

PROPOSED RULEMAKING

PENNSYLVANIA GAMING CONTROL BOARD

[58 PA. CODE CHS. 401a AND 405a]

Preliminary Provisions; Bureau of Investigations and Enforcement

The Pennsylvania Gaming Control Board (Board), under the general authority in 4 Pa.C.S. § 1202(b)(25) (relating to general and specific powers) and the specific authority in 4 Pa.C.S. §§ 1202.1 and 1516.1 (relating to code of conduct; and prosecutorial and adjudicatory functions) proposes to amend Chapters 401a and 405a (relating to preliminary provisions; and Bureau of Investigations and Enforcement) to read as set forth in Annex A.

Purpose of the Proposed Rulemaking

In accordance with revisions made to 4 Pa.C.S. Part II (relating to gaming) as part of the act of January 7, 2010 (P. L. 1, No. 1), the Board is proposing to amend Chapters 401a and 405a regarding ex parte communications and the separation of the adjudicatory functions of the Board or a presiding officer of the Board from the investigatory and prosecutorial functions of the Office of Enforcement Counsel (OEC) and the Bureau of Investigations and Enforcement (Bureau).

Explanation of Chapter 401a

Section 401a.3 (relating to definitions) amends the definition of "ex parte communication" for consistency with 4 Pa.C.S. Part II.

Section 401a.5 (relating to adjudicatory function of the Board; ex parte communications) is proposed to specify that the adjudicatory capacity of the Board or presiding officer will not be commingled with the prosecutorial or investigatory functions of the Bureau or OEC.

This section also addresses the prohibition on a Board member, presiding officer or an attorney from the Office of Chief Counsel who is advising the Board from engaging in ex parte communications with any person including an applicant, licensee, the Bureau or an attorney for the OEC. If a Board member, presiding officer or attorney from the Office of Chief Counsel does engage in an ex parte communication, the communication will be documented and notification of the communication and an opportunity to respond will be given to all parties. In addition to documenting the ex parte communication in a log, a member or presiding officer may be required to recuse himself. Section 401a.5(e) addresses the procedure for recusal of a presiding officer or Board member who engages in an ex parte communication that creates substantial reasonable doubt as to the individual's ability to act objectively, independently or impartially.

Explanation of Chapter 405a

Section 405a.1 (relating to general duties and powers) is amended to reiterate that the Bureau is independent of the Board, the Office of Hearings and Appeals and the Office of Chief Counsel and that the Bureau alone will dictate the scope and course of a background investigation without direction or limitation by the Executive Director or the Chief Counsel of the Board.

Section 405a.3(a)(7) (relating to Office of Enforcement Counsel) is proposed to reflect the additional authority given to OEC to petition the Board for the appointment of a trustee in accordance with section 1332 of the act (relating to appointment of trustee).

Section 405a.4 (relating to conduct) is amended for clarity.

Affected Parties

This proposed rulemaking affects presiding officers and members of the Board, the Office of Chief Counsel advising the Board as well as employees of the Bureau or OEC.

Fiscal Impact

Commonwealth—It is not anticipated that this proposed rulemaking will have a fiscal impact on the Board.

Political subdivisions—This proposed rulemaking will not have fiscal impact on political subdivisions of this Commonwealth.

Private sector—This proposed rulemaking will not have fiscal impact on the private sector.

General public—This proposed rulemaking will have no fiscal impact on the general public.

Paperwork Requirements

There are no paperwork requirements associated with this proposed rulemaking.

Effective Date

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

Public Comments

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed rulemaking, within 30 days after the date of publication in the *Pennsylvania Bulletin*, to Susan A. Yocum, Assistant Chief Counsel, Pennsylvania Gaming Control Board, P. O. Box 69060, Harrisburg, PA 17106-9060, Attention; Public Comment on Table Game Equipment, Regulation # 125-141.

Contact Person

The contact person for questions about this proposed rulemaking is Susan Yocum, Assistant Chief Counsel, (717) 265-8356.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 14, 2011, the Board submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Committees. A copy of this material is available to the public upon request and is available on the Board's web site at www.pgcb.state.pa.us.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory

review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Board, the General Assembly and the Governor of comments, recommendations or objections raised.

