RULES AND REGULATIONS

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 63]

[L-2009-2123673]

Call Recording for Telephone Companies

The Pennsylvania Public Utility Commission, on March 15, 2012, adopted a final rulemaking order which establishes regulatory conditions under which telephone companies may record customer communications for training and quality of service purposes.

Executive Summary

This Final Rulemaking was prompted by requests in 2007-2008 from eight (8) local exchange carriers (LECs) requesting waivers of 52 Pa. Code § 63.137 to allow them to record telephone calls between their customers and employees for training and quality of service purposes. Currently, pursuant to section 63.137, telecommunications carriers cannot record customer contact calls for any reason. Other jurisdictional utilities do not have such a restriction and are able to record calls for training and quality of service purposes. The eight LECs were granted individual waivers, and the Commission established terms and conditions for a temporary blanket waiver of section 63.137 (2) in a Blanket Waiver Order at Docket No. M-2008-2074891.

On April 19, 2010, the Commission entered a Proposed Rulemaking Order at Docket No. L-2009-2123673, which proposed to amend section 63.137 to remove the prohibition against call recording and to establish parameters for permitting call recording of customer contact calls for training and quality of service purposes. Additionally, the rulemaking proposed the ministerial edit of changing "employe" to "employee." After comments from individual jurisdictional telecommunications utilities, a statewide telecommunications organization, and IRRC, a final rulemaking order was entered on March 15, 2012. The Final Rulemaking Order reflects the comments filed in this matter.

This Final Rulemaking Order seeks to benefit every LEC by allowing uniformity across multistate service territories and establishing consistency in utility regulation. The jurisdictional utilities affected by the regulation will benefit from the regulation as they will know what is expected of them if they choose to record calls. The regulations are designed to help the utility improve training methods and quality of service provided to customers by their employees. Better trained utility employees and improved quality of service benefits utility customers. The regulations are not financially or unduly burdensome upon the jurisdictional utilities because the utilities can continue to operate without choosing to record calls. Furthermore, the utilities operating pursuant to the individual waivers and under the blanket waiver have not noted any problems with the terms of those waivers that would be codified as regulations under the proposed rulemaking. Utilities that have not requested a waiver or opted-in to the blanket waiver will be saved the time and expense of such a request.

The Commission will benefit from a more uniform approach to the methods that all utilities may use to improve quality of service and to ensure adequate employee training. Additionally, it will save time and money by eliminating the need to process individual requests for waivers or for opting into the blanket waiver.

Public Meeting held
March 15, 2012

Commissioners Present: Robert F. Powelson, Chairperson; John F. Coleman, Jr., Vice Chairperson; Wayne E. Gardner; James H. Cawley; Pamela A. Witmer

Elimination of the Call Recording Prohibition in 52 Pa. Code § 63.137 and Establishment of Regulations to Govern Call Recording for Telephone Companies; Doc. No. L-2009-2123673

Final Rulemaking Order

By the Commission:

On April 19, 2010, we issued for comment a proposed rulemaking relative to the regulatory prohibition against call recording at 52 Pa. Code § 63.137(2) relating to telephone companies[1] and to establish regulatory conditions under which telephone companies may record customer contact communications. Comments have been received. This order eliminates the language in section 63.137(2) relating to the prohibition of call recording applicable to jurisdictional telephone companies, adds "recording" to section 63.137(1) relating to compliance with state and federal laws, and makes the ministerial edit of changing "employe" to "employee" throughout section 63.137. This order is effective upon publication in the *Pennsylvania Bulletin*.

Background

52 Pa. Code § 63.137(2)

Section 63.137(2) was promulgated in an effort to balance customer privacy interests with the business interests of the telephone companies.[2] To establish this balance, telephone company call center supervisors are allowed to monitor communications between customers and utility company service representatives (i.e., customer contact calls) through "live" or "real-time" listening in, but calls may not be recorded. Substantively, section 63.137(2) provides, in relevant part, as follows:

> (2) *Service evaluation and monitoring.* The telephone company may evaluate and monitor those aspects of its operations, including customer communications, necessary for the provision of service to its customers. *The recording of conversations is prohibited*.

52 Pa. Code § 63.137(2) (emphasis added). No other jurisdictional utility industry is subject to similar customer contact or call-center call-recording prohibitions under our regulations. Section 63.137(2)(iii) relating to administrative monitoring sets the parameters for monitoring existing customer contact calls and employee-to-employee calls for quality of service provided to customers. This process is currently limited to live monitoring by the absolute prohibition in section 63.137(2).

Subsections 63.137(2)(i) and (ii) explain the processes of service evaluation and maintenance monitoring of customer-to-customer telephone calls that a telephone company has been able to perform in the provision of service to its customers. Under section 63.137(2), these

[1] The term "telephone company" as defined at 52 Pa Code § 63.132 incorporates all jurisdictional telephone companies: *Telephone company*—A public utility which provides regulated telecommunication services subject to Commission jurisdiction.

[2] The provisions of section 63.137(2) were issued pursuant to 66 Pa.C.S. §§ 501 & 1501 and were adopted July 24, 1992, effective September 23, 1992, 22 Pa.B. 3892.

calls may not be recorded. No other jurisdictional utility has similar access to customer-to-customer calls or transactions by virtue of the service it renders. The proposed rulemaking did not propose that these calls could be recorded.

Eight (8) local exchange carriers (LECs) petitioned for and received waivers of section 63.137(2).[3] The individual waivers allow them to record, for training and quality of service purposes, customer calls to their call centers. On November 20, 2008, we entered a tentative order at Docket No. M-2008-2074891 soliciting comments on proposed guidelines for a blanket waiver to avoid addressing such waiver requests on a piecemeal basis in the future. Guidelines for Temporary Waiver of the Call Recording Prohibition Set Forth at 52 Pa. Code § 63.137(2), M-2008-2074891 (November 20, 2008) (Tentative Order). The Tentative Order proposed a process whereby a telephone company could petition the Commission for a one-year partial waiver of section 63.137(2) and up to two one-year extensions, subject to proposed uniform terms and conditions applicable to operations under the temporary partial waiver.

The Tentative Order provided notice to the public, in general, and to the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA), and the Office of Trial Staff (OTS), in particular. The Pennsylvania Telephone Association (PTA) filed comments asserting that continued requirement of individual petitions with a one-year limitation and two renewals would not be consistent with a "blanket" waiver.

By order entered July 29, 2009, at Docket No. M-2008-2074891, we adopted a blanket partial waiver of section 63.137(2) thereby permitting customer contact call recording under certain circumstances. Guidelines for Waiver of the Call Recording Prohibition at 52 Pa. Code § 63.137(2) Pending Rulemaking, M-2008-2074891 (July 29, 2009). (Blanket Waiver Order). Specifically, the Blanket Waiver Order permits telephone companies to record customer contact calls for quality of service and training purposes subject to the following terms and conditions:

- File notice with the Commission, and copy the Bureau of Consumer Services, giving thirty (30) days notice;
- Provide customers with a bill insert (or equivalent information) explaining the call recording process and the opt-out process to customers thirty (30) days before commencing call recording operations;
- Provide a pre-recorded message to the effect that the call may be monitored or recorded for training or quality control purposes. The pre-recorded message must advise callers that they have the option to discontinue the call and to request a call back from an unrecorded line and must also provide instructions on how to request a call back prior to any aspect of the call being recorded;
- Use recorded calls solely for the purpose of training or measuring and improving service quality;
- Erase recorded calls after a ninety (90)-day (or shorter) retention period.

Under the Blanket Waiver Order, all other provisions of 52 Pa. Code § 63.137 remain in full force and effect. A number of telephone companies have since provided notice that they were opting to operate pursuant to the Blanket Waiver Order.

A carrier with a pre-existing waiver that had not commenced actual recording of customer contact calls pursuant to the pre-existing waiver could only subsequently commence call recording pursuant to the Blanket Waiver Order terms and conditions. A carrier that had commenced call recording of customer contact calls without a previously granted specific waiver or pursuant to the Blanket Waiver Order (i.e., a carrier that was recording customer contact calls contrary to section 63.137(2)) had twenty (20) days to come into compliance with that order or to discontinue call recording.

Pursuant to the Blanket Waiver Order, telephone companies are also permitted to petition individually for a partial temporary waiver of section 63.137(2) if they wish to request other terms than those in the Blanket Waiver Order. Only one such waiver request has been received.

When we established terms and conditions for temporary partial waiver of section 63.137(2) in the Blanket Waiver Order, we noted that we would take under consideration at another docket the matter of opening a rulemaking to eliminate the call recording prohibition.

Proposed Rulemaking Order

Our April 19, 2010 order at this docket commenced that further proceeding. In particular, the April 19, 2010 proposed rulemaking order would have permitted the recording of customer contact calls subject to the following terms and conditions:

63.137(2)(a)(iv)—*Call recording.* A telephone company may record calls by employees to or from customers, potential customers, or applicants only under the following circumstances:

(A) A telephone company shall give notice to its customers with a bill insert or equivalent customer contact explaining the call recording process and the opt-out process at least 30 days before commencing call recording or to new customers at the time service commences.

(B) A telephone company shall provide callers calling a company telephone number equipped to record customer or prospective customer calls with a pre-recorded message that the call may be monitored or recorded for training or quality control purposes.

(C) The pre-recorded message shall advise callers that they have the option to discontinue the call and to request a call back on an unrecorded line and shall provide instructions on how to request a call back prior to any aspect of the call being recorded.

(D) Recorded telephone calls shall be used solely for the purpose of training or measuring and improving service quality and may not be used for formal or informal evidentiary purposes.

(E) Recorded calls shall be erased after a 90-day or shorter retention period.

On September 28, 2010, the order was provided to the Office of Attorney General for review as to form and legality and to the Governor's Budget Office for review as to fiscal impact. At the same time, it was also provided to the Legislative Standing Committees and the Independent Regulatory Review Commission (IRRC) for review. The order was published on October 9, 2010, in the *Pennsylvania Bulletin*, at 40 Pa.B. 5819. A public comment period was established.

[3] The eight petitioning LECS are: Verizon Pennsylvania Inc. and Verizon North Inc., (Verizon LECs) Docket No. P-00072333 (December 20, 2007); Full Service Computing Co. and Full Service Network LP (Full Service LECs), Docket No. P-2008-2020446 (May 5, 2008); and Buffalo Valley Telephone Company, Conestoga Telephone and Telegraph Company, Denver and Ephrata Telephone and Telegraph Company, and D&E Systems, Inc., Docket No. P-2008-2051138 (September 23, 2008).

