RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 78]

Oil and Gas Wells

The Environmental Quality Board (Board) by this order amends Chapter 78 (relating to Oil and Gas Wells) by adding new definitions and amending § 78.19 (relating to permit application fee schedule) as set forth in Annex A. The Board has the authority to establish fees, by regulation, under section 201 of the Oil and Gas Act (act) (58 P. S. § 601.201). Under this provision, the Board has the authority to set fees at an amount that bears a reasonable relationship to the cost of administering the act.

This order was adopted by the Board at its meeting of July 21, 2009.

A. *Effective Date*

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

B. *Contact Persons*

For further information contact Ronald Gilius, Director, Bureau of Oil and Gas Management, Rachel Carson State Office Building, 5th Floor, 400 Market Street, P. O. Box 8765, Harrisburg, PA 17105-8461, (717) 772-2199 or Scott Perry, Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the Pennsylvania AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection's (Department) web site: www.depweb.state.pa.us.

C. *Statutory Authority*

The final-form rulemaking is adopted under the authority of section 201(d) of the act which authorizes the Department to establish, by regulation, well permit fees that bear a reasonable relationship to the cost of administering the act, section 604 of the act (58 P. S. § 601.604) which directs the Board to adopt regulations necessary to implement the act, and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20), authorizing and directing the Board to adopt regulations necessary for the performance of the work of the Department.

D. *Background and Purpose*

The act was passed on December 19, 1984, and established a $100 fee for oil and gas well permits. Section 201(d) of the act allows the Department to increase the fee by regulation. Under this provision, fees must be set at a level that "bears a reasonable relationship to the cost of administering" the act. Fees for traditional oil and gas wells have never been increased. However, fees for Marcellus Shale wells were recently increased on April 18, 2009.

At the same meeting that the Board approved the proposed rulemaking that is made final by this order, the Board also approved a final-omit rulemaking that increased permit fees for wells that produce natural gas from the Marcellus Shale formation. The proposed rulemaking also included the new Marcellus Shale permit application fees that were included in the final-omitted rulemaking to allow interested persons to comment on the new Marcellus Shale permit application fees as part of the proposed rulemaking. The Board committed to making appropriate changes to the Marcellus Shale permit application fees as part of the proposed rulemaking in response to public comments. On April 18, 2009, the final-omitted regulations increasing permit fees for Marcellus Shale wells were published in the *Pennsylvania Bulletin* and became final. See, 39 Pa.B. 1982.

There are three considerations that support a regulation that increases the permit application fees authorized by the act. First, the costs of administering the act have increased significantly since 1984 when the General Assembly established the $100 fee that the Department currently charges. This $100 per permit application fee does not currently bear a reasonable relationship to the cost of administering the act. Indeed, in 2008 permit fees only provided 15% of the revenue needed by the Department to administer the act. The remaining 85% was provided through the General Fund.

Second, the number of permit applications that the Department reviews annually has grown dramatically over the past several years. In 2000, 1,354 wells were drilled in this Commonwealth. In 2008, the Department issued 7,927 well permits, of which 7,451 were for traditional oil and gas wells. The Department's current staffing levels for the Oil and Gas Program were established at a time when the Department reviewed considerably fewer permit applications than it reviews today. To properly review the number of applications that the Department currently receives and to inspect the operations at sites that currently posses a permit, the Department needs additional staff that the current $100 fee cannot support.

Finally, there continues to be significant interest in the development and recovery of natural gas resources from the Marcellus Shale formation that underlies much of this Commonwealth. Despite the recent economic downturn and the decline of natural gas prices, Marcellus Shale well permitting and drilling is increasing. In 2008, the Department permitted 476 Marcellus Shale wells. In the first 5 months of 2009, the Department permitted 569 Marcellus Shale wells.

The drilling and completion techniques that allow recovery of natural gas from the Marcellus Shale present new and expanded environmental considerations that the Department must evaluate to ensure the gas is recovered in an environmentally protective manner. Many of the environmental considerations are directly related to the use of water to recover natural gas from the Marcellus Shale formation. Extracting natural gas from the Marcellus Shale requires a process known as "hydraulic fracturing." Hydraulically fracturing the Marcellus Shale uses far greater amounts of water than traditional natural gas exploration. Large volumes of water are pumped into the formation, along with sand and other materials under high pressure, to fracture the rock surrounding the well bore. A single well can use millions of gallons of water to hydraulically fracture the rock. After the hydraulic fracturing process is completed, the wastewater must be properly managed.

