternatives which may be proposed by consumers and providers, including alternatives that permit "good cause" reclassifications. This amendment merely preserves the status quo while that review and evaluation process takes place and is not intended to forever fix the method by which the Department groups nursing facilities for rate-setting purposes.

Comment

The commentator recommended that, as an alternative to the proposed amendment, the Department consider another solution which would preserve the existing MSAs but allow for facilities to be placed in a different MSA as a result of the June 6, 2003, OMB reclassification. The commentator suggested amending § 1187.94(1)(i) as follows: "the Department will use the MSA group classifications published in the Federal OMB Bulletin 99-04 to classify each nursing facility into one of three MSA groups (Level A, B, or C) or into one non-MSA group; except facilities in any county that, as of April 1, 2004, was defined by OMB to be located in and not combined with an MSA other than the one with which it was classified in OMB Bulletin No. 99-04, shall be assigned to the MSA group classification of such other MSA in OMB Bulletin No. 99-04. (This results in recognizing the changes to MSAs in OMB Bulletin No. 03-04 for Armstrong, Mercer and Pike but not the shifts to 'lower' MSA groups for Columbia, Lebanon or Somerset Counties)."

Response

The Department appreciates the commentator's attempt to minimize the adverse impacts resulting from the use of the new definitions. However, the Department's analysis of the commentator's "grandfathering" alternative indicates that it would still result in reduced payment rates to over 400 nursing facility providers. For the same reasons previously noted, the Department does not believe that the suggested alternative is appropriate.

In addition to the commentator's "grandfathering" alternative, the Department also evaluated and considered the adoption of a "hold harmless" alternative whereby each nursing facility would receive the higher of the rate calculated for the nursing facility using existing peer groups or the rate calculated using reconfigured peer groups based upon the new MSA definitions and census data. The Department calculated that this alternative would result in $3.8 million in increased costs to the MA Program in the first year and that the costs would continue to increase in subsequent years. The Department does not have sufficient funds available to cover these increased costs. In addition, the Department also determined that the "hold harmless" alternative, which would require double rate and price calculations, would be administratively burdensome to implement and could be error-prone. For these reasons, the Department determined that a "hold harmless" provision would not be appropriate for the MA Program.

Comment

A commentator suggested that the Department should amend § 1187.95(a)(3) to read as follows: "If a nursing facility changes bed size after prices have been set and prior to the following April 1, the prices and rates for the nursing facility will continue to be based on the nursing facility's bed size prior to such changes until June 30 after the changes but the nursing facility shall be reassigned to a peer group based on the changes in bed certification for price and rate setting as of July 1 after the changes. If a nursing facility changes bed size after prices have been set but after the following April 1, the prices and rates for the nursing facility will continue to be based on the nursing facility's classification prior to the changes until June 30 of the following calendar year but the nursing facility shall be assigned to a peer group based on the changes in bed certification for price and rate setting as of July 1 thereafter. [This eliminates references to changes in MSA Group from the regulation]."

Response

The Department does not find that there is any need to change the language of § 1187.95(a)(3). Section 1187.95(a)(3) specifies that "If a nursing facility changes bed size or MSA group, the nursing facility will be reassigned from the peer group used for price setting to a peer group based upon bed certification and MSA group as of April 1, for rate setting." The Department recognizes that, with the adoption of this final-omitted rulemaking, it is unlikely that a nursing facility will change its MSA group, although it may be possible if, for example, the nursing facility relocates its operation from one county to another. The Department notes that it is more likely and very possible, however, that the number of certified beds in a nursing facility may change in a way that affects the nursing facility's peer group assignment. In these instances, § 1187.95(a)(3) explains how the Department will group the nursing facility for price-setting and rate-setting.

Comment

Several commentators noted that the impact analysis contained in the Department's advance public notice and proposed rulemaking were based upon calculations made by the Department using the Year 8 FY 2002-03 rate-setting database rather than the database that the Department will use to set rates effective July 1, 2004 (Year 10). The commentators contended that the Department's failure to use the Year 10 database renders its impact analyses flawed and inaccurate. The commentators also complained that the Department refused to make the Year 10 database available for public review and use in connection with this rulemaking process. They claimed that, without access to the Year 10 database, they have been unable to "meaningfully comment" on the proposed amendment.