GREGORY C. FAJT,
Chairperson

Fiscal Note: 125-141. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 58. RECREATION

PART VII. GAMING CONTROL BOARD

Subpart A. GENERAL PROVISIONS

CHAPTER 401a. PRELIMINARY PROVISIONS

§ 401a.3. Definitions.

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

* * * * *

Ex parte communication—

(i) Any off-the-record [**communications regarding communication engaged in or received by a member or presiding officer of the Board regarding the merits of or any fact in issue relating to** a pending matter before the Board **or presiding officer** or which may reasonably be expected to come before the [**board Board or presiding officer** in a contested on-the record proceeding.

(ii) The term does not include [**off**] the following:

(A) **Off-the-record communications by [and between members, staff and employees of the Board] or between a member or presiding officer of the Board, the Department, the Pennsylvania State Police, the Attorney General or other law enforcement [officials necessary for their official duties under this part] official prior to the beginning of the proceeding solely for the purpose of seeking clarification or correction to evidentiary materials intended for use in the proceedings.**

(B) **Communications between the Board or a member and the Office of Chief Counsel.**

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(Editor's Note: The following section is new and printed in regular type to enhance readability.)

§ 401a.5. Adjudicatory function of the Board; ex parte communications.

(a) The Board or a presiding officer acts in an adjudicatory capacity when considering any matter presented for a decision by the Board or presiding officer in a contested on-the-record proceeding. To ensure the integrity and impartiality of the Board or presiding officer acting in an adjudicatory capacity, there will not be commingling of the adjudicatory functions of the Board or presiding officer and the investigatory or prosecutorial functions of the Bureau of Investigations and Enforcement or Office of Enforcement Counsel.

(b) When acting in an adjudicatory capacity regarding the facts at issue or merits of a matter pending before the Board or presiding officer, or which may reasonably be

expected to come before the Board or presiding officer in a contested on-the-record proceeding, a member or presiding officer of the Board or an attorney from the Office of Chief Counsel who is advising the Board on the matter may not engage in an ex parte communication with any person including the Bureau of Investigations and Enforcement or the Office of Enforcement Counsel.

(c) An ex parte communication received or engaged in by a member or presiding officer of the Board will be recorded in a log which will be available for public inspection at the Board's office during normal business hours and will be posted on the Board's web site. The log must include:

- (1) The name of the individual documenting the ex parte communication.
- (2) The date and time of the ex parte communication.
- (3) The names of all individuals involved in the ex parte communication.
- (4) The subject discussed.

(d) In addition to documenting an ex parte communication in accordance with subsection (c), notification of the substance of the communication and an opportunity to respond will be provided to all parties to a hearing or other proceeding directly affected by the anticipated vote or action of the Board or presiding officer related to the ex parte communication.

(e) A member or presiding officer of the Board may be required to recuse himself if substantial reasonable doubt exists as to the individual's ability to act objectively, independently or impartially in a hearing or proceeding as follows:

(1) A member or presiding officer of the Board who engaged in or received an ex parte communication will recuse himself from any hearing or other proceeding related to the ex parte communication if the context and substance of the ex parte communication creates substantial reasonable doubt as to the individual's ability to act objectively, independently or impartially.

(2) A member or presiding officer of the Board who engaged in or received an ex parte communication who elects not to recuse himself from a hearing or other proceeding will state the reasons for not recusing himself on the record prior to the commencement of the hearing or proceeding.

(3) A member or presiding officer of the Board who has identified any other reason which creates substantial reasonable doubt as to the individual's ability to act objectively, independently or impartially will recuse himself from any hearing or other proceeding related thereto.

(4) If a legislative appointee recuses himself from any hearing or other proceeding under this section, any qualified majority vote required under this part will consist of all of the remaining legislative appointees and at least two gubernatorial appointees.

(5) Failure of a presiding officer, for whom substantial reasonable doubt as to the individual's ability to act objectively, independently or impartially exists, to recuse himself from a hearing or other proceeding when required

under paragraph (1) shall be grounds for appeal to the Board.