The significantly greater use of water at Marcellus Shale wells creates a series of environmental issues during the drilling and development of a Marcellus Shale well. First, there are a number of considerations associated with withdrawal of water, including the need to monitor and restrict the amount of withdrawal to avoid dewatering streams and causing pollution. Under State water law, a person who withdrawls water in the amounts generally associated with Marcellus Shale well development shall register the withdrawal with the Department. Second, there are a number of considerations associated with the use and storage of the water used for hydraulic fracturing at the well site or at other locations. Third, there are a number of considerations associated with the proper management, treatment and disposal of the wastewater.

The Department expends considerable staff resources to review the additional information associated with a Marcellus Shale well permit. The fees provided by the final-omitted regulation provide the revenue needed to recover the Department's costs to properly evaluate a Marcellus Shale well permit application and to inspect the activities associated with Marcellus Shale well drilling. Therefore, the fees provided by the final-omitted regulation will remain unchanged.

E. *Summary of Changes Made in the Final-form Rulemaking*

§ 78.1 (relating to definitions)

In response to comments by the Independent Regulatory Review Commission (IRRC), the Department added definitions for Marcellus Shale well, "nonvertical well" and "vertical well."

§ 78.19(d) (relating to underpayment of fee)

In response to several comments, the Department removed the 10% penalty for wells that are drilled longer than the length applied for. As amended, applicants only need to submit the difference between the correct fee and the previously submitted fee.

§ 78.19(e) (relating to money-back guarantee)

This subsection stated that fees were nonrefundable. It was not the Department's intention to withhold fee refunds when the Department fails to take action on well permits within the time period required by the Department's money-back guarantee policy. This subsection has been deleted.

F. *Summary of Comments and Responses on the Proposed Rulemaking*

Fees for traditional wells

Several commentators questioned the size of the fee increase for non-Marcellus Shale wells. They contend that for conventional shallow oil and gas well permitting, either no fee increase is needed or at most, a fee increase that tracks inflation since 1983 would be more appropriate. Using the Consumer Price Index published by the United States Department of Labor's Bureau of Labor Statistics, the fee for the wells would increase from the current $100 as enacted in the act to $216.

The initial $100 permit fee did not cover the program costs in 1984. Program staff and most equipment have primarily been funded by the General Fund. Very few positions, equipment, or emergency well plugging has been funded by permit fees. Indeed, revenue provided by permit fees only covered 15% of the Department's administrative costs in 2008 with the remaining 85% funded through the General Fund. Also, permitting has increased by 398% in just the last 10 years with only recent increases in permitting staff and minimal increases in inspection staff. It is also important to note that the well permit fee is not an annual fee. Therefore, the entire program must be funded through new well permits. To provide the funding needed to employ sufficient staff and provide equipment necessary to carry out the Department's statutory duties through the well permit application fee, as envisioned by section 201(d) of the act, the permit fees must be increased in the amounts provided in the regulation to "bear a reasonable relationship to the cost of administering this act."

Fees based on well bore length

Several commentators questioned the relationship between well bore length and the administrative costs incurred by the Department in reviewing and processing the application.

Section 201(d) of the act states that well permit fees must "bear a reasonable relationship to the cost of administering this act." The Department believes the fee structure satisfies this requirement. While there is not a direct relationship between well bore length and review time, deeper wells do tend to have a greater potential for environmental impacts and this in turn requires greater Department evaluation of the potential impacts. Any set permit fee will necessarily require one group of well drillers to pay more than others if the Department's total costs to administer the program are to be covered by the permit fee as envisioned by the law. The Department believes the ability to bear the cost of increased fees is better able to be borne by operators drilling deeper wells and to do otherwise would place an undue burden on smaller operators.

Penalty for underpayment of fee

Commentators requested deletion of the provision in § 78.19(d) that penalizes the operator if the drilled well bore length exceeds the length specified in the permit application.

This provision has been removed.

Fee refund

Commentators questioned whether the Department would continue to refund permit fees according to its money-back guarantee policy in light of proposed § 78.19(e) which states that fees are nonrefundable.

This subsection has been deleted. It was not the Department's intention to withhold fee refunds where the Department fails to take action on well permits within the time period required by the Department's money-back guarantee policy. However, the Department will not refund permit fees for wells that are permitted but not drilled or for wells that are drilled that have a shorter well bore length than the length permitted.

G. *Benefits, Costs and Compliance*

Benefits

The residents of this Commonwealth and the regulated community will benefit from these regulations because the Department will be able to continue to uphold the purposes of the act. The purposes of the act are to:

(1) Permit the optimal development of the oil and gas resources of this Commonwealth consistent with the protection of the health, safety, environment and property of the citizens of this Commonwealth.