The Verizon LECs filed comments at this docket supporting elimination of the call recording prohibition. PTA, on behalf of its members, also filed comments at this docket in support of elimination of the call recording prohibition. These comments are available at www.puc.state.pa.us. IRRC also submitted comments. IRRC's comments are available at www.irrc.state.pa.us. The comment period concluded November 23, 2011.

In addition to the substantive changes, we also addressed a grammatical inconsistency in the proposed rulemaking order. Both "employe" and "employee" are used in various places in section 63.137. We proposed to change the spelling of "employe" to "employee" to reflect the generally accepted form of the term and to promote consistency throughout section 63.137.

Wiretap Act

In reviewing this matter it is essential to consider the pertinent provisions of Pennsylvania's Wiretap Act, *Wiretapping and Electronic Surveillance Control Act*, 18 Pa.C.S. §§ 5701—5704. The Wiretap Act provides, in pertinent part, that:

> It shall not be unlawful and no prior court approval shall be required under this chapter for:
>
> * * * * *
>
> (6) Personnel of any public utility to record telephone conversations with utility customers or the general public relating to receiving and dispatching of emergency and service calls provided there is, during such recording, a periodic warning which indicates to the parties to the conversation that the call is being recorded.
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> * * * * *
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> (15) The personnel of a business engaged in telephone marketing or telephone customer service by means of wire, oral or electronic communication to intercept such marketing or customer service communications where such interception is made for the sole purpose of training, quality control or monitoring by the business, provided that one party involved in the communications has consented to such intercept. Any communications recorded pursuant to this paragraph may only be used by the business for the purpose of training or quality control. Unless otherwise required by Federal or State law, communications recorded pursuant to this paragraph shall be destroyed within one year from the date of recording.

18 Pa.C.S. §§ 5704(6) and (15). Because the Pennsylvania Wiretap Act is more stringent than the federal act, we have omitted discussion of the federal law.

Comments to the Proposed Rulemaking Order

Verizon LECs

The Verizon LECs would have the Commission eliminate the call recording prohibition without imposing any conditions. They assert that the Wiretap Act provides sufficient protection to parties participating in customer contact calls that might be recorded relative to the retention and use of such calls. Verizon at 7 and 10. They assert that Chapter 30, in particular 66 Pa.C.S. § 3011(13), mandates the elimination of existing conditions and prevents the imposition of new conditions because competitive alternative service providers are not subject to any conditions. Verizon at 5.

The Verizon LECs assert that conditions are unnecessary and that recording customer contact calls will improve service. Verizon at 6. They assert that the Commission has already waived some of the proposed conditions, namely the opt-out and call-back process, relative to call analysis software[4] that Verizon had proposed using. Verizon at 7-8. The Verizon LECs assert that the opt-out process would exacerbate call-waiting times and that the bill insert provision would be unreasonably burdensome. Verizon at 9-10.

PTA

PTA supports the elimination of the prohibition applicable only to telephone companies asserting that the elimination will avoid perpetuating the discrimination against telephone companies. PTA at 3 and 5. PTA opposes, as unnecessary and costly, an obligatory bill insert or other form of customer contact 30 days before a telephone company begins recording customer contact calls. PTA also asserts that the proposed "opt-out" process that would allow customers to conduct telephone company business over unrecorded lines is "unclear" and will not strike a balance between customer privacy interests and telephone company interests. PTA has no objections to the recorded message before a call is recorded. PTA at 4. PTA believes that the regulation need not address evidentiary uses or length of retention of recorded customer contact calls because the state and federal wiretap laws are adequate protection in this regard. PTA at 5-7. PTA has no objection to change from "employe" to "employee." PTA at 3.

IRRC

IRRC raised four points. First, IRRC commented that if the proposed conditions in (A), (C), (E), and parts of (D) are retained, then the Commission should provide a more detailed explanation of why they are needed and why they are reasonable. Second, IRRC asserts that the costs of the conditions have not been quantified and justified. Third, IRRC queries the prohibition on evidentiary use. Finally, IRRC questions the proposed 90-day time frame when the Wiretap Act provides for a year-long retention. IRRC at 2.

Discussion and Resolution

This action continues the process of eliminating the call recording provision in section 63.137(2). We are persuaded by the comments from the Verizon LECs, PTA, and IRRC to not adopt the proposed provisions of subsections 63.137(2)(iv)(A), (B), (C), (D), and (E) in the final regulation. The change addresses IRRC's concerns and also addresses PTA's concerns and the substance of Verizon's concerns.

Among other arguments supporting the elimination of the section 63.137(2) prohibition on call recording, the most pressing argument is that telephone companies are

[4] As previously noted, in addition to asking for and being granted a individual waiver of section 63.137(2), the Verizon LECs requested and was granted a further specific waiver from its individual waiver and the Blanket Waiver Order. This second Verizon waiver goes to the Verizon LECs' use of the Nexidia program. The Nexidia program:

> [M]echanically scans the contents of a random sample of recorded calls (approximately six (6) calls per call-taker per day) and looks for key words and other "clues" related to quality of service and customer's satisfaction. Nexidia software then analyzes this data and produces reports and recommendations regarding effective and efficient communication. Calls will not be linked to individual call-takers [or callers]. Verizon supervisors will not listen to recorded customer calls, although a person with the requisite authorization may listen to calls. Program data and analytics will be managed by Verizon, and access will be limited to dedicated quality subject matter experts within the particular areas that are identified for remedial action.

The Nexidia process does not result in recorded calls that would be routinely listened to by Verizon LEC personnel. The Verizon Nexidia order was limited in its application to programs such as Nexidia which are mechanical word search programs; the Verizon Nexidia order was not applicable to routine call recording for service quality and training purposes contemplated in the Blanket Waiver Order.

Verizon Pet. at ¶¶ 4 and 9-10 in Pet. of Verizon, et al., P-2010-2196242 (October 21, 2010) (Verizon Nexidia).

the only class of jurisdictional utilities prohibited from recording customer contact calls for training and measuring and improving service quality. Other utilities, as well as other businesses and this Commission, routinely record calls for service quality purposes within the bounds of applicable laws concerning wiretaps and trap and trace devices. Further, the provisions of the Wiretap Act address the concerns that these eliminated proposals were initially included to address. The addition of "recording" to the itemized list in section 63.137(1) recognizes that any recording of calls by a jurisdictional telephone company must be consistent with state and federal law.

It is expressly noted that the modifications promulgated herein to section 63.137(2) neither enlarge nor limit, in any way, a jurisdictional utility's obligations or a customer's protections pursuant either to the Wiretap Act or to any applicable state or federal statutes or regulations.

The elimination of the prohibition in section 63.137(2) will increase efficiency in industry operations and facilitate the entry and participation of competitors in the telecommunications market by allowing each to standardize operations throughout its national service territories. Additionally, in the time since telephone companies in the Commonwealth have had the ability to record customer contact calls either pursuant to specific individual petition or to the Blanket Waiver Order, we have not seen any problems or customer complaints arise.

The regulatory changes to section 63.137(2) to be adopted herein are consistent with the waivers granted to the petitioning LECs and to telephone companies operating pursuant to the Blanket Waiver Order and will require no further notice to the Commission or customers to remain in compliance. We shall issue an order at the Blanket Waiver Order docket rescinding the blanket waiver after the regulatory changes promulgated herein become final.

To the extent that the PTA or the Verizon LECs' comments may have suggested further revisions to section 63.137, we have chosen not to change the provisions of sections 63.137(3)—(6). These sections refer to compliance with other laws and appropriate authorization in circumstances where service observing, call monitoring, or call recording is permitted. Further, we have chosen not to change the provisions of sections 63.137(2)(i) relating to service evaluation, 63.137(2)(ii) relating to maintenance monitoring, and 63.137(2)(iii) relating to administrative monitoring. The exiting sections 63.137(2)(i) and (ii) address telephone company access to customer-to-customer calls for telephone company purposes. Section 63.137(iii) in the existing regulations addresses telephone company access to customer contact calls as well as employee-to-employee calls. Not all companies will commence recording of customer contact calls, some companies will continue to perform service evaluation and maintenance and administrative monitoring without recording calls, and this rulemaking does not address employee-to-employee calls. Therefore, the provisions of sections 63.137(2)(i), (ii), and (iii) are still essential to protect the public interest.

Accordingly, the final changes to section 63.137 relative to the call recording prohibition are set forth in Annex A to the order. This reflects a modification from the proposal in the April 19, 2011 order, consistent with the comments filed in response thereto.

In addition to the substantive changes, we also propose to eliminate a grammatical inconsistency in the proposed rulemaking order. Both "employe" and "employee" are used in various places in section 63.137. We proposed to conform the spelling of "employe" to "employee" to reflect the generally accepted and standard form of the term and to promote consistency throughout section 63.137. There are no objections to this change. Further, this change will provide for more consistent, complete, and efficient use of electronic database tools for research relative to our regulations. It is not logical to expect the owners of the various databases to program their research engines to look for "employe" if someone has requested a search for "employee." Accordingly, this ministerial change to section 63.137 as proposed in our April 19, 2011 order is carried forward to the final rule as set forth in Annex A to this order.

The changes to section 63.137 reflected in Annex A of this order shall be effective upon publication in the *Pennsylvania Bulletin*.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 28, 2010, the Commission submitted a copy of the notice of proposed rulemaking, published at 40 Pa.B. 5819, to IRRC and the Chairpersons of the House Committee on Consumer Affairs and the Senate Committee on Consumer Protection and Professional Licensure for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the House and Senate 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 Commission 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 May 16, 2012, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on May 17, 2012, and approved the final-form rulemaking.

Conclusion

Accordingly, pursuant to sections 501, 504, 2203(12), 2205, and 2208 of the Public Utility Code, 66 Pa.C.S. §§ 501, 504, 2203(12), 2205, and 2208; sections 201 and 202 of the Act of July 31, 1968, P. L. 769 No. 240, 45 P. S. §§ 1201—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); sections 745.5 and 745.7 of the Regulatory Review Act, 71 P. S. §§ 745.5 and 745.7; 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 adopting the final regulations set forth in Annex A; *Therefore*,

It Is Ordered That:

1. The regulations of the Commission, 52 Pa. Code Chapter 63, are amended by amending § 63.137 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 as to form and legality and to the Governor's Budget Office for review for fiscal impact.

