

RULE MAKING ACTIVITIES

Each rule making is identified by an I.D. No., which consists of 13 characters. For example, the I.D. No. AAM-01-96-00001-E indicates the following:

- AAM -the abbreviation to identify the adopting agency
01 -the *State Register* issue number
96 -the year
00001 -the Department of State number, assigned upon receipt of notice
E -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing; or C for first Continuation.)

Italics contained in text denote new material. Brackets indicate material to be deleted.

Banking Department

EMERGENCY RULE MAKING

Supervision of Article XII Investment Company Holding Companies and their Subsidiaries

I.D. No. BNK-25-04-00004-E

Filing No. 662

Filing date: June 7, 2004

Effective date: June 7, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of Part 114 to Title 3 NYCRR.

Statutory authority: Banking Law, section 14(1), (1)(k); and art. XII

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: Need to meet European Commission timetable for being designated as providing equivalent supervision for certain U.S. headquartered financial groups with business activities in the European economic community.

Subject: Supervision of art. XII investment company holding companies and their subsidiaries for purposes of the European Union Financial Conglomerates Directive.

Purpose: To clarify the examination, supervision, regulation and enforcement authority of the Superintendent of Banks over financial conglomerates

for purposes of carrying out equivalent supervision under the European Union Financial Conglomerates Directive.

Text of emergency rule:

Part 114

SUPERVISION AND REGULATION OF ARTICLE XII INVESTMENT COMPANY HOLDING COMPANIES AND THEIR SUBSIDIARIES FOR PURPOSES OF THE EUROPEAN UNION FINANCIAL CONGLOMERATES DIRECTIVE

(Statutory Authority: Banking Law § 14[1], 14[1][k], Article XII)

§ 114.1 Purpose and Scope.

Article XV of the Banking Law authorizes the formation of investment companies and Article XII of the Banking Law sets forth the rights and obligations of such investment companies. The purpose of this Part is to clarify the Superintendent's examination, supervision, regulation, and enforcement authority over financial conglomerates for purposes of carrying out equivalent supervision under the European Union Financial Conglomerates Directive.

§ 114.2 Definitions.

For purposes of this Part:

"Banking Law" means the New York Banking Law.

"Banking organization" means all banks, trust companies, private bankers, savings banks, safe deposit companies, savings and loan associations, credit unions and investment companies organized under the Banking Law.

"Control" means the possession, directly or indirectly, of the power to direct or cause the direction of management and policies of an investment company, whether by means of the ownership of the voting stock or equity interests of such investment company or of one or more persons controlling such investment company, by means of a contractual arrangement or otherwise. Control shall be presumed to exist if any company, directly or indirectly, owns, controls or holds with the power to vote ten per centum or more of the voting stock or other equity interests of any investment company or of any company which owns, controls or holds with power to vote ten per centum or more of the voting stock or other equity interests of such investment company.

"Equivalent supervision" means a supervisory and regulatory regime meeting the standards required under the Financial Conglomerates Directive.

"Financial conglomerate" means a group meeting the definition of financial conglomerate under the Financial Conglomerates Directive and having an investment company within its structure.

"Financial Conglomerates Directive" means the European Union Financial Conglomerates Directive 2002/87/EC, as it may be amended from time to time.

"Investment company" means a banking organization organized pursuant to the Banking Law and subject to the provisions of Article XII of the Banking Law.

"Investment company holding company" means the top tier corporation or other entity that controls an investment company.

"Subsidiary" means a corporation or other entity at least 10 per centum of the voting stock or other equity interests of which is controlled directly or indirectly by an investment company holding company.

"Supervision Agreement" means an individual agreement entered into between a financial conglomerate and the Superintendent which provides for a detailed plan of supervision by the Superintendent over the financial conglomerate, including specific regulatory requirements applicable to the investment company holding company and its subsidiaries.

§ 114.3 Examination, Supervision, Regulation, and Enforcement Authority of the Superintendent over Investment Company Holding Companies and their Subsidiaries for Purposes of the European Union Financial Conglomerates Directive.

To assist the Banking Department in carrying out equivalent supervision of a financial conglomerate for purposes of carrying out the requirements of the Financial Conglomerates Directive, the Superintendent shall have examination, supervision, regulation, and enforcement authority over an investment company holding company and any of its subsidiaries to the same extent as he or she has examination, supervision, regulation, and enforcement authority over any banking organization under the Banking Law.

This authority includes, but is not limited to, the authority to:

(1) apply Banking Law Section 36 relating to examinations and confidentiality of information to an investment company holding company and its subsidiaries, as if such entities were banking organizations;

(2) issue orders to an investment company holding company and its subsidiaries as provided in Banking Law Section 39, as if such entities were banking organizations;

(3) impose monetary penalties for violation of law or regulation, as provided in Banking Law Section 44, as if such entities were banking organizations;

(4) impose capital requirements on an investment company holding company and its subsidiaries, as appropriate or required in the judgment of the Superintendent;

(5) prescribe requirements for the keeping of books and records by the investment company holding company and its subsidiaries;

(6) require filing by the investment company holding company and its subsidiaries with the Superintendent of periodic reports of condition, reports of income, risk profiles, large exposures and such other reports as may be required by the Superintendent;

(7) levy assessments on the investment company holding company and its subsidiaries, as provided in Banking Law Section 17, as if such entities were banking organizations;

(8) issue such general or specific rules or regulations as may be necessary to effectuate the examination, supervision, regulation, and enforcement authority over investment company holding companies and their subsidiaries for purposes of meeting the requirements of equivalent supervision under the Financial Conglomerates Directive.

§ 114.4 Supervision Agreements with Financial Conglomerates.

The Superintendent may enter into one or more Supervision Agreements with each financial conglomerate. Such Supervision Agreements will set forth the specific plan of supervision and detailed regulatory requirements applicable to an investment company holding company and its affiliates (e.g. capital requirements, reporting requirements, transactional limitations, etc.). The Superintendent may exercise enforcement authority under Banking Law Sections 39 and 44 for breaches or violations of such Supervision Agreements.

Such Supervision Agreements shall be in addition to, and shall not serve as a limitation on, the Superintendent's examination, supervision, regulation and enforcement authority provided under this Part over investment holding companies and their subsidiaries to the same extent as the Superintendent has examination, supervision, regulation, and enforcement authority over any banking organization under the Banking Law.

§ 114.5 Limitations.

The Superintendent's examination, supervision, regulation, and enforcement authority over investment company holding companies and their subsidiaries as provided in this Part is limited to those cases in which the Banking Department needs to provide equivalent supervision for a specific financial conglomerate under the Financial Conglomerates Directive.

The provisions of Banking Law Article XIII governing voluntary and involuntary liquidations of banking organizations shall not be applicable to investment company holding companies, although they are applicable to investment companies.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 4, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Sam L. Abram, Banking Department, One State St., New York, NY 10004-1417, (212) 709-1658, e-mail: sam.abram@banking.state.ny.us

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

A Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not submitted, but will be published in the *Register* within 30 days of the rule's effective date.

EMERGENCY RULE MAKING

Signage Requirements for Licensed Check Cashers

I.D. No. BNK-25-04-00022-E

Filing No. 666

Filing date: June 8, 2004

Effective date: June 23, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 400.6 of Title 3 NYCRR.

Statutory authority: Banking Law, sections 37(3), 371 and 372

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: Need to make signage requirements in Part 400 consistent with newly adopted changes in regulation governing fees which check cashers are permitted to charge.

Subject: Signage requirements for licensed check cashers.

Purpose: To change signage requirements for licensed check cashers so as to disclose the check cashing fee based on the amount of the check, and permit signs to be made from a wider range of materials in light of the possibility of changes in fees.

Text of emergency rule: Paragraph (1) of Subsection (a) of Section 400.6 of the Superintendent's Regulations shall be amended to read as follows:

(a) Every licensee shall:

(1) Post and display at all times in a conspicuous place on the premises the license and also the schedule of rates to be charged. The schedule shall be made of [plastic or metal] *durable material*, be no less than 30 inches wide and 36 inches high with letters at least > inch in size and indicate [in five cent increments, between 60 cents and \$14.00.] the fee applicable to the full amount of the check to be cashed [provided that such schedules shall indicate that the minimum fee of 60 cents shall apply to all checks under \$42.86 and that the maximum fee cannot exceed 1.4 percent of the amount of the check]. *The schedule shall indicate the fee that corresponds to the amount of the check. The amount of the check shall be set forth on the schedule in increments of \$25.00 ranging from \$25.00 to \$2,000. The schedule shall also indicate the percentage charge imposed on all checks and the minimum charge of \$1.00 per check.* The schedule shall be in English and in Spanish and posted in the customer's area.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 5, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Sam L. Abram, Banking Department, One State St., New York, NY 10004-1417, (212) 709-1658, e-mail: sam.abram@banking.state.ny.us

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

A Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not submitted, but will be published in the *Register* within 30 days of the rule's effective date.

NOTICE OF ADOPTION

Maximum Permissible Fees Charged by Licensed Check Cashers

I.D. No. BNK-10-04-00001-A

Filing No. 667

Filing date: June 8, 2004

Effective date: June 23, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 400.12 of Title 3 NYCRR.

Statutory authority: Banking Law, section 372(1)

Subject: Maximum permissible fees charged by licensed check cashers.

Purpose: To increase the maximum percentage rate that may be charged as a fee for cashing of checks by licensed check cashers; provide for an annual adjustment of such maximum per centum rate based upon an

increase in the consumer price index; and increase the minimum fee that may be charged.

Text of final rule: Amend section 400.12 of Part 400, 3 NYCRR, as follows:

§ 400.12 Fees The licensee shall be permitted to charge or collect [in fees] a fee for cashing a check, draft or money order [a sum or sums] not to exceed a (a) [1.4] 1.5 percentum of the amount of the check, draft or money order, or (b) [60 cents] \$1, whichever is greater. *Effective January 1, 2005, and annually thereafter, the maximum percentum fee specified in clause (a) of this section, shall be increased by a percentum amount, based upon an increase in the annual consumer price index for the New York—Northern N.J.—Long Island, NY—NJ—CT—PA area for all urban consumers (annual CPI-U), as reported by the Bureau of Labor Statistics of the U.S. Department of Labor for the calendar year preceding the year in which such increase is made compared to such annual CPI-U for the year prior to such preceding year. The maximum percentum fee that may be charged or collected for cashing a check, draft or money order pursuant to this section in effect at such time shall be multiplied by such computed percentum amount and the result added to such maximum percentum fee. The resulting sum shall be the revised maximum percentum fee, which shall be posted upon the internet site of the Banking Department (www.banking.state.ny.us) by the Superintendent not later than forty-five days following the public release of such annual index by the U.S. Department of Labor. Such revised maximum percentum fee shall be calculated and posted to the nearest one-hundredth of a percentum. Such revised maximum percentum fee shall be effective not later than forty-five days after the Superintendent shall have notified the Majority Leader of the Senate, the Speaker of the Assembly, and the Chairperson of both the Senate and Assembly Committees on Banks of his/her intention to change the maximum percentum fee pursuant to the provisions of Section 372.3 of the Banking Law and shall continue in effect until revised and increased in the next succeeding year based upon an increase in such annual index. If such annual CPI-U does not increase in any one year, the maximum percentum fee in effect during the year in which the index does not increase shall remain unchanged in the next succeeding year. Nothing herein shall be deemed to prohibit the Superintendent from setting, by regulation, a different maximum percentum fee at any time where the Superintendent shall find that such a fee is necessary and appropriate to protect the public interest and to promote the stability of the check cashing industry for the purpose of meeting the needs of the communities that are served by check cashers.*

Final rule as compared with last published rule: Nonsubstantive changes were made in section 400.12.

Text of rule and any required statements and analyses may be obtained from: Sam L. Abram, Banking Department, One State St., New York, NY 10004-1417, (212) 709-1658, e-mail: sam.abram@banking.state.ny.us

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Changes made in section 400.12 of 3 NYCRR merely clarify the rule and therefore do not necessitate revision to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

Assessment of Public Comment

The Department received one comment in opposition to the proposed amendment. State Assemblyman Ruben Diaz, Jr. of the 85th Assembly District, Bronx County, in his April 26, 2004 letter addressed to the Superintendent, expressed his concern that “the Department has not adequately justified the need for the increase and lacks the authority to provide for an automatic mechanism for annual upward adjustments in the maximum fee.”

The Banking Department’s Research and Technical Assistance Division conducted an extensive and deliberate analysis of its own and believes that the Department’s recommendation for future fee increases, as set forth in the attached proposed amendment, strikes a fair balance between maintaining the fees at rates that will be fair and reasonable for customers of check cashers and providing the industry with sufficient revenues to adequately operate and serve customers.

The Banking Department’s Legal Division has concluded that the provisions of Section 372(3) of the Banking Law give the Superintendent virtually unqualified authority to set the maximum check cashing fees by regulation. Included within that authority is the discretion to establish maximum fees in the future based on an index. Furthermore, the Legal Division has noted that the provisions of Section 372(3) of the Banking Law mandate that the Superintendent must notify the Majority Leader of

the Senate, the Speaker of the Assembly and the Chairperson of the Senate and Assembly Banks Committees at least thirty days before a change in the maximum fee becomes effective.

Office of Children and Family Services

NOTICE OF ADOPTION

Administration of Medication to Children in Day Care

I.D. No. CFS-30-03-00003-A

Filing No. 668

Filing date: June 8, 2004

Effective date: Jan. 31, 2005

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of sections 413.2, 414.11, 415.4, 416.11, 417.11, 418-1.11 and 418-2.11 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f) and 390; L. 2002, ch. 253; L. 2003, ch. 160; and L. 2004, ch. 20

Subject: Administration of medications to children in child day care settings.

Purpose: To maintain and regulate the ability of child day care providers licensed or otherwise regulated by the Office of Children and Family Services to administer medications to children in child day care settings.

Substance of final rule: Background:

Pursuant to Chapter 253 of the Laws of 2002, the Office of Children and Family Services (OCFS) was directed to promulgate regulations amending the requirements for administration of medications by day care providers, staff and caregivers to children in day care programs and settings.

Because these regulations would require significant activity by day care providers that wish to continue to offer administration of medications before such providers may continue to administer medications, OCFS intends to have the regulations take effect on January 31, 2005, to give day care providers time to obtain the training that will be required under the amended regulations and to obtain the services of a health care consultant, which will also be required for many providers under the amended regulations. OCFS will also have the opportunity to receive and consider public comments and make appropriate revisions to the amended regulations before they go into effect, should revisions be necessary.

Content of the Regulations:

The amended regulations will provide more detail on the standards for administration of medications to children in day care. Amendments will be made to 18 NYCRR Sections 414.11, 416.11, 417.11, 418-1.11 and 418-2.11 to modify and expand the requirements for administration of medications in, respectively, school-age child care programs, group family day care homes, family day care homes, day care centers and small day care centers. Amendments will also be made to 18 NYCRR Section 413.2 to add and amend relevant definitions, and to 18 NYCRR Section 415.4(f) to clarify the limitations on the ability of informal day care providers to administer medications.

The principal features of the amended regulations are as follow.

All day care programs that will offer administration of medications (other than over-the-counter topical ointments and lotions) will be required to designate the staff or caregivers who will be authorized to administer medications. These staff and caregivers must receive an OCFS provided or approved training in the administration of medications before such staff or caregivers will be authorized to actually administer medications to children. The training will address a variety of topics, including actual methods of administration of medications, ability to understand and follow the orders of a health care professional, recognition of common side effects, safe handling, storage and disposal of medications, and maintenance of proper documentation. Persons who are otherwise licensed in a profession authorized to administer medications (such as a nurse) will not be required to receive the training.

Programs that will offer administration of medications (other than over-the-counter topical ointments and lotions) will be required to have a

health care consultant of record who must review and approve the day care program's health care plan for the administration of medications. The health care consultant will also be required to visit the day care program to review the program's compliance with the health care plan at least once every two years.

Day care staff and caregivers other than those with an appropriate professional license (such as a nurse) will not be permitted to administer medications through injection except for epi-pens and, with the approval of OCFS, for children with special health care needs where the parent, health care provider and day care program have developed a plan for training staff in the use of injectable medications.

The requirements for the health statement required from the child's health care provider at the time of enrollment of the child in day care will be expanded to add a statement whether the child is a child with special health care needs. If the child has special health care needs, the day care provider will be required to work with the parent and the child's health care provider to develop a reasonable health care plan for the child. This plan will have to identify any added competencies that the day care provider will need and address how the day care provider will attain such competencies.

Trained day care staff and caregivers will be permitted to administer prescription medications under written instructions from the prescriber and with written permission of the parent. Trained day care staff will be permitted to administer over-the-counter medications (other than topical ointments and lotions) under written instructions from a health care provider and written permission from the parent.

Any day care staff will be permitted to administer over-the-counter topical ointments and lotions with written permission of the parent.

It will not be necessary for day care staff and caregivers to be trained for this purpose and approval by a health care consultant will not be required for a day care program that offers only this limited form of administration of medications.

In certain emergency situations, the regulations will permit administration of medications under verbal instructions and permission for one day only.

The regulations will require documentation of administration of medications, proper storage, handling and disposal of medications, and will specify the information required to be provided on the medication bottle and to be provided to the day care program.

A provision will be added to the regulations concerning provision of subsidized day care by informal day care providers (those providers who are not required to be licensed or registered because of limited hours of care, limited numbers of children cared for or limitation of care to relatives) to clarify that informal providers may not administer medications to children in care unless the informal provider is otherwise licensed to administer medications (such as a nurse) or meets the training requirements for administration of medications applicable to licensed and registered day care providers.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 413.2, 414.11, 415.4, 416.11, 417.11, 418-1.11 and 418-2.11.

Text of rule and any required statements and analyses may be obtained from: Public Information Office, Office of Children and Family Services, 52 Washington St., Rensselaer, NY 12144, (518) 473-7793

Revised Regulatory Impact Statement

1. Statutory authority:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Commissioner of the Office of Children and Family Services (Office) to establish rules, regulations and policies to carry out the Office's powers and duties under the SSL.

Section 390(2-a) of the SSL authorizes the Office to promulgate regulations establishing operational standards for registered and licensed child day care programs.

Section 410-x(3) of the SSL authorizes the Office to promulgate regulations establishing minimum health and safety standards for providers receiving funds under the child care subsidy program who are not required to be licensed or registered.

Chapter 253 of the Laws of 2002 and Chapter 160 of the Laws of 2003 require the Office to promulgate amendments to the regulations governing the administration of medications to children in day care.

Chapter 20 of the Laws of 2004 requires that the regulations be effective on January 31, 2005.

2. Legislative objectives:

The primary objective is to improve the health and physical well being of children in day care. These regulations accomplish this by enhancing the

standards under which medications can be administered to children in day care settings. By upgrading the standards in the regulatory language, the Office increases its ability to monitor and enforce compliance with the standards.

3. Needs and benefits:

The regulations improve the Office's guidance to providers who chose to administer medications to children in day care programs in order to enhance the protection of children while maintaining the ability of day care providers to operate affordable day care programs.

The regulations will be promulgated to comply with the requirement of Chapter 253 of the Laws of 2002 that the Office promulgates amendments to the regulations governing the administration of medications to children in day care. The regulations will impose new requirements on those day care providers desiring to continue to administer medications to children in care (related primarily to receiving training and obtaining a health care consultant.) In order to give the day care providers time to comply with the requirements, the regulations will become effective on January 31, 2005. That should afford providers the time necessary to comply with the new requirements, as well as affording the Office the time necessary to provide the necessary training.

The regulations will require that those persons choosing to administer medications to day care children participate in competency based training on the administration of medications. The regulations will further require that all providers who choose to administer medications to children in a day care setting must have a health care consultant of record, who must approve the day care program's policies and procedures related to the administration of medications and review the documentation of all staff approved to administer medications to verify that such staff have the necessary professional license or have completed the necessary training. The regulations will require all programs opting to administer medications to inform parents of their policies and procedures prior to their child's enrollment in the program.

These changes will result in greater controls on the administration of medications to children in day care. The changes will better protect the health and safety of children in day care by providing for training of day care providers, caregivers and staff in the proper administration of medications and by requiring the review of health care plans by a health care professional.

Parents who rely on day care services need to know that the day care programs serving their children are meeting their children's health care needs. General health care of children must include a provider's ability to administer prescription and non-prescription medications commonly prescribed or recommended by health care providers to children with childhood illnesses and/or conditions.

Presently, there is no regulation requiring that providers choosing to administer medications have any training relative to the administration of medications. There is also no requirement for programs administering medications to work with a health care consultant. Finally, there is no current requirement that a program inform parents of the program's administration of medication policies and procedures or to report errors in the administration of medications if they occur.

Adding the regulations to the existing language will benefit both the children in care who require administration of medications and the parents who are leaving their children in the care of a trained provider.

The regulations will provide that with two exceptions informal day care providers (those providers not required to be licensed or registered) who provide care for children for whom day care subsidies are provided are not permitted to administer medications to children in care. The exceptions are: if the informal provider is authorized under the Education Law to do so (for example, the informal provider is a registered nurse); or if the informal provider complies with the requirements for administration of medications applicable to a licensed or registered provider, including receiving training. This will clarify the limitations on the ability of informal day care providers who care for children receiving subsidized day care to administer medications in the informal day care setting.

4. Costs:

Adopting the new language in the regulation will incur additional costs to providers, who may incorporate the additional costs into the fees they charge parents for day care services. Costs would be incurred as a result of the provider's obligation to employ a health care consultant and to receive required training in the administration of medications.

The Office could help defray the cost of training hours through the use of funds in the Educational Incentive Program (EIP) and by accepting training hours in the administration of medications as counting toward the mandated thirty-hour training requirement. However, there will be addi-

tional costs incurred as a result of the requirement to maintain a health care consultant of record and to call upon that consultant to approve a program's health care plan, policies, and amendments, and to verify its employee's training credentials.

A health care consultant will be defined as a person with one or more of the following credentials: physician, physician assistant, nurse practitioner, or registered nurse. Using the minimum credential allowable to fill the position of health care consultant (registered nurse) a cost impact was completed.

The US Department of Labor Statistics estimates the mean hourly wage of registered nurses in New York State to be \$23.19. The estimated mean hourly wage for a pediatrician is approximately \$60. The number of hours needed to review and approve a health care plan, policies and amendments, plus the time needed to verify the credentials of the persons administering the medications would vary from program to program. Variables include depending on the size of the program, numbers of staff trained to administer medications, retention of trained staff and the complexity of the written health care policies and procedures.

At a minimum, a family day care provider who opts to administer medications would need a registered nurse's time for at least two hours. Within that two-hour period, it is assumed that the health care consultant could approve a health care policy and verify the provider's training credential. The health care plan must be updated and reviewed by the health care consultant at least once every 24 months and all any amendments to the plan during the 24 months intervening time period must be reviewed and approved as well. That would result in an average cost of \$56.38 once every 24 months. If the health care consultant were a pediatrician, the average cost would be \$120 once every 24 months. On the surface, the hourly total cost of \$56.38 incurred seems minimal in comparison to the additional safeguards the regulations would provide, but there is no way to fully anticipate the additional costs of a health care consultant. A health care consultant may decide to impose an additional charge as a result of adding increased the cost of their liability insurance and/or medical malpractice insurance and other expenses and service charges. However, this cost should be considered in contrast to the cost of having a full time nurse on staff in a day care program, which would range from approximately \$39,000 to \$60,000, depending on where in the State the program is located.

5. Local government mandates:

The regulations would not impose any new mandates on local governments, except to the extent that local governments themselves operate day care programs. For any local governments that operate day care centers or school-age child care programs, such governments would have to determine whether their day care programs will offer the administration of medications to the parents and children they serve. If they do wish to offer this service, the local governments would need to comply with the amended regulations, including obtaining a health care consultant and having appropriate staff trained in the administration of medications.

6. Paperwork:

Day care providers are currently required to have a health care plan. Under the amended regulations, the health care plan would also have to include the administration of medications policy for those providers who choose to offer administration of medications.

The amended regulations specify the information that must be included in the written instructions for administering medications given to the day care provider by the child's health care provider. The existing regulations require such written instructions but do not specify all of the information that must be included.

The amended regulations also specify the information that must be on the medication bottle or container. The existing regulations specified some of this information but the list is expanded in the amended regulations. However, this should all be information normally included on a prescription label.

Day care providers will be required to document administration of medications. This continues an existing requirement. However, providers will be required to also document any errors in the administering of medication, which is a new requirement.

Day care providers, staff and caregivers who receive training in administration of medications will be required to maintain documentation showing successful completion of such training.

7. Duplication:

The amended regulations would not duplicate any other State or federal requirements.

8. Alternatives:

Since Chapter 253 of the Laws of 2002 requires that the regulations on administration of medications for children in day care be amended, leaving the existing regulations in place is not available as an option.

The Office consulted with a variety of other interested parties in developing the amended regulations and a variety of alternatives was considered. More extensive restrictions on the ability of day care providers to administer medications were rejected, both because they could unreasonably interfere with the ability of parents to use day care for children with mild illnesses or chronic health care conditions, and out of concern for issues of compliance with the Americans with Disabilities Act. Requiring greater involvement of the health care consultant in the development and oversight of the health care plan was considered but rejected both for being too costly for providers and for being overly burdensome to potential health care consultants. The Office was concerned that requiring too much involvement by the health care consultant would make it impossible for day care providers to obtain health care consultants.

The approach that was selected was chosen as the best alternative available in balancing the need for appropriate controls on the administration of medications with the reality that this area has never been one in which a significant problem has arisen. The Office also considered the issue of costs to the day care providers and the State and the need to permit day care providers to be able to maintain the fiscal viability of their operation.

9. Federal standards:

The amended regulations do not exceed any federal standards. There are no federal standards specific to the issue of administration of medications by day care providers.

10. Compliance schedule:

The amended regulations will take effect on January 31, 2005. This will give the Office the time to make available the training required under the amended regulations and will give providers the time to obtain the training, to develop revisions to their health care plans to address administration of medications and to obtain the services of a health care consultant.

Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Although non-substantive changes were made to the proposed regulations concerning the administration of medication to children in day care, those changes do not require changes to the Regulatory Flexibility Analysis, Rural Area Flexibility Analysis or Job Impact Statement as originally published.

Assessment of Public Comment

Child Day Care Administration of Medications Regulations

The Office of Children and Family Services (Office) received a total of 304 public comment letters relative to the proposed regulations on the administration of medications in child day care programs.

The majority of the letters came from four groups of interested parties. They are: day care providers (69 letters), family based day care providers (106 letters), parents (63 letters) and Child Care Research and Referral agencies (23 letters).

The general stances of the letters received are as follows:

- 230 writers oppose all or some portion of the proposed changes;
- 6 writers oppose some portion of the proposed changes and offer modifications;
- 1 writer opposes the proposed changes but seeks clarification on some points;
- 18 writers support the proposed changes as they are;
- 36 writers support the proposed changes with suggestions on modifications; and
- 13 writers neither support nor oppose the proposed changes but wrote to comment on specific areas of concern or to ask questions.

Two categories emerged as the focal points of the public comment received by the Office. Those categories are the training requirements associated with the administration of medications and the requirements for approval of the health care plan for a day care provider that will administer medications by a health care consultant. The primary concern in each of these categories is the potential cost to the provider community.