(2) Protect the safety of personnel and facilities employed in the exploration, development, storage and production of natural gas or oil or the mining of coal.

(3) Protect the safety and property rights of persons residing in areas where such exploration, development, storage or production occurs.

(4) Protect the natural resources, environmental rights and values secured by the Pennsylvania Constitution. (58 P. S. § 601.102)

The public will benefit in two general ways. First, the public will benefit from a fiscal perspective when the costs of the regulatory program are imposed on the regulated community, as the act provides. For Marcellus Shale gas well development, the need for timely and special reviews has significantly increased the Department's cost of implementation of the program and it is in the public interest to impose these costs on the regulated community. The public also benefits from an environmental perspective because the Department will be able to hire additional staff to properly inspect new and existing traditional wells and to properly review Marcellus Shale well permit applications.

The regulated community will also benefit because the regulated community wants timely reviews of permit applications, which state law also requires. Having the staff to evaluate well permit applications in a timely and environmentally protective manner will benefit the regulated community and the public.

Costs

This rulemaking will not impose any additional costs on the Department. This proposal will help the Department offset the greater implementation costs to support new and extensive reviews of oil and gas permit applications.

The base fee for vertical wells is $250 with an additional $50 per 500 feet of well bore drilled from 2,000 feet to 5,000 feet and an additional $100 per 500 feet for the well bore drilled past 5,001 feet. Nonvertical wells and Marcellus Shale wells have a base fee of $900 with an additional $100 per 500 feet of well bore drilled past 1,500 feet. An applicant for a vertical well with a well bore length of 1,500 feet or less for home use shall pay a permit application fee of $200.

Compliance Assistance Plan

A compliance assistance plan is not necessary because the new fee structure does not create a situation where a well operator will be out of compliance with the regulation. Well permits that do not contain the appropriate fee are not complete. The Department will return the application to the applicant and tell the applicant what the appropriate fee is. To minimize this circumstance from occurring, the Department will publicize the new permit fee requirements on its web site and inform potential applicants of the new fee structure at upcoming industry trainings.

Paperwork Requirements

No additional paperwork will be required as a result of this rulemaking. However, the Department will need to amend its well permit application form and instructions to incorporate and explain the new permit fee structure.

H. *Sunset Review*

These regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

I. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 4, 2009, the Department submitted a copy of the notice of proposed rulemaking, published at 39 Pa.B. 838 (February 14, 2009) to IRRC and the House and Senate Environmental Resources and Energy Committees (Committees) for review and comment.

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

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on September 16, 2009, these final-form regulations were deemed approved by the Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on September 17, 2009, and approved the final-form regulations.

J. *Findings of the Board*

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

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

(3) These regulations do not enlarge the purpose of the proposal published at 39 Pa.B. 838.

(4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

K. *Order of the Board*

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

(a) The regulations of the Department, 25 Pa. Code Chapter 78, are amended by amending §§ 78.1 and 78.19 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

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

(c) The Chairperson of the Board shall submit this order and Annex A to IRRC and the Committees as required by the Regulatory Review Act.

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

(e) This order shall take effect immediately.

JOHN HANGER,
Chairperson

(*Editor's Note*: Section 78.15(b) was proposed to be amended at 39 Pa.B. 838. The amendment was adopted pursuant to the rulemaking which appeared at 39 Pa.B. 1982 (April 18, 2009). The proposal to amend § 78.1, amended in this rulemaking, was not included in the proposal at 39 Pa.B. 838.)

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 5812 (October 3, 2009).)

Fiscal Note: Fiscal Note 7-431 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE I. LAND RESOURCES

CHAPTER 78. OIL AND GAS WELLS

Subchapter A. GENERAL PROVISIONS

§ 78.1. Definitions.

(a) The words and terms defined in section 103 of the act (58 P. S. § 601.103), section 2 of the Coal and Gas Resource Coordination Act (58 P. S. § 502), section 2 of the Oil and Gas Conservation Law (58 P. S. § 402), section 103 of the Solid Waste Management Act (35 P. S. § 6018.103) and section 1 of The Clean Stream Law (35 P. S. § 691.1), have the meanings set forth in those statutes when the terms are used in this chapter.

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

* * * * *

Marcellus Shale well—A well that when drilled or altered produces gas or is anticipated to produce gas from the Marcellus Shale geologic formation.

* * * * *

Nonvertical well—

(i) A well drilled intentionally to deviate from a vertical axis.

(ii) The term includes wells drilled diagonally and wells that have horizonal bore holes.

* * * * *

Vertical well—A well with a single vertical well bore.