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

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

5. The regulations in Annex A become effective upon publication in the *Pennsylvania Bulletin*. Thereafter, an order shall be issued at Docket No. M-2008-2074891 rescinding the terms of the blanket waiver.

6. A copy of this order and Annex A shall be served on the Pennsylvania Telephone Association, the Office of Consumer Advocate, the Office of Small Business Advocate, and the Office of Trial Staff and a copy of this Order and Annex A shall be posted on the Commission's web site.

7. The contact persons for this matter are Sheila Brown, Bureau of Consumer Services, sheibrown@pa.gov; Melissa Derr, Bureau of Technical Utility Services, mderr@pa.gov; and Louise Fink Smith, Law Bureau, finksmith@pa.gov. Alternate formats of this document are available to persons with disabilities and may be obtained by contacting Sherri Delbiondo, Regulatory Coordinator, Law Bureau, (717) 772-4597, sdelbiondo@pa.gov.

ROSEMARY CHIAVETTA,
Secretary

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 42 Pa.B. 3182 (June 2, 2012).)

Fiscal Note: Fiscal Note 57-278 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 63. TELEPHONE SERVICE

Subchapter J. CONFIDENTIALITY OF CUSTOMER COMMUNICATIONS AND INFORMATION

§ 63.137. Service monitoring and related matters.

This section sets forth procedures for service evaluation and monitoring; use of pen registers and trap and trace devices; and responses to government requests for assistance in conducting wiretap, pen register, trap and trace and other types of investigations.

(1) *Compliance with State and Federal laws.* The telephone company shall comply with State and Federal laws regulating the recording, interception, disclosure or use of customer communications and the use of pen registers and trap and trace devices. Other recording of conversations is prohibited.

(2) *Service evaluation and monitoring.* The telephone company may evaluate and monitor those aspects of its operations, including customer communications, necessary for the provision of service to its customers.

(i) *Service evaluation.* A telephone company may engage in the sampling of customer communications by telephone company employees or automated equipment to measure service quality. This sampling of customer communications shall be kept to the minimum needed to measure service quality. Service evaluation facilities may not have monitoring access points outside official evaluation quarters. Entry to evaluation quarters shall be strictly controlled. During periods when evaluation quarters are not in use or when otherwise considered appropriate, the quarters shall be securely locked or the equipment rendered inoperative or accessible only by authorized personnel. Access to service evaluation documents that contain individual employee-customer contact information shall be closely guarded to protect the customer's privacy.

(ii) *Maintenance monitoring.* A telephone company may engage in the monitoring of telephone company facilities by an employee entering the circuit to listen and carry out tests to determine whether noise, "cross-talk," improper amplification, reproduction or other problems may exist. This includes the mandatory routines covered by equipment test lists, tracing of circuits for corrective action and other similar activities. The monitoring may not interfere with the voice or data information being carried.

(iii) *Administrative monitoring.* A telephone company may engage in the monitoring of telephone company employee contacts with customers and with other employees which have a direct bearing on the quality of service provided to customers. The monitoring equipment shall be secure at all times and only used by authorized persons. The monitoring may be performed from a remote location. When the equipment is in a remote location and is not in use, it shall be secured or made inoperative or accessible only by authorized personnel.

(3) *Security department monitoring.* To the extent permitted by applicable State and Federal law, the security department may conduct monitoring, including recording of conversations, in conjunction with the investigation of toll fraud or other unlawful uses of the telephone network. The security department shall maintain complete records of monitoring performed. At a minimum, the records shall include the date and times between which the monitoring was conducted, the name, address and telephone number of the person from whose service the communication was placed and by whose service it was received, the name of the person making the communication, the duration of the communication and information derived from the monitoring. The records shall be retained for the period of time required by telephone company document retention guidelines.

(4) *Use of pen registers and trap and trace devices.*

(i) Pen register and trap and trace devices may be used by telephone company employees in accordance with applicable State and Federal law.

(ii) In each instance in which pen register or trap and trace devices are used for a purpose other than for the operation, maintenance or testing of the network, for billing purposes or for the provision of service, a record shall be made showing the dates and times between which the pen register or trap and trace device was used, the names of the persons by whom the use was authorized, directed to be performed and conducted, and the name, address and telephone number of the person whose service was subject to use of the pen register or trap and trace device. The record shall be retained for the time required by applicable telephone company document retention guidelines.

(5) *Employee authorization.* An employee may not perform service evaluation, maintenance monitoring or administrative monitoring or direct that these activities be performed unless the employee is authorized and has a need to do so as part of the employee's work duties. An employee may not use pen register or trap and trace facilities or direct that such a device or facilities be used unless the employee is authorized and has a need to do so as part of regular work duties.

(6) *Government orders.* Orders from courts and other lawful process requiring the telephone company to assist in the performance of pen register searches, trap and trace searches, wiretap searches and other types of investigations shall be handled in accordance with applicable State and Federal law. The telephone company shall maintain a record of each investigation conducted under this subsection. The record shall be retained for the time required by applicable telephone company document retention guidelines.

[Pa.B. Doc. No. 12-1197. Filed for public inspection June 29, 2012, 9:00 a.m.]

Title 55—PUBLIC WELFARE

DEPARTMENT OF PUBLIC WELFARE

[55 PA. CODE CHS. 1187 AND 1189]

Participation Review Process for Medical Assistance Nursing Facilities

The Department of Public Welfare (Department) amends §§ 1187.21 and 1189.3 (relating to nursing facility participation requirements; and compliance with regulations governing noncounty nursing facilities) and adds Subchapter L (relating to nursing facility participation requirements and review process) to read as set forth in Annex A under the authority of section 443.1(8) of the Public Welfare Code (code) (62 P. S. § 443.1(8)). Notice of proposed rulemaking was published at 40 Pa.B. 6405 (November 6, 2010).

Purpose of Final-Form Rulemaking

The purpose of this final-form rulemaking is to provide nursing facilities and other interested persons with the regulations that the Department will use in exercising its authority to manage the enrollment and participation of nursing facilities as providers in the Medical Assistance (MA) Program.

This final-form rulemaking establishes a transparent, standardized process for the submission of bed requests and bed transfer requests and identifies the factors that the Department will use to evaluate and respond to bed requests. The final-form rulemaking also promotes a more balanced long-term living (LTL) system in this Commonwealth consistent with applicable Federal law. The overall goal of the final-form rulemaking is to serve the best interests of MA recipients by supporting the growth of home and community-based services (HCBS), which consumers prefer as a setting for LTL services, while ensuring that MA recipients continue to have access to medically necessary nursing facility services.

Background

This final-form rulemaking implements section 443.1(8) of the code, which requires the Department to promulgate regulations to establish the process and criteria for reviewing and responding to requests by nursing facilities to enroll in the MA Program or to increase their certified MA bed complements. Section 443.1(8) of the code was enacted by the General Assembly in response to the Commonwealth Court's decision in *Eastwood Nursing and Rehabilitation Center v. Department of Public Welfare*, 910 A.2d 134 (2006). In *Eastwood*, the Court held that the Department's statement of policy published at 28 Pa.B. 138 (January 10, 1998) regarding its treatment of requests by facilities to increase MA beds was unpromulgated and, therefore, an unenforceable "binding norm."

Pending the issuance of regulations or until June 30, 2012, whichever comes first, section 443.1(8) of the code authorizes the Department to continue to review pending and future requests for enrollment or expansion in accordance with the process and guidelines in the statement of policy published at 28 Pa.B. 138. Section 443.1(8)(iii) of the code also authorized the Department to amend the statement of policy published at 28 Pa.B. 138, after soliciting public comments, if the Department determined changes to the statement of policy would "facilitate access to medically necessary nursing facility services or . . . assure that long-term living care and services under the medical assistance program will be provided in a manner consistent with applicable Federal and State law, including Title XIX of the Social Security Act." After soliciting and considering public comments, the Department published an amended statement of policy and its responses to the public comments at 40 Pa.B. 1766 (April 3, 2010). See 42 Pa.B. 3748 (June 30, 2012) for a statement of policy rescinding § 1187.21a.

Affected Individuals and Organizations

This final-form rulemaking will affect nonpublic and county nursing facilities that currently participate in the MA Program or plan to enroll in the MA Program. MA recipients who choose to receive care in a nursing facility may also be affected.

Accomplishments and Benefits

The final-form rulemaking provides clear guidance to nursing facilities who seek to enroll in the MA Program or expand their current complement of MA beds. The final-form rulemaking gives nursing facilities notice of the standards that will be applied to these requests so that they can better plan their operations in the long term. Both nursing facilities and the Department will benefit from having enforceable standards that control the participation review process. MA recipients will benefit from the assurance that they will have adequate access to medically necessary nursing facility services. Finally, the final-form rulemaking also accomplishes the mandate of section 443.1(8) of the code by promulgating regulations to control the participation review process.

Fiscal Impact

Costs to MA recipients are not anticipated as a result of this final-form rulemaking. The Department expects costs or savings to the regulated community, local governments or State government associated with the implementation of the final-form rulemaking to be the equivalent to the costs and savings under the statement of policy. Under the statement of policy, the estimated cost to nursing facility providers or counties operating nursing facilities was $1,900 per request. For State Fiscal Year 2011-2012, the Commonwealth's estimated cost to administer the participation review process is $323,211 and the estimated savings is $5.811 million in State funds.

Paperwork Requirements

This final-form rulemaking contains paperwork requirements for the Commonwealth and for nursing facilities who apply for enrollment in the MA Program or an expansion of their existing MA bed complement. Required forms are not associated with the final-form rulemaking. Each application submitted by a nursing facility to the Department must include the information in § 1187.172 (relating to contents and submission of bed requests). The

time required to comply with these requirements is estimated to be equivalent to that required to comply with the submission of exception requests under the statement of policy.