Training Requirement

Comments: Of those writers who specifically commented on the proposed training requirements, 113 oppose any additional training associated with the administration of medications and 47 support an increase in training. Of the 113 writers who oppose training, 32 cited the cost of training as the factor driving their opposition; 30 additional writers claimed they could support the regulations if the state funded the training requirement; and 16 writers expressed the opinion that day care providers already have the skills needed to administer medications. The remaining

35 writers expressed separate and distinct concerns. Those concerns range from a fear that additional training time will be a burden in coverage hours to a writer who requests a delay in enacting the proposed regulatory changes.

Response: The Office considers training child care providers in the administration of medications to be essential to better protect the health, safety and welfare of children receiving care in regulated child care programs. The Office has worked diligently with the State University Training Program, New York State sister agencies, day care providers and community-based programs to create a training curriculum which focuses directly on the skills needed to administer medications. The Office is confident that the curriculum addresses both the competencies needed to administer medications to children and is respectful of the time commitment asked of the provider community. The Office will monitor the implementation of these new requirements carefully, paying particular attention to any loss in regulated capacity. However, the new requirements are based in law and must be implemented.

The Office estimates that training can be accomplished in two eight hour sessions, which includes the time needed to test participant competency. Upon completion of the course and a successful test of competencies, participants are certified for a three-year period. After three years the individual will be required to take a re-certification class, which we anticipate will be a much condensed version of the original training. Training certificates will not be site specific; they are portable in that they will remain valid even when a day care employee moves to a different day care program, different modality of care or site. However, the ability to administer medications is not a portable certification, as the second step of the approval is that the person is designated to administer medication only in an approved health plan of a regulated child care setting. The Office continues to analyze the cost of training and the applicable funding sources that may cushion the impact of the training requirement on the provider community. In the current budget year, OCFS will make available funds to reimburse child care providers for the cost of training those personnel the program seeks to specifically designate to administer medication as part of their health plan. The number of providers for whom reimbursement will be provided for a specific facility will be based on an assessment of the number of such personnel deemed to be necessary based on the capacity and hours of operation of the program. Training hours in the administration of medications will also count toward the mandated thirty-hour training requirement.

Health Care Consultant

Comments: Of those who commented on the role of the health care consultant, 54 objected on the basis that day care programs could not absorb the cost of hiring a health care consultant and 38 writers identified themselves as day care providers who said that the health care consultant requirement would result in providers either leaving the day care field or choosing to not administer medications. Other comments were from writers who expressed concern over the ability of day care providers to locate health care consultants.

Response: The Office understands the concerns. However, the role of the health care consultant is vital to the Office's commitment to better protect the health, safety and welfare of children receiving day care in New York. The Office believes that the involvement of health care consultants will improve the quality of day care programs and add a useful but not intrusive level of oversight for those day care providers who will administer medications as part of their program. The Office has been identifying funding sources to assist providers in meeting the costs of obtaining health care consultants. The Office has been working to identify lists of available health care consultants in all areas of the State and will encourage day care providers to work together with a consultant to develop plans for similar health care packages, which may help reduce the costs.

NOTICE OF ADOPTION

Market Rates for Subsidized Child Care

I.D. No. CFS-07-04-00004-A

Filing No. 658

Filing date: June 2, 2004

Effective date: June 23, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of sections 415.6 and 415.9 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 410 and 410-x(4)

Subject: Market rates for subsidized child care.

Purpose: To update the market rates social services districts can pay for subsidized child care.

Text or summary was published in the notice of proposed rule making, I.D. No. CFS-07-04-00004-P, Issue of February 18, 2004.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Public Information Office, Office of Children and Family Services, 52 Washington St., Rensselaer, NY 12144, (518) 473-7793

Assessment of Public Comment

The Office of Children and Family Services (Office) received comments on the proposed child care market rate regulations from one social services district and from two legal advocacy organizations. A summary of the comments and the response from the Office is as follows:

18 NYCRR CITATIONS

415.6(e)(1) The Office received one comment stating that the proposed regulation should require districts to "fairly negotiate" a contract with child care providers. Additionally, the commenter states that language regarding "a fairly negotiated rate" was dropped from the Local Commissioners Memorandum concerning market rates issued in 2002 by the Office and should be reinstated. The Office reviewed this comment and the Office determined that the requirements under which districts contract for the purchase of services, including child care services, are detailed in 18 NYCRR Part 405.3. These provisions require the districts to negotiate a contract and do not define the manner in which a contract is to be negotiated. Therefore, the Office believes that a new standard cannot be established in 18 NYCRR Part 415. Further, since the term "fairly negotiate" is not in regulation and is not statutorily required, the Office feels that it is not warranted to impose an additional requirement on districts in a Local Commissioners Memorandum. As such, there will be no change to the regulation based on this comment.

415.6(e)(1) The Office received one comment requesting that the regulations include a statement that a district may not require a contract as a condition of receiving payment under the New York State Child Care Block Grant. 18 NYCRR Part 415.5 already provides that a contract between the district and a child care provider is not required for child care services funded under the New York State Child Care Block Grant. The Office will continue to advise districts, in Local Commissioners Memorandums, that a contract is not required for child care services funded under the New York State Child Care Block Grant. The Office does not believe it is necessary to include such a statement in this regulation as it is already addressed in another existing regulation. As such, there will be no change to the regulation based on this comment.

415.6(e)(1)(ii) The Office received two comments stating that the proposed regulation defining actual cost of care for programs serving only subsidized children violates federal regulation 45 CFR 98.43(c) that provides, "A Lead Agency may not establish different payment rates based on a family's eligibility status or circumstances." The Office reviewed the federal regulations and requirements related to the Child Care and Development Fund, and the Office determined that the proposed regulation is in compliance with federal regulations and requirements. The proposed regulation relates to determining actual cost of care for programs serving only subsidized children. It does not apply to the market rates for such programs. The same market rates are applied for providers that are caring for subsidized children only, as for providers caring for a mix of subsidized and non-subsidized children. The regulation also does not prevent providers from obtaining a higher reimbursement rate. Therefore, a different payment rate is not being established for providers caring only for subsidized children. As such, there will be no change to the regulation based on these comments.

415.6(e)(1)(ii) The Office received two comments that the proposed regulation defining actual cost of care for programs serving only subsidized children requires burdensome proof from such providers, and fails to provide uniform guidelines on how to demonstrate the actual cost of care. The commenters further allege that providers serving exclusively low income families are not likely to have access to accountants or other professionals to help them demonstrate any increases in their costs of care, and that the regulations should require the State to provide training for child care providers so they know how to determine their actual cost of care. The Office reviewed this comment, and does not agree with the commenters' assertions. The Office would like to note that section 390-a(3) of the Social Services Law provides that in order to obtain and

maintain a license or registration to operate, child care providers must complete training at initial licensure or registration and every two years thereafter that addresses business record maintenance and management. This training should prepare providers to develop a budget for their programs based upon revenues and expenses. Therefore, the Office believes that providers should not need the assistance of a professional to demonstrate that their basic costs relating to occupancy, insurance, employees or food have increased. Thus, the need to demonstrate any increased costs will not constitute an undue burden to providers. The Office also believes that it is unnecessary to add uniform guidelines or additional training on how to demonstrate actual cost of care. The current training child care providers must complete in order to maintain their license or registration to operate provides sufficient information to enable providers to show their actual cost of care. In addition, OCFS will be issuing guidance to districts on criteria to consider when determining if there has been an increase in the cost of care. As such, there will be no changes to the regulations based on these comments.

415.6(e)(1)(ii) The Office received two comments recommending that it should be a requirement that child care providers be advised, in writing, of the reasons they are denied a rate increase and also have the opportunity for a hearing if they disagree with the denial. The Office reviewed this comment and believes that it is inappropriate for the State to mandate that districts notify providers in writing, or that providers have a right to an appeal the decision in these situations. The Office believes that districts are in the best position to determine local needs and how best to serve their provider communities. In addition, the Office may only provide a fair hearing right if statutory authority for such a hearing right exists. The relevant statutes do not provide child care providers with a hearing right in this or any other situation. Therefore, there will be no changes to the regulations based on these comments.

415.6(e)(1)(ii) The Office received two comments that the proposed regulation defining actual cost of care for programs serving only subsidized children will result in incoherent and irrational outcomes for providers with enrollments that fluctuate between serving only subsidized children and those serving a combination of private pay children and subsidized children. The commenter asked how these situations would be handled. The Office reviewed these comments and the Office believes that implementation guidelines should not be in regulation but issued as a separate release to districts. The Office will be issuing guidelines to districts that address how to handle situations where enrollment of subsidized children only changes frequently. The Office believes that these guidelines will provide standardized directions to apply in circumstances where enrollment changes and, therefore, determinations by the districts will not be incoherent or irrational. As such, there will be no changes to the regulations based on these comments.

415.6(e)(1)(ii) The Office received one comment that the proposed regulation defining actual cost of care should be clarified to exclude not-for-profit agencies that sub-contract with child care providers. The Office reviewed these comments. The Office would like to clarify that the market rates, and for the same reasons, the provisions regarding demonstrating actual cost of care, do not apply to not-for-profit agencies that are not directly providing child care services. However, if the actual child care providers that are subcontractors of the not-for-profit agencies are serving subsidized children only, the child care providers are subject to the actual cost of care requirements. As such, there will be no change made to the regulations based on this comment.

415.9 The Office received one comment recommending that districts be allowed flexibility to authorize alternative options to the four rate setting categories provided in regulation. The Office reviewed this comment and the Office believes that the market rates defined by the five modalities of care, the four age groupings and the four rate periods are reasonable and provide districts with appropriate flexibility in paying for child care services. Furthermore, section 410-x(4) of the Social Services Law requires that the Office take into account variations in the costs of providing child care in different settings and to children of different age groups when establishing the market rates. As such, there will be no change made to the regulations based on this comment.

415.9 The Office received one comment that questioned the methodology of the market rate survey since the resultant market rates for New York City seem low. The commenter recommended that the market rates for New York City be reexamined. The Office reviewed the methodology used to conduct the market rate survey and to determine the market rates for New York City. The Office has determined that the methodology and the calculation of the market rates meet acceptable and appropriate stan-

dards for sampling and survey. As such, there will be no changes to the regulations based on this comment.

Department of Civil Service

NOTICE OF ADOPTION

Examination Appeals

I.D. No. CVS-13-04-00004-A

Filing No. 663

Filing date: June 7, 2004

Effective date: June 23, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 55.2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Examination appeals.

Purpose: To avoid unnecessary technical examination appeals that have bearing on the selection of candidates.

Text or summary was published in the notice of proposed rule making, I.D. No. CVS-13-04-00004-P, Issue of March 31, 2004.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-25-04-00007-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify positions in the exempt class in the Department of Audit and Control.

Text of proposed rule: Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Audit and Control, by increasing the number of positions of Administrative Assistant from 11 to 29.

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 18, 2004 under the notice of proposed rule making I.D. No. CVS-07-04-00005-P.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-25-04-00008-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To delete a position from and classify a position in the exempt class in the Executive Department.

Text of proposed rule: Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading "Office of General Services," by decreasing the number of positions of Special Assistant from 13 to 12 and, in the Executive Department under the subheading "Office for Technology," by adding thereto the position of Special Assistant.

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 18, 2004 under the notice of proposed rule making I.D. No. CVS-07-04-00005-P.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Jurisdictional Classification

I.D. No. CVS-25-04-00009-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the non-competitive class in the Executive Department.

Text of proposed rule: Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Commission of Correction," by increasing the number of positions of Secretary 2 from 1 to 2.

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 18, 2004 under the notice of proposed rule making I.D. No. CVS-07-04-00005-P.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Jurisdictional Classification

I.D. No. CVS-25-04-00010-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify positions in the non-competitive class in the Executive Department.

Text of proposed rule: Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Office for Technology," by adding thereto the positions of Radio Engineer (4) and Radio Technician (3).

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 18, 2004 under the notice of proposed rule making I.D. No. CVS-07-04-00005-P.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Jurisdictional Classification

I.D. No. CVS-25-04-00011-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Appendix(es) 1 and 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify positions in the exempt and non-competitive classes in the Department of Audit and Control.

Text of proposed rule: Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Audit and Control, by adding thereto the positions of Chief of Staff and Executive Deputy Comptroller and by increasing the number of positions of Executive Assistant from 6 to 7, Executive Secretary from 3 to 6 and Secretary from 12 to 14; and

Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Audit and Control, by adding thereto the position of Chief Information Officer (1).

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 18, 2004 under the notice of proposed rule making I.D. No. CVS-07-04-00005-P.

**Department of Correctional
Services**

NOTICE OF ADOPTION

Use of Restraints in Special Housing Units

I.D. No. COR-15-04-00006-A

Filing No. 669

Filing date: June 8, 2004

Effective date: June 23, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 305.3 of Title 7 NYCRR.

Statutory authority: Correction Law, section 112

Subject: Use of restraints in special housing units.

Purpose: To establish a uniform procedure for application of restraints on inmates assigned to special housing units during movement outside their cells.

Text or summary was published in the notice of proposed rule making, I.D. No. COR-15-04-00005-P, Issue of April 14, 2004.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Anthony J. Annucci, Deputy Commissioner and Counsel,

Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 457-4951

Assessment of Public Comment

The agency received no public comment.

Department of Health

EMERGENCY RULE MAKING

Environmental Laboratory Standards (Bioterrorism)

I.D. No. HLT-21-04-00012-E

Filing No. 670

Filing date: June 8, 2004

Effective date: June 8, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of section 55-2.13 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 502

Finding of necessity for emergency rule: Preservation of public health, public safety and general welfare.

Specific reasons underlying the finding of necessity: The Department of Health finds that immediate adoption of this rule is necessary to preserve the public health, safety and general welfare, and that compliance with State Administrative Procedure Act (SAPA) Section 202(1) for this rulemaking would be contrary to the public interest. These regulations add a new section to existing Subpart 55-2, which, under the authority of Public Health Law Section 502, implements standards for examination of environmental samples containing or potentially containing agents that pose significant public health or national security risks, and for certification of laboratories performing such examinations. The proposed emergency amendment must be adopted immediately to ensure timely and reliable environmental testing for biological and chemical so-called "critical agents," including such recognized deadly agents of bioterrorism as anthrax.

Numerous unregulated firms have risen to the challenge of testing samples for agents of bioterrorism from environments such as public office buildings and private residences. These firms bring to the marketplace a broad range of analytical experience, capacity and expertise, and use various testing methods for ruling out the presence of infectious organisms such as anthrax. However, market forces alone cannot ensure the quality and reliability of critical agent testing. Therefore, emergency rules for laboratory certification must be promulgated without delay in this critically urgent emergent area of public health protection. These proposed regulations will protect the public from unqualified providers of environmental testing services for critical agents by promulgating minimum standards for: laboratory director and testing personnel qualifications; use of approved methods for sample collection and decontamination; record keeping systems to track the location of isolated agents; chain-of-custody protocols to ensure the admissibility of test results as evidence in legal proceedings; test result reporting procedures; client reports content; and sample and/or isolate referral protocols.

Reliable and early identification, enhanced by this emergency filing, is crucial to appropriate public health response to biological or chemical terrorism, and/or other such incidents posing a significant public health threat. To that end, the Department of Health has established standards for a new area of certification, environmental critical agent testing, to improve New York State's preparedness for, and rapid response, to adverse public health events, including terrorist-instigated disease outbreaks. The new certification will permit the Department and the public to quickly identify and engage laboratories to test environmental samples for microorganisms and chemical agents posing a public health or security risk, in the event of terrorist-initiated environmental contamination. Furthermore, certification in critical agent testing will provide indispensable regulatory oversight to shield the public from unproven or incorrectly applied test methods that could generate compromised or unreliable results in emergency health threat situations. Department oversight afforded by this emergency filing will also help reduce use of ineffective and unproven safety procedures

that could fail to confine a dangerous agent or, in the worst case, even promote its further dissemination to threaten an even larger population.

Rule filing on a non-emergency basis, including the delay incurred from a public comment period, is unacceptable, as it would permit individuals and laboratories to test for critical agents without any assurance that testing is being performed in a safe and reliable manner.

Subject: Environmental laboratory standards.

Purpose: To establish minimum requisites for laboratories testing critical agents.

Text of emergency rule: Subpart 55-2 is amended by reserving new Section 55-2.12 for future use and adding new Section 55-2.13 as follows:

Section 55-2.12 (reserved)

Section 55-2.13 Requirements for laboratories engaged in testing for critical agents in environmental samples.

(a) For purposes of this Subpart, critical agent shall mean an organism, chemical element or chemical compound, which is recognized as posing a risk to national security and/or requiring special action to protect the public health because the agent: can be disseminated (e.g., in air, water or food) or transmitted person-to-person with ease; causes moderate to high mortality and/or morbidity; and can have a significant public health impact. The term organism includes, but is not limited to, a virus, bacterium, or product of an organism. Critical agents shall include critical biological and chemical agents specified by the federal Centers for Disease Control and Prevention (CDC) in published documents, and other such agents as the Commissioner of Health has determined meet the above criteria.

(b) (1) Prior to performing testing for any critical agent in an environmental sample, a laboratory shall submit a request to the department, and receive an initial or revised certificate of approval that includes the specialty of critical agent testing. The certificate of approval shall also list the specific critical agent(s) included in the approval, the approved method(s), and the types of samples (e.g., surface swipes, powder, fluid and bulk material) the laboratory may accept for testing. No laboratory shall examine an environmental sample for a biological or chemical critical agent without certification of approval specific to each critical agent for which testing is conducted.

(2) The department may withhold or limit its approval if the department is not satisfied that the laboratory has in place adequate policies, procedures, facilities, equipment, instrumentation and trained personnel to ensure that collection, labeling, accessioning, preparation, analysis, result reporting, storage, transportation, shipping, and disposition of all environmental samples, derivatives and related materials shall be performed in a manner that: ensures consistently correct performance of the approved methods; ensures the protection of the health, safety and welfare of the laboratory's employees and the public; and is consistent with the requirements of this Subpart, and all other applicable laws, rules and regulations. The department shall also consider a laboratory's (bio)safety level facilities and practices in its determination to approve the laboratory for critical agent testing in environmental samples.

(c) In addition to application and attestation requirements found elsewhere in this Subpart, a laboratory seeking approval to perform critical agent testing in environmental samples shall submit:

(1) a standard operating procedure manual documenting laboratory policies, procedures, facilities, equipment, supplies, instrumentation and personnel for critical agent testing, which are designed to ensure that collection, labeling, accessioning, preparation, analysis, result reporting, storage, transportation, shipping, and disposition of all environmental samples, derivatives and related materials shall be performed in a manner that ensures consistently correct performance of the approved methods; ensures the protection of the health, safety and welfare of the laboratory's employees and the public; and is consistent with the requirements of this Subpart, and all other applicable laws, rules and regulations; and

(2) an attestation signed by the owner(s) and director(s) that the laboratory will accept only the type(s) of samples (e.g., surface swipes, powder, fluid and bulk material) specified on the laboratory's certificate of approval, and that the owner(s) and director(s) will take whatever action is necessary to ensure that such samples are collected, labeled, accessioned, prepared, analyzed, stored, transported, shipped and disposed of, and all results are reported in a manner consistent with the approved method and with all other documentation submitted to the department.

(d) In addition to the preceding requirements of this Subpart, a laboratory engaged in critical agent testing in environmental samples, through its owner(s) and director(s), shall:

(1) establish, maintain, review periodically, and implement written policies and procedures which are designed to ensure that collection,

labeling, accessioning, preparation, analysis, result reporting, storage, transportation, shipping and disposition of samples shall be performed in a manner that ensures consistently correct performance of the approved methods, ensures the protection of the health, safety and welfare of laboratory personnel, sample collectors and the public to the extent possible, and is consistent with all applicable laws, rules and regulations, as well as recognized standards of practice designed to minimize the risks associated with potential exposure to similar hazardous substances or critical agents. Such policies and procedures shall include specific procedures for containment, secured storage, decontamination, and/or disposal or destruction of the sample(s), derivatives, and related collection materials, supplies and/or equipment, as necessary and/or appropriate for the relevant suspected critical agent;

(2) have written policies and procedures in place to implement a chain-of-custody protocol whenever required by a law enforcement agency. Such policies and procedures shall be developed in consultation with law enforcement officials or other persons with appropriate experience and training in chain-of-custody issues, and shall at a minimum require an intact continuous record of the physical possession, storage, and disposition of the sample and any derivatives, including the signatures of all persons who access the sample and derivatives, the date of such access and other pertinent information;

(3) (i) ensure that all laboratory employees engaged in collecting and/or transporting environmental samples receive sufficient training in hazardous material handling techniques to ensure they will perform their responsibilities in a safe and reliable manner. Such training shall include, but not be limited to, training in sample collection, packaging, decontamination, transportation, and chain-of-custody policies and procedures established by the laboratory. The laboratory shall maintain documentation of such training for a minimum of three (3) years and take such other action as is necessary to ensure ongoing compliance with such policies and procedures;

(ii) develop and implement sample acceptance criteria designed to protect the health, safety and welfare of laboratory personnel, sample collectors, and the public to the extent feasible. Such criteria shall be consistent with approved methods for sample collection, handling, packaging and decontamination, and shall minimally define conditions under which a sample shall be rejected, and conditions under which a sample shall be tested and results reported with limitations. The laboratory shall make its sample acceptance criteria available to clients;

(4) issue reports of test results in a format and of a content required by the approved method, and necessary for interpretation of the test results, including, but not limited to, unambiguous identification of the tested environmental sample, including collection location, source and sample type, and limitations of the method. The department may restrict a laboratory's ability to report information concerning a test result whenever confirmatory or supplemental testing is required by the approved method;

(5) report laboratory findings to the department within twenty-four (24) hours via telephone, facsimile and/or electronic transmission, using a number or e-mail address designated by the department, whenever the findings indicate that an environmental sample contains an organism, its product or component, or a chemical, any of which exhibits characteristics or properties consistent with those of a critical agent. Whenever the department determines that supplemental testing is necessary to confirm the results of a test, and/or further identify the characteristics of a critical agent for public health protection, law enforcement or research purposes, the laboratory shall submit all or part of the sample or its derivative(s) to the department or its designee, as directed by the department; and

(6) establish and implement a critical agent inventory and tracking system that accounts for all environmental samples and their derivatives suspected or confirmed to contain critical agents. Unless required to document chain of custody pursuant to paragraph (2) above or required by this paragraph, a laboratory may discontinue inventory and tracking of samples and derivatives, provided laboratory findings have established the absence of a critical agent. Inventory and tracking documentation shall include the identity of all individuals who access such materials and the date of access, as well as specific information regarding transfer, disposal or other disposition of the materials. Samples and their derivatives, access records, chain of custody records and records of the analyses shall be maintained in a secure manner until the statute of limitations for bringing any related criminal or civil action has expired, and the sample and its derivatives are no longer needed for evidence in any pending legal matter or by law enforcement officials. Access records, chain of custody records

and records of the analyses of confirmed positive samples, shall be maintained for ten (10) years, or as required above if longer.

(e) For critical biological agents, an environmental laboratory's proficiency testing performance shall be evaluated based on the known presence or absence of the critical agent, or, as applicable, its product or component. Satisfactory performance shall be a result correctly indicating the presence or absence of the critical agent, or, as applicable, its product or component. Unsatisfactory performance shall be a result incorrectly indicating the presence or absence of the critical agent, or, as applicable, its product or component.

(f) Personnel requirements for environmental sample testing for critical biological agents that are microbiologic organisms shall be as follows:

(1) notwithstanding the requirements of section 55-2.10 of this Subpart, the environmental laboratory shall employ, as director, one of the following:

(i) a person who holds or meets the qualifications for a New York State clinical laboratory director certificate of qualification in the applicable subspecialty of microbiology (such as bacteriology), pursuant to Part 19 of this Title;

(ii) a person with an earned doctoral degree or master's degree in the chemical, environmental, physical or biological sciences or engineering, with at least sixteen (16) college semester credit hours in the biological sciences including at least one (1) course having microbiology as a major component, and at least one year of experience in analysis of representative analytes for which the laboratory is approved or seeking approval; or

(iii) a person with a bachelor's degree in the chemical, environmental, physical or biological sciences or engineering, with at least sixteen (16) college semester credit hours in the biological sciences including at least one (1) course having microbiology as a major component, and at least two years of experience in analysis of representative analytes for which the laboratory is approved or seeking approval; and

(iv) with respect to environmental laboratories that limit their critical biological agent testing to toxin analysis, any of the following personnel qualifications may be substituted for qualifications set forth in subparagraphs (i) through (iii) above, as follows: a New York State clinical laboratory director certificate of qualification in toxicology may be substituted for the certification in microbiology requirement specified in subparagraph (i) above; and coursework consisting of a minimum of sixteen (16) college semester credit hours in the biological and/or chemical sciences including at least (1) one course in biochemistry may be substituted for the coursework requirements, but not the educational degree requirements, specified in subparagraphs (ii) and (iii) above; and

(2) sample preparation, analysis and related responsibilities shall be performed by an analyst who shall have an associate's degree or equivalent, with at least twelve (12) college semester credit hours in the biological sciences, and at least one year of experience in analysis of representative analytes; provided, however, that a person with at least three (3) years experience in the analysis of representative analytes immediately preceding the effective date of this section shall be deemed to have met the requisite qualifications for performing critical agent analysis in the laboratory in which such experience has been obtained. Analysts with critical biological agent testing responsibilities that are limited to toxin sample preparation, analysis and related responsibilities may meet the semester credit hour qualifications set forth in this paragraph by completing a minimum of twelve (12) college semester credit hours in the biological and/or chemical sciences.

(g) This section shall not apply to bacteriologic testing for total and fecal coliform bacteria (i.e., the common form of *Escherichia coli*) in potable and non-potable water.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-21-04-00012-P, Issue of May 26, 2004. The emergency rule will expire August 6, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

Public Health Law Section 502 authorizes the Commissioner of Health to issue certificates of approval to environmental laboratories, and prescribe the requirements for granting such approvals. The Commissioner is

also empowered to adopt and amend regulations for implementing the provisions and intent of Section 502, and to prescribe the educational and technical qualifications of environmental laboratory director(s).

Legislative Objectives:

Section 502 of the Public Health Law requires all laboratories performing environmental analysis on samples collected in New York State to hold certificates of approval on such analyses as issued by the Commissioner of Health. The Commissioner is authorized to establish standards for approved laboratories and technical and educational qualifications for laboratory directors to ensure that tests conducted for public health or personal health protection, or the protection of the environment or natural resources are performed in a reliable manner.

Needs and Benefits:

Accurate and reliable identification of critical agents in environmental samples is crucial to appropriate public health response to potential biological or chemical terrorism events, and/or other such incidents posing a significant public health threat. Therefore, the Department proposes the addition of a new Section 55-2.13 for the specialty of "critical agents testing" which sets forth minimum standards for: laboratory director and testing personnel qualifications; use of approved methods for environmental sample collection and decontamination; record keeping systems to track the location of confirmed positive samples and isolated agents; sample chain-of-custody protocols; test result reporting procedures, including appropriate notification of the Department; client result reports content; sample and/or derivative referral protocols; and proficiency testing.

The proposal's definition of "critical agents" is largely based on the federal Centers for Disease Control and Prevention (CDC)'s criteria for biological and chemical agents of significant public health or national security risk. However, the rule not only encompasses agents categorized by the CDC as critical agents, but also agents that the Commissioner of Health has determined may require special action to protect the public health because they are easily disseminated, could cause high to moderate morbidity and/or mortality and can have a significant public health impact. The proposal's consistency with the federal criteria will promote communication among responsible agencies and enhance coordinated response at all levels, while permitting the Commissioner to react swiftly to local conditions and preparedness needs.