* * * * *

Subchapter B. PERMITS, TRANSFERS, AND OBJECTIONS

§ 78.19. Permit application fee schedule.

(a) An applicant shall pay a permit application fee according to the following schedule:

Vertical Wells		*Nonvertical Wells*		*Marcellus Shale Wells*	
Total Well Bore Length in Feet	Total Fee	Total Well Bore Length in Feet	Total Fee	Total Well Bore Length in Feet	Total Fee
0 to 2,000	$250	0 to 1,500	$900	0 to 1,500	$900
2,001 to 2,500	$300	1,501 to 2,000	$1,000	1,501 to 2,000	$1,000
2,501 to 3,000	$350	2,001 to 2,500	$1,100	2,001 to 2,500	$1,100
3,001 to 3,500	$400	2,501 to 3,000	$1,200	2,501 to 3,000	$1,200
3,501 to 4,000	$450	3,001 to 3,500	$1,300	3,001 to 3,500	$1,300
4,001 to 4,500	$500	3,501 to 4,000	$1,400	3,501 to 4,000	$1,400
4,501 to 5,000	$550	4,001 to 4,500	$1,500	4,001 to 4,500	$1,500
5,001 to 5,500	$650	4,501 to 5,000	$1,600	4,501 to 5,000	$1,600
5,501 to 6,000	$750	5,001 to 5,500	$1,700	5,001 to 5,500	$1,700
6,001 to 6,500	$850	5,501 to 6,000	$1,800	5,501 to 6,000	$1,800
6,501 to 7,000	$950	6,001 to 6,500	$1,900	6,001 to 6,500	$1,900
7,001 to 7,500	$1,050	6,501 to 7,000	$2,000	6,501 to 7,000	$2,000
7,501 to 8,000	$1,150	7,001 to 7,500	$2,100	7,001 to 7,500	$2,100
8,001 to 8,500	$1,250	7,501 to 8,000	$2,200	7,501 to 8,000	$2,200
8,501 to 9,000	$1,350	8,001 to 8,500	$2,300	8,001 to 8,500	$2,300
9,001 to 9,500	$1,450	8,501 to 9,000	$2,400	8,501 to 9,000	$2,400
9,501 to 10,000	$1,550	9,001 to 9,500	$2,500	9,001 to 9,500	$2,500
10,001 to 10,500	$1,650	9,501 to 10,000	$2,600	9,501 to 10,000	$2,600
10,501 to 11,000	$1,750	10,001 to 10,500	$2,700	10,001 to 10,500	$2,700
11,001 to 11,500	$1,850	10,501 to 11,000	$2,800	10,501 to 11,000	$2,800
11,501 to 12,000	$1,950	11,001 to 11,500	$2,900	11,001 to 11,500	$2,900
		11,501 to 12,000	$3,000	11,501 to 12,000	$3,000

(b) An applicant for a vertical well exceeding 12,000 feet in total well bore length shall pay a permit application fee of $1,950 + $100 for every 500 feet the well bore extends over 12,000 feet. Fees shall be rounded to the nearest 500-foot interval.

(c) An applicant for a nonvertical well or Marcellus Shale well exceeding 12,000 feet in total well bore length shall pay a permit application fee of $3,000 + $100 for every 500 feet the well bore extends over 12,000 feet. Fees shall be rounded to the nearest 500-foot interval.

(d) If, when drilled, the total well bore length of the well exceeds the length specified in the permit application, the operator shall pay the difference between the amount paid as part of the permit application and the amount required by subsections (a)—(c).

(e) An applicant for a vertical well with a well bore length of 1,500 feet or less for home use shall pay a permit application fee of $200.

(f) At least every 3 years, the Department will provide the EQB with an evaluation of the fees in this chapter and recommend regulatory changes to the EQB to address any disparity between the program income generated by the fees and the Department's cost of administering the program with the objective of ensuring fees meet all program costs and programs are self-sustaining.

[Pa.B. Doc. No. 09-1987. Filed for public inspection October 23, 2009, 9:00 a.m.]

Title 34—LABOR AND INDUSTRY

DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE CHS. 111 AND 131]

[Correction]

Special Rules of Administrative Practice and Procedure Before the Workers' Compensation Appeal Board; Special Rules of Administrative Practice and Procedure Before Workers' Compensation Judges

An error occurred in the definition of "service" in § 111.3 in the final-form rulemaking which appeared at 39 Pa.B. 6038, 6042 (October 17, 2009). The correct version of the definition is as follows:

Service—Delivery in person, by mail or electronically. If service is by mail, it is deemed complete upon deposit in the United States mail, as evidenced by a United States Postal Service postmark, properly addressed, with postage or charges prepaid.