Public Comment

The Department received nine letters through the public comment process, which included written comments from three of the nursing facility trade associations (LeadingAge PA (formerly the Pennsylvania Association of Non Profit Homes for the Aging), the Pennsylvania Association of County Affiliated Homes and the Pennsylvania Health Care Association), nursing facility providers, Senator Stewart J. Greenleaf and Representative Bernard T. O'Neill. The Independent Regulatory Review Commission (IRRC) also commented on the proposed rulemaking. In addition, the Department met with representatives of the nursing facility trade associations on August 15 and September 26, 2011, to discuss the final-form rulemaking.

Discussion of Comments and Major Changes

Following is a summary of the major comments received within the public comment period following publication of the proposed rulemaking and the Department's response to those comments.

General—Brain injury and Olmstead planning process

One commentator asked the Department to identify residents of nursing homes within specific age ranges who have a traumatic or nontraumatic brain injury and to provide information on an individual Olmstead planning process that assures brain injury rehabilitation is needed to prepare the individuals for participation in community services under the Independence or CommCare Waivers.

Response

This final-form rulemaking regulates the enrollment and participation of nursing facilities as providers in the MA Program. Although the Department requests data regarding specialized medical services if an applicant proposes to serve individuals needing those services, under §§ 1187.174(7) and 1187.176(a)(2)(iii) (relating to information and data relevant to bed requests; and criteria for the approval of bed requests other than bed transfer requests), this final-form rulemaking does not specifically address or identify individuals with brain injury. Therefore, this comment, which is more in the nature of an information request, is outside the scope of the comment and response process.

Economic impact—Regulatory Analysis Form

IRRC asked what costs are associated with the statement of policy because the Regulatory Analysis Form (RAF) stated the cost and savings imposed by the final-form rulemaking will be equivalent to the costs associated with the former statement of policy. IRRC also requested an estimate of the fiscal savings and costs associated with implementation and compliance for the current year and 5 subsequent years.

Response

As previously noted, nursing facility costs associated with the statement of policy are estimated to be $1,900 per request and include approximately 15 hours of labor (10 hours at a professional level and 5 hours at a nonprofessional level), the cost of copies (1 original package and 2 copies from 20 to 100 pages each) and delivery. This estimate does not include costs associated with a facility's bed assessment independent of the statement of policy, such as feasibility or market studies, financial projections and other related data.

In addition, the RAF reflects an estimate of the fiscal savings and costs associated with implementation and compliance for the current year and 5 subsequent years.

General—MA nursing facility beds

One commentator offered a general objection to the addition of any MA nursing facility beds in this Commonwealth. The commentator suggested there should be a moratorium on new Medicaid licensed beds in this Commonwealth. The commentator further suggested that the Department delete the sections that refer to the addition of licensed Medicaid beds either at a nursing facility or a continuing care retirement community (CCRC).

Response

The Department does not agree that there should be a moratorium on additional MA nursing facility beds. There may be instances in which the enrollment of a new MA nursing facility provider or an increase in the bed capacity of an existing MA nursing facility provider is needed to assure that MA recipients continue to have access to medically necessary nursing facility services. For example, an increase in bed capacity may be needed if nursing facility services are not available for MA recipients who reside in a particular locale or who have specialized medical needs that are not being met by the current MA nursing facility provider complement.

§ 1187.162. Definitions—Closed-campus CCRC

A commentator suggested changing the definition of "closed-campus CCRC" by allowing for the CCRC to have a nursing facility component no more than 30 miles from the campus on which the CCRC's independent living units are located. IRRC questioned what the phrase "same campus" means and if the nursing facility component of the closed-campus CCRC has to be located within a specific distance of the independent living units.

Response

As discussed later in further detail, the Department received comments expressing opposite opinions regarding CCRC bed requests. After carefully considering the varying viewpoints, the Department has decided not to include separate CCRC provisions and eliminated the provisions pertaining solely to closed-campus CCRCs in this final-form rulemaking. A nursing facility within a CCRC will continue to have the opportunity to submit a bed request, including bed transfer requests, under § 1187.175 (relating to criteria for the approval of bed transfer requests) and § 1187.176.

§ 1187.162—Closed-campus CCRC—Entrance fee, resident agreement and marketing

One commentator suggested broadening the criteria pertaining to paid entrance fees under the definition of "closed-campus CCRC." The commentator suggested criteria regarding payment, amount and availability of the entrance fee as an asset to pay expenses. In addition, the commentator suggested modifying the criteria around the resident agreement. The commentator suggested striking the language "that is effective at least 30 days and" and recommended additional language related to the rights and privileges of subscribers to move between types of care and language related to prohibiting subscribers from inappropriately shifting assets. The commentator stated that the subparagraph regarding marketing nursing facility components is overly broad and has the potential of restricting important information about CCRCs to consumers. The commentator recommended the following language: "The CCRC markets its nursing facility as a component of the larger CCRC." IRRC also questioned the need for this requirement.

Response

As previously stated, the Department decided not to include separate CCRC provisions and eliminated the provisions pertaining solely to closed-campus CCRCs in this final-form rulemaking. Nursing facilities within CCRCs may submit bed requests and bed transfer requests under §§ 1187.175 and 1187.176.

§ 1187.172(a)(4). Contents and submission of bed requests—Compliance history

One commentator suggested that because licensure surveys vary from state to state and considerably within regions in states, it is unfair to consider the licensure and certification history of out-of-State facilities in evaluating a bed request by a facility in this Commonwealth. The commentator requested that the language regarding licensure, participation, sanctions and remedies imposed on other nursing facilities owned or controlled by the same applicant be limited to facilities in this Commonwealth only.

Another commentator recommended deleting the language "sanctions or remedies" and revising the language to consider only civil monetary penalties for repeated resident rights violations. IRRC also asked what the phrase "imposition of remedies" means and why an applicant is required to provide information to the Department about the "imposition of remedies." Both IRRC and the commentator suggested the provisions focus on violations that lead to the imposition of fines instead of the "imposition of remedies."

Response

The Department determined that it is relevant to the review process to consider the history of an owner's Medicare and Medicaid compliance. Under this final-form rulemaking, applicants are not required to disclose every citation of regulatory noncompliance. Rather, an applicant shall disclose whether the legal entity, an owner of the subject facility or a related party involved in the proposed project owned, operated or managed a nursing home that had serious deficiencies that it was precluded from participating in the Medicare and Medicaid programs, had its license to operate revoked or suspended, was subject to sanctions or remedies because it violated the rights of its residents or had deficiencies that immediately jeopardized their health and safety or was designated a special focus facility by the Federal government. An owner's experience in other states becomes particularly relevant in instances when the owner may not be currently operating a nursing facility in this Commonwealth but is, or has, operated a nursing facility in another state that has been sanctioned or closed due to noncompliance issues. Limiting consideration of compliance history to nursing facilities in this Commonwealth does not afford the Department the capability to consider this critical information.

The final-form rulemaking uses the terms "civil monetary penalties, sanctions and remedies" because these terms are used in Federal law and regulations, including section 1919(h) of the Social Security Act (42 U.S.C.A. § 1396r(h)) and 42 CFR 488.406 (relating to available remedies), and by state licensing entities. Further, sanctions or remedies may be imposed that do not involve imposition of fines or civil monetary penalties. For example, under Federal law and regulations, other remedies that may be imposed depending on the violations include imposition of a temporary manager, the denial of payment for new admissions, directed plans of correction, directed in-service training and State monitoring. See 42 CFR 488.406(a). If the language was changed to focus solely on civil monetary penalties, instances of potential or actual harm or immediate jeopardy of a resident's health or safety could be excluded from the review. The Department, however, added language to clarify that imposition of civil monetary penalties, sanctions or remedies for resident rights violations are under State or Federal law.

§ 1187.173(a)(1) and (2). Review and public process relating to bed requests—Groups

IRRC recommended deleting "the Department will use its best efforts" because it is nonregulatory and does not establish a binding norm. In addition, a commentator recommended the Department shorten the decision time frame for bed requests by developing four review groups with quarterly reviews as opposed to two review groups with biannual reviews.

Response

The Department agrees with IRRC's comment and deleted "use its best efforts to." Instead, the Department added language extending the review process an additional 90 days if public comments are received. This will allow an appropriate amount of time to research, analyze and process the request. Further, extensions are consistent with past practice and have not resulted in access issues.

§ 1187.173(c)—Expedited review

One commentator requested clarifications or examples of "good cause" that would constitute an approval for an expedited review. In addition, IRRC asked the Department to include the criteria that will be used to determine "good cause."

Response

Specifically limiting the criteria used to determine good cause for the expedited review of bed requests in the final-form rulemaking may not benefit the regulated community. By retaining the discretion and flexibility of determining good cause for each request on a case-by-case basis, the Department will avoid denying good cause based solely on a finite set of circumstances and criteria that may not encompass all scenarios. The Department intends this exception to apply only in limited situations, such as a catastrophic event or natural disaster. In determining whether good cause exists, the Department will consider among other things whether operational urgency is critical to MA recipients and the MA Program.

§ 1187.173(d)—Public process

IRRC asked the Department to identify the web site where information will be posted and questioned whether the Department will consider posting the comments it receives. One commentator questioned where and when the online workbooks will be posted, the period of time for data in the workbook and how applicants will be made aware of their availability. The commentator also recommended the workbook contain the day-one MA days and the occupancy for the county and the Commonwealth. In addition, the commentator requested the Department provide detailed information regarding the publication and public comment period for bed requests and asked how applicants will be made aware of their availability. Another commentator endorsed the transparency in the public process. This commentator requested that the public process include bed transfer requests, closed-campus CCRC bed requests and the posting of comments received by the Department.

A commentator also suggested that under the public process provisions, closed-campus CCRC bed requests are

treated in the same manner as bed transfer requests by providing for a monthly posting and a 15-day public comment period. The commentator suggested deleting the CCRC provisions or revising the provisions.

Response

The Department amended subsection (d) to clarify that the data book will be available on the Department's web site at www.dpw.state.pa.us/provider/doingbusinesswithdpw/longtermcarecasemixinformation/index.htm. The Department will update the data book as information becomes available and reports are completed. Each piece of data will be clearly labeled with the period of time it represents. The MA day-one admission rates and MA occupancy rates are considered data relating to availability of MA nursing facility services under subsection (d)(1)(i). Therefore, it will be included in the workbook.