Due to the increased complexity and special issues presented by critical agent testing, this regulation establishes new requirements in addition to expanding several minimum standards now in place for environmental laboratories. However, the decision to engage in critical agent testing is strictly voluntary, and a laboratory needs to comply with the new and expanded requisites only if it applies for the specialty.

The educational requirements for technical directors in microbiology have been expanded beyond those required for sewage and water treatment plant operation to include post-doctoral, master's and/or bachelor's degree credentials. Qualifications for technical directors involved in critical biological agent testing of toxins have been added, as existing Subpart 55-2.10 does not provide specific or appropriate alternative qualifications in this area. The proposed amendment recognizes the expertise resident in clinical laboratories, and would allow clinical laboratory directors certified in clinical microbiology to oversee environmental critical agent testing for microbiological organisms and toxins (*e.g.*, ricin), and clinical laboratory directors certified in either microbiology or toxicology to oversee environmental critical agent testing for toxins, provided the facility is dually certified as an environmental laboratory with an approved specialty of "critical agent testing" pursuant to Subpart 55-2. Minimum qualifications for analysts performing critical agent testing for microbiological agents and/or toxins in environmental samples are also set forth at the level of an associate's degree. The Department believes this degree or its equivalent is a necessary requisite because of the higher level of knowledge, expertise and experience required to handle critical agents safely, and follow the attendant complex testing, reporting and security protocols. The setting of minimum educational and experience qualifications for critical agent analysts is consistent with the Department's approach to certifying environmental laboratories in the Contract Laboratory Protocol (CLP) tier. CLP laboratories must demonstrate capability to adhere to stringent testing protocols and to issue reports of a content and organization able to withstand a high level of scrutiny by scientific and legal authorities. The analyst qualifications set forth in this proposal are also consistent with those for clinical testing personnel performing high complexity testing specified in the federal Clinical Laboratory Improvement Amendment of 1988 (CLIA). To preclude displacement of any individuals currently employed due to the new minimum qualifications, the proposed rule contains a grandfather clause allowing analysts with three years' experience conducting similar

analyses to qualify for critical agent testing within his or her current employment setting.

In addition to establishing personnel qualifications for environmental laboratory directors and testing personnel, the proposed amendment protects the public and ensures high quality environmental testing for biological and chemical critical agents by requiring laboratories to: use approved methods for sample collection, handling and decontamination; limit access to samples and sample derivatives, such as isolated organisms; and develop and maintain record keeping systems to track the location of samples and isolated agents. The proposed regulation also requires laboratory employees to be trained in hazardous materials handling, sample collection, packaging, decontamination, transport, disposal and chain-of-custody protocols. Furthermore, the regulation requires environmental laboratory director(s) to develop sample acceptability criteria to protect the health, safety and welfare of laboratory personnel, sample collectors and the public, and to make such criteria available to clients upon request. Such precautionary measures to be taken at the pre- and post-analytic stages are designed to reduce, to the extent feasible, submission of samples that may pose a danger to transporters and to recipient laboratory personnel.

The proposed regulation requires laboratories to employ facilities and practices for bio-safety and chemical safety as appropriate for the critical agent(s) tested, to protect the public health, safety and welfare and prevent the use of ineffective procedures that could fail to confine dangerous agents or even promote their further dissemination. Additionally, the rule effectively restricts the often complex and potentially dangerous procedures for confirmatory testing and further characterization of an agent to appropriately equipped sites.

The rule also provides for restricting the reporting of analytical results should the Department determine that limitation on report distribution, language or content is necessary to preclude dissemination of potentially misleading information, particularly for unconfirmed or preliminary results. Furthermore, the regulation requires laboratories to notify the Department of any analytical finding indicating the presence of a critical agent. This requirement will promote clear communication lines of test results for various agents, and permit the Department to make determinations regarding the need for supplemental or confirmatory testing, as well as assess the public health threat and need for further governmental intervention.

The sensitive nature of critical agent testing requires environmental laboratories to establish procedures to keep track of environmental samples and their derivatives following testing and characterization, ensure continued proper handling of samples and any derived agents, and limit inappropriate access by laboratory personnel and the public. The proposed amendment establishes requirements for a tracking and inventory control system to record and identify the exact location and disposition of environmental samples and derivatives that test positive for a critical agent. The required retention period of at least ten years for access records and analysis records is consistent with the ten-year requirement for drinking water analysis records currently in place. Samples and their derivatives, access records and records of the analyses which are needed for potential civil or criminal actions must be retained in a secure manner until the statute of limitations for bringing a civil or criminal proceeding has expired and such items are no longer needed as evidence in any pending legal matter. However, it is anticipated that in most instances where such retention is required, the Department or a law enforcement agency will assume responsibility for the sample and any derivatives. The rule's enhanced record keeping requirements will also ensure the availability of records pertaining to positive samples until no longer needed for evidence in pending legal matters or by law enforcement officials, and provide grounds for admissibility of test results by establishing a chain-of-custody documentation requirement for testing initiated by law enforcement officials.

Laboratories applying for approval in the specialty of critical agent testing will be required to submit their policies and procedures to the Department for review and approval to ensure adherence to approved methods. The amendment also details criteria for scoring of proficiency testing results for environmental bacteriologic analytes, and excludes from the proposed requirements microbiological methods for detecting and monitoring for the common form of *E. coli* in potable and nonpotable waters, for which the Department already offers certification.

Costs:

Costs to Private Regulated Parties:

The costs of compliance will vary significantly, primarily by a laboratory's existing biosafety level (*e.g.*, BSL-2 or BSL-3) and whether it meets U.S. Centers for Disease Control and Prevention (CDC) safety and security requisites for handling the particular critical agent(s) and specimen

type(s) it proposes to test. A laboratory already meeting CDC's safety and security standards is expected to incur no new costs. On the other hand, a facility minimally equipped for handling infectious agents – because it limits testing to basic microbiology testing to monitor drinking water, for instance – may accrue extensive renovation and/or construction costs.

Since the regulation's initial filing, thirty facilities requested application information for certification in anthrax testing. Six laboratories have been granted certification in anthrax testing; two of the six applicants required minor modifications to existing facilities to comply with the proposed requisites for microbiologic testing. No additional modifications would be necessary by laboratories granted certification in anthrax testing in order to qualify them for certification in critical agent testing for toxins, as toxin testing requires less stringent biosafety facilities than those required for anthrax analyses.

Facilities which do not comply with these requirements currently may incur the following compliance costs: costs for purchase and installation of a state-of-the-art biological safety cabinet; costs for establishing negative air pressure conditions and adequate air filtration with space renovation or new construction; and costs for security systems, such as installation of card-key devices, and/or locks on entrances to storage and work areas. The Department expects that commercial laboratories voluntarily incurring costs by electing to establish critical agent testing capacity will be able to offset such costs with income from fee-for-service and contractual charges imposed on clients.

According to manufacturers' estimates, costs for purchase and installation of a biological safety cabinet to meet minimal BSL-2 standards range from \$6,275 to \$11,365. Upgrading existing standard microbiology workspace to BSL-3 would require extensive modifications to usable space and air handling and filtration systems, and would be expected to result in costs comparable to new construction. According to vendors of modular construction, who gave estimates to public health officials in NYS and other states, costs for a 600-square foot BSL-3 building range from \$240,000 to \$500,000. Given the Department's experience thus far, it is unlikely that any commercial entity will choose to develop new BSL-3 capacity. Since a BSL-2 facility is sufficient for testing of critical biological agents that are toxins, any costs associated with establishing a BSL-3 facility would not be applicable to BSL-2 environmental laboratories applying for certification in toxins alone.

Relatively minor expenditures would be necessary for supplies related to sample collection, including personal protection gear, and secure storage of samples with presumptive or confirmed critical agent findings. Laboratory supply catalogues indicate that the two plastic zipper-lock bags per sample would cost less than \$1.00; a box of 100 disposable gloves costs approximately \$6.00; and a lockable refrigerator-freezer costs \$500. Costs to equip one individual sample collector or analyst with requisite personal protective equipment are estimated at a minimum of \$10 for one set of disposable outerwear comprised of gown, shoe covers and gloves, to a maximum of \$500 for a rechargeable self-contained breathing apparatus.

Costs related to security systems vary greatly, depending on the sophistication of the system (*i.e.*, electronic or manual), and costs of maintenance and service contracts. According to estimates given by two manufacturers of card-key systems, one portal with card-key entry would cost \$5,000. One manufacturer of video surveillance equipment estimated that a laboratory installing a sixteen-camera system would incur costs of \$15,000. It is not possible to estimate operating and maintenance of security systems, since service contracts would vary according to the size of the system. Since no express requirements are in place for security equipment, a laboratory may control access to certain areas with stringent administrative controls, including sign-in logs and identification badges, at lower costs than a mechanical or electronic system.

Clinical laboratories seeking certification as environmental laboratories, as well as previously unregulated commercial concerns offering environmental testing (*e.g.*, as part of remediation following confirmed incidents), will need to pay approval fees equivalent to first-year Department Environmental Laboratory Approval Program (ELAP) fees, estimated at \$550. Clinical laboratories and previously unregulated facilities may also incur compliance costs similar to those for existing environmental laboratories described above. Based on a written survey of clinical laboratories currently licensed in the category of microbiology pursuant to Public Health Law Article 5, Title V, the Department estimates that 73 percent of these laboratories have existing capability for critical agent testing and would not need to expend significant resources for biosafety facilities unless they need to purchase personal protective equipment and related items to comply with the more stringent safety practices for critical agents testing.

Most clinical laboratories interested in testing environmental samples for biological critical agents already employ laboratory directors and testing personnel who qualify under the proposed educational and experiential criteria. The majority of environmental laboratories certified to perform microbiology testing limit that testing to low biosafety level work (*e.g.*, potable water testing), and generally do not employ personnel meeting the proposed requirements. While these sites would not incur additional personnel costs for analysts because of the proposal's grandfathering provision, requirements for a technical director would entail some added costs. According to a survey published in 2001 by the American Council of Independent Laboratories, the mean hiring rate for scientists with a bachelor's degree and one to three years' experience is \$38,900. A person with these credentials would meet the proposal's minimum requirements for a technical director of a laboratory performing anthrax testing on environmental samples. Since the regulation was first filed, the Department has found that none of the environmental laboratories currently limiting their services to monitoring of sewage and water treatment facilities are interested in performing critical agent testing. The majority of environmental laboratories certified to perform chemical testing (*i.e.*, for environmental contaminants) already employ personnel meeting the proposed requirements for toxin testing.

Laboratories applying for approval under these regulations will incur costs of approximately \$3.00 to \$20.00 to copy to the Department all policies and procedures relevant to critical agent testing. On occasion, a laboratory may incur costs for shipping presumptively positive samples to the Wadsworth Center or another designated facility for further testing. The cost of shipping an isolate of a microbiologic critical agent (*e.g.*, a culture tube) by common carrier is estimated at between \$25 and \$50, depending on the need for keeping the agent's temperature constant with ice packs, for example. As an alternative, law enforcement officials, laboratory employees or couriers may be used for transporting samples at an anticipated maximum cost of \$350, assuming an 800-mile round trip and a \$25 hourly personnel wage.

Costs for Implementation and Administration of the Rule:

Costs to State Government:

New York State, with the exception of the Department as stated below, would incur costs to the same extent as private regulated parties should any State-operated environmental laboratories, such as those operated by the Department of Environmental Conservation, take on critical agent testing.

Costs to the Department:

The Department will incur costs for development and implementation of a proficiency-testing program for one or more analytes in the critical agent specialty, and for travel to conduct onsite assessments of applicable laboratory facilities. Since existing staff will coordinate the initial development and implementation, as well as periodic mailings, of any proficiency testing designed to challenge laboratories engaged in critical agent testing, the Department anticipates no new costs for personnel salaries and overhead. Costs of one proficiency-testing event challenging 25 laboratories using surrogate material for the analyte are in the range of \$75-\$1200 for materials (depending on the organism, toxin and source); \$325 for mailing containers; \$250 for postage; and approximately \$100 for related paperwork. However, costs related to proficiency testing, as well as travel expenses for on-site assessments, would be recovered through approval fees charged to the laboratories.

Costs to Local Government:

Local government would incur no new costs, except that local government-operated facilities providing regulated services under this proposal would incur the costs described for private regulated parties.

Paperwork:

The only new paperwork requirements imposed by this regulation are: (1) development and submission of relevant policies and procedures; (2) submission of a request for approval to perform critical agent testing; (3) development of chain-of-custody policies and procedures; (4) development of a tracking system for specimens; and (5) reporting of presumptively positive results to the Department.

Local Government Mandates:

The proposed regulations impose no new mandates on any county, city, town or village government; or school, fire or other special district, unless a county, city, town or village government; or school, fire or other special district operates an environmental laboratory, and, therefore, is subject to these regulations to the same extent as a private regulated party.

Duplication:

These rules do not duplicate any other law, rule or regulation, except that some terminology found in federal critical agent rules promulgated by the CDC has been used in this regulation to facilitate response coordination

for domestic preparedness. Federal standards and recommendations for (bio)safety, sample collection, testing algorithms and reporting serve as the underpinnings of this rule, but are not duplicated therein.

This proposal is not duplicative of, but will harmonize with, anticipated Department of Environmental Conservation rules to address the treatment, handling and disposal of waste resulting from critical agent incidents and response to such incidents.

Alternative Approaches:

The alternative to adopting the proposed amendments is to apply the Department's existing standards to critical agents testing. However, because of the special issues raised by critical agent testing the Department has determined that the alternative of applying existing minimal requirements to this area is totally unacceptable.

Federal Standards:

Since there is no federal certification program in place for environmental laboratories, these regulations do not duplicate any federal standards. To the extent that the CDC, the U.S. Environmental Protection Agency, or the federal Department of Transportation have promulgated standards affecting environmental laboratory testing for evaluation of adverse public health events, these regulations are consistent with, and complement, such standards.

Compliance Schedule:

Regulated parties which are adequately staffed and equipped to perform critical agent testing in a safe and reliable manner should be able to comply with all aspects these regulations as of their effective date, upon publication of a Notice of Emergency Adoption in the New York State Register, except for obtaining the approval of the Department. The Department is prepared to approve laboratories for critical agent testing for select analytes, such as anthrax and the toxin ricin, on an expedited basis. Thus, it is expected that laboratories that are fully prepared to undertake such testing may be approved within days of publication of this regulation. Laboratories that are not ready and able to meet the requirements of this regulation should not be engaged in such testing.

Regulatory Flexibility Analysis

Effect of Rule:

The Department's Environmental Laboratory Approval Program (ELAP) currently certifies 779 laboratories. Of these, 227 are located out-of-State and do not qualify as small businesses. Of the remaining 552 laboratories, 275 are governmental laboratories, and 277 are commercial entities, of which 170 are estimated to be small businesses. For the most part, governmental laboratories, which are primarily drinking water and sewage treatment plant laboratories operated by counties, municipalities and townships, are not expected to apply for the environmental testing specialty of critical agents, for which this amendment sets standards.

Of the approximately 900 facilities holding a New York State clinical laboratory permit, 135 qualify as small businesses, and 50 are owned and operated by local governments.

Compliance Requirements:

This proposed rule establishes minimum standards necessary to protect the public and laboratory employees from the health and safety risks inherent in critical agent testing. Due to the increased complexity and special issues presented by critical agent testing, this regulation establishes new requirements in addition to expanding several minimum standards now in place for environmental laboratories. However, the decision to engage in critical agent testing is strictly voluntary, and small businesses and local governments need to comply with the new and expanded requisites only if they operate environmental laboratories that apply for the specialty.

Proposed Section 55-2.13 sets forth minimum standards for: laboratory director and testing personnel qualifications; use of approved methods for sample collection and decontamination; record keeping systems to track the location of confirmed positive samples and isolated agents; sample chain-of-custody protocols; test result reporting procedures, including appropriate notification of the Department; client result reports content; sample and/or derivative referral protocols; and proficiency testing.

This regulation's requirement that laboratories retain records of sample tracking and access for ten years is consistent with the ten-year retention requirement for drinking water analysis records already in place. The Department has contacted numerous laboratories representing various types of ELAP-approved facilities, including commercial, industrial and government laboratories, and has determined that many of these laboratories, particularly those with electronic record-keeping systems, are already retaining records for periods well in excess of five years.

Laboratories applying for approval in the specialty of critical agent testing will be required to submit their policies and procedures to the

Department for review and approval to ensure adherence to approved methods and the requirements of this new section. Since such information, often in the format of manuals, is a universal component of all laboratories' operation, this should not be a burdensome requirement to regulated parties.

Professional Services:

No need for additional professional services is anticipated.

Compliance Costs:

It is not expected that the cost of compliance for small businesses and local governments will be different than for other regulated parties. With the possible exception of environmental testing conducted for public health purposes by county- or city-operated laboratories, the Department expects that costs could be offset by income from per-test or per-site charges imposed by a laboratory on its clients. The costs of compliance will vary significantly, primarily by a laboratory's existing biosafety level (e.g., BSL-2 or BSL-3) and whether it meets U.S. Centers for Disease Control and Prevention (CDC) safety and security requisites for handling the particular critical agent(s) and specimen type(s) it proposes to test. A laboratory already meeting CDC's safety and security standards is expected to incur no new costs. On the other hand, a small business or government-operated facility minimally equipped for handling infectious agents – because it limits testing to basic chemistry and microbiology testing to monitor drinking water, for instance – may accrue extensive renovation and/or construction costs in the unlikely event it wished to take on critical agent testing.

Since the regulation's initial filing, thirty facilities requested application information for certification in anthrax testing. Six laboratories have been granted certification in anthrax testing; of those six, two are operated by local governments, and one is a small business. The two government-operated laboratories required only minor modifications to existing facilities to comply with the proposed requisites for microbiologic testing; two additional government-operated laboratories are currently undergoing modifications in order to qualify for certification for anthrax testing. The costs of on-going modifications at the two applicant facilities are being funded through a National Centers for Disease Control and Prevention (CDC) public health preparedness grant to New York State. No additional modifications would be necessary by facilities already certified for anthrax testing in order that they qualify for certification in critical agent testing for toxins.

Facilities which do not comply with these requirements currently may incur the following compliance costs: costs for purchase and installation of a state-of-the-art biological safety cabinet; costs for establishing negative air pressure conditions and adequate air filtration with space renovation or new construction; and costs for security systems, such as installation of card-key devices, and/or locks on entrances to storage and work areas.

According to manufacturers' estimates, costs for purchase and installation of a biological safety cabinet to meet minimal BSL-2 standards range from \$6,275 to \$11,365. Upgrading existing standard microbiology workspace to BSL-3 would require extensive modifications to usable space and air handling and filtration systems, and would be expected to result in costs comparable to new construction. According to vendors of modular construction, who gave estimates to public health officials in NYS and other states, costs for a 600-square foot BSL-3 building range from \$240,000 to \$500,000. Given the Department's experience thus far, it is unlikely that any commercial entity will choose to develop new BSL-3 capacity.

Relatively minor expenditures would be necessary for supplies related to sample collection, including personal protection gear, and secure storage of samples with presumptive or confirmed critical agent findings. Laboratory supply catalogues indicate that the two plastic zipper-lock bags per sample would cost less than \$1.00; a box of 100 disposable gloves costs approximately \$6.00; and a lockable refrigerator-freezer costs \$500. Costs to equip one individual sample collector or analyst with requisite personal protective equipment are estimated at a minimum of \$10 for one set of disposable outerwear comprised of gown, shoe covers and gloves, to a maximum of \$500 for a rechargeable self-contained breathing apparatus.

Costs related to security systems vary greatly, depending on the sophistication of the system (i.e., electronic or manual), and costs of maintenance and service contracts. According to estimates given by two manufacturers of card-key systems, one portal with card-key entry would cost \$5,000. One manufacturer of video surveillance equipment estimated that a laboratory installing a sixteen-camera system would incur costs of \$15,000. It is not possible to estimate operating and maintenance of security systems, since service contracts would vary according to the size of the system. Since no express requirements are in place for security equipment, a laboratory may control access to certain areas with stringent administrative

controls, including sign-in logs and identification badges, at lower costs than a mechanical or electronic system.

Clinical laboratories seeking certification as environmental laboratories, as well as previously unregulated commercial concerns offering environmental testing (*e.g.*, as part of remediation following confirmed incidents), will need to pay approval fees equivalent to first-year Department Environmental Laboratory Approval Program (ELAP) fees, estimated at \$550. Clinical laboratories and previously unregulated facilities may also incur compliance costs similar to those for existing environmental laboratories described above. Based on a written survey of clinical laboratories currently licensed in the category of microbiology pursuant to Public Health Law Article 5, Title V, the Department estimates that 73 percent of these laboratories have existing capability for critical agent testing and would not need to expend significant resources for biosafety facilities unless they need to purchase personal protective equipment and related items to comply with the more stringent safety practices for critical agents testing.

Most clinical laboratories interested in testing environmental samples for biological critical agents already employ laboratory directors and testing personnel who qualify under the proposed educational and experiential criteria. The majority of environmental laboratories certified to perform microbiology testing limit that testing to low biosafety level work (*e.g.*, potable water testing), and generally do not employ personnel meeting the proposed requirements. While these sites would not incur additional personnel costs for analysts because of the proposal's grandfathering provision, requirements for a technical director would entail some added costs. According to a survey published in 2001 by the American Council of Independent Laboratories, the mean hiring rate for scientists with a bachelor's degree and one to three years' experience is \$38,900. A person with these credentials would meet the proposal's minimum requirements for a technical director of a laboratory performing anthrax testing on environmental samples. Since the regulation was first filed, the Department has found that none of the environmental laboratories currently limiting their services to monitoring of sewage and water treatment facilities are interested in performing critical agent testing. The majority of environmental laboratories certified to perform chemical testing (*i.e.*, for environmental contaminants) already employ personnel meeting the proposed requirements for toxin testing.

Laboratories applying for approval under these regulations will incur costs of approximately \$3.00 to \$20.00 to copy to the Department all policies and procedures relevant to critical agent testing. On occasion, a laboratory may incur costs for shipping presumptively positive samples to the Wadsworth Center or another designated facility for further testing. The cost of shipping an isolate of a microbiologic agent (*e.g.*, a culture tube) by common carrier is estimated at between \$25 and \$50, depending on the need for keeping the agent's temperature constant with ice packs, for example. As an alternative, law enforcement officials, laboratory employees or couriers may be used for transporting samples at an anticipated maximum cost of \$350, assuming an 800-mile round trip and a \$25 hourly personnel wage.

Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to small businesses and local governments that are not already presented by undertaking these activities in a safe and reliable manner. Appropriate equipment and supplies to perform critical agent testing in a safe and reliable manner are currently available should a laboratory choose to begin testing in this specialty. The regulation does not require any laboratory, regardless of ownership type, to undertake testing for critical agents.

Minimizing Adverse Impact:

This regulation imposes requirements only on those laboratories which choose to undertake critical agent testing. Standards have been established at the absolute minimum necessary for safe and reliable testing. The department did not consider different compliance requirements or exceptions for small businesses or local governments because of the importance of this type of testing to public health, safety and welfare.

Small Business and Local Government Participation:

In the development of these regulations, the Department had informal discussions with environmental and clinical laboratories concerning their interest in and capacity to perform critical agent testing. Some of these discussions occurred with small businesses and local governments. The Department believes that the urgent need for public health and safety oversight in the area of critical agent testing obviates the need for extensive solicitation of regulated party input at this time.

Rural Area Flexibility Analysis

Effect of Rule:

The Department's Environmental Laboratory Approval Program (ELAP) currently certifies 779 environmental laboratories. Of these, 227 are located out-of-State and are not considered to be in rural areas. Of the remaining 552 laboratories, 374 are located in rural areas. Of these 374 rural facilities, 198 currently hold certifications in bacteriology, including 56 laboratories operated by counties, municipalities and townships, local governments that only conduct procedures to monitor water treatment. For the most part, environmental laboratories affiliated with drinking water or sewage treatment are not expected to apply for the environmental testing specialty of critical agents, for which this amendment sets standards.

Of the approximately 900 facilities holding a New York State clinical laboratory permit, only 118 are located in areas designated as rural. Of these, only 85 currently hold permits in bacteriology general or virology general and would be possible candidates for testing microbiological critical agents. Of the 118 clinical laboratories designated rural, fewer than 50 currently hold permits in toxicology. The vast majority of these restricts on-site toxicological analysis to screening for drugs of abuse in the emergency room setting, and would not likely be candidates for testing for critical biological agents that are toxins.

Compliance Requirements:

This proposed rule establishes minimum standards necessary to protect the public and laboratory employees from the health and safety risks inherent in critical agent testing. Due to the increased complexity and special issues presented by critical agent testing, this regulation establishes new requirements in addition to expanding several minimum standards now in place for environmental laboratories. However, the decision to engage in critical agent testing is strictly voluntary, and a laboratory needs to comply with the new and expanded requisites only if it applies for the specialty.

Proposed Section 55-2.13 sets forth minimum standards for: laboratory director and testing personnel qualifications; use of approved methods for sample collection and decontamination; record keeping systems to track the location of confirmed positive samples and isolated agents; sample chain-of-custody protocols; test result reporting procedures, including appropriate notification of the Department; client result reports content; sample and/or derivative referral protocols; and proficiency testing.

This regulation's requirement that laboratories retain records of sample tracking and access for ten years is consistent with the ten-year retention requirement for drinking water analysis records already in place. The Department has contacted numerous laboratories representing various types of ELAP-approved facilities, including commercial, industrial and government laboratories, and has determined that many of these laboratories, particularly those with electronic record-keeping systems, are already retaining records for periods well in excess of five years.

Laboratories applying for approval in the specialty of critical agent testing will be required to submit their policies and procedures to the Department for review and approval to ensure adherence to approved methods and the requirements of this new section. Since such information, often in the format of manuals, is a universal component of all laboratories' operation, this should not be a burdensome requirement to regulated parties.

Professional Services:

No need for additional professional services is anticipated.

Compliance Costs:

It is not expected that the cost of compliance for applicant laboratories located in rural areas will be different than for other regulated parties. With the possible exception of environmental testing for public health purposes by county- or city-operated laboratories, the Department expects that costs could be offset by income from per-test or per-site charges imposed by a rural laboratory on its clients. The costs of compliance will vary significantly, primarily by a laboratory's existing biosafety level (*e.g.*, BSL-2 or BSL-3) and whether it meets U.S. Centers for Disease Control and Prevention (CDC) safety and security requisites for handling the particular critical agent(s) and specimen type(s) it proposes to test. A laboratory already meeting CDC's safety and security standards is expected to incur no new costs. On the other hand, any facility minimally equipped for handling infectious agents – because it limits testing to basic chemistry and microbiology testing to monitor drinking water, for instance – may accrue extensive renovation and/or construction costs in the unlikely event it wished to take on critical agent testing.

Since the regulation's initial filing, thirty facilities requested application information for certification in anthrax testing. None of the six laboratories that have been granted certification in anthrax testing are located in a county having townships with population densities of 150 persons or less

per square mile. The Department expects few, if any, environmental laboratories located in rural areas to apply for certification in toxin testing, even though it requires less stringent (i.e., BSL-2) biosafety facilities than those required for microbiological critical agent testing.

Facilities which do not comply with these requirements currently may incur the following compliance costs: costs for purchase and installation of a state-of-the-art biological safety cabinet; costs for establishing negative air pressure conditions and adequate air filtration with space renovation or new construction; and costs for security systems, such as installation of card-key devices, and/or locks on entrances to storage and work areas.