[Pa.B. Doc. No. 09-1925. Filed for public inspection October 16, 2009, 9:00 a.m.]

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 21]

[L-2008-2038549/57-262]

Defining the Term Household Goods in Use Carrier

The Pennsylvania Public Utility Commission (Commission) on April 16, 2009, adopted a final rulemaking order which amends the definition of the term "household goods in use carrier."

Executive Summary

The recent emergence of containerized moving service firms, such as Portable on Demand Storage (PODS), as an alternative to traditional full service loading and unloading, packing and unpacking moving services for consumers, has raised issues regarding how PODS-type carriers should be regulated. In particular, it appears that PODS-type services, in which the customer is responsible for packing and unpacking, and loading and unloading the container, is more akin to common carrier of property service. Under these circumstances, the only service ordinarily provided by the carrier is transportation, making it appropriate to impose the lesser degree of regulation associated with property common carriers to these containerized moving service carriers.

Based upon the Commission's consideration of this issue to date, as well as our review of the approach to this issue taken by the Federal government and other states, we are amending our regulations to distinguish the operating authority of carriers of household goods and carriers of property based upon the nature of the service provided and not upon the type of contents being transported. By changing the definition of a household goods carrier, the Commission's regulation will be more consistent with the Federal government as well as the majority of other states. A service-based definition of a household good user will obviate the need for determining whether certain items qualify as household goods. A service-based definition will also eliminate unequal treatment among PODS carriers who transport household goods and PODS carriers who transport property, when the same service is being provided.

The Commission, therefore, will amend its existing regulation in 52 Pa. Code § 21.1 defining the term "household goods in use carrier." The amended definition will categorize PODS-type services as transportation of property irrespective of the contents of the move, so long as the only service provided is the transportation of property from one location to another. If, however, a company such as PODS provides packing and unpacking or loading and unloading services, or both, it will still be required to have a certificate as a household goods in use carrier.

Additionally, the existing regulation in § 21.1 includes as a "household goods in use carrier" the "transportation of property from a factory or store when the property is purchased by the householder with intent to use in his dwelling." *Id.* Thus, the current regulation covers instances such as when a buyer purchases a large appliance or furniture from a department store, and then arranges for the department store to deliver the item to the buyer's dwelling. The amended regulation seeks to change this in keeping with its Federal counterpart, 49 U.S.C.A. § 13102(10) as amended. In 1999, the Federal government amended § 13102(10) to *exclude* moves from a factory or store, whereas this provision previously included such moves. The Commission believes a similar amendment to § 21.1 is in order, as we no longer intend to require household goods authority for such deliveries.

The Commission contact persons are Adam Young, (717) 787-5000 (Law Bureau) and Eric A. Rohrbaugh, (717) 783-3190 (Law Bureau).

Public Meeting held
April 16, 2009

Commissioners Present: James H. Cawley, Chairperson; Tyrone J. Christy, Vice Chairperson; Robert F. Powelson; Kim Pizzingrilli; Wayne E. Gardner

Rulemaking Re: Amendment to 52 Pa. Code § 21.1; Defining the Term Household Goods in Use Carrier; Doc. No. L-2008-2038549

Final Rulemaking Order

By the Commission:

In accordance with Section 501 of the Public Utility Code, 66 Pa.C.S. § 501, the Commission formally commenced its rulemaking process to amend its existing regulations at 52 Pa. Code § 21.1 defining the term "Household goods in use carrier."

Background and Procedural History

The recent emergence of containerized moving service firms, such as Portable on Demand Storage (PODS), as an alternative to traditional full service loading and unloading, packing and unpacking moving services for consumers, has raised issues regarding how PODS-type

carriers should be regulated.[1] In particular, it appears that PODS-type services, in which the customer is responsible for packing and unpacking, and loading and unloading the container, and the only service ordinarily provided by the carrier is transportation, is more akin to common carrier property service. Under those circumstances, it may be appropriate to impose the lesser degree of regulation associated with property common carriers to these containerized moving service carriers.

Based upon the Commission's consideration of this issue to date, as well as our review of the approach to this issue taken by the Federal government and other states, we are amending our regulations to distinguish the operating authority of carriers of household goods and carriers of property based upon the nature of the service provided and not upon the type of contents being transported. By changing the definition of a household goods carrier, the Commission's regulation will be more consistent with the Federal government as well as the majority of other states. A service-based definition of a household good user will lessen confusion about determining what items qualify as household goods. A service-based definition will also eliminate unequal treatment among PODS carriers who transport household goods and PODS carriers who transport property, when the same service is being provided.