(6) Failure of a member, for whom substantial reasonable doubt as to the individual's ability to act objectively, independently or impartially exists, to recuse himself from a hearing or other proceeding when required will be grounds for appeal to a court of competent jurisdiction if the Board action being appealed could not have occurred without the participation of the member.

(f) Nothing in this subsection will preclude a member of the Board from consulting with other members individually if the consultation complies with 65 Pa.C.S. §§ 701—716 (relating to Sunshine Act) or with employees or independent contractors whose functions are to assist the Board in carrying out its adjudicative functions.

CHAPTER 405a. BUREAU OF INVESTIGATIONS AND ENFORCEMENT

§ 405a.1. General duties and powers.

(a) **Except for administrative purposes, the Bureau is a distinct entity, independent of the Board, the Office of Chief Council and the Office of Hearings and Appeals.**

(b) The Bureau has the powers and duties set forth in section 1517 of the act (relating to investigations and enforcement) including:

* * * * *

(c) **The Bureau will determine the scope of a background investigation, which may not be directed or limited by the Executive Director or Chief Counsel of the Board.**

§ 405a.3. Office of Enforcement Counsel.

(a) The Office of Enforcement Counsel within the Bureau has the following powers and duties:

* * * * *

(7) **Petition the Board for the appointment of a trustee under section 1332 of the act (relating to appointment of trustee).**

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§ 405a.4. Conduct.

(a) **[An] As provided in section 1202.1(c.1) of the act (relating to code of conduct), an attorney representing the Bureau or Office of Enforcement Counsel, or an employee involved in the hearing process, may not [discuss the case ex parte with a presiding officer assigned to the case,] engage in an ex parte communication with a member or presiding officer of the Board, the Chief Counsel or an attorney [assigned to the case] from the Office of Chief Counsel [or a Board member] who is advising the Board.**

(b) **A member or presiding officer of the Board, the Chief Counsel or an attorney [assigned to the case] from the Office of Chief Counsel [or a Board member] who advises the Board may not [discuss or] exercise [a] supervisory responsibility or exert influence over any employee of the Board or Bureau with respect to**

an enforcement **proceeding or** hearing with which the employee is involved.

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[Pa.B. Doc. No. 11-327. Filed for public inspection February 25, 2011, 9:00 a.m.]

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 59]

[L-2008-2034622]

Liquid Fuels Pipeline Regulations

The Pennsylvania Public Utility Commission (Commission), on July 15, 2010, adopted a proposed rulemaking order which sets forth new language for regulation of liquid fuels and hazardous materials pipelines by incorporating 49 CFR Part 195.

Executive Summary

Currently, Pennsylvania exercises jurisdiction over petroleum and oil pipeline utilities including utilities such as Laurel Pipe Line Co., Sunoco Pipeline, and Conoco Philips Pipe Line Co. Under section 102(1)(v), the Commission also has jurisdiction over hazardous materials and liquid fuels transported via pipeline or conduit for the public for compensation, yet currently has no specific regulations in place to effectively address enforcement and safety issues.

The United States Department of Transportation's (DOT) Pipeline and Hazardous Materials Safety Administration's (PHMSA) Hazardous Liquid Pipeline Safety Grant Program supports efforts to develop and maintain state natural gas, liquefied natural gas, and hazardous liquid pipeline safety programs. The objective of the Pipeline Safety Grant Program is for states to develop and maintain natural gas, liquefied natural gas, and hazardous liquid pipeline safety programs. Eligible state programs will cover such areas as inspection and testing of gas pipelines as well as related travel, training, and research. Funds must be expended for personnel, equipment, and activities reasonably required for the pipeline safety program. DOT will provide Federal matching funds, up to 50% to any state agency with a certificate under 49 U.S.C.A. § 60105, an agreement under 49 U.S.C.A. § 60106, or to any state acting as a DOT agent on interstate pipelines.