According to manufacturers' estimates, costs for purchase and installation of a biological safety cabinet to meet minimal BSL-2 standards range from \$6,275 to \$11,365. Upgrading existing standard microbiology work-space to BSL-3 would require extensive modifications to usable space and air handling and filtration systems, and would be expected to result in costs comparable to new construction. According to vendors of modular construction, who gave estimates to public health officials in NYS and other states, costs for a 600-square foot BSL-3 building range from \$240,000 to \$500,000. Given the Department's experience thus far, it is unlikely that any commercial entity will choose to develop new BSL-3 capacity.

Relatively minor expenditures would be necessary for supplies related to sample collection, including personal protection gear, and secure storage of samples with presumptive or confirmed critical agent findings. Laboratory supply catalogues indicate that the two plastic zipper-lock bags per sample would cost less than \$1.00; a box of 100 disposable gloves costs approximately \$6.00; and a lockable refrigerator-freezer costs \$500. Costs to equip one individual sample collector or analyst with requisite personal protective equipment are estimated at a minimum of \$10 for one set of disposable outerwear comprised of gown, shoe covers and gloves, to a maximum of \$500 for a rechargeable self-contained breathing apparatus.

Costs related to security systems vary greatly, depending on the sophistication of the system (i.e., electronic or manual), and costs of maintenance and service contracts. According to estimates given by two manufacturers of card-key systems, one portal with card-key entry would cost \$5,000. One manufacturer of video surveillance equipment estimated that a laboratory installing a sixteen-camera system would incur costs of \$15,000. It is not possible to estimate operating and maintenance of security systems, since service contracts would vary according to the size of the system. Since no express requirements are in place for security equipment, a laboratory may control access to certain areas with stringent administrative controls, including sign-in logs and identification badges, at lower costs than a mechanical or electronic system.

Clinical laboratories seeking certification as environmental laboratories, as well as previously unregulated commercial concerns offering environmental testing (e.g., for anthrax on surfaces), will need to pay approval fees equivalent to first-year Department Environmental Laboratory Approval Program (ELAP) fees, estimated at \$550. Clinical laboratories and previously unregulated facilities may also incur compliance costs similar to those for existing environmental laboratories described above. Based on a written survey of clinical laboratories currently licensed in the category of microbiology pursuant to Public Health Law Article 5, Title V, the Department estimates that 73 percent of these laboratories have existing capability for critical agent testing and would not need to expend significant resources for biosafety facilities unless they need to purchase personal protective equipment and related items to comply with the more stringent safety practices for critical agents testing. Clinical laboratories that conduct toxicology analyses and environmental laboratories that conduct chemical testing (e.g., for environmental contaminants) already have in place adequate biosafety facilities for toxin testing and would not need to expend significant resources to meet this amendment's requisites.

Most clinical laboratories interested in testing environmental samples for biological critical agents already employ laboratory directors and testing personnel who qualify under the proposed educational and experiential criteria. The majority of environmental laboratories certified to perform microbiology testing limit that testing to low biosafety level work (e.g., potable water testing), and generally do not employ personnel meeting the proposed requirements. While these sites would not incur additional personnel costs for analysts because of the proposal's grandfathering provision, requirements for a technical director would entail some added costs. According to a survey published in 2001 by the American Council of Independent Laboratories, the mean hiring rate for scientists with a bachelor's degree and one to three years' experience is \$38,900. A person with these credentials would meet the proposal's minimum requirements for a technical director of a laboratory performing anthrax testing on environmental samples. Since the regulation was first filed, the Department has

found that none of the environmental laboratories currently limiting their services to monitoring of sewage and water treatment facilities are interested in performing critical agent testing. The majority of environmental laboratories certified to perform chemical testing (e.g., for environmental contaminants) already employ personnel meeting the proposed requirements for toxin testing.

Rural laboratories applying for approval under these regulations will incur costs of approximately \$3.00 to \$20.00 to copy to the Department all policies and procedures relevant to critical agent testing. On occasion, a laboratory may incur costs for shipping presumptively positive samples to the Wadsworth Center or another designated facility for further testing. The cost of shipping an isolate of a microbiologic agent (e.g., a culture tube) by common carrier is estimated at between \$25 and \$50, depending on the need for keeping the agent's temperature constant with ice packs, for example. As an alternative, law enforcement officials, laboratory employees or couriers may be used for transporting samples at an anticipated maximum cost of \$350, assuming an 800-mile round trip and a \$25 hourly personnel wage.

Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to facilities located in rural areas that are not already presented by undertaking these activities in a safe and reliable manner. Appropriate equipment and supplies to perform critical agent testing in a safe and reliable manner are currently available should a laboratory choose to begin testing in this specialty. The regulation does not require any laboratory, regardless of location, to undertake testing for critical agents.

Minimizing Adverse Impact:

This regulation only imposes requirements on laboratories choosing to undertake critical agent testing. Standards have been established at the absolute minimum necessary for safe and reliable testing. The department did not consider different compliance requirements or exceptions for facilities located in rural areas because of the importance of this type of testing to public health, safety and welfare.

Participation by Parties in Rural Areas:

In the development of these regulations, the Department had informal discussions with environmental and clinical laboratories concerning their interest in and capacity to perform critical agent testing. Few, if any, rural laboratories chose to participate in these discussions. The Department believes that the urgent need for public health and safety oversight in the area of critical agent testing obviates the need for extensive solicitation of regulated party input at this time.

Job Impact Statement

A Job Impact Statement is not required because it is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs and employment opportunities. The revision proposes minimum standards for a recently recognized specialty of environmental laboratory testing, i.e., critical agent testing. No requirement is imposed that a laboratory be certified in this specialty, and the Department expects that, of the small number of laboratories anticipated to seek certification in critical agent testing, few, if any, will need to take on additional capacity in the form of hiring new personnel. Therefore, this proposed amendment has no implications for job opportunities.

NOTICE OF ADOPTION

Bathing Beaches

I.D. No. HLT-11-04-00024-A

Filing No. 660

Filing date: June 3, 2004

Effective date: June 23, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of Subpart 6-2 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 225

Subject: Bathing beaches.

Purpose: To clarify the definition of "bathing" and after-hours activities on bathing beaches.

Text of final rule: Section 6-2.2(d) is amended to read as follows:

(d) Bathing shall mean to become partially or totally immersed in water and shall include swimming, wading and diving, but shall exclude fishing, scuba diving and surfing.

The table of contents for Subpart 6-2 is amended to read as follows:

SUBPART 6-2
Bathing Beaches

(Statutory authority: Public Health Law, Section 225)

Sec.

GENERAL PROVISIONS

6-2.1 Purpose

* * *

6-2.15 Water quality [standards and] monitoring.

* * *

Section 6-2.15 is amended to read as follows:

6-2.15 Water quality [standards and] monitoring.

* * *

Section 6-2.15(a) is amended to read as follows:

(a) No bathing beach shall be maintained or operated on any body of water when the water quality is determined by the permit-issuing official to constitute a potential hazard to health if used for bathing.

To determine if the water quality constitutes a potential hazard to health requiring closure of the beach, the permit-issuing official shall consider one or a combination of any of the following items: results of a sanitary survey; historical water quality model for rainfall and other factors; verified spill or discharge of contaminants affecting the bathing area; and water quality indicator levels specified in this section.

Section 6-2.15(c) is repealed and replaced with a new 6-2.15(c) to read as follows:

(c) *Bacteriological Quality. The following bacteriological indicator levels shall be used when determining acceptability of water quality for bathing beaches.*

(1) *Based on a single sample, the upper value for the density of bacteria shall be:*

- (i) 1,000 fecal coliform bacteria per 100 ml; or
- (ii) 61 enterococci per 100ml for freshwater; or
- (iii) 104 enterococci per 100ml for marine water; or
- (iv) 235 *E.coli* per 100ml for freshwater (*E.coli* is not to be used as an indicator in marine water).

(2) *Based on the mean of the logarithms of the results of the total number of samples collected in a 30 day period, the upper value for the density of bacteria shall be:*

- (i) 2,400 total coliform bacteria per 100ml; or
- (ii) 200 fecal coliform bacteria per 100ml; or
- (iii) 33 enterococci per 100ml for freshwater; or
- (iv) 35 enterococci per 100ml for marine water; or
- (v) 126 *E.coli* per 100ml for freshwater (*E.coli* is not to be used as an indicator in marine water).

(3) *When the above described levels are exceeded, the permit-issuing official shall cause an investigation to be made to determine the source or sources of pollution and, along with other factors described in Section 6-2.15(a) determine if the beach shall be closed.*

Section 6-2.16(a) is amended to read as follows:

(a) All areas of an operator's property that are adjacent to the designated public beach area and are accessible to the public for entry into the water for *bathing* shall be supervised or patrolled during hours of operation. [Swimming] *Bathing* shall be prohibited where required supervision is not provided.

Section 6-2.16(b) is amended to read as follows:

(b) Operators must maintain signs stating the hours during which public bathing is allowed, and that [entry into the water] *bathing* at other times is prohibited.

Section 6-2.16(d) is amended to read as follows:

(d) No boating, water skiing, *fishing*, or surfboarding shall be permitted in the [swimming and] *bathing* [areas] *area during the hours bathing is allowed*. Separate areas for the above activities may be designated by floating lines and buoys.

Section 6-2.19 item 4.11 is amended to read as follows:

4.11 Water Quality. Bathing beaches shall meet the water quality [standards] *criteria* for bacteriological, physical and chemical quality specified below.

Section 6-2.19 items 4.11.1, 4.11.1.1, and 4.11.1.2 are repealed and replaced with a new 4.11.1 through 4.11.1.5 as follows:

4.11.1 Bacteriological quality. Based on the mean of the logarithms of the results of 5 or more samples collected in a 30 day period, the upper value for the density of bacteria shall be:

- 4.11.1.1 2,400 total coliform bacteria per 100 ml; or
- 4.11.1.2 200 fecal coliform bacteria per 100 ml; or
- 4.11.1.3 33 enterococci per 100 ml for freshwater; or
- 4.11.1.4 35 enterococci per 100 ml for marine water; or
- 4.11.1.5 126 *E.coli* per 100 ml for freshwater (*E.coli* is not to be used as an indicator in marine water)

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 6-2.15, 6-2.15(a) and 6-2.19, item 4.11.

Text of rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Although the regulation has been changed since it was published in the *State Register* on March 17, 2004, the changes do not necessitate any changes to the Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis or Job Impact Statement.

Assessment of Public Comment

In response to the March 17, 2004 notice in the *State Register*, a total of 55 written comments were received during the public comment period. Written comments were received from: (1) 50 individuals interested in surfing and beach access issues at Rockaway Beach, New York City; (2) a NYC Councilman; (3) a member of the State Assembly; (4) the Commissioner of the New York City Department of Environmental Protection (NYCDEP); (5) the President of the Board of the Coalition to Save Hempstead Harbor; and (6) Representatives of the Natural Resources Protective Association of Staten Island and NY/NJ Baykeepers.

Forty-two letters addressed the definition of bathing. Forty-one of these letters were in full support of the change to the definition of bathing which excludes fishing, scuba diving and surfboarding from regulated bathing activities and one supported the amendments but also recommended additional changes to allow "swim at your own risk" and designation of surf only beaches at Rockaway Beach.

Ten letters did not comment on the language of the proposed amendments, but commented on various aspects of use rules and requirements for Rockaway Beach including establishment of surf only beaches, allowing swim at your own risk, use of flotation devices and beach operating hours.

One letter endorsed the amendments pertaining to water quality testing which adds enterococcus and *E.coli* as indicator organisms while maintaining coliform standards in the regulations.

One letter supported the clarification to allow fishing but the commenter believed that the definition of activities constituting bathing are problematic and could violate the public's right to access the shoreline.

The NYCDEP letter indicated that the existing title of the section on water quality monitoring entitled "Water Quality Standards and Monitoring" could be misinterpreted to set new statewide bacteriological water quality standards. Based on this interpretation, NYCDEP believes the indicators could be viewed as state standards and regulatory action might be taken for sewage discharges even when the wastewater discharge met current state water quality standards as promulgated by the State Department of Environmental Conservation.

The following reflects the major concerns expressed by those who commented and Department response:

Water Quality Standards:

Commenter indicated that including enterococcus and *E.coli* in the "Water Quality Standards and Monitoring" section could be perceived as creating a new statewide water quality standard.

Response:

The Department agrees to modify the wording to make it clear that the inclusion of additional bacteriological indicator organism levels is not setting water quality standards, which is the Department of Environmental Conservation's responsibility. Insignificant minor revisions will be made to Sections 6-2.15 and 6-2.19 item 4.11. The word "standard" will be deleted from the title of Section 6-2.15 which will now read "Water Quality Monitoring" and under 6-2.15(a) the proposed amendment will be re-worded from ". . . water quality standards specified in this section" to "water quality indicator levels specified in this section." In 6-2.19 item 4.11 the word "standard" will be deleted from the text and the item re-worded to read: "Water quality. Bathing Beaches shall meet the water quality criteria for bacteriological, physical and chemical quality specified below."

Definition of bathing:

Commenter indicated that the definition of bathing is problematic and could violate the public's right to access the shoreline.

Response:

No changes are proposed to further distinguish between what is defined as a bathing activity and those activities excluded. The intent of amending the definition is to make it clear that surfboarding, fishing and scuba diving

are not considered bathing activities and not to be regulated as such. The amendments do not prohibit access to the shoreline.

Changes made to the original proposal as published on March 17, 2004, respond to public comment and clarify the proposal and are viewed by the Department's Division of Legal Affairs to be minor and non-substantive.

Insurance Department

EMERGENCY RULE MAKING

Rules for Key Person Corporate-Owned Life Insurance

I.D. No. INS-25-04-00001-E

Filing No. 657

Filing date: June 2, 2004

Effective date: June 2, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of Part 48 (Regulation 180) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301 and 3205

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: Corporate-owned life insurance covering rank-and-file employees, also called "janitors insurance" or "dead peasant insurance," has been the focus of numerous negative press articles and public commentaries over the last several years. In many cases, the covered employees were not notified and did not consent to such insurance. In addition, the Internal Revenue Service has pursued litigation against some companies using corporate-owned life insurance as a means of evading taxes.

Most recently in response to criticism concerning COLI, the United States Senate has drafted legislation that provides for the taxation of death proceeds of corporate-owned life insurance under certain circumstances. The Senate's proposal addresses the abuses of "janitor insurance" and recognizes the legitimate business need for COLI to serve as a funding vehicle for employee benefit plans. As a result, the Senate's legislative proposal provides that death benefit under corporate-owned life insurance policies will not be taxable if the employee is a key employee as defined in the proposed legislation.

The potential for abuse in the corporate-owned life insurance market has long been a concern of the New York Legislature. Chapter 491 of the Laws of 1996 added a new subsection (d) to Section 3205 to provide notice, consent and termination rights to employees, including rank-and-file employees, whose lives were insured under corporate-owned life insurance programs designed to fund employee benefit plans. Such notice, consent and termination rights were designed to reduce the potential for abuse in the COLI market.

Since the notice, consent and termination rights only apply in the case of Section 3205(d) COLI and not key person COLI under Section 3205(a)(1)(B), it is imperative that insurers only insure key employees under Section 3205(a)(1)(B). This will also ensure that rank and file employees and other non-key employees receive the notice, consent and termination rights prescribed by Section 3205(d) and to curb some of the reported abuses associated with COLI on rank-and-file employees. This will serve to ensure that employees insured pursuant to the insurable interest provisions of Section 3205(a)(1)(B) are key employees.

The establishment of a key employee standard based on the proposed federal legislation will aid in curbing abuse in the corporate-owned life insurance market. Therefore, for the reasons stated above, this rule must be promulgated on an emergency basis for the preservation of the general welfare.

Subject: Rules for key person corporate-owned life insurance.

Purpose: To provide guidance to insurers in defining the term key person for the purpose of compliance with the requirements of section 3205(a)(1)(B) and (d) of the Insurance Law.

Text of emergency rule: A new Part 48 of Title 11 NYCRR (Regulation No. 180) is adopted to read as follows:

§ 48.0 Preamble and Purpose.

(a) Section 3205(b)(2) of the Insurance Law provides in part that "No person shall procure or cause to be procured, directly or by assignment or otherwise any contract of insurance upon the person of another unless the benefits under such contract are payable . . . to a person having, at the time when such contract is made, an insurable interest in the person insured."

(b) Section 3205(a)(1)(B) of the Insurance Law defines the term "insurable interest", for the purposes of life and accident and health insurance, to include ". . . a lawful and substantial economic interest in the continued life, health or bodily safety of the person insured, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the insured."

(c) Under Section 3205(a)(1)(B), an employer has an insurable interest in the lives of certain employees and other persons, commonly referred to as "key employees" or "key persons", whose services and qualifications are of such nature that their death or disability would cause the employer to incur a substantial pecuniary loss.

(d) The purpose of this Part is to establish standards for life insurers and fraternal benefit societies issuing key person company-owned life insurance to ensure that the employees or other persons on whose lives coverage is being written pursuant to Section 3205(a)(1)(B) of the Insurance Law are actually key persons.

§ 48.1 Underwriting Guidelines.

An insurer using key person company-owned life insurance shall establish and apply appropriate underwriting guidelines to ensure that the employees or other persons on whose lives policies are written pursuant to Section 3205(a)(1)(B) are actually key persons.

§ 48.2 Standards.

For purposes of this Part and for establishing whether there exists an insurable interest under Section 3205(a)(1)(B) at the time the policy is issued, the term key person shall include the following persons:

(a) An employee who is one of the five highest paid officers of the employer;

(b) An employee who is a five-percent owner of the employer. A "five-percent owner" shall mean:

(1) If the employer is a corporation, any person who owns or controls more than five percent of the outstanding stock of the corporation or stock possessing more than five percent of the total combined voting power of all stock of the corporation; or

(2) If the employer is not a corporation, any person who owns more than five percent of the capital or profits interest in the employer;

(c) An employee who had compensation from the employer in excess of \$90,000 in the preceding year;

(d) An employee who is among the highest paid 35 percent of all employees; or

(e) An employee or other person who makes a significant economic contribution to the company, including but not limited to, an employee who is responsible for management decisions, has a significant impact on sales or a special rapport with customers and creditors, possesses special skills, or would be difficult to replace. Criteria for the employer's determination shall be included in the insurer's underwriting guidelines.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire August 30, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Eric Mangan, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-2280, e-mail: emangan@ins.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

The superintendent's authority for the adoption of Regulation 180 (11 NYCRR 48) is derived from Sections 201, 301, and 3205 of the Insurance Law.

Sections 201 and 301 of the Insurance Law authorize the superintendent to prescribe regulations accomplishing, among other concerns, interpretation of the provisions of the Insurance Law, as well as effectuating any power given to him (under the provisions of the Insurance Law) to prescribe forms or otherwise to make regulations.

Section 3205 of the Insurance Law defines the term "insurable interest" and sets forth insurable interest requirements for any policy of life insurance and accident and health insurance.

2. Legislative objectives:

The insurable interest requirements contained in Section 3205 reflect the state's public policy against contracts wagering on human life. Section 3205(b)(1)(2) prohibits the issuance of any policy upon the life of another person unless the beneficiary is the insured, personal representative of the

insured, or a person having an insurable interest in the insured at the time the policy is issued. Section 3205(a)(1)(B), applicable when policies are purchased by persons not closely related to the insured by blood or by law, defines "insurable interest" to include a lawful and substantial economic interest in the continued, life, health or bodily safety of the person insured, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the insured. Employers and insurers have historically relied upon Section 3205(a)(1)(B) to satisfy the insurable interest requirement for the purchase of insurance on the lives of "key persons" or "key employees."

In 1996, the Legislature added new subsections (d) and (e) to Section 3205 of the Insurance Law (L. 1996 c. 491) to specifically grant employers an insurable interest in any employee or retiree who is eligible to participate in an employee benefit plan. The Legislature enacted Section 3205(d) in order to assist employers with the financing of employee benefit plans through the use of corporate-owned life insurance ("COLI") purchased on the lives of employees.

The purpose of the proposed regulation is to establish standards for life insurers issuing key employee COLI, pursuant to Section 3205(a) rather than Section 3205(d) COLI, to ensure that the employees on whose lives coverage is being written pursuant to Section 3205(a)(1)(B) of the Insurance Law are actually key employees.

3. Needs and benefits:

As noted in the Federal Standard section below, the definition of key employee in this proposed regulation is based on the definition of key employee set forth in a draft bill pending in the United States Senate which provides for the taxation of death proceeds of COLI under certain circumstances. The Senate's proposal is intended to eliminate well-publicized abuses of COLI. The proposal also recognizes the legitimate business need for employers to use corporate owned policies as a funding vehicle for employee benefits, and specifically provides that COLI death benefits would not be taxable if the covered employee meets the definition of a key employee.

The potential for abuse in the COLI market has historically been a concern of the New York legislature as evidenced by the enactment of notice, consent and termination rights in Section 3205(d) and (e) of the Insurance Law in 1996, establishing an insurable interest for the purchase of life insurance used to fund employee benefit plans. Since the employee notice, consent and termination rights are not required when company-owned life insurance is purchased under Section 3205(a)(1)(B), it is imperative that insurers be provided with standards for key employees to ensure that such employees are key employees and to avoid the potential for any further abuses in the market. The establishment of a key employee standard would provide such guidance.

In addition, a key employee standard would enhance the Department's market conduct exams by providing field examiners with a reference point. Field examiners currently lack statutory or regulatory standards for determining the proper application of Section 3205(a) and, specifically, whether COLI insurance issued pursuant to Section 3205(a) is on key employees.

The key employee standard is particularly important in the bank-owned life insurance market, in which employees do not receive Section 3205(d) protections. Currently, banks do not purchase coverage under Section 3205(d) because the employee's ability to terminate coverage makes the policy an unreliable mechanism for funding plan liabilities and results in adverse tax consequences to the bank. When bank-owned life insurance is issued as key employee coverage under Section 3205(a)(1)(B), the key employee standard created by this proposed regulation will help ensure that the covered employees will in fact be key employees.

4. Costs:

Life insurers licensed in New York that sell key employee COLI are required to establish and apply appropriate underwriting guidelines to ensure that the employees on whose lives policies are written under Section 3205(a)(1)(B) are key employees. It is expected that most insurers in the key employee COLI market already have established key person underwriting guidelines and therefore will not incur any costs with the promulgation of the proposed regulation. Any insurers in the key employee COLI market that lack established key person underwriting guidelines would incur costs associated with the development of such guidelines. Insurers that do not participate in the key person COLI market should incur no costs in connection with the proposed regulation.

Costs to the Insurance Department will be minimal. There are no costs to other government agencies or local governments.

5. Local government mandates:

The proposed regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork:

The proposed regulation imposes no new reporting requirements.

7. Duplication:

The proposed regulation does not duplicate any existing law or regulation.

8. Alternatives:

The Department considered but rejected the prospect of issuing a Circular Letter to establish the standard for key person. The Department was concerned that the Circular Letter proposal would not have the same force and effect of a regulation, and would therefore be an inadequate mechanism to apply and enforce the insurable interest requirements of Section 3205.

9. Federal standards:

The definition of key employee in this proposed regulation is based on the definition of key employee set forth in a draft COLI bill pending in the United States Senate which provides for the taxation of death proceeds of COLI under certain circumstances. The Senate bill, which was approved by the Senate Finance Committee in February, 2004, provides that a key employee may be either a "highly compensated employee" under Section 414(q) of the Internal Revenue Code or a "highly compensated individual" under Section 105(h)(5) of the Internal Revenue Code (except that '35 percent' shall be substituted for '25 percent' in subparagraph (C) thereof). The purpose of the definition of key employee in the Senate bill is to create an exemption from tax for death proceeds paid to employers in connection with COLI, and does not relate to state insurable interest laws. There is no federal standard that defines key employee in the context of insurable interest for life insurance.

10. Compliance schedule:

The proposed regulation establishes a standard for all key employee life insurance policies issued before and after the effective date of the Regulation.

Regulatory Flexibility Analysis

1. Small Businesses:

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all life insurance companies licensed to do business in New York State, none of which fall within the definition of "small business" as found in section 102(8) of the State Administrative Procedure Act. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and believes that none of them fall within the definition of "small business", because there are none which are both independently owned and have under one hundred employees.

2. Local governments:

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

Insurers covered by the regulation do business in every county in this state, including rural areas as defined under SAPA 102(10).

2. Reporting, recordkeeping and other compliance requirements; and professional services:

The regulation provides guidance to insurers in defining the term key person.

3. Costs:

Life insurers that sell key person COLI to fund broad-based employee benefit plans are required to establish and apply appropriate underwriting guidelines to ensure that the employees on whose lives policies are written under Section 3205(a)(1)(B) are key employees. It is expected that most insurers in the key person COLI market already have established key person underwriting guidelines and therefore will not incur any costs with the promulgation of the Regulation. Any insurers in the key person COLI market that lack established key person underwriting guidelines will incur costs associated with the development of such guidelines. Insurers that do not participate in the key person COLI market should incur no costs in connection with the Regulation.

Costs to the Insurance Department will be minimal. There are no costs to other government agencies or local governments.

4. Minimizing adverse impact:

It does not impose any adverse impact on rural areas.

5. Rural area participation:

The regulation was drafted after consultation with the Life Insurance Council of New York, a trade organization representing life insurers in New York.

Job Impact Statement

Nature of impact: The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This regulation provides guidance to insurers in defining the term key person for the purpose of compliance with the requirements of section 3205(a)(1)(B) of the Insurance Law.

Categories and number affected: No categories of jobs or number of jobs will be affected.

Regions of adverse impact: This rule applies to all insurers licensed to do business in New York State. There would be no region in New York which would experience an adverse impact on jobs and employment opportunities.

Minimizing adverse impact: No measures would need to be taken by the Department to minimize adverse impacts.

Self-employment opportunities: This rule would not have a measurable impact on self-employment opportunities.

NOTICE OF ADOPTION**Recognition of the 2001 CSO Mortality Table**

I.D. No. INS-14-04-00014-A

Filing No. 659

Filing date: June 3, 2004

Effective date: June 23, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of Part 100 (Regulation 179) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1304, 4217, 4218, 4221, 4224, 4240 and 4517; and arts. 24 and 26

Subject: 2001 CSO Mortality Table.

Purpose: To recognize, permit and prescribe the use of the 2001 Commissioners Standard Ordinary (CSO) Mortality Table for life insurance.

Text or summary was published in the notice of proposed rule making, I.D. No. INS-14-04-00014-P, Issue of April 7, 2004.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Eric Mangan, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5257, e-mail: emangan@ins.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Text of rule and any required statements and analyses may be obtained from: Diane Wallace Wehner, Department of Labor, Counsel's Office, Bldg. 12, Rm. 509, State Campus, Albany, NY 12240, (518) 457-4380, e-mail: usbdww@labor.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Long Island Power Authority**NOTICE OF ADOPTION****Tariff for Electric Service**

I.D. No. LPA-51-03-00013-A

Filing date: June 2, 2004

Effective date: June 2, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The Long Island Power Authority (authority) approved revisions to the authority's tariff for electric service for Green Energy Program.

Statutory authority: Public Authorities Law, section 1020-f(2) and (u)

Subject: Tariff for electric service.

Purpose: To adopt certain revisions for electric service for a Green Energy Program.