The Proposed Rulemaking Order was adopted at our Public Meeting on May 22, 2008 and was approved 4-0. The Proposed Rulemaking Order then went to the Independent Regulatory Review Commission (IRRC) on September 25, 2008, and was published in the *Pennsylvania Bulletin* on October 11, 2008 at 38 Pa.B. 5665. Comments from interested parties were due on November 10, 2008, but no comments were filed, either by any interested parties, or by IRRC.

Discussion

The Commission currently determines whether to grant a certificate for moving household goods or a certificate for moving property based upon the contents being transported. The regulations define "household goods in use" as "personal effects and property used or to be used in a dwelling."[2] 52 Pa. Code § 21.1. Companies such as PODS offer services to individuals who are moving personal items from one residence to another. The customer pays for the transportation service, but handles the loading and unloading of the items him/herself. Thus, the kinds of contents that these service providers transport sometimes fall within the Commission's definition of household goods. However, these carriers may also transport property aside from household goods. In these instances, the Commission requires these carriers to obtain a certificate as a carrier of property.

Several differences exist between the requirements for obtaining a certificate to be a carrier of household goods and a carrier of property. Generally, the application to obtain a household goods certificate imposes more requirements upon the carrier than those required for a carrier of property. First, the application fee for a household goods certificate is more expensive ($350 as opposed to $100 for a carrier of property). Second, the household goods application requires the applicant to specifically describe the nature and character of its service, including a full description of the territory where the applicant plans to operate. There is no corresponding requirement on the application to be a common carrier of property. Third, carriers of household goods must file a tariff and seek Commission approval for any change in rates, whereas carriers of property are not required to file a tariff. This third requirement for a household goods carrier is arguably the most stringent one; it regulates a carrier's rates by binding the carrier to a tariff that must be approved by the Commission. And last, after the application for a household goods carrier is accepted by the Commission, it is published in the *Pennsylvania Bulletin*. Any active Pennsylvania certified carrier holding household goods authority in the same geographical area may file a protest to the granting of the application. Thereafter, carriers may resolve protests amongst themselves or, if an agreement cannot be reached, a hearing will be held before an administrative law judge (ALJ). A carrier of property does not have to encounter protests when it files an application for authority.

There are, however, several similarities between the manner in which a carrier of household goods and a carrier of property are regulated. For example, the Commission requires both types of carriers to maintain the same amount of insurance: $300,000 per accident per vehicle to cover liability for bodily injury, death or property damage and $5,000 for loss or damage to cargo. Additionally, the Commission imposes the same requirements to both types of carriers related to annual assessments, safety regulations, the marking of vehicles, fines and penalties, and other general requirements. Therefore, carriers of household goods must abide by more regulations and are more limited in the scope of their operating authority. The resulting inequality is that carriers like PODS who transport household goods are regulated more than carriers of property even though they provide the exact same service.

a. Federal Law

The Federal government determines the scope of the operating authority of household goods carriers based on the nature of service provided rather than the kind of goods being transported. The Interstate Commerce Commission (ICC)[3] has expressly declined to apply household goods regulatory requirements to general freight carriers transporting household goods. *See Practices of Motor Common Carriers of Household Goods*, 17 MCC 467 (1939) (holding that general freight carriers transporting household goods were not subject to the ICC's household goods regulations unless they performed services typical of a household goods carrier); *American Red Ball Transit Co. v. McLean Trucking Co., Inc.*, 67 MCC 305 (1956) (concluding that a general freight carrier with a household goods exclusion in its certificate could transport household goods in the same equipment used to transport general freight); *Glosson Motor Lines, Inc.—Purchase—Helderman*, 101 M.C.C. 151 (1966).

In 2001, a subdivision of the United States Department of Transportation (DOT), the Federal Motor Carrier Safety Administration (FMCSA) denied a petition for declaratory order filed by the American Moving and

[1] PODS provides a "you pack, we haul" moving service where the company delivers a portable storage unit to the customer. The customer packs the unit, and then PODS loads the unit onto a truck and transports the shipment to its destination, where the customer unpacks. PODS uses a special hydraulic truck to lift the unit so as not to disturb the contents inside. PODS handles the customer's contents when the unit is being hoisted onto the truck, during transport and during the detachment from the truck. PODS also gives the customer an option to arrange for a team of "expert packers" to pack boxes as well as load and unload the unit. *See* http://www.pods.com/. *See also* http://www.getasam.com/sam/portable-storage (Providing the same service as PODS.).