In addition, subsection (d) was amended to clarify that the bed requests and bed transfer requests will be posted on the Department's web site. Further, language was added to subsection (d) that the Department will post both the written public comments regarding bed and bed transfer requests received by the Department as well as the applicant's responses to those comments. Public comments will be posted to the Department's web site after the public comment period. An applicant's responses to those comments will be posted to the Department's web site upon receipt. Since the bed request information will be accessible online, the Department deleted language pertaining to providing copies of the requests to the public.

In response to the comment regarding the public process for a closed-campus CCRC bed request, as previously discussed, the Department has deleted the separate CCRC provisions. Therefore, there is not a public process specifically for CCRCs.

§ 1187.174. Information and data relevant to bed requests

One commentator requested that closed-campus CCRC beds not be included when calculating the MA occupancy rates in either the county or primary service area (PSA) when used to determine the need for additional MA beds. The commentator also requested that the final-form rulemaking be revised to clarify what beds will be used in this MA occupancy rate calculation if the CCRC provisions remain as part of the final-form rulemaking.

Response

As previously stated, the Department decided not to include separate CCRC provisions and eliminated the provisions pertaining solely to closed-campus CCRCs in this final-form rulemaking.

§ 1187.174(3)—Data regarding the availability of HCBS

IRRC and a commentator questioned what is the need for the data regarding the availability of HCBS and admissions and discharges at MA nursing facilities. The commentator suggested that expansion of both HCBS and availability of nursing facility beds is needed but that one does not necessitate preclusion of the other. The commentator also requested HCBS not be considered when determining the need for additional MA beds and that it be deleted from the final-form rulemaking.

Response

The Department disagrees with the commentator's recommendation to eliminate this provision. Consideration of the availability of HCBS has been a part of the Department's needs assessment for additional MA-certified beds in a particular area since the first statement of policy published at 28 Pa.B. 138. The Department explained:

> In considering its MA Program needs, the Department will also examine whether those needs can be appropriately met through the provision of HCBS rather than additional nursing facility beds. The Department views HCBS to have several important benefits. Among other things, many older residents of this Commonwealth and residents with disabilities prefer HCBS over institutional services. Given a choice, the Department believes that many people would choose to remain in their own homes and communities rather than reside in a nursing facility. Moreover, in many, if not most, instances, the Department has found that HCBS are less expensive than institutional services.

The Department also noted at 28 Pa.B. 138, 139 that an underlying objective of the statement of policy was to promote the Department's ongoing efforts to develop a fuller array of service and support options for consumers. The Department's experience during the past 10 years has only reinforced these views and its commitment to balance the LTL service system to provide MA recipients with more service choices to meet their needs.

For many consumers, HCBS continues to be a more preferable and less costly option than institutional care. By enabling consumers to receive necessary care and services in their own homes, HCBS can delay or prevent institutionalization of individuals who would otherwise require care in nursing facilities. As a result, as the Department has worked to steadily increase the supply of HCBS throughout this Commonwealth, there has been a decline in the use of nursing facility services. The Department expects this trend to continue as HCBS and support options for consumers are further expanded.

Balancing the LTL service system does not mean that the Department will never approve increases in MA nursing facility beds. It does mean, however, that the Department intends to evaluate requests for the increases in the context of creating a balanced continuum of publicly-funded care. By directing the Department to continue to use the statement of policy and develop regulations in reviewing and responding to bed requests, the General Assembly endorsed this approach. See the act of June 30, 2007 (P. L. 49, No. 16). Consequently, as has been done since the first statement of policy was published at 28 Pa.B. 138, the Department will continue to consider the availability of HCBS as a relevant factor in assessing the need for additional institutional capacity in the MA Program.

§ 1187.174(5)—Data regarding admissions and discharges

IRRC and a commentator questioned the need for data regarding admissions and discharges of the MA nursing facility and the MA nursing facilities in the PSA in determining adequate access for MA eligible individuals. The commentator requested that it be deleted from the final-form rulemaking.

Response

The Department disagrees that data regarding admissions and discharges at MA nursing facilities should be deleted. This information can provide useful data that is indicative of MA recipients' access to nursing facility services in a particular area.

§ 1187.174(7)—Specialized medical services

One commentator questioned how the Department intends to assure that a nursing facility which requests new

MA beds to provide specialized services will actually provide that service and whether the Department plans to decertify MA beds if a provider does not fulfill the specialized services.

Response

The Department has monitored the status of approved projects since the first statement of policy published at 28 Pa.B. 138 and intends to continue monitoring approved projects to ensure that the beds are licensed, certified and available for occupancy within the required timeline as agreed to by the Department and subject facility. As a condition of the approval, the Department has required a semiannual project status report to be submitted 6 months after receiving approval and every 6 months thereafter. Upon completion of a project involving specialized medical services, the Department will continue to monitor to determine if the conditions agreed to continue to be met by reviewing an annual status report submitted by the nursing facility.

§ 1187.175. Criteria for the approval of bed transfer requests

One commentator suggested the provisions regarding bed transfer requests are written in a manner that will limit a provider's ability to make modifications to the physical plant, provide the highest quality care and meet regulatory expectations. This commentator questioned if the Department intends for the capital component payment to follow the bed from the surrendering provider to the receiving provider. The commentator recommended the capital component payment follow the bed, but at a minimum requests that the Department includes language in the final-form rulemaking to clarify this issue.

Another commentator expressed support for the concept of bed transfers between facilities and agrees that a facility receiving the MA licensed beds should be held to an established minimum MA occupancy level. The commentator asserted that population and demographic shifts within this Commonwealth do occur and that the Commonwealth and interested nursing facilities should have the ability to negotiate bed transfers.

Response

The Department does not agree that the regulations limit a provider's ability to make modifications to its physical plant, provide the highest quality care and meet regulatory expectations. To the contrary, regardless of whether they transfer beds, nursing facility providers can and shall modify the physical plant as may be necessary to provide quality care consistent with Federal and State MA Program participation requirements.

Although the participation review regulations do not address whether the beds that are transferred to the receiving facility will be eligible for the capital component of payments, the Department's regulations regarding payment for nursing facility services provide the guidelines for the waiver of the capital component payment limitation in certain circumstances. See §§ 1187.113 and 1187.113b (relating to capital component payment limitation; and capital cost reimbursement waivers—statement of policy). In accordance with those provisions, the provider can include a request for capital component payments with its bed request and the Department will act upon the payment request in the context of reviewing the bed transfer request.

The Department appreciates the commentator's support of the concept of bed transfers between nursing facilities and the requirement that the receiving provider achieve and maintain a specific MA day-one admission rate as stated under § 1187.175(a)(2).

§ 1187.175(a)(2)—MA day-one admission rate

One commentator asked the Department to clarify how it will calculate the surrendering provider's MA day-one admission rate that the receiving provider's MA day-one admission rate will be required to meet or exceed.

Response

The Department will determine the MA day-one admission rate using the most recent MA day-one report completed and posted to its web site prior to the application date of the bed transfer request. This report is generally updated quarterly using data obtained from Minimum Data Set submissions. Each report spans a full year which ends on the day prior to each picture date. A picture date is the first calendar day of the second month of each calendar quarter as defined under § 1187.2 (relating to definitions) and shows a "snapshot" of residents in nursing facilities in this Commonwealth.

Section 1187.174(2) has been amended to provide additional clarification as to which report the Department will use to determine the MA day-one admission rate. In addition, the definition of "MA day-one admission rate" has been amended by replacing the language "fiscal year" with "12-month period" and a definition for "MA day-one report" has been added to § 1187.162 (relating to definitions).

§ 1187.175(a)(5)—(7)—Change in peer group and costs to the MA Program (renumbered as § 1187.175(a)(4)—(6))

One commentator questioned whether a bed transfer request will be disapproved if the request results in one of the nursing facilities changing peer groups or will only be approved if both nursing facilities remain in the same peer groups as prior to the bed transfer.

Another commentator expressed the concern that the criterion regarding increased MA cost resulting from bed transfers will benefit the Commonwealth's Medicaid budget, but not MA recipients. The commentator recommended revising the language to allow for increased costs to the MA Program if it results in improving or maintaining access to care. IRRC requested an explanation of how the criteria for the approval of bed transfer requests will benefit MA recipients.

Response

These provisions avoid the excessive shifting of nursing facility beds as a means to manipulate peer groups for an increased per diem rate. If the per diem rates would increase as a result of peer group manipulation, it would be at the expense of other facilities and ultimately the MA recipients and the MA Program.

The Department uses peer groups, peer group medians and peer group prices to determine case-mix rates for nonpublic nursing facilities for each State fiscal year. The Department uses geographic location and bed size to group facilities, except those nursing facilities that meet the definition of "special rehabilitation facility" or "hospital-based nursing facility," into one of 12 peer groups in accordance with § 1187.94 (relating to peer grouping for price setting). The median of each peer group is used to calculate prices for three of the four cost centers (resident care, other resident related and administrative) of each peer group in accordance with § 1187.96 (relating to price- and rate-setting computations). These peer group prices are a major component in the per diem rates.

The Department will not disapprove a bed transfer request if either of the facilities changes peer groups unless the change in peer groups results in increased reimbursement for either the surrendering or receiving provider or decreased reimbursement for any other providers. Data used to make the determination of whether an increase in either the surrendering or receiving provider's MA rate or whether there is a decrease in any other providers' MA rate will occur will be from the most recent rate quarter as of the date of the request for the bed transfer. If the rates for the most recent rate quarter are not final, the data used for the proposed rates will be used. The surrendering or receiving provider will stay in the originating peer group if it still meets the criteria for that group since this final-form rulemaking does not supersede the regulations regarding peer groups in § 1187.94.

§ 1187.175(a)(1)—(8)—Bed requests and bed transfer requests

§ 1187.177(a)(1)—(4). Criteria for the approval of bed requests other than bed transfer requests—Bed requests and bed transfer requests (§ 1187.177 renumbered as § 1187.176)

One commentator questioned whether it is the Department's intent to disapprove a request if all the criteria are not met. The commentator requested clarification on how the approval criteria will be applied and recommended that the Department provide some room for flexibility in the provisions to allow for the exchange of information between the applicant and the Department as well as exceptions to the established provisions.

Response

The Department will disapprove a bed transfer request or bed request if any of the items in §§ 1187.175(a) and 1187.176(a) are not satisfied.