Therefore, we propose to amend § 59.33 to include regulations addressing transportation of hazardous materials and liquid fuels by pipeline or conduit as consistent with 49 CFR Part 195 and in accordance with the Pipeline Safety Grant Program Payment Agreement entered into with the DOT.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 10, 2011, the Commission submitted a copy of this proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Committees. In addition to submitting the proposed rulemaking, the Commission provided IRRC and will provide the Committees with a copy of a detailed Regulatory Analysis Form. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Department, the General Assembly and the Governor of comments, recommendations or objections raised.

Public Meeting held
July 15, 2010

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

***Liquid Fuels Pipeline Regulations;
Doc. No. L-2008-2034622***

Proposed Rulemaking Order

By the Commission:

In accordance with Section 501 of the Public Utility Code, 66 Pa.C.S. § 501, the Commission formally commences its rulemaking process to amend its existing regulations at 52 Pa. Code § 59.33 to include new language for the regulation of liquid fuels and hazardous materials pipelines by incorporating Chapter 195 of the Code of Federal Regulations. The Commission seeks comments from all interested parties on this proposed regulation amendment, which is found at Annex A to this Order.

A. Background and Procedural History

Section 102 of the Public Utility Code, 66 Pa.C.S. § 102, defines a public utility as “Any person or corporations now or hereafter owning or operating in the Commonwealth equipment or facilities for . . . (v) Transporting or conveying natural or artificial gas, crude oil, gasoline, or petroleum products, materials for refrigeration, or oxygen or nitrogen, or other fluid substance, by pipeline or conduit, for the public for compensation.” Id. § 102(1)(v).

Currently, Pennsylvania exercises jurisdiction over petroleum and oil pipeline utilities including utilities such as Laurel Pipe Line Co., Sunoco Pipeline, and Conoco Philips Pipe Line Co. Pursuant to Section 102(1)(v), the Commission also has jurisdiction over hazardous materials and liquid fuels transported via pipeline or conduit for the public for compensation, yet currently has no specific regulations in place to effectively address enforcement and safety issues. Therefore, we are proposing to amend our regulations to include regulations addressing transportation of hazardous materials and liquid fuels by pipeline of conduit as consistent with 49 CFR § 195.0 et seq., and in accordance with the Pipeline Safety Grant Program Payment Agreement entered into with the Department of Transportation.

Discussion

The U.S. Department of Transportation’s (DOT) Pipeline and Hazardous Materials Safety Administration’s (PHMSA) Hazardous Liquid Pipeline Safety Grant Program supports efforts to develop and maintain state natural gas, liquefied natural gas, and hazardous liquid pipeline safety programs.¹ The objective of the Pipeline

Safety Grant Program is to develop and maintain state natural gas, liquefied natural gas, and hazardous liquid pipeline safety programs.

The Pipeline Safety Grant Program, in which Pennsylvania currently participates, is a 100% performance-based program with the performance criteria of 100 points. Eligible programs will cover such areas as inspection and testing of gas pipelines as well as related travel, training, and research. Funds must be expended for personnel, equipment, and activities reasonably required for the pipeline safety program. DOT provides federal matching funds, up to 50 percent to any state agency with a certificate under Section 60105 of Title 49, *United States Code*, an agreement under Section 60106 of Title 49, *United States Code*, or to any state acting as a DOT agent on interstate pipelines.

Funding to the states is allocated by a method designed to reflect the degree to which a state has met specific levels of performance, based on information provided in certification packages and the results of DOT’s Regional Office program evaluation. The allocation is determined by assigning point values to the states for having achieved certain levels of program participation, dividing this point score by the sum of the states’ point scores, and multiplying this ratio by the amount available for the distribution. PHMSA distributes the remaining funds according to certain criteria designed to seek improvements in various state programs. The criteria used by PHMSA is the extent of intrastate jurisdiction, inspector qualifications, recommended number of inspection person-days, state adoption of applicable Federal regulations, and other relevant criteria. New state programs, such as Pennsylvania’s, are automatically funded at a minimum score of 90 for the first three years (assuming the state is making satisfactory progress in meeting certification requirements), thereby providing an adequate cushion for these state programs to get established.