[2] Household goods in use also includes transportation "arranged and paid for by the householder, including transportation of property from a factory or store when the property is purchased by the householder with intent to use in his dwelling." 52 Pa. Code § 21.1.

[3] The ICC has since been dissolved and its functions have been transferred to the United States Department of Transportation (DOT). The DOT considers ICC orders to have precedential effect. *See* Interstate Commerce Comm'n Termination Act of 1995, Pub. L. 104-88, § 204, 109 Stat. 803 (1995).

Storage Association, Inc. (AMSA). The petition requested that carriers such as PODS be subject to the same regulatory requirements applicable to registered household goods carriers. *Am. Moving and Storage Assoc.*, Pet. for Declaratory Order. (U.S. Dep't of Transp. June 13, 2001). AMSA contended that consumers using customer-packed and carrier-hauled services were being unfairly denied the regulatory protections established for users of traditional household goods carriers. In denying AMSA's petition, FMCSA explained that it has adopted the underlying rationale of the ICC decisions, namely that the household goods requirements are directed at a discrete segment of the transportation industry that is service oriented. But, because carriers such as PODS are customer-packed, loaded and unloaded, the service aspect is missing. The FMCSA also explained that there is no evidence that Congress intended to change the longstanding treatment of household goods transportation, which is more service oriented than carriers of property. *Id.* at 2. Federal case law also supports the FMCSA's decision to regulate PODS as carriers of property. *See Hath v. Alleghany Color Corp.*, 369 F. Supp. 2d 1116 (D. Ariz. 2005).

Additionally, in 2005, Congress amended its statutory definition of a household goods motor carrier to exclude services by PODS carriers.[4] The Federal Highway Authorization bill has adopted this definition. *See* SAFE, ACCOUNTING, FLEXIBLE, EFFICIENT TRANSPORTATION EQUITY ACT: A LEGACY FOR USERS, H.R. 3, 109th Congress § 4202 (2005). Therefore, the decisions of the DOT/ICC, Federal case law and Federal statutes interpret PODS-type carriers to be excluded from household goods regulatory requirements because of the nature of the service provided.

b. Other States

A number of other states exclude PODS-type carriers from being considered household goods carriers.[5] These states, which consider these carriers to be carriers of property, place emphasis on the nature of the service provided, rather than the type of contents being transported. These states do not believe that the inherent nature of a household goods shipment, which is predominantly a packing and handling service, is present since the individual customer packs and seals their goods. The Commission concurs with this view. The transportation of household goods is a more personal service that includes entry into the customer's residence, packing of the customer's household goods, loading the household goods into the truck, transport to another residence, entry into the other residence, and subsequent unloading and unpacking. The personal nature of this service warrants greater regulatory oversight to protect the public interest. In contrast, the PODS-type service is more akin to the transportation of property in that the only service provided, in most cases, is transportation of the customer's property or household goods.

c. Exclusions

The existing regulation at 52 Pa. Code § 21.1 includes as a "household goods in use carrier" the "transportation of property from a factory or store when the property is purchased by the householder with intent to use in his dwelling." *Id.* Thus, the current regulation covers instances such as when a buyer purchases a large appliance or furniture from a department store, and then arranges for the department store to deliver the item to his/her dwelling. The current regulation exists in keeping with its Federal counterpart, 49 U.S.C.A. § 13102(10), as it existed prior to the 1999 amendments, which changed the definition from *including* moves from a factory or store, to *excluding* moves from a factory or store.[6] The Commission believes a similar amendment to 52 Pa. Code § 21.1 is in order, as we no longer intend to require household goods authority for such deliveries.

Therefore, the regulation as amended in Annex A specifically excludes the transportation of property from a factory or store when the property is purchased by the householder with intent to use in his dwelling. It is the intent of the Commission not to require such factories or stores to have a household goods carrier certificate for such moves, even in the instance where an agent or employee loads and unloads the item(s).

Conclusion

The Commission, therefore, will amend its existing regulation at 52 Pa. Code § 21.1 defining the term "Household goods in use carrier" consistent with Annex A to this Order. The amended definition will categorize PODS-type services as transportation of property irrespective of the contents of the move, so long as the only service provided is the transportation of property from one location to another. If, however, a company such as PODS provides packing and unpacking and/or loading and unloading services, it will still be required to have a certificate as a household goods in use carrier.

Regulatory Review

Under section 5(a) of the Regulatory Review Act, (71 P. S. § 745.5(a)), the agency submitted a copy of the final rulemaking, which was published as proposed at 38 Pa.B. 5665 on October 11, 2008, and served September 25, 2008, to the Independent Regulatory Review Commission (IRRC) and the House Committee on Consumer Affairs and the Senate Committee on Consumer Protection and Professional Licensure for review and comment. No comments were filed to this final-form rulemaking.