In addition, for bed transfer requests under § 1187.175, the Department added subsection (c) and amended subsection (a)(3) and (4) to clarify that approval of a bed transfer request is not a determination that additional MA-certified beds are needed in a particular region to maintain or improve MA recipients' access to medically necessary services. Bed transfers pertain to the redistribution of existing beds in the MA Program, not the addition of new beds. In reviewing a bed transfer request, the Department will assess whether or not approval of a bed request would create a need for additional beds in a particular region under § 1187.175(a)(3) and (4). The Department also added criterion under subsection (a)(8) to clarify that the receiving provider shall be licensed, MA-certified and available for immediate occupancy prior to the surrendering provider decertifying and closing beds.

§§ 1187.175(b) and 1187.177(c)—Goal of rebalancing

§ 1187.176. Criteria for the approval of bed requests other than bed transfer requests—Goal of rebalancing

IRRC requested the Department to point to the statutory language that would support the Department's goal to rebalance the Commonwealth's publicly-funded LTL system to create a fuller array of service options for MA recipients. IRRC also asked the Department to explain what criteria will be used to make this determination. A commentator asked how the Department will determine whether or not a request will negatively affect the goal to rebalance the long-term care delivery system, how it will be measured and whether the Department will consider the negative impact on affected nursing facilities as part of the determination.

Response

Consideration of the availability of HCBS has been a part of the Department's needs assessment for additional MA-certified beds in a geographic area since the first statement of policy was published at 28 Pa.B. 138. By directing the Department to continue to use the existing statement of policy and develop regulations in reviewing and responding to bed requests, the General Assembly sanctioned this approach. See 28 Pa.B. 138 and section 443.1(8) of the code. Moreover, the General Assembly has specifically endorsed a balance of institutional and home-and-community based long term care as "in the best interest of all Pennsylvanians" in the act of July 25, 2007 (P. L. 402, No. 56).

As previously noted, balancing the LTL service system does not mean that the Department will never approve increases in MA nursing facility beds. What it does mean, however, is that the Department will evaluate requests for increases in the context of creating a balanced continuum of publicly-funded care.

The Department will consider the availability of both existing nursing facility services and alternative HCBS in assessing the need for additional institutional capacity in the MA Program and if the county or PSA of the requesting facility has sufficient nursing facility beds.

§§ 1187.175(b)(2), 1187.176(b)(2) and 1187.177(c)(2)—Alternatives to nursing facility bed requests

A commentator contends that the focus in considering alternatives to nursing facility services should be solely on the needs of the recipient and not the cost to the MA Program and recommended modifying the language and eliminating consideration of costs to the MA Program.

Response

The criteria regarding alternatives allows for the Department to manage and target increases in MA beds and determine where the beds are required. This process assures MA recipients have appropriate access to care. Careful stewardship of institutional resources permits the expansion of other service options for MA recipients, such as more HCBS.

§ 1187.176—Criteria for the approval of closed-campus CCRC bed requests

The Department received varying comments regarding CCRC bed requests. Senator Stewart J. Greenleaf, Representative Bernard T. O'Neill and several commentators expressed their support for allowing CCRCs to access MA certified beds under limited circumstances to allow residents to age in place. Another commentator, however, suggested the section is crafted for the benefit of the Department's Medicaid budget and not for the benefit of MA recipients and asked that CCRCs be allowed temporary certification so residents may age in place.

Another commentator supported the overall intent of the proposed rulemaking to provide a limited bed process for CCRCs, but suggests refining the language to better meet the Department's policy objectives.

In contrast, several commentators expressed concerns with the special provisions provided for closed-campus CCRCs. They suggest the provisions are too restrictive or offer a strategic advantage and special treatment to one small segment of nursing facilities. Another commentator asserts the MA day-one requirement for closed-campus CCRC requests must be consistent with the requirements for another nursing facility provider seeking to add MA beds. The commentators requested reexamination of the

CCRC provisions, amendment of the provisions or deletion of the provisions. IRRC also questioned the need for separate criteria for CCRC bed requests compared to non-CCRC bed requests and asked for these criteria to be explained. One of the commentators requested the Department provide information on how it will monitor whether or not the provider continues to meet the definition of a "closed-campus CCRC."

Finally, IRRC and a commentator also expressed concern with the ratio of a CCRC's independent living units to its nursing facility beds, which must be equal to or less than 17 independent living units to 1 nursing facility bed. IRRC requests an explanation of the basis for the ratio. The commentator contended the provision is unduly limiting, arbitrary and not reflective of industry practice. The commentator requested the provision be deleted.

Response

As previously stated, after careful consideration, the Department has decided not to include separate CCRC provisions in the final-form rulemaking. The provisions pertaining solely to closed-campus CCRCs, including proposed § 1187.176, have been deleted and §§ 1187.176—1187.178 have been renumbered accordingly. Under the final-form rulemaking, the process and criteria for reviewing a CCRC nursing facility bed request for participation in the MA Program is the same process and criteria for all nursing facility bed requests. The Department does not agree that establishing a uniform process and set of criteria for bed requests will prohibit MA recipients from accessing medically-necessary nursing facility services. To the contrary, having a separate set of criteria for nursing facility beds associated with a CCRC may inhibit the Department's efforts to develop a fuller array of services.

§ 1187.177(a)(3)(ii) and (iv)—MA occupancy rate (renumbered as § 1187.176)

A commentator suggested that the requirement of an MA occupancy rate for bed requests places an unreasonable burden on nursing facilities because it will impose an artificial application of a mandated percentage of MA residents inhibiting them from expanding their outreach to MA-eligible individuals. The commentator requested the paragraph be deleted from the final-form rulemaking. IRRC also inquired regarding the need for this criterion.

The commentator also questioned the provision to employ welfare or MA recipients in its subject facility and suggested the deletion of the provision.

Response

The requirement to maintain a specified MA occupancy rate does not inhibit outreach to MA eligible individuals. Since the provision permits a facility to exceed the average MA occupancy rate, it contemplates and allows expanded outreach. In addition, this provision is needed to ensure that MA eligible individuals will have adequate access to medically necessary nursing facility services. Maintaining a minimum MA occupancy rate suggests that MA recipients are occupying the additional beds as necessary.

After careful consideration, the Department deleted the requirement to employ welfare or MA recipients in the subject facility as a regulatory requirement.

§ 1187.177(b)—Bed request overall occupancy rates (renumbered as § 1187.176)

IRRC asked the Department to explain how it determined the numeric percentages regarding average annual occupancy rate to be appropriate and reasonable. A commentator also recommended that an occupancy rate threshold of 90% or less be deemed sufficient in assessing the need for additional MA-certified beds in a particular PSA and county.

Response

Although the Department considers individual nursing facilities to be fully occupied with an occupancy ratio in the range of 90% to 95% with smaller facilities (119 beds or less) at the lower end of the range the Department disagrees with the recommendation that the occupancy rate threshold be lowered from 95% to 90%. The overall occupancy rate in § 1187.176(b) refers to the overall occupancy rate for a particular region, not an individual facility. An individual nursing facility currently enrolled in the MA Program submitting a request for additional beds may be at full capacity while an adequate number of beds are still available in the requesting facility's county and PSA to meet the needs of MA recipients. The Department will not approve additional nursing facility beds unless they are needed to provide access to medically necessary nursing facility services in a particular region.

Other states have varying overall occupancy criteria for adding new nursing facility beds. For example, Ohio has a moratorium on new beds, New York's overall utilization threshold is 97% and Maryland's overall regional occupancy target is 95% for bed need projections.

Additional Changes

In addition to the changes previously discussed, the Department amended § 1187.173(b) (relating to review and public process relating to bed requests) by changing "those" to "bed transfer" and adding language to clarify the timeline for decisions pertaining to bed transfer requests. Subject to expedited review, the Department will issue decisions on bed transfer requests within 120 days after the expiration of the 30-day public comment period. This change will provide nursing facility providers with a specific timeline for decisions relating to bed transfer requests. Also, the Department amended § 1187.175(a)(6), renumbered as § 1187.175(a)(5). For purposes of consistency, "receiving facility" was changed to "receiving provider." Further, the Department made a correction to § 1187.176(a)(2)(i) and (ii). The subparagraphs incorrectly stated "primary service" instead of "primary service area."

Regulatory Review Act

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on October 22, 2010, the Department submitted a copy of the notice of proposed rulemaking, published at 40 Pa.B. 6405, to IRRC and the Chairpersons of the House Committee on Human Services and the Senate Committee on Public Health and Welfare for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the House and Senate 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 May 16, 2012, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on May 17, 2012, and approved the final-form rulemaking.

Findings

The Department finds that:

(1) Public notice of intention to adopt the administrative regulation by this order has been given under sections 201 and 202 of the Commonwealth Documents Law (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) Adoption of this final-form rulemaking in the manner provided by this order is necessary and appropriate for the administration and enforcement of the code.

Order

The Department, acting under section 443.1(8) of the code, orders that:

(a) The regulations of the Department, 55 Pa. Code Chapters 1187 and 1189, are amended by adding §§ 1187.161, 1187.162 and 1187.171—1187.177 and by amending §§ 1187.21 and 1189.3 to read as set forth in Annex A.

(*Editor's Note*: Proposed § 1187.176 has been withdrawn by the Department.)

(b) The Secretary of the Department shall submit this order and Annex A to the Offices of General Counsel and Attorney General for approval as to legality and form as 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 order shall take effect upon publication in the *Pennsylvania Bulletin*.

GARY D. ALEXANDER,
Secretary

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 42 Pa.B. 3182 (June 2, 2012).)

Fiscal Note: Fiscal Note 14-524 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 55. PUBLIC WELFARE

PART III. MEDICAL ASSISTANCE MANUAL

CHAPTER 1187. NURSING FACILITY SERVICES

Subchapter C. NURSING FACILITY PARTICIPATION

§ 1187.21. Nursing facility participation requirements.

In addition to meeting the participation requirements established in Chapter 1101 (relating to general provisions), a nursing facility shall meet the following requirements:

(1) The nursing facility shall be licensed by the Department of Health.

(2) Every bed licensed by the Department of Health in a nursing facility that participates in the MA Program shall be certified for MA participation.

(3) The nursing facility shall abide by applicable Federal, State and local statutes and regulations, including Title XIX of the Social Security Act (42 U.S.C.A. §§ 1396—1396q), sections 443.1—443.6 of the Public Welfare Code (62 P. S. §§ 443.1—443.6) and applicable licensing statutes.