Since the Gas Service Regulations at 52 Pa. Code § 59 and the Federal Code Regulations on the Transportation of Hazardous Liquids by Pipeline at 49 CFR § 195 are already used in the regulation of natural gas and hazardous liquid pipelines respectively, we propose to amend 52 Pa. Code § 59.33 to include hazardous liquid pipelines, and specifically reference 49 CFR § 195.

Conclusion

The Commission, therefore, formally commences its rulemaking process to amend its existing regulations at 52 Pa. Code § 59.33 consistent with Annex A to this Order. The Commission intends to carry out part of the Pipeline Safety Program by adopting applicable Federal regulations. The Commission seeks comments from all interested parties on this proposed regulation amendment, which is found at Annex A to this Order.

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—7.234, we are considering adopting the proposed regulations set forth in Annex A; *Therefore,*

¹Authorized by the Natural Gas Pipeline Safety Act of 1968, Public Law 90-481, 49 U.S.C. 1971, as amended; Public Law 92-401, 86 Stat. 616; Public Law 93-403, 88 Stat. 802; Public Law 94-477, 90 Stat. 2073; Pipeline Safety Act of 1979, Title I and Title II, Public Law 96-129, 93 Stat. 989; Pipeline Safety Reauthorization Act of 1988, Public

Law 100-561; Pipeline Safety Act of 1992, Public Law 102-508; 49 U.S.C. 601; Public Law 103-272; Accountable Pipeline Safety and Partnership Act of 1996, Public Law 104-304.

It Is Ordered That:

1. A proposed rulemaking be opened to consider the regulations set forth in Annex A.

2. The Secretary shall submit this proposed rulemaking order and Annex A to the Office of Attorney General for review as to form and legality and to the Governor’s Budget Office for review of fiscal impact.

3. The Secretary shall submit this proposed rulemaking order and Annex A for review and comments to the Independent Regulatory Review Commission and the Legislative Standing Committees.

4. The Secretary shall certify this proposed rulemaking order and Annex A and deposit them with the Legislative Reference Bureau to be published in the *Pennsylvania Bulletin*.

5. An original and 15 copies of any written comments referencing the docket number of the proposed regulations be submitted within 30 days of publication in the *Pennsylvania Bulletin* to the Pennsylvania Public Utility Commission, Attn: Secretary, P. O. Box 3265, Harrisburg, PA 17105-3265.

6. A copy of this proposed rulemaking 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.

7. The contact person for this proposed rulemaking 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.

ROSEMARY CHIAVETTA,
Secretary

Fiscal Note: 57-281. No fiscal impact; (8) recommends adoption.

Annex A

**TITLE 52. PUBLIC UTILITIES
PART I. PUBLIC UTILITY COMMISSION
Subpart C. FIXED SERVICE UTILITIES
CHAPTER 59. GAS SERVICE
SERVICE AND FACILITIES**

§ 59.33. Safety.

(a) *Responsibility.* Each public utility shall at all times use every reasonable effort to properly warn and protect the public from danger, and **shall** exercise reasonable care to reduce the hazards to which [**employes**] **employees**, customers and others may be subjected to by reason of its equipment and facilities.

(b) *Safety code.* The minimum safety standards for all [**gas transmission and distribution facilities**] **natural gas and hazardous liquid public utilities** in this Commonwealth shall be those issued under the pipeline safety laws as found in 49 U.S.C.A. §§ 60101—60503 and as implemented at 49 CFR Parts [**191—193**] **190—195, 198** and 199, including all subsequent amendments thereto [**future**]. **Future** Federal amendments to 49 CFR Parts [**191—193**] **190—195, 198** and 199, as amended or modified by the Federal government, shall have the effect of amending or modifying the Commission’s regulations with regard to the minimum safety standards for all [**gas transmission and distribution facilities**] **natural gas and hazardous liquid public utilities**. The amendment or modification shall take effect 60 days after the effective date of the Federal amendment or modification, unless the Commission publishes a notice in the *Pennsylvania Bulletin* stating that the amendment or modification may not take effect.

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[Pa.B. Doc. No. 11-328. Filed for public inspection February 25, 2011, 9:00 a.m.]