Text or summary was published in the notice of proposed rule making, I.D. No. LPA-51-03-00013-P, Issue of December 24, 2003.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Richard Kessel, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 222-7700

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Assessment of Public Comment:

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

**PROPOSED RULE MAKING
HEARING(S) SCHEDULED****Electric Service Tariff**

I.D. No. LPA-25-04-00005-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Long Island Power Authority is considering revisions to the authority's tariff for electric service concerning miscellaneous service charges.

Statutory authority: Public Authorities Law, section 1020-f(z) and (u)

Subject: Tariff for electric service.

Purpose: To adopt certain revisions to the tariff for electric service.

Public hearing(s) will be held at: 10:00 a.m. on Aug. 24, 2004 at Huntington Town Hall, 100 Main St., Huntington, NY; and 2:00 p.m. on Aug. 24, 2004 at Omni Teleconference Center, 333 Earle Ovington Blvd., Uniondale, NY.

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Interpreter Service: Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Substance of proposed rule (Full text is not posted on a State website): The Long Island Power Authority (Authority) is considering a proposal to make certain revisions to its tariff for electric service. The revisions relate

Department of Labor**NOTICE OF ADOPTION****Public Employee Occupational Safety and Health Standards**

I.D. No. LAB-16-04-00001-A

Filing No. 664

Filing date: June 7, 2004

Effective date: June 23, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 800.3 of Title 12 NYCRR.

Statutory authority: Labor Law, section 27-a.4(a)

Subject: Public employee occupational safety and health standards.

Purpose: To incorporate by reference those safety and health standards adopted by the U.S. Department of Labor, Occupational Safety and Health Administration, as of Dec. 31, 2003.

Text or summary was published in the notice of proposed rule making, I.D. No. LAB-16-04-00001-P, Issue of April 21, 2004.

Final rule as compared with last published rule: No changes.

to several of the "Charges for Miscellaneous Services" and include the establishment of a "Service Initiation Charge" for non-residential customers who request service. The Authority may approve, reject, or modify, in whole or in part, the proposal.

Text of proposed rule and any required statements and analyses may be obtained from: Richard Kessel, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 222-7700

Data, views or arguments may be submitted to: Same as above

Public comment will be received until: five days after the last scheduled public hearing.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Electric Service Tariff

I.D. No. LPA-25-04-00006-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Long Island Power Authority is considering a proposal to extend and improve LIPA's existing business development and business retention programs.

Statutory authority: Public Authorities Law, section 1020-f(2) and (u)

Subject: Tariff for electric service.

Purpose: To adopt certain revisions to the tariff for electric service to extend and improve LIPA's existing business development and business retention programs.

Public hearing(s) will be held at: 10:00 a.m. on Aug. 24, 2004 at Huntington Town Hall, 100 Main St., Huntington, NY; and 2:00 p.m. on Aug. 24, 2004 at Omni Teleconference Center, 333 Earle Ovington Blvd., Uniondale, NY.

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Interpreter Service: Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Substance of proposed rule (Full text is not posted on a State website): The Long Island Power Authority (Authority) is considering a proposal to make certain revisions to its Tariff for Electric Service concerning Business Development programs. The revisions include the extension of the Business Development programs beyond July 2004 indefinitely (except for the Power-for-Jobs program, which expires on December 31, 2005); the redefinition of certain electric load restrictions within the existing programs; the reduction of the scope of benefits/discounts available to participants in the Manufacturing Competitiveness and Empire Zone programs; the modification of the calculation of Power-for-Jobs (PFJ) revenues to reflect updates to the load sharing arrangement and the application of system losses; the creation of a new "Statement of Energy and Peak Demand Losses" applicable to both the Power-for-Jobs program and the Long Island Choice program, with appropriate references within the tariff with respect to Service Classification 14 (Long Island Choice ESCOs); and the provision of language to clarify certain components of each program and that the benefits of only one program can apply to a given load. The Authority may approve, reject, or modify, in whole or in part, the proposal.

Text of proposed rule and any required statements and analyses may be obtained from: Richard Kessel, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 222-7700

Data, views or arguments may be submitted to: Same as above

Public comment will be received until: five days after the last scheduled public hearing.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Department of Motor Vehicles

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Motor Vehicle Inspections

I.D. No. MTV-25-04-00023-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Part 79 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 301(d)(1), (f), 302(a) and (e)

Subject: Motor vehicle inspections.

Purpose: To test emissions.

Substance of proposed rule (Full text is posted on the following State website: www.nysdmv.com): The primary purpose of this regulation is to set forth the requirements for the On Board Diagnostics (OBD) emissions test in the upstate area. The regulation also clarifies many of the provisions of Part 79 relative to both the safety and emissions inspections.

Part 79.1 clarifies several definitions used in such part, including which inspections may be performed at which stations.

Part 79.2 further clarifies definitions and corrects spelling.

Part 79.4 clarifies procedures relative to vehicles registered within the NYMA that are inspected outside of the NYMA.

Part 79.5 incorporates OBD and introduces an inspection extension.

Part 79.6 amends sticker fees.

Part 79.7 amends types of inspection in the NYMA and non-NYMA in terms of the current fees and provides for an inspection fee increase in the upstate area to offset the additional costs for the new inspection equipment.

Part 79.8 clarifies what constitutes a working day.

Part 79.9 clarifies equipment requirements for different classifications of stations, and describes the required emissions equipment.

Part 79.11 clarifies what constitutes a valid inspection document.

Part 79.12 clarifies recordkeeping requirements.

Part 79.13 clarifies and simplifies sign posting requirement.

Part 79.15 clarifies Fleet inspections stations, Portable Fleet inspection stations and Trailer Only inspection stations.

Part 79.17 clarifies that an inspector must have his/her inspection in their possession at all times while performing inspections and requires passing a recertification test prior to performing OBD inspections.

Part 79.20 provides for an inspection extension if a vehicle fails the OBD II inspection for certain conditions, clarifies that an inspector must request previous inspection information, and clarifies re-inspection procedures.

Part 79.21 clarifies the basis for passing/failing the safety inspection.

Part 79.23 clarifies that this section is in addition to Part 79.21 and is not a stand-alone section for Medium Duty vehicles.

Part 79.24 is re-written and sets forth the requirement for all emissions tests for all subject vehicles, excepting vehicles subject to the Diesel Emissions requirement.

Part 79.25 expands issuance of waiver to OBD inspections and clarified requirements.

Part 79.26 clarifies requirements related to the inspection of Heavy Duty diesel vehicles.

Part 79.27 clarifies the basis for passing/failing the Heavy Vehicle safety inspection.

Part 79.28 clarifies the basis for passing/failing the Motorcycle safety inspection.

Text of proposed rule and any required statements and analyses may be obtained from: Michele Welch, Counsel's Office, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

Data, views or arguments may be submitted to: Ida L. Traschen, Associate Counsel, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

1. Statutory authority: Section 301(a) of the Vehicle and Traffic Law provides that the Commissioner of Motor Vehicles shall require an annual safety inspection of every motor vehicle registered in New York State. Section 301(c) of such Law authorizes the Commissioner to establish those mechanisms and equipment subject to the safety inspection. Section 301(d) of such Law authorizes the Commissioner, in consultation with the Commissioner of the Department of Environmental Conservation, to implement a motor vehicle emissions inspection program. Section 301(f) of such Law authorizes the Commissioner to promulgate regulations necessary to implement a heavy duty vehicle inspection program. Section 302(a) of such Law provides that it shall be the duty of the Commissioner to administer the provisions of Article 5. Section 302(e) of such Law empowers the Commissioner to make reasonable rules and regulations for the administration and enforcement of Article 5 and the periods during which motor vehicles are required to be inspected. Section 304(b) of such Law requires the Commissioner to establish procedures for reporting the results of inspections and notifying owners. Section 304-a of such Law authorizes the Commissioner to establish standards for certified inspectors.

2. Legislative objectives: The Federal Clean Air Act of 1990, (42 U.S.C 7401 *et seq.*) and the accompanying regulations at 40 CFR Part 51.351 require the states to incorporate a check of the onboard diagnostic (OBD) computer as part of the inspection and maintenance program by January 1, 2002; NYS previously requested an extension until January 1, 2003, now seriously overdue. These amendments will further the objectives of the Federal Clean Air Act of 1990 by reducing emissions that cause air pollution.

This regulation also meets the objectives set forth in Article 5 of the Vehicle and Traffic Law by insuring that motor vehicles registered in NYS meet the State's rigorous emissions inspection criteria. This furthers the State's objective of cleaner and healthier air.

3. Needs and benefits: The State must adopt an OBD II emissions test regulation to remain in compliance with the Federal Clean Air Act of 1990 and the accompanying regulations at 40 CFR Part 51.351. Part 51.351 requires all 1996 and later light-duty vehicles (less than 8,501 pounds) equipped with certified OBD systems to be subject to an enhanced emissions OBD II test procedure. Failure to implement such testing by July 1, 2004 may yet result in the loss of 2 billion dollars in federal highway funding. In addition, the Department of Environmental Conservation has listed OBD II testing as a key element of its State Implementation Plan (SIP). The SIP is submitted to the federal Environmental Protection Agency to document that the State has established a clean air program that meets the requirements of the Clean Air Act of 1990.

On Board Diagnostics refers to a system, within passenger cars and light trucks in 1996 and newer vehicles, which monitors system degradation as it relates to powertrain components and emission control devices.

The State currently has two different programs in place; one program in the 9 county New York Metropolitan Area (NYMA) and one program in the 53 county Upstate Area. The NYMA includes the counties of New York, Kings, Queens, Richmond, Bronx, Nassau, Suffolk, Westchester and Rockland. Each of these areas will require different regulation changes in order to incorporate the mandated OBD testing.

Effective with the installation of the new equipment and appropriate notice to the industry, all 1996 and newer vehicles outside the NYMA shall be checked for the operation and activation of the vehicle's OBD system monitors. These monitors are manufacturer specific and include the comprehensive component monitor, misfire monitor, fuel monitor, oxygen sensor monitor, fuel monitor, oxygen sensor monitor, the catalyst monitor, the EGR monitor, the EVAP monitor, and the AIR monitor. Inspection stations in the NYMA will have the option to purchase and install an optional software upgrade, after approval by DMV/DEC, that will perform the OBD II inspection on 1996 & newer vehicles registered in the NYMA. This upgrade to the current NY-TEST machines is optional and will not be required. Many inspection stations in the NYMA have complained about the length and complexity of the dynamometer test. Where as the dynamometer test takes about 15 minutes to perform, the OBD II test, including data input and data communications, takes only 5 minutes. Other advantages of OBD testing, as determined by EPA and vehicle manufacturer studies include: vehicle emissions problems are being identified earlier, scan tool equipment which provides valuable diagnostic information to the inspector in the form of fault codes that facilitate identifying the cause of the emissions problem, and a less intrusive testing methodology of the EVAP system. Presently EVAP system testing is only a visual check of the gas cap Upstate, and a pressure test of the gas cap in the NYMA. The pressure test is time consuming and the tester requires calibration and maintenance, and neither check is as accurate as an OBD II system check

which tests the entire fuel system for leaks. In addition, OBD typically identifies problems earlier than a traditional dynamometer test, therefore emissions related problems can be corrected sooner, generally at a lower cost and before the vehicle produces harmful emissions.

Effective July 1, 2003 in the upstate area, if the on board diagnostic malfunction indicator light (MIL) does not operate properly it has been deemed a basis to fail the emissions portion of the inspection. Currently, in the NYMA, if the MIL does not operate properly, the vehicle owner is merely given advice to have the vehicle serviced soon. For the NYMA, the effective date will be predicated on the necessary software update by three vendors.

This regulation is also beneficial to inspection station facilities (and their customers), because it clarifies many provisions of Part 79 without making substantive changes. Some key examples of these clarifications are: clarifies which NYMA vehicles may be inspected upstate without a temporary waiver; clarifies and simplifies the equipment requirements for each classification of inspection station; simplifies recordkeeping requirements pursuant to installation of the new OBD II testing equipment; and, clarifies the basis for passing or failing various parts of the safety inspection.

The proposed regulation will benefit the general public by enhancing to State's efforts to reduce air pollution caused by motor vehicles. This benefits the health and welfare of all New Yorkers. In addition, there is some evidence from the experience with emissions testing in Vermont, that there may be a lower failure rate with the OBD II test. This is due in part because educated vehicle owners notice that the MIL is improperly illuminated, and repair their vehicles' emission system prior to the emissions test. In addition, NYMA residents that have an OBD enabled vehicle can now get a single vehicle inspection anywhere in the state, rather than requiring them to receive a low enhanced, and subsequent high enhanced inspection when they return to the NYMA. This will benefit college students, vacation property owners and other segments of the population that regularly travel the state.

4. Costs: a. To regulated parties: As of January 2004, there were 4,400 licensed inspection stations in the NYMA, approximately 3,800 of which are actively transmitting inspection data monthly. NYS is currently testing software upgrades from the DEC approved NYTEST equipment vendors to conduct the OBD II test. The vendors are estimating the cost of such optional equipment to be up to \$1,000. This additional cost would be borne by the stations. In the event the station chooses to purchase the upgrade, the station cost will, in part, be offset by the reduction in time to conduct the emissions test. The current dynamometer test is more lengthy and complex than the OBD II emissions test. The dynamometer test takes about 15 minutes, where as the OBD II scan test, including data input and data communications, only takes 5 minutes. Thus, there will be a significant savings in labor resources. In addition, long-term maintenance of the OBD II testing equipment is less costly than maintenance of the dynamometer. DMV estimates that approximately 51% of the vehicles registered in the NYMA are eligible for the OBD II test. The other 49% will still be subject to the tailpipe testing. However, the number of vehicles subject to OBD II is increasing at a rate of 6-8% annually.

The cost to an upstate station to purchase the required NYVIP equipment is \$1664.02 for the basic unit capable of performing all required functions. There are optional upgraded equipment packages that a station may wish to buy. In addition, each station will need to install a dedicated telephone line for the unit to use, but the phone numbers dialed will be toll free; there will be no long distance charges. There will also be a per-call fee paid to the contractor of 36.5 cents for each inspection. This per-call fee includes all regular maintenance of the unit for the life of the contract (seven years). It is expected that stations opting to participate in the program would need to perform 256 inspections per year to cover the cost of the equipment, the per connection fee, the analog phone line and the additional labor needed to perform the OBD inspection. The cost to the stations will be addressed by the increase of \$5 in the emissions inspection fee. There will be a positive cost impact on all inspection stations in light of the new requirement that a vehicle will fail the emissions inspection if the malfunction indicator light is illuminated. This will result in an increased number of failures Upstate, which translates to an increased number of repairs. Downstate, the failure rate is likely to be comparable to the current failure rate as we are replacing one test with another.

b. Cost to the State, the agency and local governments: As stated in 4a, local governments that have their own certified inspection program may have to purchase the OBD II testing equipment. As stated above, the cost downstate could be up to \$1,000. Upstate, the locality will have to purchase the same equipment as a public station. The Department esti-

mates that there are approximately 800 localities that perform their own inspections.

The Department of Motor Vehicles will incur minimal costs in implementation of this regulation. The Department already has a system in place that receives transmissions from the inspection stations regarding the passing/failing of motor vehicles subject to the inspection. This will be expanded to handle upstate stations as well as the current stations downstate. The Department will revise the CR-79 form, which essentially updates revisions to the Commissioner's Regulations. This shall cost the Department about \$35,000, including printing and mailing costs of 16,000 copies. In addition, the Department will revise the VS-28 booklet, which sets forth the emissions procedures, at a cost of about \$8,000. This includes printing and mailing costs of 5,000 copies (initial mailing to NYMA stations only). Failure to implement the OBD II program may result in the loss of 2 billion dollars in federal highway funding to the State and delay reduction in vehicle emissions required in the SIP.

c. Source: DMV's Office of Vehicle Safety and the Department of Environmental Conservation.

d. Cost to vehicle registrants: The proposed emissions fee increase of \$5 is expected to impact 4.7 million upstate motorists that currently have gas powered vehicles under 8,500 lbs for the years subject to low enhanced and OBD inspections (model years 1979-2002).

5. Local government mandates: Local governments in the NYMA that conduct their own emissions testing program may be required to purchase the OBD II testing equipment at a cost of \$1,664.02. The Department estimates that there are about 800 localities performing their own inspections.

6. Paperwork: The reporting requirements are greatly simplified by this rule. There are no additional requirements for stations in the NYMA, and upstate stations participating in the new program will have all records, previously written by the station, electronically kept and reported. Sticker inventory will also be kept in the new equipment, making it much easier for the station to comply with issuing and security rules.

7. Duplication: This proposed regulation does not duplicate or conflict with any State or Federal rule. It does require the implementation of the OBD II emissions test that is required by the Clean Air Act of 1990 and the accompanying regulations at 40 CFR Part 51.

8. Alternatives: The Department did not consider a no action alternative because the OBD II emissions test is required by Federal law. Failure to implement such a test may result in the loss of 2 billion dollars in federal highway funds.

9. Federal standards: The rule does not exceed the Federal emission standards set forth in the Clean Air Act of 1990 or its accompanying regulations at 40 CFR Part 51.

10. Compliance schedule: All upstate stations must begin OBD II inspections by June 30, 2004, and all NYMA stations must begin OBD II emissions testing by April 1, 2005 in order to be in compliance with Federal law.

Regulatory Flexibility Analysis

1. Effect of rule: The Department estimates that approximately 95% of the inspection stations in New York State are considered small businesses. There are approximately 11,000 (about 8,700 of which are active) licensed inspection stations in the Upstate Region of the State, and 4,400 (about 3,800 of which are active) in the New York Metropolitan Area (NYMA).

Approximately 800 political subdivisions in NYS perform their own inspections.

2. Compliance requirements: All upstate public inspection stations will have to obtain the requisite equipment to perform the OBD II emissions inspection. Similarly, local governments who perform their own vehicle emissions inspections will have to obtain such equipment. Local governments that do not have sufficient vehicles subject to an emissions inspection may be exempt from purchasing the equipment. There are no additional recordkeeping or reporting requirements associated with this proposal. Both inspection stations and local governments will have to report test results to DMV, but reports will be electronic and automatic, as will sticker inventory and issuing reports.

All Upstate inspection stations will fail vehicles if the OBD II check indicates a failure in the system. For the NYMA, the OBD II system failure will be predicated on a requested software change by all equipment vendors. Once completed, all inspection stations in the State will fail vehicles for OBD II system failure. In the interim, EPA deems the existing dynamometer test to be equivalent to the OBD test in terms of credit for reducing vehicle emissions, so we do not see an inequity.

3. Professional services: The vendor, selected by a competitive procurement, who manufactures the OBD inspection equipment will be re-

quired to install and service the OBD II equipment for inspection stations and political subdivisions that perform their own inspections. Minimum training will be required for proper use of the equipment, and will be available at no additional cost. No other professional services shall be needed.

4. Compliance costs: Inspection stations and local governments, who inspect their own vehicles will be required to purchase the OBD II equipment or upgrade at a cost of up to \$1,664.02. On the beneficial side, NYMA inspection stations will save time performing the OBD II test, which is far less complex than the current dynamometer test. Where as the dynamometer test takes about 15 minutes to perform, the OBD II test, including data input and data communications, takes only 5 minutes. The cost to the stations will be addressed by the increase of \$5 in the emissions inspection fee. DMV estimates that approximately 51% of vehicles in the NYMA are currently subject to the OBD II test, increasing at an annual rate of 6-8% annually. In addition, upstate stations will benefit from simplified and automatic recordkeeping and sticker inventory requirements. DMV recently entered a contract with Testcom Inc. that provides for the transmission of emissions testing results and other data to DMV. Thus, each station will need to install a dedicated phone line at an estimated cost of \$25 per month, depending upon the carrier selected. There will also be a per-call fee paid to the contractor of 36.5 cents for each inspection, when the stations transmits the inspection information over a toll free line. This per-call fee includes all regular maintenance of the unit for the life of the contract (seven years).

5. Economic and technological feasibility: Currently, inspection stations and political subdivisions in the NYMA employ a tailpipe emissions test. This test is complex and lengthy in nature. Since the OBD test is far simpler and quicker to perform, it will be technologically feasible. Although the NYMA stations may have to make an initial investment of up to \$1,664, the relative speed and ease of the test will produce savings in the long run. Upstate stations will make an investment that is much less than dynamometer equipment, and will perform a less labor-intensive inspection than a dynamometer test would be.

6. Minimizing adverse impact: This rule is the direct result of a federal requirement found in the Clean Air Act of 1990. Other than seeking to minimize the implementation cost of the OBD II inspection system by optimizing system arrangement to meet the federal requirements, no further means can be designed to minimize economic impacts. The effect on local governments from the rule will be no different from other regulated parties. The Department will assist inspection stations in obtaining the appropriate training to run the OBD equipment.

7. Small business and local government participation: The Department has consulted with the Long Island Gasoline Retailers Association, the Gasoline & Service Dealers Association, the Service Station Dealers of Greater NY, the Long Island Petroleum Dealers Association and the Greater New York Dealers Association. We also consulted with State and Federal DOT, Federal EPA and the State Department of Environmental Conservation.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: The proposed rule applies to the entire State. Therefore, inspection stations in all areas of the State will be affected. The rule does not specifically target rural areas. At this time, the requirement related to the purchase of new OBD II emissions testing equipment only applies to upstate stations that want to continue performing vehicle emissions inspections. Stations in the New York Metropolitan Area (NYMA), which includes the counties of Nassau, Suffolk, Kings, Queens, Bronx, Richmond, New York, Westchester and Rockland have already purchased emissions testing equipment and are not required to purchase equipment at this time.

2. Reporting, recordkeeping and other compliance requirements: All light duty public inspection stations in the upstate area will be required to purchase and use the new OBD II equipment. Competitive bidding has resulted in a unit that will perform the inspection at a cost of \$1664.02, which is a very reasonable cost compared with surrounding states, and one that is in line with other diagnostic and repair equipment purchased by such stations. The cost will be partially offset by labor savings for recordkeeping, which will now be simplified and automatic.

The provisions in this rule that clarify safety inspection requirements apply to stations throughout the State.

3. Costs: The cost to an upstate station to purchase the required equipment is \$1664.02 for the basic unit capable of performing all required functions. There are optional upgraded equipment packages that a station may wish to buy. In addition, each station will need to install a dedicated telephone line for the unit to use, but the phone numbers dialed will be toll

free; there will be no long distance charges. There will also be a per-call fee paid to the contractor of 36.5 cents for each inspection. This per-call fee includes all regular maintenance of the unit for the life of the contract (seven years). There will be no additional maintenance costs, unless the equipment is damaged through abuse or misuse. The cost to the stations will be addressed by the increase of \$5 in the emissions inspection fee.

4. Minimizing adverse impact: The proposed rule does not impose an adverse impact on rural areas of the State. Industry surveys, consultation with repair associations and industry representatives indicate that the costs to rural stations are well within typical costs of other station equipment.

5. Rural area participation: The Department consulted with the NYS Dealers Association and the NYS Gasoline Retailers Association, which represents inspection stations in rural areas. In addition, DMV formed an upstate advisory board comprised of associations, industry representatives, and other appropriate members to assist DMV in addressing upstate emissions issues.

Job Impact Statement

1. Nature of impact: There is a slight anticipated impact on increased job opportunities and jobs in the Upstate Region of the State. The competitive procurement for this system resulted in a contract award to a NYS business. This business anticipates hiring at least 8 new people in order to carry out the contract, and has subcontracted with several other NYS businesses (e.g., IBM, Handheld Products and ATTS Training) to perform some components of the program including equipment and training. There are 3,800 active inspection stations in the New York Metropolitan Area (NYMA). They will see labor savings as the result of using the OBD II emissions testing system on 1996 and newer vehicles, because the OBD test is both simpler and quicker than the dynamometer test. This will free up inspectors to perform other tasks, such as repairs, which are more remunerative for such stations. The Department anticipates no other effects on employment opportunities as the result of this rule. There are approximately 8,700 active emissions inspection facilities in Upstate New York. They will see some additional repair work as a result of the OBD II system failure criteria. In the past, when new emissions testing technology has been introduced, many automotive technicians seek training on the technology. Although OBD has been a part of the industry since 1994, including this parameter as a failure criterion for vehicle inspections is likely to spur some short term growth in the technician training industry.

2. Categories and numbers affected: There are approximately 3,800 active inspection stations in the NYMA, employing about 23,000 emissions inspectors. There are approximately 8,700 active emission inspection facilities in Upstate New York, employing about 34,000 emission inspectors.

3. Regions of adverse impact: The Department anticipates a slight increase in job opportunities in the upstate area of the State.

4. Minimizing adverse impact: OBD II testing requirements are required by the Federal Clean Air Act of 1990. No adverse impact is anticipated as the result of this rule. Therefore, the Department had no need minimize the impact of the rule.

5. Self-employment opportunities: Not applicable.

Statutory authority: Parks, Recreation and Historic Preservation Law, sections 3.09(8) and 13.15(1)

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: All fees collected by the Office of Parks, Recreation and Historic Preservation are dedicated, by law, to the operations, maintenance and improvement of state parks and historic sites. Revenues resulting from the fees adopted by this emergency rule were called for by the enacted FY 2003-04 state budget and support activities, improvements and services already planned and implemented for FY 2004-05. Due to increased public demand for use of its facilities, the OPRHP has invested substantial resources in upgrading facilities, including overnight lodging, picnic shelters, and marinas and making new facilities available to the public. In order to continue to fund its operations and maintain facilities and services consistent with its statutory duty to provide for the "health, safety and welfare of the public using the facilities under its jurisdiction", the OPRHP finds it in the public interest to implement the new fee schedule in time for the summer season, when facilities are the most utilized. Failure to adopt this rule at this time would result in a loss of revenue which would necessitate reductions in the level of services provided at parks and historic sites in 2004, including public safety, and would negatively impact planned capital projects and programs designed to promote and enhance public safety and the general welfare of the visiting public.

Subject: Fees and charges for the use of facilities.

Purpose: To establish and/or increase fees for the use of certain facilities, continue and expand current level of support for park operations, maintenance and infrastructure improvement necessary due to increased public demand.

Text of emergency/proposed rule: Subdivision (b) of section 381.1 of Title 9 NYCRR is amended as follows:

Subparagraph (i) of paragraph (2) is amended and a new clause (d) is added to read as follows:

(i) Niagara region. The following charges shall apply in all marinas in the region, *except for the Wilson Tuscarora marina:*

(d) *At Wilson Tuscarora marina all berths-\$28 per foot.*

Clauses (a) and (b) of subparagraph (ii) of paragraph (2) are amended to read as follows:

(a) The following charges shall apply at the marinas at Allan H. Treman State Park[,] and Seneca Lake State Park [Taughannock Falls State Park, Sampson State Park and Lodi Point State Park]:

- (1) 18 feet or less-[\$450] \$500.
- (2) over 18 feet-[\$30] \$33 per foot.
- (3) surcharge for electricity-[\$5] \$7 per foot.

[(b) Allan H. Treman State Park and Seneca Lake State Park]

(4) *dry slips (seasonal parking for boat trailers)-\$350.*

(b) [Allan H. Treman State Park and Seneca Lake State Park dry slips (seasonal parking for boat trailers)-\$350] *The following charges shall apply at the marinas at Taughannock Falls State Park, Sampson State Park and Lodi Point State Park:*

- (1) 18 feet or less-\$450.
- (2) Over 18 feet-\$30 per foot.
- (3) Surcharge for electricity-\$5 per foot.

Clause (a) of subparagraph (iv) of paragraph (2) is deleted, clauses (b) and (c) are relettered to be clauses (a) and (b) and are amended to read as follows:

(a) [Pole moorings—\$41 per foot (\$650 minimum)] Finger piers—[\$45] \$50 per foot ([\$700] \$800 minimum).