(4) An MA-enrolled nursing facility with 60 or more licensed beds providing skilled nursing and rehabilitation services in accordance with the Medicare requirements shall also be enrolled in the Medicare Program to the extent that it has sufficient beds to accommodate the Medicare-eligible residents it is required to serve. This does not preclude a nursing facility with a bed complement of under 60 beds from enrolling in the Medicare Program.

(i) A nursing facility certified to participate in the Medicare Program shall have sufficient beds to accommodate its Medicare-eligible residents. Payment will be based on criteria found in § 1187.101(b) (relating to general payment policy).

(ii) Failure to be enrolled and certified in the Medicare Program will result in denial of claims for a resident with both Medicare and MA coverage.

(5) The nursing facility shall meet the requirements of Subchapter L (relating to nursing facility participation requirements and review process).

Subchapter L. NURSING FACILITY PARTICIPATION REQUIREMENTS AND REVIEW PROCESS

GENERAL PROVISIONS

BED REQUESTS

GENERAL PROVISIONS

§ 1187.161. Applicability.

This subchapter applies to applicants as defined in § 1187.162 (relating to definitions).

§ 1187.162. Definitions.

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

Applicant—A legal entity or a person authorized by and acting on behalf of a legal entity who submits a bed request to the Department.

Bed request—A request by an applicant for the Department's approval to increase the number of MA-certified beds in a subject facility that is a provider or a request by an applicant to increase the number of MA-certified beds in the MA Program by enrolling a subject facility as a new provider.

Bed transfer request—A bed request in which the following conditions apply:

(i) The applicant seeks the Department's approval to increase the number of MA-certified beds in a provider.

(ii) The applicant represents that, if the Department approves the request, at least the same number of MA-certified beds will be decertified and closed at a different provider.

(iii) The providers are located in the same county, or the driving distance between providers is no greater than 25 miles if both providers are in MSA Level A, as

specified by the Federal Office of Management and Budget in the OMB Bulletin No. 99-04, or no greater than 50 miles in all other cases.

Legal entity—One of the following:

(i) A person who is a licensee of a licensed nursing facility, as authorized by the Department of Health.

(ii) A person proposing to develop or construct a long-term care nursing facility as defined in Chapter 8 of the Health Care Facilities Act (35 P. S. §§ 448.801—448.821).

MA day-one admission rate—The quotient of the number of MA day-one recipients admitted to the subject facility during a 12-month period, divided by the total number of individuals admitted to the nursing facility during the same 12-month period.

MA day-one recipient—An individual who is eligible for nursing facility services under the MA Program or who becomes eligible for nursing facility services under the MA Program within 60 days of the date of the individual's admission to a nursing facility.

MA day-one report—A document displaying admission rates of MA day-one recipients for a 12-month period using data obtained from Federally-approved PA specific MDS submissions for each nursing facility enrolled in the MA Program.

MA occupancy rate—The quotient of the total MA days of care reported in an MA cost report, divided by the total actual days of care reported in the same MA cost report.

Nonpublic nursing facility—A nursing facility other than a county nursing facility or a facility owned or operated by the State or Federal government.

Overall occupancy rate—The quotient of the total actual days of care reported in an MA cost report, divided by the total available days of care reported in the same MA cost report.

Owner—A person having an ownership or control interest, as defined in section 1124(a) of the Social Security Act (42 U.S.C.A. § 1320a-3(a)), in the subject facility.

Person—A natural person, corporation (including associations, joint stock companies and insurance companies), partnership, trust, estate, association, the Commonwealth, and any local government unit, authority and agency thereof.

Primary service area—One of the following:

(i) The county in which the subject facility is or will be physically located.

(ii) The geographic area from which the subject facility draws or is expected to draw at least 75% of its resident population, as determined by the Department.

Proposed project—Any one of the following:

(i) An increase in the number of licensed beds in a provider.

(ii) The construction of a new county or nonpublic nursing facility if there is an expectation that the facility will become a provider.

(iii) The enrollment of a county or nonpublic nursing facility as a provider.

Provider—A licensed county or nonpublic nursing facility that is certified and enrolled as a nursing facility provider in the MA Program.

Receiving provider—The provider identified in a bed transfer request which will increase the number of its MA-certified beds if the bed transfer request is approved. The receiving provider is the subject facility of the bed transfer request.

Related party—A person who is or would be identified as a related party in a subject facility's MA cost report if the person were to provide goods, services or property to the subject facility.

Specialized medical services—Services that require staffing with advance training and need-specific equipment, including services needed by an individual who has severe dementia or traumatic brain injury or who requires a respirator for survival, or who receives bed side hemodialysis. Specialized medical services are not routinely provided in general nursing facilities and do not include the services of a dedicated Alzheimer's unit or infection isolation wing, osteopathic treatment or similar services.

Subject facility—An existing or proposed county or nonpublic nursing facility identified on a bed request that will increase the number of its licensed nursing facility beds or enroll as a provider in the MA Program if the bed request is approved.

Surrendering provider—The provider identified on a bed transfer request which will decertify and close at least the same number of MA-certified beds as the receiving provider identified in the same bed transfer request, if the request is approved.

BED REQUESTS

§ 1187.171. Enrollment in the MA Program and expansion of existing providers.

(a) As a condition of participation in the MA Program, an applicant shall submit a bed request to the Department and obtain the Department's advance written approval before increasing the number of MA-certified beds in a subject facility that is a provider or before applying for the enrollment of a subject facility as a new provider.

(b) As a condition of participation in the MA Program, an applicant shall submit its bed request to the Department prior to beginning a proposed project that involves the construction of a new nursing facility or an expansion of an existing nursing facility.

§ 1187.172. Contents and submission of bed requests.

(a) *Required contents.* An applicant's bed request must contain the following information:

(1) *Ownership information.*

(i) The applicant shall provide the name and address of each person who is any of the following:

(A) The applicant and a description of the applicant's involvement in the proposed project.

(B) The legal entity of the subject facility.

(C) An owner of the subject facility.

(D) A related party involved in the proposed project and a description of the related party's involvement with the project.

(ii) For each person identified, the applicant shall specify whether:

(A) The person is a spouse, parent, child or sibling of another person identified.

(B) During the 3-year period preceding the bed request, the person is or was an owner of a nursing facility,

whether or not located in this Commonwealth, and, if so, the name and address of each of the nursing facilities.

(2) *Project overview.*

(i) The applicant shall provide an overview of the proposed project which includes a description of the population and primary service area the applicant intends to serve.

(ii) The applicant shall include a narrative and supporting documentation addressing each criterion in §§ 1187.175 and 1187.176 (relating to criteria for the approval of bed transfer requests; and criteria for the approval of bed requests other than bed transfer requests), as applicable, and indexed to the criterion being addressed.

(3) *Financial information.*

(i) The applicant shall provide a feasibility or market study and financial projections prepared for the project that identify the following:

(A) Project costs.

(B) Sources of project funds.

(C) Projected revenue sources by payor type.

(D) Specific assumptions used and expected occupancy rates by payor type.

(ii) The applicant shall provide independent audited or reviewed financial statements of the subject facility for the most recent year prior to the fiscal year in which the bed request is filed. If the financial statements are not available for the subject facility, the applicant shall provide independent audited or reviewed financial statements of the legal entity or parent corporation of the subject facility for the most recent year prior to the fiscal year in which the bed request is filed.

(4) *Compliance history.* For each person identified in the ownership information section of the bed request as specified under paragraph (1), an applicant shall specify whether or not any of the following applies, and, if so, the applicant shall attach copies of all documents relating to the applicable action, including notices, orders or sanction letters received from the Federal Centers for Medicare and Medicaid Services or any state Medicaid, survey or licensing agency:

(i) The person is currently precluded or, at any time during the 3-year period preceding the bed request, was precluded from participating in the Medicare Program or any State Medicaid Program.

(ii) The person is or, at any time during the 3-year period preceding the date of the bed request, was a party to or the owner of a party to a corporate integrity agreement with the Department or the Federal government.

(iii) The person owned, operated or managed a nursing facility, including the subject facility and, at any time during the 3-year period preceding the date of the bed request, one of the following applies:

(A) The facility was precluded from participating in the Medicare Program or any state Medicaid Program.

(B) The facility had its license to operate revoked or suspended.

(C) The facility was subject to the imposition of civil monetary penalties, sanctions or remedies under State or Federal law for resident rights violations.

(D) The facility was subject to the imposition of remedies based on the failure to meet applicable Medicare and Medicaid Program participation requirements, and the facility's deficiencies were graded as immediate jeopardy to resident health and safety.

(E) The facility was designated a special focus facility by the Federal Centers for Medicare and Medicaid Services, indicating a poor performing facility.

(5) *Certification and authority.*

(i) A bed request shall be signed by the applicant.

(ii) The applicant shall certify that the representations made and the information provided in the bed request are true and correct to the best of the applicant's knowledge, information and belief.

(iii) If the applicant is a person other than the legal entity of the subject facility, the applicant shall certify that the applicant is authorized to submit the bed request on behalf of the legal entity and that the legal entity has reviewed and approved the contents of the bed request.

(b) *Optional information.* In addition to the required content specified under subsection (a), an applicant may include in its bed request whatever information the applicant feels is relevant to or supports its bed request.

(c) *Submission.* An applicant shall submit an original and two copies of its bed request to the Department.

§ 1187.173. Review and public process relating to bed requests.

(a) *Groups.* Except as specified in subsection (b), the Department will consider bed requests in two groups, as follows:

(1) Group one will consist of bed requests received January 1 through June 30. Subject to subsection (c), the Department will issue decisions on group one by the following December 31. If the Department receives public comments under subsection (d), the Department may extend the review process an additional 90 days.

(2) Group two will consist of bed requests received from July 1 through December 31. Subject to subsection (c), the Department will issue decisions on group two by the following June 30. If the Department receives public comments under subsection (d), the Department may extend the review process an additional 90 days.

(b) *Bed transfer requests.*

(1) The Department will consider bed transfer requests in the order in which they are received.

(2) Subject to subsection (c), the Department will issue decisions on bed transfer requests within 120 days after the expiration of the public comment period under subsection (d).

(c) *Expedited review.* If an applicant demonstrates to the satisfaction of the Department that good cause exists, the Department, within its sole discretion, may expedite its review and respond to a bed request before the target date provided that the Department will not respond prior to the close of the applicable public comment period specified in subsection (d).