This final-form regulation was deemed approved by the House Committee on Consumer Affairs, the Senate Committee on Consumer Protection and Professional Licensure and IRRC on August 5, 2009, in accordance with section 5(g) of the Regulatory Review Act.

Accordingly, under sections 501 and 1501 of the Public Utility Code, 66 Pa.C.S. § 501 and 1501; section 204 of the Act of July 31, 1968, P. L. 769 No. 240, as amended, 45 P. S. § 1204, and the regulations promulgated thereunder at 1 Pa. Code §§ 7.1, 7.2 and 7.5 (relating to notice of proposed rulemaking required; adoption of regulations; and approval as to legality) ; the Commission adopts the regulations at 52 Pa. Code § 21.1 as set forth in Annex A; *Therefore*,

It is Ordered That:

1. The regulations of the Commission, 52 Pa. Code Chapter 21, are amended by amending § 21.1 to read as set forth in Annex A.

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

[4] "The term does not include a motor carrier when the motor carrier provides transportation of household goods in containers or trailers that are entirely loaded and unloaded by an individual (other than an employee or agent of the motor carrier)." (49 U.S.C.A. § 13102.) (1995), *amended* by 49 U.S.C.A. § 13102(12)(C) (Supp. 2005).

[5] Based on staff's contacts with other state utility commissions, the following states have determined that PODS-type carriers are excluded from the type of regulation imposed on household goods carriers: Alabama, Idaho, Indiana, Iowa, Massachusetts, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Dakota, Virginia and Washington.

[6] 1999 Amendments. Par. (10)(A). Pub.L. 106-159, § 209(a), struck out, "including transportation of property from a factory or store when the property is purchased by the householder with intent to use in his or her dwelling," and inserted, "except such term does not include property moving from a factory or store, other than property that the householder has purchased with the intent to use in his or her dwelling and is transported at the request of, and the transportation charges are paid to the carrier by, the householder."

3. The Secretary shall submit this order and Annex A to the Legislative Standing Committees and to IRRC for review and approval.

4. The Secretary shall certify this order and Annex A and deposit them with the Legislative Reference Bureau for final publication upon approval by IRRC.

5. A copy of this order and Annex A shall be served on the Office of Trial Staff, the Office of Consumer Advocate, and the Office of Small Business Advocate, the Tri-State Household Goods Tariff Conference, the Pennsylvania Moving and Storage Association and all carriers currently holding Household Goods authority from the Commission.

6. This regulation shall become effective upon publication in the *Pennsylvania Bulletin*.

7. The contact person for this order is Adam D. Young, Assistant Counsel, Law Bureau, (717) 772-8582. Alternate formats of this document are available to persons with disabilities and may be obtained by contacting Sherri DelBiondo, Regulatory Coordinator, Law Bureau, (717) 772-4579.

JAMES J. MCNULTY,
Secretary

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 5096 (August 22, 2009).)

Fiscal Note: Fiscal Note 57-262 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart B. CARRIERS OF PASSENGERS OR PROPERTY

CHAPTER 21. GENERAL PROVISIONS

§ 21.1. Definitions.

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

Certificate—A certificate of public convenience as issued by the Commission.

Commission—The Pennsylvania Public Utility Commmission.

Common carrier of property—A motor common carrier who or which transports property, other than household goods in use.

Corporation—A body corporate, joint stock company or association, domestic or foreign, its lessee, assignee, trustee, receiver or other successor in interest, having the powers or privileges of corporations not possessed by individuals or partnerships, but not including a municipal corporation except as otherwise expressly provided in the act.

Household goods in use—

(i) As used in connection with transportation, the term means personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of the dwelling, and similar property if the transportation of the effects or property is arranged and paid for by either the householder or by another party.

(ii) The term does not include:

(A) A motor carrier when the motor carrier provides transportation of household goods in containers or trailers that are entirely packed, loaded, unloaded or unpacked by an individual other than an employee or agent of the motor carrier.

(B) Transportation of property from a factory or store when the property is purchased by the householder with the intent to use it in the householder's dwelling.

Household goods in use carrier—A motor common or contract carrier that transports household goods in use.

Motor carrier—A common or contract carrier by motor vehicle.

Passenger carrier—A motor common or contract carrier that transports passengers.

[Pa.B. Doc. No. 09-1988. Filed for public inspection October 23, 2009, 9:00 a.m.]