(b) Surcharge for provision of electricity:

- (1) 30 amp (floating dock)—[\$55] \$65.

Clause (a) of subparagraph (v) of paragraph (2) is amended, clauses (c) and (d) are relettered to be clauses (d) and (e) and a new clause (c) is added to read as follows:

- (a) Keewaydin State Park:
 - (1) with electricity —[\$50] \$55 per foot (\$850 minimum).
 - (2) without electricity — \$45 per foot (\$750 minimum).
- (c) *Wellesley Island-\$750 flat fee.*

Clauses (d) through (h) of subparagraph (i) of paragraph (3) are relettered (e) through (i), new clauses (d) and (j) are added, and clauses (a), (b), (c), (e), (f), (g), (h) and (i) are amended to read as follows:

(a) Heckscher State Park-Field 3 Pavillion-\$300 per day.

[(1) Weekdays-\$125.

(2) Weekends and holidays-\$175.]

(b) Heckscher State Park-Field 2 Area (minimum of 400 people required).

Office of Parks, Recreation and Historic Preservation

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Fees and Charges for the Use of Facilities

I.D. No. PKR-25-04-00021-EP

Filing No. 665

Filing date: June 8, 2004

Effective date: June 8, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 381.1 of Title 9 NYCRR.

- (1) 400-700 people, weekdays-[\$200] \$250.
 (2) 400-700 people, weekends and holidays-[\$250] \$300.
 (3) 701-2000 people, weekdays-[\$250] \$300.
 (4) 701-2000 people, weekends and holidays-[\$300] \$350.
 (5) 2001-3000 people, weekdays-[\$300] \$350.
 (6) 2001-3000 people, weekends and holidays-[\$350] \$400.
- (c) Heckscher State Park-Deer Range and Taylor Pavilions (minimum of 100 people required).
 (1) Up to 400 people, weekdays-[\$125] \$175.
 (2) Up to 400 people, weekends and holidays-[\$175] \$225.
 (3) 401-700 people, weekdays-[\$200] \$250.
 (4) 401-700 people, weekends and holidays-[\$250] \$300.
 (5) 701-[400] 2000 people weekdays-[\$250] \$300.
 (6) 701-2000 people weekends and holidays-[\$300] \$350.
- (d) Heckscher State Park—Concession Areas 2 and 8.
 (1) weekdays-\$175.
 (2) weekends-\$225.
- (e) Belmont Lake State Park—Birch, Oak and Pine Pavilions.
 (1) weekdays—[\$125] \$175.
 (2) weekends and holidays—[\$175] \$225.
- (f) Belmont Lake State Park-Maple Pavilion.
 (1) weekdays-[\$75] \$175.
 (2) weekends and holidays-[\$125] \$225.
- (g) Hempstead Lake State Park.
 (1) weekdays—[\$125] \$175.
 (2) weekends—[\$175] \$225.
- (h) Valley Stream State Park.
 (1) weekdays—[\$125] \$175.
 (2) weekends and holidays—[\$175] \$225.
- (i) Orient Beach State Park.
 (1) weekdays-[\$125] \$175.
 (2) weekends and holidays-[\$175] \$225.
- (j) Sunken Meadow State Park East Picnic Building.
 (1) weekdays-\$175.
 (2) weekends and holidays-\$225.
- Clause (b) of subparagraph (iii) of paragraph (3) is amended to read as follows:
 (b) John Boyd Thacher State Park[- \$150 (includes vehicle use fees)].
 (1) picnic shelters without parking attendant—\$175 (includes vehicle use fees).
 (2) picnic shelters-\$100 (does not include vehicle use fee).
- Paragraph (3) is amended by adding new subparagraph (viii) to read as follows:
 (viii) New York City Region
 (a) Roberto Clemente State Park reserved picnic areas (200 maximum capacity)-\$120.
- Subparagraph (ix) of paragraph (4) is amended by amending clause (a), adding new clauses (d) and (e), and adding new subparagraphs (xv) through (xx) to read as follows:
 (ix) Riverbank State Park.
 (a) Cultural Complex.
 (1) Non-profit groups-[\$150 per hour] \$180 per session (3 hours).
 (2) Others-[\$300 per hour] \$360 per session (3 hours).
 (d) Fitness Room Annual Pass-\$150.
 (e) Rink Rental
 (1) Ice Rink-\$225 per hour.
 (2) Ice Rink Season Pass- \$200 per adult; \$150 per child (under 18 years of age).
 (3) Roller Rink-\$105 per hour.
 (xv) Lake Erie State Park Bathhouse-\$100 per day.
 (xvi) Delta Lake Bathhouse-\$100 per day.
 (xvii) Nissequoque State Park Administration Conference Room-\$100 per day.
 (xviii) Sterling Forest State Park Visitor Center Conference Room-\$100 per day.
 (xix) Fahnestock State Park Hubbard Lodge-\$100 per day.
 (xx) Peebles Island Conference Room-\$100 per day.

Paragraph (5) is amended by adding a new clause (b) to subparagraph (i) as follows:

- (b) Small Cottage-\$350 per week.

Clause (c) of subparagraph (iii) of paragraph (5) is amended to read as follows:

- (c) Camp Allegany-[\$150] \$250 per day.

Clause (a) of subparagraph (iv) of paragraph (5) is amended and a new clause (b) is added to read as follows:

- (a) Genesee Conference Center-[\$200] \$225 per day.

(b) Maplewood Lodge-\$150 per night; \$600 per week-summer season; \$125 per night; \$500 per week rest of year.

Clauses (a) and (b) of subparagraph (vi) are amended to read as follows:

(a) Two bedroom cottage-Summer season -[\$500] \$600 per week; \$100 per night; Rest of year-\$400 per week.

(b) Three bedroom cottage-Summer season-[\$600] \$700 per week; \$125 per night; Rest of Year-\$500 per week.

Subparagraph (vii) of paragraph (5) is amended to read as follows:

- (vii) Golden Hill State Park.

(a) Lighthouse Cottage-[\$125] \$200 per night; [\$875] \$975 per week.

Paragraph (5) is amended by adding subparagraphs (viii) and (ix).

- (viii) Lake Taghkanic Cottages

- (a) four-person cottage-\$615 per week.

- (b) six-person cottages-\$675 per week.

(ix) Grass Point State Park Cottage-\$700 per week summer season; \$500 per week rest of year.

This notice is intended to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire September 5, 2004.

Text of rule and any required statements and analyses may be obtained from: Elaine H. Bartley, Office of Parks, Recreation and Historic Preservation, Agency Bldg. 1, 19th Fl., Albany, NY 12238, (518) 473-7889, e-mail: elaine.bartley@oprhp.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

1. Statutory authority:

Section 3.09 of the Parks, Recreation and Historic Preservation Law authorizes the Office of Parks, Recreation and Historic Preservation (OPRHP) to operate and maintain State parks, parkways, historic sites and recreational facilities. Subdivision eight of this section authorizes the adoption of rules and regulations as may be necessary for the performance or exercise of the functions, powers and duties of the Agency. Subdivision one of section 13.15 of the Parks, Recreation and Historic Preservation Law authorizes OPRHP to establish fees and other charges for the use of facilities under its jurisdiction.

2. Legislative objectives:

Subdivision two (a) of section 102 of the State Administrative Procedure Act (SAPA) includes within the definition of a rule certain fees charged by or paid to any agency. Consequently, any fees charged by OPRHP which are in excess of one hundred dollars and can reasonably be expected to result in annual aggregate revenues of more than \$1000 must be promulgated according to the provisions of SAPA.

3. Needs and benefits:

OVERVIEW

In 2002, the OPRHP amended its rules setting forth the fees for patron use of a variety of park facilities in order to make fees consistent throughout the State park system or to make them comparable to fees charged by the private sector. As a follow-up to the 2002 rulemaking, the amendments encompassed by this proposed rulemaking are for fees that were not revised in 2002 or are for new facilities that have recently become available. In particular, the amendments provide for: 1) a fee schedule for recently constructed and renovated picnic shelters, as well as changes in fees for existing picnic shelters; 2) a fee schedule for newly constructed or recently acquired boating facilities and increases to marina slip rental fees and related charges; and 3) fees for newly offered special event facilities and seasonal and overnight housing rentals.

PICNIC SHELTERS

New fees are proposed for newly constructed and renovated picnic shelters and revised fees are proposed for existing shelters in order to maintain comparability with fees currently charged for other picnic shelters in the state park system that are similar in size, design, location, and/or demand.

MARINAS

Adjustments in the marina fee schedule are proposed to reflect the addition of new marina slips and to maintain comparability with other overnight fees, such as cabins and campsites to better reflect local market rates and demands.

SPECIAL EVENT FACILITIES

As in the 2002 amendments to Part 381, OPRHP included new fees for the use of a number of gardens, lawns, structures, and other unique spaces which may be reserved by the public for meetings, conferences, weddings, parties, and other special events. Since 2002, the public's interest in these unique spaces has continued to grow. In response to this demand, OPRHP has made available more facilities of this nature for the public's use and enjoyment. As in the past, the fees are based on fees already established for similar facilities in the park region as well as fees charged for similar facilities in the local area (where comparisons can be readily made).

RENTAL OF SEASONAL LODGING

OPRHP continues to make available to the public overnight accommodations in unique park and historic structure settings that would otherwise remain vacant, unused, or under-utilized. Fees for such seasonal and overnight accommodations are based on OPRHP's cabin rate structure, fees charged for comparable rentals in the surrounding area (if available), and rates paid on a pilot basis to evaluate the public's interest in such accommodations.

GENERAL DISCUSSION

Some may view these regulations as having a positive impact on local tourism efforts. From the perspective of small businesses in the local area that rely in large part on tourists, it is important that State Parks continue to offer new and exciting overnight facilities within a range that is both affordable but not significantly under market. Periodically, OPRHP performs market-based analyses using data compiled from private and not-for-profit providers of overnight accommodations, marina berths and special event facilities. When establishing fees for facilities that have just come on line, OPRHP relies heavily on the fees it charges for similar facilities at different locations within the state park system.

OPRHP is responsible for managing a vast array of natural and cultural resources within its 168 state parks and 35 historic sites. Since 1995, the Agency has increased its land holdings substantially adding eighteen new state parks including over 40,000 acres of parkland. In 1992, the Legislature established the State Parks Infrastructure Fund (SPIF) to ensure that OPRHP would have a stable and predictable funding source—even during fiscally unstable times—dedicated to rehabilitating park facilities. (See section 97-mm of the State Finance Law). All fee revenues collected through the activities and services provided at State parks, including day use and camping fees, cabin rentals, golf concession revenue, admission fees and the fees proposed by this regulation are dedicated by law to provide for the operations, maintenance and improvement of State Parks and historic sites.

4. Costs:

Costs to regulated parties for the implementation of and continuing compliance with the rule: The only parties regulated by the rule are persons and groups that choose to use park facilities. The costs for the use of these facilities are identified in the rule. In addition, there may be nominal costs associated with applying to use special event facilities, depending on the size and complexity of the special event. Such costs may include the time involved in filling out the permit application and in consulting with facility managers in doing so. These costs, however, are no different than those ordinarily associated with planning such events, regardless of the venue.

Costs of the Agency, the State and local governments for the implementation and continuation of the rule: Costs to the Agency are limited to costs associated with the staff time necessary to revise and update informational and reporting documents and costs necessary to manage the special events and seasonal lodging programs. At this time, OPRHP does not anticipate that these costs will require additional State expenditures. No other costs to the State and to local governments have been identified. OPRHP estimates that these fees will result in increased annual revenues in the amount of \$250,000.

5. Local government mandates:

The rule does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or fire district.

6. Paperwork:

There are no new reporting requirements in connection with the rule. The only changes which OPRHP will need to make will be to update its public information documents and internal documents and reports.

7. Duplication:

OPRHP is unaware of any existing State or Federal requirements this proposal would duplicate.

8. Alternatives:

Possible alternatives exist in varying the amount of fee increases. In order to continue to meet the need for safe and enjoyable public recrea-

tional facilities, it is necessary to provide the funds for expenditures related to park operations, maintenance and infrastructure improvements. OPRHP anticipates that the demand for the use of these facilities will continue to grow. The fees proposed are consistent with local market conditions and the cost of comparable facilities in the area.

9. Federal standards:

OPRHP is unaware of any federal standards relating to the subject area of this rule.

10. Compliance schedule:

The fees imposed by this rule will be applicable for the use of all facilities upon the effective date of the rule.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis is not submitted with this notice because the rule will not impose any adverse economic impact or reporting, record-keeping or other compliance requirements on small businesses or local governments. The proposed amendments implement changes in fees for the use of various facilities in State parks and historic sites.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this notice because the rule will not impose any adverse economic impact or reporting, record-keeping or other compliance requirements on public or private entities in rural areas. The proposed amendments implement changes in fees for the use of various facilities in State parks and historic sites.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because the rule will not have a substantial adverse impact on jobs and employment opportunities. The proposed amendments implement changes in fees for the use of various facilities in State parks and historic sites.

Public Service Commission

NOTICE OF ADOPTION

Rochester Gas and Electric Corporation's Economic Development Plan

I.D. No. PSC-34-03-00014-A

Filing date: June 2, 2004

Effective date: June 2, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on May 19, 2004, adopted an order in Case 02-E-0198 directing Rochester Gas and Electric Corporation's (RG&E) to revise its Economic Development Plan.

Statutory authority: Public Service Law, sections 5(1)(b), 64, 65(1), (2), (3), (5), 66(1), (4), (5), (10), (12), 71 and 72

Subject: Economic Development Plan.

Purpose: To comply with the commission's order adopting recommended decision with modifications.

Substance of final rule: The Commission directed Rochester Gas and Electric Corporation to modify its proposed Economic Development Plan for commercial and industrial electric customers in its service territory, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(02-E-0198SA4)

NOTICE OF ADOPTION

Economic Development Plan by Rochester Gas and Electric Corporation**I.D. No.** PSC-37-03-00016-A**Filing date:** June 2, 2004**Effective date:** June 2, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on May 19, 2004, adopted an order in Case 02-G-0199 directing Rochester Gas & Electric Corporation (RG&E) to revise its Economic Development Plan.

Statutory authority: Public Service Law, sections 5(1)(b), 64, 65(1), (2), (3), (5), 66(1), (4), (5), (10), (12), 71 and 72

Subject: Economic Development Plan.

Purpose: To comply with the order adopting recommended decision with modifications.

Substance of final rule: The Commission directed Rochester Gas and Electric Corporation to modify its proposed Economic Development Plan for commercial and industrial electric and gas customers in its service territory, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(02-G-0199SA3)

NOTICE OF ADOPTION

Issuance of Debt by Long Island Water Corporation**I.D. No.** PSC-43-03-00041-A**Filing date:** June 3, 2004**Effective date:** June 3, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on June 2, 2004, adopted an order in Case 03-W-1338 approving Long Island Water Corporation's request to enter into a loan agreement with the Environmental Facilities Corporation for \$16 million in long-term debt.

Statutory authority: Public Service Law, section 89-f

Subject: Petition for the issuance of debt.

Purpose: To finance capital projects for the production and distribution of water and to cover certain issuance expenses related to the debt.

Substance of final rule: The Commission authorized Long Island Water Corporation authority to issue and sell \$16,000,000 of aggregate principal amount of long-term debt in connection with the issuance by New York State Environmental Facilities Corporation of tax-exempt bonds, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-W-1338SA1)

NOTICE OF ADOPTION

Transmission and Distribution of Gas by the Northeast Gas Association**I.D. No.** PSC-49-03-00009-A**Filing date:** June 3, 2004**Effective date:** June 3, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on June 2, 2004, adopted an order in Case 03-G-1507 granting Northeast Gas Association (NGA) a waiver of 16 NYCRR sections 255.756 and 255.757 and denying its request for a waiver of 16 NYCRR section 255.755.

Statutory authority: Public Service Law, section 66(12)

Subject: Request for waiver of the commission's rules and regulations.

Purpose: To waive certain requirements of the commission's rules and regulations of 16 NYCRR Part 255.

Substance of final rule: The Commission approved Northeast Gas Association's (NGA) request for waiver of 16 NYCRR §§ 255.756 and 255.757 and denied NGA's request for a waiver of 16 NYCRR § 255.755, subject to the terms and conditions set forth in the Order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-G-1507SA1)

NOTICE OF ADOPTION

Refunded Overcharges by the City of Jamestown**I.D. No.** PSC-04-04-00015-A**Filing date:** June 7, 2004**Effective date:** June 7, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on June 2, 2004, adopted an order in Case 03-E-1785 authorizing the City of Jamestown to allocate approximately \$2.4 million of refunds to the completion of several capital projects and to recover associated litigation costs.

Statutory authority: Public Service Law, sections 66(12) and 113(2)

Subject: Allocation of a refund.

Purpose: To allow the City of Jamestown to use refund proceeds towards reducing operating costs and improving system efficiency and reliability.

Substance of final rule: The Commission authorized the City of Jamestown to allocate approximately \$2.4 million of refunds received from Niagara Mohawk Power Corporation and the New York Power Authority for the completion of several capital projects and to recover associated litigation costs, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-E-1785SA1)

NOTICE OF ADOPTION

Submetering of Electricity by Adam Jakubowicz

I.D. No. PSC-08-04-00012-A

Filing date: June 4, 2004

Effective date: June 4, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on June 2, 2004, adopted an order in Case 04-E-0110 allowing Adam Jakubowicz to submeter electricity at 410 W. 48th St., New York, NY.

Statutory authority: Public Service Law, sections 65(1), 66(1), (2), (3), (4), (5), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant Adam Jakubowicz permission to submeter electricity.

Substance of final rule: The Commission authorized Adam Jakubowicz to submeter electricity at 410 West 48th Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(04-E-0110SA1)

NOTICE OF ADOPTION

Refund Overcharges by the City of Jamestown

I.D. No. PSC-10-04-00017-A

Filing date: June 7, 2004

Effective date: June 7, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on June 2, 2004, adopted an order in Case 03-E-1785 authorizing the City of Jamestown to use approximately \$96,000 of a refund for extraordinary capital projects.

Statutory authority: Public Service Law, sections 66(12) and 113(2)

Subject: Allocation of a refund.

Purpose: To allow the City of Jamestown to use refund proceeds towards reducing operating costs and improving system efficiency and reliability.

Substance of final rule: The Commission authorized the City of Jamestown to allocate approximately \$96,000 of a refund received from the New York Independent Systems Operator for the completion of several capital projects, subject to the terms and conditions to set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-E-1785SA2)

NOTICE OF ADOPTION

Submetering of Electricity by RBNB Wall Street Owner LLC

I.D. No. PSC-11-04-00034-A

Filing date: June 4, 2004

Effective date: June 4, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on June 2, 2004, adopted an order in Case 04-E-0148 allowing RBNB Wall Street Owner LLC (RBNB) to submeter electricity at 63 Wall St., New York, NY.

Statutory authority: Public Service Law, sections 65(1), 66(1), (2), (3), (4), (5), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant RBNB permission to submeter electricity.

Substance of final rule: The Commission authorized RBNB Wall Street Owner LLC to submeter electricity at 63 Wall Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(04-E-0148SA1)

NOTICE OF ADOPTION

Operation and Management of Camfield-Purcell Water Works, Inc. and Brickyard Road Water System

I.D. No. PSC-13-04-00020-A

Filing date: June 7, 2004

Effective date: June 7, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on June 2, 2004, adopted an order in Case 04-W-0214 making permanent the order appointing temporary operator issued on March 16, 2004.

Statutory authority: Public Service Law, section 89(b)

Subject: The acts and practices of service provided by Camfield-Purcell Water Works, Inc. (Camfield-Purcell) and Brickyard Road Water System (Brickyard).

Purpose: To adopt as a permanent rule the terms of the commission's March 16, 2004 order appointing the Town of Stillwater as a temporary operating agent to Camfield-Purcell and Brickyard.

Substance of final rule: The Commission adopted as a permanent rule the provisions of the Commission's March 16, 2004 Order appointing the Town of Stillwater as temporary operator of Camfield-Purcell Water Works, Inc. and Brickyard Road Water System, subject to the terms and conditions set forth in the Order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(04-W-0214SA2)

NOTICE OF ADOPTION

Underground Line Extensions by Niagara Mohawk Power Corporation

I.D. No. PSC-14-04-00007-A
Filing date: June 2, 2004
Effective date: June 2, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on June 2, 2004, adopted an order in Case 04-E-0368 approving modifications to Niagara Mohawk Power Corporation's (Niagara Mohawk) tariff schedule, P.S.C. No. 207—Electricity.

Statutory authority: Public Service Law, section 66(12)

Subject: Tariff filing by Niagara Mohawk.

Purpose: To reflect revisions to underground distribution system costs based on a five-year average of the actual calendar year data.

Substance of final rule: The Commission approved amendments to Niagara Mohawk Power Corporation's Tariff Schedule, P.S.C. No. 207 to reflect revisions to underground distribution system costs based on a five-year average of the actual calendar year data opposed to the traditional one-year average costs.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-E-0368SA1)

NOTICE OF ADOPTION

Area and Street Lighting Changes by Central Hudson Gas & Electric Corporation

I.D. No. PSC-15-04-00024-A
Filing date: June 2, 2004
Effective date: June 2, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on June 2, 2004, approved revisions in Case 04-E-0385 to Central Hudson Gas and Electric Corporation's (Central Hudson) tariff schedule, P.S.C. No. 15—Electricity.

Statutory authority: Public Service Law, section 66(12)

Subject: Tariff filing by Central Hudson.

Purpose: To provide additional lighting options and more flexibility in administering street lighting service.

Substance of final rule: The Commission authorized Central Hudson Gas & Electric Corporation's (Central Hudson) to amend its Service Classification No. 5 — Area Lighting and Service Classification No. 8 — Public Street and Highway Lighting which will provide additional lighting options, allow for more flexibility in administering street lighting service, respond to customers concerns and have the potential of reducing costs.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-E-0385SA1)

NOTICE OF ADOPTION

Transmission Revenue Adjustment by Niagara Mohawk Power Corporation

I.D. No. PSC-15-04-00025-A
Filing date: June 2, 2004
Effective date: June 2, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on June 2, 2004, adopted an order in Case 04-E-0419 approving modifications to Niagara Mohawk Power Corporation's (Niagara Mohawk) tariff schedule P.S.C. No. 207—Electricity.

Statutory authority: Public Service Law, section 66(12)

Subject: Tariff filing by Niagara Mohawk.

Purpose: To allocate a percentage of the transmission revenue adjustment to S.C. No. 4—second voltage level customers.

Substance of final rule: The Commission approved amendments to Niagara Mohawk Power Corporation's Tariff Schedule, P.S.C. No. 207 to allocate a percentage of the Transmission Revenue Adjustment to S.C. No. 4—Second Voltage Level Customers.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-E-0419SA1)

NOTICE OF ADOPTION

Clarifications to Tariff Provisions by National Fuel Gas Distribution Corporation

I.D. No. PSC-15-04-00027-A
Filing date: June 2, 2004
Effective date: June 2, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on May 5, 2004, adopted an order in Case 04-G-0304 authorizing revisions to National Fuel Gas Distribution Corporation's (NFG) schedule for gas service—P.S.C. No. 8.

Statutory authority: Public Service Law, section 66(12)

Subject: Tariff filing by National Fuel Gas Distribution Corporation (NFG).

Purpose: To clarify and correct tariff provisions.

Substance of final rule: The Commission approved a request by National Fuel Gas Distribution Corporation (NFG) to update shared meter provisions, to change the published index used for establishing various charges, to replace "DTI South Point" with "Dominion South Point" and to make corrections to Economic Development Zone rate discounts for S.C. No. 13—Daily Metered Transportation Service and S.C. No. 13M—Monthly Metered Transportation Service customers.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-G-0304SA1)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Interconnection Agreement between Frontier Communications of AuSable Valley, Inc., et al. and Sprint Communications Company, L.P.

I.D. No. PSC-25-04-00012-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a modification filed by Frontier Communications of AuSable Valley, Inc., Frontier Communications of Sylvan Lake, Inc., Frontier Communications of New York, Inc., Frontier Communications of Seneca Gorham, Inc., Ogden Telephone Company and Sprint Communications Company, L.P. to revise the interconnection agreement effective on April 5, 2004.

Statutory authority: Public Service Law, section 94(2)

Subject: Inter-carrier agreements to interconnect telephone networks for the provisioning of local exchange service.

Purpose: To amend the interconnection agreement.

Substance of proposed rule: The Commission approved an Interconnection Agreement between Frontier Communications of AuSable Valley, Inc., Frontier Communications of Sylvan Lake, Inc., Frontier Communications of New York, Inc., Frontier Communications of Gorham, Inc., Ogden Telephone Company and Sprint Communications Company, L.P. in April 2004. The companies subsequently have jointly filed amendments to clarify the provisions regarding Local Number Portability. The Commission is considering these changes.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-C-0617SA1)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Petition for Rehearing by Nucor Steel Auburn, Inc.

I.D. No. PSC-25-04-00013-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Public Service Commission is considering petitions for rehearing and clarification regarding the commission's April 19, 2004 order on a petition from Nucor Steel Auburn, Inc. requesting that New York State Electric & Gas Corporation be directed to revise and modify its policies and practices for calculating and billing marginal cost adjustments under flexible rate contracts with individual customers.

Statutory authority: Public Service Law, sections 5(b), 65(1), 66(1)-(5), (12), (12-b), (12-c) and (14)

Subject: Policies and practices of New York State Electric & Gas Corporation for calculating and billing marginal cost adjustments under flexible rate contracts with individual customers.

Purpose: To consider revisions and modifications to the policies and practices of New York State Electric & Gas Corporation for calculating and billing marginal costs adjustments under flexible rate contracts with individual customers.

Substance of proposed rule: The Public Service Commission is considering petitions for rehearing and clarification regarding the Commission's April 19, 2004 Order on a petition from Nucor Steel Auburn, Inc. requesting that New York State Electric & Gas Corporation be directed to revise and modify its policies and practices for calculating and billing marginal cost adjustments under flexible rate contracts with individual customers.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-E-1306SA2)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Petitions for Rehearing by Corning Incorporated

I.D. No. PSC-25-04-00014-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Public Service Commission is considering petitions for rehearing and clarification regarding the commission's April 19, 2004 order on a petition from Corning Incorporated requesting that New York State Electric & Gas Corporation be directed to revise and modify its policies and practices for calculating and billing marginal cost adjustments under flexible rate contracts with individual customers.

Statutory authority: Public Service Law, sections 5(b), 65(1), 66(1)-(5), (12), (12-b), (12-c) and (14)

Subject: Policies and practices of New York State Electric & Gas Corporation for calculating and billing marginal cost adjustments under flexible rate contracts with individual customers.

Purpose: To consider revisions and modifications to the policies and practices of New York State Electric & Gas Corporation for calculating and billing marginal cost adjustments under flexible rate contracts with individual customers.

Substance of proposed rule: The Public Service Commission is considering petitions for rehearing and clarification regarding the Commission's April 19, 2004 Order on a petition from Corning Incorporated requesting that New York State Electric & Gas Corporation be directed to revise and modify its policies and practices for calculating and billing marginal cost adjustments under flexible rate contracts with individual customers.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-E-1307SA2)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Lightened Regulation by Flat Rock Windpower II, LLC

I.D. No. PSC-25-04-00015-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Public Service Commission is considering whether to approve, reject or modify a petition of Flat Rock Windpower II, LLC (Flat Rock II) for an order providing for lightened regulation.