Response

The Department disagrees with the commentators' suggestion that its impact analyses are inaccurate or flawed. The Department used the data that was available to it during the course of this rulemaking process, and has analyzed the impact of using the new MSA definitions and 2000 census data with the Year 8, Year 9 and Year 10 databases as each of those databases was compiled. Each analysis yielded the same result. As previously noted and discussed, a clear majority of providers would suffer payment rate reductions if the Department reconfigures peer groups using the new MSA definitions and 2000 census data.

The Department also disagrees with the suggestion that commentators have been denied the opportunity for meaningful comment because they did not have access to the Year 10 database. Generally, it has been the policy of the Department to make its rate-setting databases available to the public at the time it issues rates and prices for a fiscal year. During the course of this rulemaking process, the Department posted its Year 8 and Year 9 databases on its website. The commentators had access to and submitted various analyses to the Department based upon that data. The Department recently made its Year 10 database available on its website for interested parties to download. Although this database may not have been available to commentators during the rulemaking process, the Department nonetheless received numerous thoughtful comments in response to its advance public notice and notice of proposed rulemaking. Notably, the same commentators who claim to have been denied the opportunity for meaningful comment submitted lengthy substantive comments on the Department's proposed amendment and offered alternative proposals to the Department for consideration. The Department considered all of the comments and alternative proposals it received.

Comment

A commentator noted that an impact analysis conducted by the Bureau of Long Term Care Programs indicated that the use of the new OMB MSA classifications would result in cost-savings to the MA Program of approximately $1 million. The commentator stated that the proposed rulemaking did not address this impact analysis or possible savings from the use of alternatives, but indicated instead that the proposed amendment would have no fiscal impact if adopted. The commentator suggested that the Bureau's own impact analysis demonstrates that the Department's proposed rulemaking has a fiscal impact which differs from the "no impact" described in the preamble to the proposed rulemaking.

Response

The Department has repeatedly acknowledged that the use of the new MSA definitions and census data would result in payment rate reductions for the majority of nursing facility providers. If these payment rate reductions were implemented, the Department estimates that payments in Year 10 would decline overall by approximately $1.3 million. The Department considered this estimate, as well as its previous estimates, which were computed based upon the earlier databases. These estimates identify the potential fiscal impact of changing the payment methodology to specifically incorporate the new MSA definitions and census data, not the impact of the amendment.

The Department determined that it should not adopt the new MSA definitions but should instead amend its regulations to expressly maintain the status quo in the geographic peer groups. As previously discussed, the Department concluded that maintaining the status quo would cause less disruption in the provider community, would continue to group similarly located nursing facilities and was a more preferable alternative for the MA Program. Because the Department is maintaining the status quo by adopting this amendment, the Department correctly stated that there is no fiscal impact associated with the final-omitted rulemaking.

Comment

A commentator noted that the populations of Somerset and Carbon Counties are below the 100,000 minimum required for a Level C classification. However, the Department designated those counties as MSA Level C in the proposed rulemaking. The commentator asked the Department to explain why these two counties have Level C status when they do not meet the necessary population requirements. The same commentator also noted that the proposed rulemaking describes the Level B group as having a population of 250,000 to 999,999 and Level C group as having population of 100,000 to 249,000. The commenter pointed out that counties with populations between 249,000 and 250,000 were not addressed and asked at which level these counties would be assigned.

Response

The Department notes that the Level C population range was identified in the proposed rulemaking as 100,000 to 249,000. This was an error. The correct population for Level C should have read 100,000 to 249,999. In determining the correct MSA level for a group, each county does not have to meet the population requirements individually; rather the population requirement for the different levels applies to the total population of all counties in the MSA. Since Carbon County is grouped with Lehigh and Northampton Counties, the total population of the three counties is considered, and, when combined, the total population is within the MSA level B range as specified by the 1990 MSA grouping classifications. Similarly, Somerset and Cambria Counties are grouped together and their combined total population falls within the 100,000 to 249,999 range for MSA Level C.

Sunset Date

There is no sunset date. However, the Department will review the effectiveness of the regulation and the issue of peer group classifications as part of its continuing discussions with the nursing facility industry, consumers and other stakeholders on a more comprehensive overhaul of the case-mix payment system.

Regulatory Review Act

Under sections 443.1(5)(ii) and 454 of the code, this final-omitted rulemaking is not subject to review under the Regulatory Review Act.

Findings

The Department finds that:

(1) Notice of proposed rulemaking is omitted in accordance with section 204(1)(iv) of the CDL and 1 Pa. Code § 7.4(1)(iv) because this rulemaking relates to Commonwealth grants and benefits.