(d) *Public process.*

(1) *Data book.* The Department will compile and make available on the Department's web site a workbook for each review period containing the following:

(i) Data relating to the availability and cost of MA nursing facility services Statewide and by county.

(ii) Data relating to the availability and cost of home and community-based services Statewide and by county.

(iii) Commonwealth and county demographic data.

(2) *Publication of and public comment period for bed requests.* Following the close of each 6-month request period, the Department will post on the Department's web site a list of bed requests, other than bed transfer requests included in the group under consideration. The Department will make the requests in that group available for review by the public during regular business hours, and will accept written comments related to the requests in the group for a 30-day period following the date that the notice is posted online. Written comments received by the Department and the applicant's responses to the public comments will be posted on the Department's web site.

(i) The group one list will be posted on the Department's web site on or before July 31.

(ii) The group two list will be posted on the Department's web site on or before January 31.

(3) *Publication of and public comment period for bed transfer requests.* No later than 15 calendar days following the last day of each calendar month, a list of the bed transfer requests received by the Department during that calendar month will be posted on the Department's web site. The Department will make the requests listed for that calendar month available for review by the public during regular business hours, and will accept written comments related to the requests for a 15-calendar-day period following the date that the list is posted online. Written comments received by the Department and the applicant's responses to the public comments will be posted on the Department's web site.

§ 1187.174. Information and data relevant to bed requests.

In reviewing an applicant's bed request, the Department will consider the information provided by the applicant and any public comments received on the request. In addition, the Department may consider information contained in the Department's books and records or obtained from persons other than the applicant that is relevant to the applicant's bed request, including the following:

(1) Data relating to the overall occupancy rates of MA nursing facilities in the primary service area identified in the bed request, the county in which the subject facility is or will be located and, in the case of a bed transfer request, the county in which the surrendering provider is located.

(2) Data relating to the MA day-one admission rates and the MA occupancy rates of MA nursing facilities in the primary service area identified in the bed request, the county in which the subject facility is or will be located and, in the case of a bed transfer request, the county in which the surrendering provider is located.

(i) The Department will determine the MA day-one admission rate using the most recent MA day-one report completed and posted to the Department's web site prior to January 1 for group one and July 1 for group two as provided under § 1187.173(a) (relating to review and public process relating to bed requests).

(ii) The Department will determine the MA day-one admission rate using the most recent MA day-one report completed and posted to the Department's web site prior to the application date of the bed transfer request.

(3) Data relating to the availability of home and community-based services in the primary service area identified in the bed request, the county in which the subject facility is or will be located and, in the case of a bed transfer request, the county in which the surrendering provider is located.

(4) Data relating to the demographics of the primary service area identified in the bed request, the county in which the subject facility is or will be located and, in the case of a bed transfer request, the county in which the surrendering provider is located.

(5) Data relating to admissions and discharges at MA nursing facilities in the primary service area identified in the bed request, the county in which the subject facility is or will be located and, in the case of a bed transfer request, the county in which the surrendering provider is located.

(6) Data relating to the compliance history of the subject facility and the persons identified in the ownership information section of the bed request, as specified under § 1187.172(a)(1) (relating to contents and submission of bed requests).

(7) If the applicant is proposing to provide specialized medical services in the subject facility, data relating to the availability of those services in the primary service area identified in the bed request the county in which the subject facility is or will be located and, in the case of a bed transfer request, the county in which the surrendering provider is located.

§ 1187.175. Criteria for the approval of bed transfer requests.

(a) Upon consideration of the information specified in § 1187.174 (relating to information and data relevant to bed requests), the Department may approve a bed transfer request only if the following are satisfied:

(1) The bed transfer request contains the information required under § 1187.172(a) (relating to contents and submission of bed requests).

(2) The receiving provider agrees to achieve and maintain an MA day-one admission rate that is equal to or greater than the surrendering provider's MA day-one admission rate or another MA day-one admission rate as may be agreed to by the Department.

(3) The change in the bed complements of the receiving and surrendering providers will maintain or improve access to medically necessary nursing facility services for MA recipients.

(4) Neither provider will receive an increase in reimbursement as a result of a change in its peer group if the bed transfer request is approved.

(5) If the proposed bed transfer will result in a change in peer group assignments under this chapter for the surrendering or receiving provider, the change will not have a negative effect on the MA Program, on MA recipients or on other facilities which are members of the affected peer group.

(6) Approval of the bed transfer request will not result in increased costs to the MA Program.

(7) The circumstances specified in § 1187.172(a)(4) do no apply.

(8) Both the surrendering provider and the receiving provider agree that the new or additional beds at the receiving provider shall be licensed, MA-certified and

available for immediate occupancy before the surrendering provider decertifies and closes a bed.

(b) The Department may deny a bed transfer request even if the conditions specified in subsection (a) are satisfied if the Department determines one of the following:

(1) Approval of the request would negatively affect the Department's goal to rebalance the Commonwealth's publicly-funded long-term living system to create a fuller array of service options for MA recipients.

(2) There are alternatives to the transfer of beds, such as an increase in home and community-based services, that would be less costly, more efficient or more appropriate in assuring that long-term living care and services will be provided under the MA Program in a manner consistent with applicable Federal and State law.

(c) Approval of a bed transfer request is not a determination that additional MA-certified beds are needed to maintain or improve MA recipients' access to medically necessary services in the primary service area or county in which the receiving provider is located.

§ 1187.176. Criteria for the approval of bed requests other than bed transfer requests.

(a) The Department may approve a bed request, other than a bed transfer request, only if the following are satisfied:

(1) The bed request contains the information required under § 1187.172(a) (relating to contents and submission of bed requests).

(2) The additional MA-certified nursing facility beds are needed in the primary service area or the county in which the subject facility is located to maintain or improve MA recipients' access to medically necessary nursing facility services based on any of the following:

(i) The existing MA-certified bed capacity in the primary service area or the county in which the subject facility is or will be located is insufficient to assure that MA recipients have access to medically necessary nursing facility services.

(ii) Systemic barriers prevent MA recipients from accessing the existing MA-certified bed capacity in the primary service area or the county in which the subject facility is or will be located.

(iii) The applicant is proposing to admit and serve MA recipients who require specialized medical services in the subject facility and MA recipients do not have access to the specialized medical services in the existing MA-certified bed capacity in the primary service area or the county in which the subject facility is or will be located.

(3) The legal entity agrees, in a form acceptable to the Department, to the following:

(i) The subject facility will admit and serve MA day-one recipients.

(ii) The subject facility will maintain an MA occupancy rate that equals or exceeds the average MA occupancy rate of MA nursing facilities in the county in which the subject facility is or will be located or, in the case of a subject facility that is proposing to offer specialized medical services, the MA occupancy rate as may be agreed to by the Department.

(iii) The construction and operation of the new or additional beds will be economically and financially feasible without the receipt of MA fixed property capital component payments, and it is not entitled to MA capital component payments for fixed property related to the new or additional beds.

(4) The circumstances specified in § 1187.172(a)(4) do not apply.

(b) In determining whether a need for additional MA-certified beds exists under subsection (a), the following will apply:

(1) MA-certified bed capacity will be deemed sufficient if the average annual overall occupancy rates of providers in the primary service area and county in which the subject facility is or will be located is 95% or less, based on the most recent MA cost report data submitted by those providers.

(2) If the average annual overall occupancy rates of providers in the primary service area or county in which the subject facility is located exceeds 95%, based on the most recent MA cost report data submitted by those providers, the Department will consider the following information in assessing whether a need for additional MA-certified beds exits:

(i) The total number of MA-certified nursing facility beds in the primary service area.

(ii) The total number of licensed nursing facility beds in the primary service area.

(iii) The annual overall occupancy rates of providers in the primary service area based on the most recent MA cost report data submitted by those providers.

(iv) The annual actual bed days in the primary service area for the most recent 3-year period including the most recent cost report period, as submitted by nursing facility providers in the primary service area.

(3) No systemic barrier that prevents MA recipients from accessing MA-certified bed capacity will be deemed to exist if the average MA occupancy rate and the average MA day-one admission rate of providers in the primary service area and county in which the subject facility is or will be located are above the Statewide average rates or within one percentage point below the Statewide rates.

(c) The Department may deny a bed request even if the conditions specified in subsection (a) are satisfied if the Department determines one of the following:

(1) Approval of the request would negatively affect the Department's goal to rebalance the Commonwealth's publicly-funded long-term living system to create a fuller array of service options for MA recipients.

(2) There are alternatives to the bed request, such as an increase in home and community-based services, that would be less costly, more efficient or more appropriate in assuring that long-term living care and services will be provided under the MA Program in a manner consistent with applicable Federal and State law.

§ 1187.177. Time lines for completion of approved projects.

(a) If the Department approves a bed request, the approved project shall be completed in sufficient time so that the beds may be licensed, certified and available for occupancy within 3 years from the date of the Department's decision, or by another date as may be agreed to by the Department.

(b) The provider will make documentation available upon the Department's written request at any time and for so long as the nursing facility is an MA provider, as

may be necessary to demonstrate compliance with the terms of the approved exception request.

CHAPTER 1189. COUNTY NURSING FACILITY SERVICES

Subchapter A. GENERAL PROVISIONS

§ 1189.3. Compliance with regulations governing noncounty nursing facilities.

(a) Unless a specific provision of this chapter provides to the contrary, the following subchapters of Chapter 1187 (relating to nursing facility services) are applicable to county nursing facilities:

(1) Subchapter B (relating to scope of benefits).

(2) Subchapter C (relating to nursing facility participation).

(3) Subchapter D (relating to data requirements for nursing facility applicants and residents), except for § 1187.33(b) (relating to resident data and picture data reporting requirements).

(4) Subchapter I (relating to enforcement of compliance for nursing facilities with deficiencies).

(5) Subchapter K (relating to exceptional payment for nursing facility services).

(6) Subchapter L (relating to nursing facility participation requirements and review process).

(b) If a provision of Chapter 1187 is made applicable to county nursing facilities by subsection (a) or other provision of this chapter, and the provision of Chapter 1187 uses the term "nursing facility," that term shall be understood to mean "county nursing facility," unless the context clearly indicates otherwise.

[Pa.B. Doc. No. 12-1198. Filed for public inspection June 29, 2012, 9:00 a.m.]