Statutory authority: Public Service Law, section 4(1), 69, 70 and 110

Subject: The manner in which Flat Rock II will be regulated as an electric corporation.

Purpose: To consider the regulatory regime applicable to Flat Rock II.

Substance of proposed rule: By Petition filed May 20, 2004, Flat Rock II seeks an order providing for lightened regulation of it as an electric corporation, consistent with similar orders issued to other electric corporations operating in the wholesale market. Flat Rock II is the prospective owner of an electric generating facility proposed to be located in Lewis County, New York

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brillig, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(04-E-0643SA1)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Submetering of Electricity by AMPS, Inc.

I.D. No. PSC-25-04-00016-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Public Service Commission is considering a request filed by AMPS, Inc. on behalf of Kent Waterfronts, LLC, to submeter electricity at the Schaefer Landing Project located at 450 Kent Ave., (Schaefer Landing East Tower), 440 Kent Ave. (Schaefer Landing North Tower), and 444 Kent Ave. (Schaefer Landing South Tower), Brooklyn, NY.

Statutory authority: Public Service Law, sections 65(1) and 66(1), (2), (3), (4), (5), (12) and (14)

Subject: Submetering of electricity for new master metered residential rental units owned or operated by private or government entities.

Purpose: To permit electric submetering at the Schaefer Landing Project located at 450, 440 and 444 Kent Ave., Brooklyn, NY.

Substance of proposed rule: The Commission will consider individual submetering proposals on a case-by-case basis in the category of new, renovated or existing residential properties owned or operated by private or government entities according to established guidelines. The Owner at the Schaefer Landing Project located at 450 Kent Avenue, 440 Kent Avenue and 444 Kent Avenue, Brooklyn, New York, has submitted a proposal to master meter and submeter this new residential complex that is undergoing construction. The total electric building usage for this complex will be master metered and each residential unit will be individually submetered.

The submetering plan sets forth proposals on electric rates, security, grievance procedures and dispute resolution, economic benefits and metering systems in compliance with the Home Energy Fair Practices Act (HEFPA). The Commission may accept, deny or modify, in whole or in part, the proposal to submeter electricity at the Schaefer Landing Project located at 450 Kent Avenue, 440 Kent Avenue and 444 Kent Avenue, Brooklyn, New York.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brillig, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(04-E-0657SA1)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Major Gas Rate Increase by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-25-04-00017-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Public Service Commission is considering whether to approve, reject, or modify, in whole or in part, a joint proposal filed by Consolidated Edison Company of New York, Inc. (Con Edison), Department of Public Service staff, and other parties that recommends a three-year rate plan which includes: (1) changes to the rates, charges, rules and regulations contained in the company tariff schedule, P.S.C. No. 9—Gas; (2) various changes to the manner in which Con Edison interacts with customers and marketers; (3) revisions to its retail access program; (4) implementation of energy efficiency programs; (5) modification to its gas safety performance measures; and (6) other related changes to the manner in which the company operates its gas business.

Statutory authority: Public Service Law, sections 5(b), 32, 53, 65 and 66

Subject: Consideration of a major rate increase for Con Edison's gas business, a joint proposal containing a three-year rate plan for Con Edison's gas business, and matters related to the operation of the company's gas business.

Purpose: To consider increases in annual gas revenues for Con Edison, modifications to the manner, terms, and conditions pursuant to which Con Edison provides service to its gas customers and interacts with marketers, and related matters.

Substance of proposed rule: This is supplemental to a Notice issued June 2, 2004 in this proceeding. Consolidated Edison Company of New York, Inc. (Con Edison) made a tariff filing to revise its rates and terms of service for its gas business. Subsequently, Con Edison, Department of Public Service Staff, and other parties to the proceeding entered into a joint proposal that recommends a three-year rate plan which includes: (1) a rate increase of \$28.7 million in the first year and smaller increases in the second and third years and other changes to the rates, charges, rules and regulations contained in the company's tariff schedule, P.S.C. No. 9 – Gas; (2) changes to the manner in which Con Edison interacts with customers and marketers; (3) revisions to the company's retail access program; (4) implementation of gas-related energy efficiency programs; (5) modification to the company's gas safety performance measures; and (6) other, related changes to the manner in which the company operates its gas business. The Public Service Commission is considering whether to approve, reject, or modify, in whole or in part, the proposed rate increases, the other terms and conditions of the joint proposal, and other related issues.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brillig, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-G-1671SA2)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Dishonored Check Charge By Fillmore Gas Company, Inc.

I.D. No. PSC-25-04-00018-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Fillmore Gas Company, Inc. to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 1.

Statutory authority: Public Service Law, section 66(12)

Subject: Dishonored check charge and charge for special services.

Purpose: To revise its dishonored check charge rules and establish charges for special services.

Substance of proposed rule: Fillmore Gas Company, Inc. proposes to revise its rules for dishonored check charges and to establish charges for Special Services such as Special Meter Read Fees and Same Day or Non-Business Hour Service Requests.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(04-G-0613SA1)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Low Income Rate Programs and Competitive Market Programs

I.D. No. PSC-25-04-00019-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Pursuant to an order establishing further procedures and notice soliciting comments issued in Case 04-G-0718, the Public Service Commission is considering proposals to continue certain low income and competitive market rate plan programs after the expiration of National Fuel Gas Distribution Corporation's rate plan.

Statutory authority: Public Service Law, sections 5(1)(b), 64, 65(1), (2), (3), (5), 66(1), (4), (5), (10), (12), 71 and 72

Subject: Low income rate programs and competitive market programs.

Purpose: To consider proposals for the continuation of certain low income and competitive market rate plan programs after the expiration of National Fuel Gas Distribution Corporation's rate plan.

Substance of proposed rule: Pursuant to an Order Establishing Procedures and Notice Soliciting Comments issued in Case 04-G-0718, the Public Service Commission is considering proposals to continue certain rate plan programs after the expiration of National Fuel Gas Distribution Corporation's rate plan, including a Low Income Residential Assistance Program; Elderly Blind and Disabled Program; Competition Backout Credits; and a competition Outreach and Education Program.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(04-G-0718SA1)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Major Steam Rate Increase by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-25-04-00020-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Public Service Commission is considering whether to approve, reject, or modify, in whole or in part, a joint proposal filed by Consolidated Edison Company of New York, Inc. (Con Edison), Department of Public Service staff, and other parties that recommends a two-year rate plan which includes: (1) changes to the rates, charges, rules and regulations contained in the company tariff schedule, P.S.C. No. 3—Steam; (2) changes to the manner in which Con Edison interacts with customers; (3) implementation of an economic development plan; (4) allocation of the costs of the East River Repowering Project between the company's steam and electric businesses; and (5) other related changes to the manner in which the company operates its steam business.

Statutory authority: Public Service Law, sections 5(c), 79 and 80

Subject: Consideration of a major rate increase for Con Edison's steam business, a joint proposal containing a two-year rate plan for Con Edison's steam business, and matters related to the operation of the company's steam business.

Purpose: To consider increases in annual steam revenues for Con Edison, modifications to the manner, terms, and conditions pursuant to which Con Edison provides service to its steam customers, and related matters.

Substance of proposed rule: This is supplemental to a Notice issued June 2, 2004 in this proceeding. Consolidated Edison Company of New York, Inc. (Con Edison) made a tariff filing to revise its rates and terms of service for its steam business. Subsequently, Con Edison, Department of Public Service Staff, and other parties to the proceeding entered into a joint proposal that recommends a two-year rate plan which includes: (1) a rate increase of \$49.6 million in the first year and \$27.4 million in the second year and other changes to the rates, charges, rules and regulations contained in the company's tariff schedule, P.S.C. No. 3 - Steam; (2) changes to the manner in which Con Edison interacts with customers; (3) implementation of an economic development plan and creation of a business development task force; (4) specifying the rate treatment of the capital costs for the East River Repowering Project; and (5) other, related changes to the manner in which the company operates its steam business. The Public Service Commission is considering whether to approve, reject, or modify, in whole or in part, the proposed rate increases, the other terms and conditions of the joint proposal, and other related issues.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-S-1672SA2)

Racing and Wagering Board

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Rules of Bingo

I.D. No. RWB-25-04-00003-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Part 5800 of Title 9 NYCRR.

Statutory authority: Executive Law, art. 19-B, section 435(1)(a)

Subject: Rules of bingo.

Purpose: To amend the bingo rules in order to better clarify and instruct, permit and conduct new games, offer new prizes, and remove antiquated and unnecessary restrictions, including but not limited to items such as: eliminating the restrictions on games offering bonus prizes, increase fees

to bookkeepers, allow sales of bingo cards in packages, approve tiered bingo games with tiered prize amounts, eliminate the requirement for an assistant caller where a video camera and monitors are used, and approve use of multi-colored bingo balls.

Substance of proposed rule (Full text is posted at the following State website: www.racing.state.ny.us/charitable/char.home.htm): 1. Section 5800.1 Definition of terms. This Subtitle has been deleted and replaced with an alphabetized list of updated and new definitions intended to both facilitate the readers' location of such definitions and to clarify previous ambiguities:

- “Admission card or package” is defined;
- “Bingo Control Law” is defined;
- “Bingo Licensing Law” is defined;
- “Card” or “sheet” is defined;
- “Clerk” is defined;
- “Department” is defined;
- “Double-header” is defined;
- “Early bird” is added as a new game;
- “Electronic bingo aid” is defined;
- “Extra regular card” is defined;
- “Face-card” is defined;
- “Governing body” and “municipal governing body” are defined;
- “Gross receipts” are defined;
- “Jackpot game” is defined;
- “Lawful purposes” are defined;
- “Limited period bingo” is defined;
- “Occasion” is redefined;
- “Opportunity” is defined;
- “Package” is defined;
- “Player select” is added as a new game;
- “Pre-drawn bingo” is added as a new game;
- “Prize” is defined;
- “Quick bingo game” is added as a new game;
- “Regular bingo game” is defined;
- “Series” is defined;
- “Special bingo game” is redefined;
- “Session” is defined;
- “Supercard” is amended to remove the limitation on supercards only in cities having a population in excess of one million, pursuant to statute.
- “Tri-color bingo” is added as a new game;
- “Triple-header” is defined; and
- “Wild-number game” is added as a new game.

2. Section 5812.9 Jurisdiction of license. This section has been amended to codify the existing procedures whereby a municipality to license an organization that is domiciled beyond its territorial limits to conduct bingo within its territorial limits.

3. Section 5814.15 Establishment of maximum rentals. This section has been amended to codify the criteria that have been used in determining rents to be fair and reasonable for more than thirty years.

4. Section 5815.11 Persons prohibited from participating in bingo. This section, which prohibits manufacturers and suppliers and their respective agents from conducting, participating, advising, or assisting in the conduct of bingo or from rendering any service to anyone involved with the conduct of bingo, is amended to prohibit manufacturers and suppliers from loaning money or anything of value to those involved with the conduct of bingo, directly or indirectly.

5. Section 5815.14 Sales to other than licensed organizations prohibited. This section has been amended to permit licensed suppliers to sell bingo supplies and equipment to hotels that have received an identification number from the Board, and to licensed commercial lessors that have obtained prior written approval from the Board to purchase such equipment. The minimum age for qualifying a person as a senior citizen has been lowered from 65 years of age to 55 years of age, pursuant to statute.

6. Section 5815.20 Supplier's gifts, donations and loans prohibited.

This new section has been added to prohibit suppliers from selling or distributing bingo supplies or equipment for less than fair market value.

7. Section 5820.7 Compensation of bookkeepers and accountants. This section has been amended to increase the fees payable to bingo bookkeepers and accountants that have remained constant since 1981.

8. Section 5820.8 Admission charge. This section has been amended to raise the maximum price of an admission from \$1 to \$5 pursuant to statute, and permits such admission cards to be sold as part of a package of cards. This section is also amended to require that all persons entering a bingo hall, purchase an admission card and restricts the sale and use of admission cards to one per person.

9. Section 5820.12 This section, previously titled “Sale of bingo cards without disclosing face” has been changed to “Players' selection of face-cards prohibited; surrender of unused bingo opportunities” to facilitate the sale of opportunities in the new games player select and pre-drawn bingo.

10. Section 5820.13 The title of this section has been changed from “Time for selling bingo cards” to “Time for selling bingo cards; accounting of bingo cards sold.” This section has been amended to remove the restriction on the sale of bingo cards after the “10th” scheduled game and add the game “marking the halfway point in an occasion” except for cards sold for supercards and jackpot games, and to require that each licensee keep an accurate count of early bird cards, player select cards, pre-drawn cards, quick bingo cards and supercards sold. This section also requires that admission cards extra regular cards and special cards be different and readily distinguishable from each other.

11. Section 5820.14 Price of bingo cards. This section has been amended to include early bird cards, player select cards, pre-drawn cards and quick bingo cards; permits bingo opportunities that are sold as part of a package to be sold singly, provided such single opportunities are different and distinguishable from those opportunities comprising said package and the price of each opportunity or package is conspicuously posted and remains constant throughout the occasion. This amendment also raises the maximum price per supercard to ten dollars; requires that the price for at least one opportunity to participate in any early bird game shall not exceed one-dollar; permits the sale of opportunities for double-headers and triple-headers as part of a package; and permits the sale of tiered bingo games.

12. Section 5820.15 Kind of equipment used for games. This amendment permits the use of colored objects or balls to provide added security, and explains the procedures to be implemented when it is determined that an object or ball is not present in the receptacle at the start of play, due to mechanical malfunction or human error.

13. Section 5820.16 Drawing of numbers. This section eliminates the need to have an assistant caller present when an audio-video system is employed that displays the next ball to be called on video monitors. This amendment also eliminates the handling of the object or ball by the caller when a “hands-free” bingo system is utilized, and permits the conduct of wild number bingo games under certain conditions.

14. Section 5820.17 Visibility of drawing to players. This section has been amended to require that, when an audio-video system is used, the video monitors be maintained in good working order and visible to a majority of the players at all times.

15. Section 5820.18 The title of this section has been changed from “Announcement of winning combinations before game” to “Announcement of winning patterns before a game” and has been amended to require that the winning patterns for all games, including games comprised of multiple parts, be listed on the licensed bingo organization's bingo program required under new section 5820.39.

16. Section 5820.19 The title of this section has been changed from “Permissible winning combinations” to “Permissible winning patterns” and has been amended to clarify certain winning patterns. The amendment also requires that a player not be compelled to cover or daub fewer than four numbered spaces on any face-card to win, nor shall any winning pattern require the covering or daubing of numbers appearing on more than three bingo face-cards.

17. Section 5820.20 This section, which has been changed from “Bonus prizes prohibited” to “Bonus prizes” removes the restriction on bonus prizes based on the type of bingo card used, the winning pattern, or the number of calls required to win, provided the type of cards and winning patterns have been approved in writing by the Board, in accordance with 5820.19, the bonus prize will not exceed the limitations on single prize and series of prizes, and the number of calls and the winning pattern are listed on the organization's application for bingo license and the bingo program required by new Section 5820.39. This section has been further amended to expand upon the conduct of progressive bingo games by permitting prizes to be increased in bingo occasions held subsequent to an occasion in which a primary prize is not awarded.

18. Section 5820.27 Multiple winners.

This section has been amended to clarify the procedures for awarding prizes when more than one winning bingo is determined on the same number called, and when multiple winners are determined in tri-color bingo games and tiered bingo games.

19. Section 5820.30 Admission charge as requisite to participate. This section has been amended to clarify the requirement that all persons entering a bingo hall or participating in any bingo game purchase at least an admission card, prevents players from being forced to purchase more

than an admission card or package, and prohibits a player from purchasing or playing more than one admission card or package.

20. Section 5820.34 The title of this section, "Persons serving another licensee or participating as a player" has been changed to "Persons prohibited as players" for the purpose of removing the prohibition against assisting at bingo for more than one organization pursuant to statute and to clarify that no person who has assisted in the conduct of a bingo occasion shall participate as a bingo player or purchase raffle tickets during such occasion.

21. Section 5820.39 Accommodations to be furnished players. This section has been amended to require that all players be furnished with a bingo program listing the name and identification number of the licensee, the house rules in effect, and a schedule of the games to be played and the prizes to be awarded therein. This section has also been amended to require that all bingo halls comply with federal, state and local smoking laws.

22. Section 5820.42 Sale and distribution of bingo supplies. This section has been amended to clarify that a licensed supplier may only sell or lease bingo equipment at fair market value.

23. Section 5820.47 Advertising of bingo games. This section adds, pursuant to statute, the word "radio" to the approved forms by which licensed authorized organizations may advertise their bingo games, and hyphenates the word "firefighting" to "fire-fighting"

24. Section 5820.49 Player select game use of board-approved player select bingo cards. This new section introduces the player select game in which a player, prior to the commencement of that game, purchases a blank player select card and enters the numbers of his or her choice thereon. Prizes are awarded to those players whose selected numbers match those randomly drawn by the bingo operator.

25. Section 5820.51 Pre-drawn bingo game; use of board-approved rip-open or sealed bingo cards. This new section introduces pre-drawn bingo game which may be conducted by a licensed authorized organization either as the first game of its occasion, or as the first game following an intermission, in which a pre-determined number of bingo balls are pre-picked at random from the receptacle. Pre-drawn bingo games shall be conducted using only Board-approved rip-open or sealed special opportunities, which shall be constructed in such a manner, and of such material, so as to prevent the viewing of the numbers printed thereon until the purchasing player opens the opportunity by tearing off perforated edges or otherwise breaking a secured seal enclosing the face-card.

26. Section 5820.52 Quick bingo game; use of board-approved quick bingo cards. This section introduces the new quick bingo game, which is a special game conducted in conjunction with another scheduled bingo game, in which specially constructed quick bingo cards are sold and marked by the players.

27. Section 5820.53 House rules. This new section requires that licensed authorized organizations adopt house rules to inform their players how situations not addressed by law, rule or regulation will be handled. Such house rules shall include, but need not be limited to, seat reservations, late calls of bingo, electrical power interruptions, and the participation of minors. House rules shall be prominently posted, listed in the bingo program required by Section 5820.39, and shall be audibly announced prior to the commencement of each bingo session.

28. Section 5820.54 Seat reservations. This new section requires that organizations adopt a house rule either permitting or prohibiting the saving of seats at bingo occasions.

29. Section 5820.56 Tri-color bingo game; use of board-approved tri-color bingo opportunities. This new section authorizes the conduct of the new game tri-color bingo and specifies the types of bingo opportunities used in such games.

30. Section 5821.18 Lawful expenditures. This section codifies the purposes for which bingo proceeds may be disbursed previously contained in Bulletin #9, and is identical to the provisions of Section 5624.21 Lawful Expenditures governing the purposes for which games of chance proceeds may be disbursed.

31. Section 5822.5 Limitations upon lessors. This section has been changed to prevent a licensed authorized organization from leasing its premises when such facility is simultaneously needed by the organization for other activities.

32. Section 5822.10 Written agreement to be filed. This section has been changed to require that each lease agreement for the rental of bingo premises between two licensed authorized organizations be submitted to the licensing authority for approval of both the lease and rental fees to be charged, rather than submitting them to the Board, because the local authorities are more familiar with the premises to be utilized and the fair pricing of the rents proposed. To assist the licensing authorities, the

amendment further requires that the licensing authority consult with the Board prior to rendering a decision.

33. Section 5822.11 Mandatory provisions. This section has been changed to prohibit bingo lessors from loaning money or anything else of value to anyone conducting bingo pursuant to a bingo lease agreement.

Text of proposed rule and any required statements and analyses may be obtained from: Erin Dahlmeyer, Secretary to the Board, Racing and Wagering Board, One Watervliet Ave. Ext., Suite 2, Albany, NY 12206, (518) 453-8460, e-mail: edahlmeyer@racing.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

1. Statutory authority:

The New York State Racing and Wagering Board is authorized to promulgate these rules and regulations pursuant to Executive Law Article 19-B Section 435.1(a), which defines the powers and duties of the Commission (Board) as they relate to bingo. It reads, in pertinent part, as follows:

The Commission shall have the power and it shall be its duty to:

... supervise the administration of the bingo licensing law and adopt, amend and repeal rules and regulations governing the issuance and amendment of licenses thereunder and the conducting of games under such licenses which rules and regulations shall have the force and effect of law and shall be binding upon all municipalities issuing licenses and upon licensees thereunder and licensees of the commission to the end that such licenses shall be issued to qualified licensees only and that said games shall be fairly and properly conducted for the purposes and in the manner in the said bingo licensing law prescribed and to prevent the games thereby authorized to be conducted from being conducted for commercial purposes or purposes other than those therein authorized participated in by criminal or other undesirable elements in the funds derived from the games being diverted from the purposes authorized and to provide uniformity in the administration of said law throughout the State, the commission shall prescribe forms of application for licenses, amendment of licenses, reports of the conduct of games and other matters incident to the administration of such law

The Board's statutory authority, as outlined in Executive Law 435, mandates that it promulgate rules and regulations consistent with Article 14-H of the General Municipal Law (GML), which is known as the Bingo Licensing Law. It is vital to note that the statute uses the word shall when expressing the Board's duties. The word shall, when interpreting the statute, means that the Board must perform these responsibilities, chiefly among them the promulgation of rules and regulations governing the issuance of licenses and the conduct of bingo and its attendant activities under the Bingo Licensing Law. Consistent with this authority the Board has proposed rules to ensure that bingo games are fairly and properly conducted, that the proceeds derived from such games for worthy causes be maximized, and that the games authorized to be conducted are not operated for commercial purposes, as mandated by Article 1, Section 9 of the Constitution, Section 475 of the GML and Executive Law Section 435.

2. Legislative objectives:

The public policy objectives the legislature sought to advance by the enactment of the Bingo Licensing Law are identical to the purposes set forth under Section 431 of the Executive Law. Section 475 of the General Municipal Law states, in pertinent part:

It is hereby declared to be the policy of the legislature that all phases of the supervision, licensing and regulation of bingo and of the conduct of bingo games, should be closely controlled and that the laws and regulations pertaining thereto should be strictly construed and rigidly enforced; that the conduct of the game and all attendant activities should be so regulated and adequate controls so instituted as to discourage commercialization in all its forms, including the rental of commercial premises for bingo games, and to ensure a maximum availability of the net proceeds of bingo exclusively for application to the worthy causes and undertakings specified herein; that the only justification for this article is to foster and support such worthy causes and undertakings, and that the mandate of section nine of article one of the state constitution, as amended, should be carried out by rigid regulation to prevent commercialized gambling, prevent participation by criminal and other undesirable elements and prevent the diversion of funds from the purposes herein authorized.

Section 431 of the Executive Law reads, in pertinent part, as follows:

It is hereby declared to be the policy of the legislature that all phases of the supervision, licensing and the regulation of bingo and of the conduct of bingo games, should be closely controlled and that the laws and regula-

tions pertaining thereto should be strictly construed and rigidly enforced; that the conduct of the game and all attendant activities should be so regulated and adequate controls so instituted, as to discourage commercialization in all its forms, including the rental of commercial premises for bingo games, and to insure a maximum availability of the net proceeds of bingo exclusively for application to the worthy causes and undertakings specified herein; that the only justification for this article is to foster and support such worthy causes and undertakings, and that the mandate of section nine of article one of the state constitution, as amended, should be carried out by rigid regulation to prevent commercialized gambling, prevent participation by criminal and other undesirable elements and prevent the diversion of funds from the purposes herein authorized.

3. Needs and benefits:

The purpose of these amendments is consistent with Constitutional and legislative mandates requiring rigid control and supervision over bingo operations and the stimulation of interest in charitable gaming, thereby maximizing proceeds for worthy causes. Authorized organizations conducting bingo will directly benefit from the introduction of new bingo games and the related supplies proposed, and the relaxing of many of the rules and regulations currently governing the conduct of such games will increase attendance at the charitable fundraisers by permitting the licensees to be more competitive with the bingo games conducted in neighboring jurisdictions, resulting in a commensurate increase in funds available for worthy causes.

Two of the proposed amendments reflect statutory changes: Section 5815.14 lowers the age of senior citizens from 60 to 55 years of age consistent with Section 495-a of the General Municipal Law; and Section 5820.8 raises the price of bingo admission cards from one dollar to five dollars consistent with Section 489 of the General Municipal Law, and deletes references to the pricing of special cards.

With the exception of bingo rule amendments that were adopted in 1999 and 2001 that made substantial changes, the preponderance of the current bingo rules and regulations have remained virtually unchanged since their promulgation under the Bingo Control Commission nearly forty years ago; a time when bingo was only the second legalized form of gambling in the State, and was just in its infancy.

The "hard-board" bingo opportunities — once a mainstay in the playing phases of bingo — have long since been replaced with packages of bingo cards printed on inexpensive, recyclable newsprint paper, although there are no existing rules to guide the manufacturers, suppliers and licensees on the sales, use and accountability of such bingo opportunities.

Many of the proposed rules reflect a codification of directives and policies issued by the Bingo Control Commission prior to the enactment of the State Administrative Procedure Act ("SAPA"). Although no longer enforceable under the provisions of the SAPA, the instructions provided by these bulletins and policies are still heavily relied upon by bingo licensees and, therefore, must be codified to make them readily available to as many authorized organizations as possible via the Board's internet website.

For instance, the existing rules provide neither the specific purposes for which bingo funds can be expended, nor the process and criteria utilized in the Board's determination that rental fees for the use of commercial bingo premises are fair and reasonable, pursuant to Section 481.1(b) of the Bingo Licensing Law. Currently the Board uses Board Bulletin 9 (revised October 1991) as a guide for charitable organizations as to what qualifies as a lawful expenditure under Board Rule 5821.10(b). Similarly, the Board uses Bulletin 50 as a guideline for commercial lessor applicants seeking approval of costs that serve as a justification for rent. Board rule 5814.15 currently requires Board approval of rent, but lacks any criteria for determining rent. Bulletin 50 has historically served as that basis for Board determinations regarding fair and reasonable rents. Board Rule 5814.15 would be expanded to codify Bulletin 50 and proposed Board Rule 5821.18 would be created to codify Bulletin 9. The proposed rules are a codification of current board standards and would not impose any impose any new burdens on regulated parties.

The outdated rules setting the monetary allowances for expenditures and professional fees will be raised to more accurately reflect today's costs, thereby affording the licensees an ability to employ the services of competent professionals.

By recognizing and addressing the modernization of charitable bingo operations our proposed amendments will permit licensed authorized organizations to replace antiquated bingo devices with state-of-the-art computerized systems that display the numbered bingo balls called via television monitors and greatly suppress cheating through the televised display and computerized verification of winning bingo face-cards. These new bingo calling systems, which can be operated by one person while maintaining

the integrity of the games, reduce the number of volunteers needed to conduct bingo games and, with their exciting new features, will increase attendance and profits as well, maximizing the funds available for worthy causes.

Several proposed rules prohibit licensed bingo manufacturers and suppliers from selling, leasing or otherwise providing bingo supplies or equipment to licensed authorized organizations at other than fair market value, which will protect small businesses against lost business to manufacturers and suppliers willing and able to provide goods free of charge or at drastically reduced prices, to the detriment of the small business owners.

Rules codifying previous policies requiring that licensees adopt house rules explaining how unusual situations will be handled will promote the fairness, proper conduct and uniformity of bingo operations mandated by Executive Law Article 19-B Section 435.1(a).

Rule 5822.5 has been amended to clarify that the premises of a licensed authorized organization cannot be leased at times when such premises are simultaneously needed by the organization for other activities, or if the facility is used mostly as a bingo premises.