(2) The adoption of this amendment in the manner provided by this order is necessary and appropriate for the administration and enforcement of the code.

(3) Any delay in the effective date of this final-omitted rulemaking beyond July 1, 2004, would be impracticable and contrary to the public interest since: (i) it would be inconsistent with the Commonwealth's approved State Plan and, thereby, jeopardize the receipt of Federal matching funds; (ii) it would violate the requirement of section 443.1(5) of the code that the Department calculate and make payments to nursing facility providers consistent with the Commonwealth's approved State Plan; (iii) it would prevent the Department from removing an inherent inconsistency within the Department's regulation which made the regulation impossible to apply for rate-setting beginning July 1, 2004; and (iv) a subsequent effective date would cause disruption to the majority of providers by creating ongoing uncertainty in the rate-setting process.

Order

The Department, acting under the authority of sections 201(2), 206(2), 403(b), 443.1(5) and 454 of the code, orders that:

(a) The regulations of the Department, 55 Pa. Code Chapter 1187, are amended by amending § 1187.94 to read as set forth in Annex A.

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

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

(d) This final-omitted rulemaking shall take effect July 1, 2004.

ESTELLE B. RICHMAN,
Secretary

Fiscal Note: 14-496. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 55. PUBLIC WELFARE

PART III. MEDICAL ASSISTANCE MANUAL

CHAPTER 1187. NURSING FACILITY SERVICES

Subchapter G. RATE SETTING

§ 1187.94. Peer grouping for price setting.

To set net operating prices under the case-mix payment system, the Department will classify the nursing facilities participating in the MA Program into 14 mutually exclusive groups as follows:

(1) Nursing facilities participating in the MA Program, except those nursing facilities that meet the definition of a special rehabilitation facility or hospital-based nursing facility, will be classified into 12 mutually exclusive groups based on MSA group classification and nursing facility certified bed complement.

(i) Effective for rate setting periods commencing July 1, 2004, the Department will use the MSA group classification published by the Federal Office of Management and Budget in the OMB Bulletin No. 99-04 (relating to revised definitions of Metropolitan Areas and guidance on uses of Metropolitan Area definitions), to classify each nursing facility into one of three MSA groups or one non-MSA group.

(ii) The Department will use the bed complement of the nursing facility on the final day of the reporting period of the most recent audited MA-11 used in the NIS database to classify nursing facilities into one of three bed complement groups.

(iii) The Department will classify each nursing facility into one of the following 12 peer groups:

Peer Group #	*MSA Group*	*# Beds*
1	A	> or = 270
2	A	120—269
3	A	3—119
4	B	> or = 270
5	B	120—269
6	B	3—119
7	C	> or = 270
8	C	120—269
9	C	3—119
10	non-MSA	> or = 270
11	non-MSA	120—269
12	non-MSA	3—119

(iv) A peer group with fewer than seven nursing facilities will be collapsed into the adjacent peer group with the same bed size. If the peer group with fewer than seven nursing facilities is a peer group in MSA B or MSA C and there is a choice of two peer groups with which to merge, the peer group with fewer than seven nursing facilities will be collapsed into the peer group with the larger population MSA group.

(2) To set net operating prices under the case-mix payment system, the Department will classify the nursing facilities participating in the MA Program that meet the definition of a special rehabilitation facility into one peer group, peer group number 13. Regardless of the number of facilities in this peer group, the Department will not collapse the peer group of special rehabilitation facilities.

(3) To set net operating prices under the case-mix payment system, the Department will classify the nursing facilities participating in the MA Program that meet the definition of a hospital-based nursing facility into one peer group, peer group number 14. Regardless of the number of facilities in this peer group, the Department will not collapse the peer group of hospital-based nursing facilities.

(4) Once nursing facilities have been classified into peer groups for price setting, the nursing facility costs will remain in that peer group until prices are rebased, unless paragraph (5) applies.

(5) Paragraph (3) sunsets on the date that amendments are effective in Chapter 1163 (relating to inpatient hospital services), to allow for the inclusion of costs previously allocated to hospital-based nursing facilities. Subsequent to the effective date of the amendments to Chapter 1163, the Department will classify hospital-based nursing facilities in accordance with paragraph (1).

[Pa.B. Doc. No. 05-1514. Filed for public inspection August 12, 2005, 9:00 a.m.]