4. Costs:

a. Costs to the regulated parties for the implementation and continuing compliance with the rules.

There are no added costs to the manufacturers and suppliers of bingo equipment or to the licensed authorized organizations associated with the implementation or compliance of the proposed rules, with the exception of the cost to the licensed authorized organizations of purchasing the new bingo supplies necessary for participating in the proposed games, and an anticipated increase in additional license fees paid by the licensed authorized organizations to the municipalities based on a proportionate increase in the gross profits expected from their conduct of the proposed games, should the licensed authorized organizations opt to participate in such games.

The actual costs or savings cannot be predicted by the Board for several reasons. Since the rule does not require organizations to purchase new bingo blowers and caller stations, and the decision whether to upgrade to a computerized bingo system is left entirely up to the organization, the rule doesn't actually impose a new cost. Many organizations have already purchased new computer bingo caller stations with video monitors, so the rule would not allow these organizations to operate in compliance with the rules and would not impose a new cost. Other organizations may choose to keep their current bingo station equipment because the size of their bingo crowds is not large enough to justify upgrading the caller station. Other organizations may choose to retain the older equipment to preserve a certain social atmosphere unique to some bingo occasions. Since most organizations already have such computerized systems, and the Board has no way of determining what organizations intend to purchase such new systems and what the total cost will be to the organizations.

b. Costs to the agency, the State and local governments for the implementation and continuation of the rules.

There will be no costs borne by the State, Board, or local governments by the promulgation of these amendments.

c. The information, including the source(s) of such information and the methodology upon which the cost analysis is based.

Opinions were sought from licensed authorized organizations, municipal licensing officials, municipal bingo inspectors, and the representatives of licensed manufacturers and distributors of bingo supplies and equipment.

5. Local government mandates:

The proposed rules will have little affect on local governments, with the exception of the requirement that local officials, rather than the Board, approve bingo rental fees in the limited instances when one licensed authorized organization leases its premises to another licensed authorized organization for the conduct of bingo. To assist the local officials, the proposed rule requires that the local officials consult with the Board, a process more closely duplicating the policy actually in effect for many years, whereby municipal clerks telephonically confer with the Board to determine that proposed rental fees are reasonable. Since the local officials are familiar with the premises to be leased in their own communities, they are in a better position than the Board to determine whether or not rental fees are fair to their licensees.

6. Paperwork:

No increase in paperwork is anticipated.

7. Duplication:

The proposed rules do not duplicate, overlap or conflict with any State or federal requirement.

8. Alternatives:

No significant alternatives to the proposed rules were considered.

9. Federal standards:

There are no similar federal standards.

10. Compliance schedule:

The proposed rules do not require a compliance timeline.

Regulatory Flexibility Analysis

1. Effect of rule:

The proposed rules will permit small businesses licensed by the Board as bingo suppliers to offer for sale a variety of new bingo opportunities and modern bingo operating systems. There are currently 4 manufacturers and 81 suppliers licensed to distribute bingo supplies in New York State, all of which can benefit financially by the potential sale of the supplies and equipment permitted by the proposed rules.

Several proposed rules prohibit licensed bingo manufacturers and suppliers from selling, leasing or otherwise providing bingo supplies or equipment to licensed authorized organizations at other than fair market value, which will protect small businesses against lost business to manufacturers and suppliers willing and able to provide goods free of charge or at drastically reduced prices, to the detriment of the small business owners. The Board cannot quantify on an industry-wide basis the savings that bingo suppliers will realize if the fair-market rule is adopted.

The proposed rules will have little affect on local governments, with the exception of the requirement that local officials, rather than the Board, approve bingo rental fees in the limited instances when one licensed authorized organization leases its premises to another licensed authorized organization for the conduct of bingo.

To assist the local officials, the proposed rule requires that the local officials consult with the Board, a process more closely duplicating the policy actually in effect for many years, whereby municipal clerks telephonically confer with the Board to determine that proposed rental fees are reasonable. Since the local officials are familiar with the premises to be leased in their own communities, they are in a better position than the Board to determine whether or not rental fees are fair to their licensees.

Local governments will likely benefit from an increase in the additional bingo license fees collected by those agencies based on a proportionate rise in profits derived from the conduct of the proposed games. There are currently 601 towns of the 927 towns in New York State, and 263 villages of the 534 villages in New York State, that have enacted statutes enabling bingo.

2. Compliance requirements:

The proposed rules will require no additional compliance issues for small businesses or local governments, other than the approval of bingo rental fees between licensed authorized organizations by municipalities outlined in (1), above.

3. Professional services:

The proposed rules will not require that licensed manufacturers and suppliers of bingo supplies and equipment or local governments employ professional services.

4. Compliance costs:

The proposed rules will require no additional capital costs to be incurred by licensed manufacturers and suppliers of bingo supplies and equipment, or the local governments.

The actual costs or savings cannot be predicted by the Board for several reasons. Since the rule does not require organizations to purchase new bingo blowers and caller stations, and the decision whether to upgrade to a computerized bingo system is left entirely up to the organization, the Board has no way determining what organizations intend to purchase such new systems and what the total benefit will be to small businesses that sell bingo equipment. Many organizations have already purchased new computer bingo caller stations with video monitors, so the rule would benefit suppliers who service such equipment.

Similarly, since the purchase of new bingo games is not mandated and is discretionary based upon an organization's unique needs, the Board cannot determine what the benefit will be to small businesses that sell bingo supplies.

5. Economic and technological feasibility:

The proposed rules will not require any additional costs or technology on the part of licensed manufacturers and suppliers of bingo supplies and equipment, or local municipal governing bodies.

6. Minimizing adverse impact:

The proposed rules will have no adverse impact on licensed manufacturers and suppliers of bingo supplies and equipment, or local municipal governing bodies.

7. Small business and local government participation:

The Board complied with Subdivision 6 of Section 202-b of the State Administrative Procedure Act by mailing a postcard to every authorized bingo organization, licensed manufacturer and supplier of bingo supplies and equipment, and local municipal governing body authorizing bingo, urging them to review the proposed rules on the Board's website and to provide comments. The comments received were carefully considered and many of them were incorporated into these final proposals.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted because the rules will not impose any adverse economic impact on reporting, recordkeeping or other compliance requirements upon private or public entities located in rural areas.

Job Impact Statement

1. Nature of impact:

The proposed rules will have no impact on jobs or employment opportunities in New York State.

2. Categories and numbers affected:

The proposed rules will have no impact on jobs or employment opportunities in New York State.

3. Regions of adverse impact:

The proposed rules will have no disproportionate adverse impact on jobs or employment opportunities in any region of New York State

4. Minimizing adverse impact:

The proposed rules will have no adverse impact on jobs or employment opportunities in New York State.

Department of Transportation

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

State Public Transportation Safety Board

I.D. No. TRN-25-04-00002-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of sections 990.1 through 990.14, addition of sections 990.16 through 990.20 and repeal of Appendixes B-19 and B-22 of Title 17 NYCRR.

Statutory authority: Transportation Law, section 17-b; and art. 9-B

Subject: State Public Transportation Safety Board.

Purpose: To provide consistency with the standards and requirements of the Code of Federal Regulations that have been incorporated by reference and clarify the procedures of the New York State Public Transportation Safety Board to better preserve public safety.

Substance of proposed rule (Full text is not posted on a State website): Current regulations for public transportation systems and services under Safety Board jurisdiction are quite detailed in developing and documenting acceptable safety policies, procedures, practices and future strategies. In addition, current Safety Board procedures are somewhat unclear and unwieldy, but some systems do not yet possess or have direct access to the necessary safety expertise to ensure public safety. Furthermore, the existing Safety Board requirements do not specifically include long standing practices followed by rail carriers under Safety Board jurisdiction, although such practices have been considered to be acceptable by the Safety Board and now are required by the incorporation of 49 CFR Part 659.

In order to more effectively promote the safety of the public, the proposed revisions are intended to modernize, streamline and clarify the Safety Board's requirements and make them consistent with new federal regulations.

The proposed revisions provide for the following :

1. Clarify and update definitions to better describe the properties under the jurisdiction of the Safety Board and the required procedures of the Safety Board.

2. Streamline and make more consistent the accident and safety incident notification and investigation procedures among the various public transportation modes.

3. Clarify and update the Safety Board's System Safety Program Plan requirements and add proactive safety provisions for bus preventative

maintenance cycles, preventability (consistent with national industry standards), designated staff at properties certified in safety accident investigation, federal safety-related waivers and exemptions, and safety-sensitive positions.

4. Incorporate by reference the Safety Board's System Safety Program Plan Guidelines.

5. Incorporate by reference 49 CFR Part 659 for State Safety Oversight of Rail Fixed Guideway Systems, as issued by the Federal Transit Administration.

6. Detail Safety Board procedures regarding the development of recommendations to the public transportation systems and services.

7. Revise the rail and bus operator accident report forms.

Text of proposed rule and any required statements and analyses may be obtained from: Dennison P. Cottrell, Department of Transportation, Passenger and Freight Safety Division, POD 53, 50 Wolf Rd., Albany, NY 12232, (518) 457-6512, e-mail: dcottrell@dot.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 60 days after publication of this notice.

Regulatory Impact Statement

1. Statutory Authority:

The statutory authority for the State Public Transportation Safety Board ("Safety Board") to promulgate these rules is found in the Transportation Law. ("TL").

TL Article 9-B established the Safety Board as an independent investigative and advisory body to examine the causes of accidents on public transportation and make recommendations in order to prevent the occurrence of further accidents and thereby promote the safety to the public.

Article 9-B, Section 217 generally sets forth the Safety Board's powers and duties. Subdivision (4) of Section 217 specifically authorizes the Safety Board to promulgate rules and regulations necessary to carry out the provisions and purposes of Article 9-B and to enforce any standards established thereunder.

TL 17-b, specifically, § 17-b(2) and (3) gives the Safety Board the authority, along with the Commissioner of Transportation, to determine whether public transportation plans or amendments to said safety plan filed by transportation authorities and public transportation operators or carriers receiving mass transportation operating assistance, are satisfactory and feasible and, therefore, provides the basis for the proposed rules detailing the requirements necessary for a plan to be deemed satisfactory and feasible.

2. Legislative Objectives:

The proposed amendments to the regulations follow the legislative intent by revising the existing Safety Board regulations to reflect recently enacted Federal regulations regarding rail fixed guideway systems, as well as to better fulfill the Safety Board's responsibility for the investigation of all accidents involving public transit, by computer rail, subway and bus lines under Safety Board jurisdiction and to better fulfill the Safety Board's responsibility for making recommendations to such public transit operators to prevent accidents.

3. Needs and Benefits:

a. The proposed amendments further the intent and purposes of Section 17-b and Article 9-B of the Transportation Law. These changes reflect a need to better promote the safety of the public by improved investigative and preventative requirements regarding accidents.

Specifically, these proposed changes are based on the following objectives:

(i) Simplify the Board's operating procedures to streamline the accident notification and investigation process; make it consistent across modes; facilitate communication and sharing of information between PTSB staff and transit properties; and, accelerate the offering of recommendations when appropriate.

The existing duties and powers of the board need to be revised to more accurately reflect the administrative processes of the board such as meeting times, staff delegations of functions, and making findings and recommendations. Such duties and powers also need to reflect the oversight functions of the board for the new rail fixed guideway requirements.

Prompt notification by companies to the PTSB will result in faster responses to accidents by PTSB investigators who often have to travel far distances to remote accident locations. Those investigators can then conduct a substantial portion of their accident investigation at the accident scene (or an immediate followup), collect data and review evidence at the scene prior to the roads being opened up to traffic when data or possibly evidence could be lost or altered forever (vehicle being towed away), and work with police and transit officials at the scene.

Communications can then be improved because the companies would be working with the various investigative entities in a more coordinated way.

Furthermore, the companies would spend less time, after the accident site is finally cleared, trying to find data and evidence and having their employees interviewed by PTSB staff. In addition, the clarified investigation provisions would avoid confusion or inconsistent compliance with requirements such as the notification provisions for rail accidents which provide for very limited and specified exceptions.

We have brought consistency to as many pieces of what are two distinct operations - bus versus rail - as best we can. Our proposed regulations will provide for bus and rail accident consistency regarding the time frame to report all such accidents (now 90 minutes) and the phone numbers used to report all such accidents. However, the accident criteria in the PTSB regulations involving numbers of injuries or type of event is tailored to the differences between bus and rail operations and their respective accident statistics. Both bus and rail criteria obviously require an investigation of fatal accidents. However, regarding bus accident injuries, the number of five or more is used 1) to stratify the more severe bus accidents on the bell curve and 2) respond directly to those bus accidents that occur with an estimated frequency that could be properly investigated given the available resources of the PTSB staff. Currently PTSB bus investigators work an estimated 70-80% of their time on PTSB criteria bus accidents reported from over 135 different bus companies, with their remaining work hours spent on SSPP and on-site reviews. A substantial change in the bus criteria would have a direct effect on the ability of the staff to respond directly to an undisturbed crash site and overall to be able to process cases in a timely manner.

Alternatively, derailments and debris strikes are rail specific. Furthermore, regarding rail accident injuries, the number two is used as a result of an analysis of hundreds of accident records and determined to be the optimum number of injuries generally associated with rail type accidents that needed to be captured.

PTSB properties recognize the obvious differences between bus and rail types of accidents whereby injuries and fatalities generally occur in smaller numbers during rail accidents than in bus accidents, except for the catastrophic rail accidents which sometimes occur.

(ii) Adjust Board procedures in order to comply with Federal Transit Administration requirements (49 CFR Part 659) for State Safety Oversight of Rail Fixed Guideway Systems.

In accordance with Section 659.21 of Title 49 of the Code of Federal Regulations, the PTSB is the oversight agency authorized to implement the requirements of Part 659 of those federal regulations. Compliance with the provisions of Part 659 is necessary to avoid the loss of millions of dollars of federal funding. The Federal Transit Administration has no role under the provisions of 49 CFR Section 659.21.

(iii) Modernize and clarify the Board's system safety plan requirements to focus attention on and reflect the need for transit properties to establish preventive maintenance procedures that are consistent with industry practices and manufacturer's recommendations; and, to encourage transit properties to establish their own in-house accident investigation and analysis procedures, including the rating of accidents according to their preventability consistent with national Safety Council and PTSB guidelines.

The PTSB is responsible for carrying out various efforts that will help to prevent the occurrence of future accidents. Therefore, each system safety program plan has had to include a process for the determination of preventability. The PTSB has supported this with the development of free training classes explaining the process of "determining preventability". Proper accident investigation determines how an accident occurred and thus is a necessary tool in the determination of an accident's preventability. Free Bus Accident Investigation Training for Identifying Safety Hazards (BAITFISH) training classes include not only the "how to" but also examples of best practices of other established accident investigation programs. As far as related costs are concerned, if smaller systems known as Rural Transportation Assistance Programs (RTAP) attend the free classes, they are reimbursed with State and Federal funds for all travel and lodging associated with this effort. Roughly 72 of the 135 PTSB properties have had their staff take one or more of the BAITFISH classes. The development of in-house investigation procedures is based on the belief that once a property utilizes training such as BAITFISH, the property will upgrade its institutional/staff knowledge and existing policies as a matter of course.

Under the proposed Section 990.12(e), bus preventative maintenance cycles need to be explicitly stated in a company's system safety program plan to be approved by the PTSB and maintenance of the buses shall be scheduled accordingly. "Preventative maintenance" is accomplished

through these provisions because companies are then required to perform vehicle maintenance at regular intervals. Mechanical problems would then be found at those regular vehicle maintenance examinations in the controlled setting of a company's maintenance facility instead of on the road in an accident situation. Furthermore, PTSB staff would review the company's preventative maintenance records and see if the company's employees were complying with the company's own preventative maintenance procedures in its system safety program plan.

b. Furthermore, in order to produce more thorough investigations and thereby more effectively prevent future accidents, existing regulations need to be revised in order to overcome certain problems.

i. Companies frequently provided late notice of accidents which delayed PTSB investigators' responses and at times caused the removal of crucial evidence and or disturbance of the accident site. Thus the notification provisions had to be strengthened and clarified for efficient and effective accident investigations.

ii. Companies frequently did not adhere to their own industry accepted accident prevention techniques and standards and thus such industry accepted techniques and standards are being incorporated into the PTSB regulations to require consistent compliance.

4. Costs:

Safety Board investigations are provided at no cost to the public transit carriers under the Safety Board's jurisdiction and therefore the changes to the Safety Board's investigative procedures also should not result in any costs to such carriers. Moreover, the other proposed changes will result in either no costs or negligible costs to these public transit carriers.

Over the past several years the PTSB bus staff has been providing BAITFISH training classes in bus accident investigation. There is no charge to attend the classes which are held at locations throughout the State, given in one day sessions and fulfill the system safety program plan requirement regarding having at least one staff person certified in a comprehensive accident investigation training program approved by the Safety Board. We are currently working to train 12 in-state bus industry representatives to provide the BAITFISH training program on an ongoing basis throughout New York State starting in the early part of 2003.

We also recognize that many other courses exist that are acceptable options for bus companies to send their staff to be trained. For example, the Transportation Safety Institute (TSI) sponsored by the FTA provides very low cost tuition classes specifically on transportation safety issues. These classes would be approved as a comprehensive accident training program. Our list would include this program, however it would be the bus company's responsibility to provide the cost of traveling to the TSI classes. Other programs also exist such as the accident investigation series from the Institute of Police Technology and Management. Although Institute of Police Technology and Management Program costs are about \$800 per student, per class, its program would also be approved (in fact its program instruction is well above the technical level of the baseline that we would list as an approved training program) and travel would still be the responsibility of the bus company.

The proposed provisions regarding rail fixed guideway systems which incorporate 49 CFR Part 659 merely formalize long standing practices that have been utilized by rail carriers under Safety Board Jurisdiction and deemed acceptable by the Safety Board.

49 CFR 659.45 requires rail fixed guideway systems to submit annual reports. The cost is virtually non-existent since much of the same information is and has been for some time, been submitted to the PTSB on a yearly basis with regards to updating their System Safety Program Plans. As noted above, this is a requirement for the FTA which piggybacks information PTSB has collected for years. There is nothing new here, just another reporting mechanism. Basically, the same is true for corrective action plans for unacceptable hazardous conditions (UHC's). UHC's are reported as they develop and are detected. The number of actual reports of UHC's has been very, very small and being so, not costly at all. Both FTA regulated properties, New York City Transit and Niagara Falls Transit Authority, have been doing similar functions as part of their safety programs since 1984 and nothing new has surfaced.

The proposed changes can produce potential cost savings regarding bus accidents. According to data collected and analyzed by the Office of Data Analysis of the Federal Motor Carrier Safety Administration, transit/inter-city bus crashes cost a total of approximately \$978 million in 1997 incurred by bus drivers, other drivers involved either directly or indirectly in the crashes and the public in general. Since the New York State Public Transportation Safety Board has jurisdiction over approximately 19% of these bus services, the efforts of the PTSB, to a degree made more effective by the revisions to the PTSB regulations, to potentially reduce or prevent

the number and severity of bus accidents can produce a maximum cost savings to drivers and the public of approximately \$186 million. Further details on such cost data are available at <http://www.fmcsa.dot.gov>.

There should be a cost savings to the PTSB staff of approximately 10 percent based on saving 10 hours on a 40 hour investigation times \$30.00/hr. times actual case experience (approximately 20 times a year) equals about $20 \times 300 = \$6,000$.

If the company implements safety training and preventative maintenance inspections (PMI) and thereby avoids the occurrence of two accidents that meet PTSB criteria, then there are additional savings of about $40 \times 30 \times 2 = \$2,400$ + additional administrative costs (*i.e.*, going to the PTSB staff supervisor and higher review up to and including the Public Transportation Safety Board and the Transit company's cost to be involved through the whole process).

5. Local Government Mandates:

None.

However, these regulations do apply to municipal operations as well as those of private companies. The enabling legislation directed that all transit operators receiving Operating Assistance from the state take the basic steps necessary to operate safely. That has been the case since the PTSB was created in 1984. These amendments of themselves should not impose any additional cost or burden on the operator, whether they be municipal or private. The end result should be fewer accidents and a reduced severity of those accidents that do occur, thus lower cost.

6. Paperwork:

The proposed regulations generally clarify and simplify various provisions including accident notification and investigation procedures and system safety program plans.

Furthermore, additional notice requirements for rail accidents can be fulfilled through the use of the carrier's existing forms that are merely forwarded to the Safety Board staff thereby avoiding additional paperwork and costs.

7. Duplication:

None.

8. Alternatives:

Alternatives to simplifying, clarifying and making the Safety Board Regulations more effective and consistent with federal regulations are: (1) risking public safety, or (2) risking the loss of millions of dollars of federal funding because the Federal Transit Administration requires compliance with 49 CFR Part 659 for the State to be eligible for rail transit funding that the State then distributes to carriers. These alternatives were not considered to be preferable over the recommended approach in the proposed regulations.

Moreover, the no action alternative to the current regulations was rejected because it would leave open the possibility of future incidents of lost data or evidence due to late notification by companies of accidents whereby vehicles or other evidence has been removed and the roadway opened up to traffic. Consequently, with such future incidents of late notice and lost information possibly occurring under the current regulations, the PTSB's investigative reports and recommendations will not be as thorough (as they would be under the proposed regulations) and will not be as instructive to the companies and the public in showing how such accidents were caused and could be prevented in the future.

Based on the PTSB staff's outreach efforts, major industry input was obtained which the PTSB staff evaluated in determining whether certain alternate provisions might be more reasonable and more effective for implementation of the PTSB's overall goal of safe transportation.

Time periods for telephone and written notice of bus and rail accidents were lengthened to 90 minutes for telephone notice and 48 hours for written notice. The outreach revealed that the previous shorter alternate language provisions would be difficult for carriers to comply with given the many complexities involved in accident situations.

The types of determinations for returning a formerly removed employee back to a safety-sensitive position required to be reported to the PTSB has been significantly reduced. This change would avoid an otherwise over-burdensome obligation given the very large numbers of determinations that would have been required to be generated under the previous alternate language.

9. Federal Standards:

At present, the only federal standards that deal with transit system safety are those of the Federal Transit Administration in 49 CFR 659 and these apply to Rail Fixed Guideway Systems (New York City Transit's Subway system and the Niagara Frontier Transportation Authority's Metro Rail) which we have incorporated by reference in the proposed regulations.

10. Compliance Schedule:

All proposed regulations, except those changes involving system safety program plans are effective upon publication in the *State Register*. Those proposed regulations involving system safety program plans in 17 NYCRR § 990.12 are effective 1 year after publication of the final rule in the *State Register* in order to permit public transit carriers under Safety Board jurisdiction and Safety Board staff sufficient time to adjust to those clarified and simplified requirements.

Regulatory Flexibility Analysis

1. Effect of Rule:

The Safety Board has jurisdiction over commuter rail, light rail, subway, rapid transit and bus carriers that receive Statewide mass transportation operating assistance. There are approximately 115 carriers providing public transportation under Safety Board jurisdiction in this State of which approximately 7 are public authorities, approximately 41 are county and municipal public bus operations, and approximately 67 are private bus carriers providing service under contract to municipalities. The clarification and simplification of the Safety Board regulations in 17 NYCRR Part 990 will especially benefit the smaller public transit bus carriers. Of the approximately 115 total public transit carriers under Safety Board jurisdiction, approximately two-thirds would be considered to be smaller public transit bus carriers and have fewer than 25 vehicles.

Each year the PTSB publishes an annual report summarizing accident statistics from over the past ten years. The annual report for Calendar Year 2000 indicates that there were a total of 79 bus accidents and 39 rail accidents that were reported and met the Board's criteria for investigation. Copies of the annual reports are available upon request.

The clarification and simplification of the Safety Board regulations into a more user friendly product will help to facilitate a better understanding of what the Safety Board requires of such carriers. In many cases, the proposed regulations merely formalize practices that various carriers have followed and have been approved by the Safety Board. As a result, carriers under Safety Board jurisdiction will be less dependent on Safety Board staff for consulting on acceptable practices and will be better able to develop future safety strategies and relate such strategies to the overall operations of the company.

2. Compliance Requirements:

The only significant changes involve the incorporation of the Rail Fixed Guideway Systems requirements consistent with federal regulations and only affect large rail carriers under Safety Board jurisdiction that are operated by state created public authorities. The remaining changes generally involve clarification and simplification of accident notifications, investigations, the recommendation process, system safety program plan requirements, and other Safety Board procedures and provisions.

3. Professional Services:

No additional or unique services are required.

4. Compliance Costs:

Since the proposed regulations implement statutory obligations and provide clarification and guidance, they should result in either no costs or negligible costs.

5. Economic and Technological Feasibility:

This proposed update does not add any increased requirements that would have a significant economic or technological impact.

6. Minimizing Adverse Impact:

These proposed amendments do not add any significant additional burden on small businesses and local governments. The only significant additional requirement that is being added is that each property have at least one person trained. Over the past several years the Department has developed a special safety training course specifically designed to meet the needs of smaller carriers. It has already been given to over 98 individuals from 78 transit properties. The cost is free. The proposed regulations will require all properties to have at least one person trained within two years and steps are underway to establish a network of trainers around the state to deliver the course.

The Safety Board intends to continue its practice of proactive training and encouragement of carriers under its jurisdiction in the field of transportation safety and therefore, will allow one year after publication of the final rule in the state register for compliance with all changes involving system safety program plans. This will also ease any negligible effects on small businesses and the local governments that they service.

7. Small Business and Local Government Participation:

Safety Board staff generally meet with the staff of every carrier under its jurisdiction at least once every few years in addition to frequent telephone calls back and forth for guidance and clarification and appearances by certain of such carriers at regular Safety Board meetings. The Safety Board staff have utilized valuable information derived from their interac-

tions with such carriers and incorporated such information, where appropriate, in the clarified and simplified changes to the Safety Board regulations. Therefore, there is not expected to be any adverse impact on small businesses. Furthermore, the revisions do not increase requirements or effects on local governments.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted because this proposed rule will not impose any adverse economic impact or reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The New York State Public Transportation Safety Board, in consultation with the Federal Transit Administration, has considered the effects of the proposed revisions and has determined that the proposed regulatory revisions will not have any adverse impact on rural areas. The proposed revisions are consistent with the standards and requirements of the federal regulations that have been incorporated by reference in this proposed rule and preserve public safety to facilitate compliance and understanding.

Furthermore, these revisions provide for a uniform commitment to safety for bus and rail carriers overseen by the Safety Board and therefore, the proposed revisions will not adversely impact rural areas.

Moreover, measures have been taken to ensure that the proposed rule would have none or minimal adverse impacts on rural areas.

As noted previously the only significant additional requirement established in this regulation is that properties have at least one employee appropriately trained. Before entertaining the inclusion of such a requirement the Board and the Department designed and established a special training course specifically targeted to meet the needs of smaller rural operators. It has already been given to 98 individuals from 78 properties and a team of 10 experienced transit safety professionals from around the state is being assembled to continue delivering this course upon request at no cost to the properties.

Job Impact Statement

A job impact statement is not submitted because this proposed rule, by its nature, will not have a substantial adverse impact on jobs and employment opportunities. The proposed revisions are consistent with the standards and requirements of the federal regulations that have been incorporated by reference in this proposed rule and clarify the procedures of the New York State Public Transportation Safety Board to better preserve public safety. Consequently, the proposed revisions will have either a positive impact or no impact on jobs and employment opportunities.